* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Decided on: 20th December, 2023***

\+ **CS(COMM) 249/2017(earlier Suit no. 1214/2009) & CC(COMM) 130/2017**

SHRI AJAY KALRA .....Plaintiff

Represented by: Mr. Puneet Taneja, Ms. Laxmi Kumar &Mr. Manmohan Singh Narula, Advocates.

versus

DELHI DEVELOPEMENT AUTHORITY& ORS.

..... Defendant

Represented by: Ms. Beenashaw N. Soni, Additional Standing Counsel, Ms. Mansi Bhatia & Mr. Bhupesh Pandotra, Advocates.

\+ **CS(COMM) 250/2017 (earlier suit no.1215/2009) & CC(COMM) 129/2017**

SHRI AJAY KALRA .....Plaintiff

Represented by: Mr. Puneet Taneja, Ms. Laxmi Kumar &Mr. Manmohan Singh Narula, Advocates.

versus

DELHI DEVELOPEMENT AUTHORITY & ORS.

..... Defendant

Represented by: Ms. Beenashaw N. Soni, Additional Standing Counsel, Ms. Mansi Bhatia & Mr. Bhupesh Pandotra, Advocates.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J UDGEMENT

NEENA BANSAL KRISHNA, J.

1. The present two Suits for Recovery of Rs. 1,43,80,795/- *in CS(COMM) 249/2017*and Rs.2,62,53,812/- *in CS(COMM) 250/2017*have been filed on behalf of the plaintiff.

2. **The facts in brief** are that the plaintiff, a Civil Engineering Contractor was enlisted with the Delhi Development Authority (hereinafter referred to as "DDA") as Class-I (B&R) Contractor. The defendant No. 1-DDA sometime in early April, 2002, invited the tenders for construction of 160 HIG Category-II Houses (four storey) and 160 Scooter Garages in LIC Pocket-II, Sector B, Vasant Kunj which was sub-divided into two groups i.e., Internal Development and Construction of 80 HIG Category-II Houses and 80 Scooters Garages **(Group-I)** and Internal Development and Construction of another 80 HIG Category-II Houses and 80 Scooter Garages **(Group-II)**. The estimated cost of Group-I was Rs. 2,95,35,245/- and the estimated cost of Group-II was Rs.2,95,25,621/-.

3. Defendant No. 1-DDA accepted the Item Rate Tender of the plaintiff at Rs.2,55,24,764 and Rs.2,56,24,273/- for Group I and II respectively and the work was awarded by two separate Letters of Award, both dated 19th April, 2002 for each group. A formal Agreement dated 26th April, 2002 was executed between the plaintiff and the defendant No. 1 through defendant No. 2-Executive Engineer/SWD4/DDA.

4. According to the Agreement, the work for both the Groups had to be completed within a period of 24 months from the date of start i.e. 29.04.2002.

5. **It is asserted by the plaintiff** that heimmediately mobilized his resources, including men, material and machinery and reached the site on

28th April, 2002 with duly intimation to the defendant No.1-DDA vide Letter dated 06th May, 2002.

6. It is claimed that the Building Construction Contract was solely based on performance of reciprocal obligations.The following obligations were required to be fulfilled by defendant No.1 as a pre-requisite for the timely completion of the Contract which are as under:

(i) That the site belongs to DDA free from encroachments and good for construction, without any litigation's and the same is in their (DDA's) possession for this work.

(ii) That the building plans showing various services such as water supply, sewerage, storm water drains, land use etc. are duly approved by the local municipal/competent authorities.

(iii) That the detailed drawings, structural as well as architectural are available with the Department for smooth and efficient execution of the work to achieve the completion within the stipulated time period.

7. It is asserted that the defendant No. 1/DDA from the very beginning failed to honour the fundamental reciprocal obligations under the Contract.Though the site was handed over on 27th April, 2002, but immediately upon start of the earth work, it was soon found that the site was not conducive for construction as most of the blocks were located on back filled ditches and the strata was filled up or erratic in nature as a result of which the foundation bed/ground was not firm.

8. Further, the defendant No. 1/DDA failed to supply the layout plan and the structural drawings which were providedonly by 18.06.2002 and not at the start of the work. The plaintiff who had already mobilized his men,

material and machinery as per the scheduled requirement of the Work, had to keep his labour, machinery and the establishment idle at site which resulted in losses to the plaintiff.

9. It is further asserted that the since the entire site was located at localized back filled ditches, there was a marked difference in the level of adjoining plots. Thus, the belated structural drawings that were provided to the plaintiff were of no use as in all the blocks expansion joints were to be provided and it was not clear from the drawings as to how the cross walls and plinth beam could be provided in view of the level difference between the adjoining blocks.

10. To resolve these issues, the plaintiff wrote a Letter dated 08.08.2002 requesting the defendants to provide the necessary clarifications by way of sketch/drawings. This request for revised structural and foundation drawings was also recognized by the Engineering staff of the DDA at the site and the same had also been recorded in the Hindrance Register, on 21.09.2002. The demand for revised structural and foundation drawings was reiterated by the plaintiff vide letter dated 04.10.2002 as the delay on the part of DDA was hampering the progress of the work and causing losses to the plaintiff on account of idling of men, material, machinery etc.

11. It is claimed that the DDA engineers and staff were aware from the very beginning that the Site was not conducive for construction, despite which the Site was allotted to the plaintiff. It was only on the repeated requests of the plaintiff that a fresh soil investigation in few blocks was initiated by the defendant No. 1 and the site was inspected by the senior officers of the DDA.

12. On realizing the impossibility to execute the work, the Executive Engineer (SWD-4)/defendant No. 2 vide his Letter dated 13.12.2002 directed the plaintiff not to execute any work at the site as the proposal for an alternative site was being considered by the Competent Authority. This unscheduled stoppage of the work resulted in severe losses to the plaintiff, which he registered in the Master Register maintained by the DDA.

13. According to the plaintiff, though officers assured an alternative site, nothing was heard from the DDA even after 10 months from the date of stoppage of work.In order to mitigate the losses, the plaintiffrequested the DDA vide Letter dated 03.10.2003carry out certain modifications in the layout plan which would enable the plaintiff to construct around 100 plus housesat the existing site until an alternative site was made available.

14. According to the plaintiff, after almost 20 months from the scheduled date of start, arevised layout plan reducing the number of flats from 160 to 136 i.e. 72 forGroup I& 64 for GroupII was handed over to him on17.12.2003 and it was informed to plaintiff that the revised structuraldrawings will be shortly issued.

15. Resultantly, the work could not still be started because of the non-availability of thestructural/foundation drawings. As per the revised layout plan also, someblocks were shifted to new locations for which soil investigation wasbeing done by the Department. Because of the aforesaid change in layoutand the ongoing soil investigation at the new site, plaintiff had to make large scalechanges in its plans and also shift the steel yards, water tanks, labour huts, site office etc. thereby causing further loss to plaintiff. In addition to this, the movement of labour and deployment of plant and machinery by other agencies forcarrying out soil investigation

further disrupted the progress of work andalso led to increased losses for plaintiff.

16. Almost upon the completion of 24 months,plaintiff was instructed to start the work in some of the blocks for whichrevised structural drawings were issued to him only on 5.04.2004. Thesaid conduct of defendants was in total derogation to the terms of theAgreement and the promises made by defendant on the basis of which the plaintiff had quoted his rate for executing thepresent works. Moreover, the conducting of soil investigation thricewithin the scheduled period of contract, when various types of equipmentwere being brought to site by different agencies from time to time, furthershows the apathy and non-contractual conduct on the part ofDDA which increased plaintiff's misery and losses.

17. It was asserted by the plaintiff that as the scope of work had drastically been reduced from 160 to 136houses and further DDA had miserably failed to honour its reciprocal obligations on which the timely completion of the contract was dependent, resulted in the plaintiff incurring heavy losses. Vide his letter dated 24.04.2004 the plaintiff notified DDA thatbecause of fundamental breach of contract committed by the defendants, plaintiff hasincurred substantial losses and he shall, amongst other claims, be entitled to the followingas compensation for the losses suffered by him:

> *(i) Expenditure towards maintaining the site staff due to change insite.*
> *(ii) Idle charges towards maintaining the machinery and T&P due tochange in site.*
> *(iii) Loss of turn over for prolongation of the contract due to change insite.*
> *(iv) Loss of profit due to breach committed by the department for theportion ofwork not allowed to be completed.*

(v) Head office-Overhead expenditure and loss for prolongation of thecontract beyond stipulated date.
(vi) Site Office- Overhead expenditure and loss for prolongation of thecontract beyond the stipulated date.
(vii) Market rise due to prolongation period of the contract over andabove 10CC/Escalation.
(viii) Loss due to bank charges for obtaining bank guarantee etc.

18. It was further asserted by the plaintiff that the defendants acknowledgedthe fact that the breach was on theirpart and as they miserably failed to fulfill their reciprocal obligations.Thus, DDAthrough its senior staff members requested the plaintiff to continue with thework and gave a positive assurance with regard to plaintiffs claim forcompensation.

19. Since the plaintiff had already started the work in some of the blocks for which structural drawings were supplied by the defendants, he quantified some of his claims and notified the same todefendants vide his letter dated 23.06.2004for the necessary payment in order to avoid further financial crunch.

20. It was asserted that the plaintiff vide his letter dated 25.06.2004 again requesteddefendants to issue drawings for the balance 4 blocks as plaintiff hadalready incurred huge losses dueto the delay and stoppage of work.The plaintiff further notified that DDA would have tocompensate him for the losses and expenditure incurred by him due to thedelay caused in not making available the drawings and shallbe submitting his claim shortly in this regard.

21. The plaintiff claimed that after he had remobilized entire men, material andmachinery on false assurances of compensation from the defendants for their various breached, theDepartment started coercing

plaintiff to withdraw hisClaims vide letter dated 2.07.2004.DDA sought the plaintiff to give anUndertaking that he will not claim any 10CC/ escalation beyond thestipulated date of completion due to revised layout plan/ on account of soilcondition at site.

22. It is submitted that when the plaintiff opposedthe illegaldemand of furnishing an Undertaking, the defendants tried to coerce plaintiff by illegally trying to encash the performance Bank Puarantees by writing letter dated14.07.2004 to plaintiff's the bank (Central Bank of India, Defence Colony). The plaintiff claimed that it was clear that the department and more specifically some of its officials had malafide intention of coercing plaintiff and taking benefit of their own wrongs, as the said encashment was evidentlyfraudulent.Thus, having no other option Engineer in Charge,DDA persuaded theplaintiffto keep the Bank Guarantees alivetill the pending issues were sorted out. Accordingly, plaintiff vide his letterdated 15.07.2004 enclosed the renewed Bank Guarantees having extendedthem for further period of one year i.e. upto 15.07.2005.

23. It came as utter shock and dismay of plaintiff when he received letter dated16.07.2004 from the Executive Engineer (SWD-4) alleging that there has beenpilferage of grinded soft rock (fine aggregate) from the site and aDepartmental Inquiry was in process.The plaintiff was directed to stop the work and maintain status quo till further orders.

24. It was asserted that the plaintiff was under the impression that work got stoppedfor some internal Departmental Inquiry as mentioned in Letterdated 16.07.2004 and thought that the work would be restarted in a day or two. However, nothing was heard from the defendants for almost two weeks.Thereafter, the plaintiff vide hisletter dated 3.08.2004 informed the

Executive Engineer that though the work wasstopped in terms of his directions citing a Departmental Inquiry with respect to some alleged pilferage, however, anystoppage of work would adversely affect his finances and would furtherincrease his expenses as well as the losses and damages.A request was madefor the withdrawal of the Order for stoppage of work.He also requested for joint measurements of work done.

25. However, despite plaintiff requesting permission to re-start thework, no response camefrom the defendants.In order to mitigate the losses as a prudentcontractor, the plaintiff wrote a letter dated15.09.2004 to defendant informing that the cement lying at the site stores may betransferred to some other works as with the passage of time the same wouldddeteriorate and become unusable.

26. It came as a further shock to the plaintiff when he received a*Show Cause Notice dated 22.09.2004* on 25.09.2004 from the Secretary, Contractor's RegistrationBoard, alleging that the CE (SWZ) reported about the illegalmining taking place at the site of work and that plaintiff was actively involved in it as the stonecrushing machine installed at the site of work belonged to plaintiff and as to why disciplinary action shouldnot be initiated against him.

27. Immediately on the receipt of the aforesaid Show Cause Notice,the plaintiff vide letter dated 1.10.2004 refuted all the allegationsmade in the Notice and requested the Secretary (CRB) tofurnish the report ofCE (SWZ) based on which the *Show Cause Notice* wasissued. He also sought all the relevant documents and statements relied uponfor framing the allegations and preparing the said report or to provide aninspection of the record to enable him to give a detailed reply to the Notice.

28. The plaintiff had bonafide apprehension that the authoritiesmay take an arbitrary decision prejudicing the interest of plaintiff withoutproviding a fair opportunity.He expressed hisapprehensions vide Letter dated 6.10.2004 and submitted a detailed account of the entire circumstancesleading to the issue of Show Cause Notice. He categorically pointedout that in the Letter dated 16.07.2004 only an allegation of pilferage ofgrinded soft rock was made and that too not against him,however, the same has been arbitrarily converted into alleged illegalmining.

29. Further, he denied that he haddone any mining activity as he neither owned a stone crushing machinenor was such a machine brought at site. It wasexplained that a stone crushing machine is of huge dimensions and is veryheavy which is not easily transportable.It requires specialinstallations and therefore such a machine cannot be brought at any place,be installed, run in a day and removed the next day as the site was constantlybeing inspected by DDA officers.Pertinently, at no point of time the DDA officers found anyactivity even remotely connected with illegal mining at site.

30. Also,necessary measurements had been taken by DDA during the period December,2003-July2004 and then also, no illegal mining orinstallation of stone crushing machine was alleged. The site was alsoinspected by Chief Engineer (SWZ) on 9.06.2004 and his inspectionreport/comments were noted in the Master Register where there is noassertion about the presence of stone crushing machine at site. Even on 29.06.2004, there was an inspection of the site by the ExecutiveEngineer and in his inspection Report/Comment as noted in the Site OrderBook there is not even a whisper of the presence of the crushingmachine or mining at the site. In these circumstances, plaintiff not onlyasked for a favorable

decision but also asked for an opportunity ofpersonal hearing before any final decision was taken on the Show CauseNotice.

31. That almost after one year of submitting the aforesaid reply requestingfor a personal hearing and inspection of documents, CRB arbitrarily,illegally and against the principles of natural justice decided to remove the plaintiff from the list of DDA's approvedcontractors on 3.06.2005 though the same was intimated to plaintiff after two months, videletter dated 3.08.2005.

32. It is submitted that the plaintiff suffered a huge financial crunch due to the arbitrary acts of the defendant No.1 and went into depression as his entire business wasruined and came to a grinding halt. After a few months,the plaintiffrealized that the work was still continuing on paper. Though plaintiff had no financial resources to continue plaintiff, requested DDAon 30.1.2006 to close the existing Agreement and clear hispending dues/claims at the earliest.

33. It is further asserted thatthe plaintiff was intimidated and coerced to such an extent that toavoid any arbitrary and illegal penal action, he was made to write that heis ready and willing to give up his genuine claims and shall not claimcompensation from DDA for the losses caused to him by the breachescommitted by the department.

34. It was asserted that the request to foreclose the Agreement, gave an opportunity to the DDA and some of its officials to further perpetrate their illegal and arbitrary actions against plaintiff. The plaintiff soon came to know that the Department instead of closing the Contract, had intention of terminating the contract.

35. AShow Cause Notice dated 4.11.2006 was then issuedstating that plaintiffwas allegedly associated with pilferage and grinding of soft rock at thesite and therefore, work had to be got stopped by the Department. It is submitted that it is the defendants who committed breach of terms and conditions ofthe Contract, resulting in the non-completion of work. However, the defendant malafidely put the plaintiff to ShowCause as to why an action under Clause 3 and sub - Clause 3(a) and/ or 3(b)and 3 (c) of the Agreement should not be taken against him.

36. It was asserted that the aforesaid Show Cause Notice was served on plaintiff'sservant on 15.11.2006 and since plaintiff was not available in the country,his father immediately on the next day i.e. 16.11.2006 informeddefendants that plaintiff is not available in the country. It was informed by plaintiff's father that he shall be coming back after 10 days and therefore requested that no action be taken till then.

37. The plaintiff realizing that the Department and some of its erringofficers were hell bent upon ousting plaintiff from the contract and fromthis business, rushed back to India on 18.11.2006 itself and immediatelythereafter on 24.11.2006 submitted his detailed Reply negating all theallegations and further highlighted the shifting and wavering stand ofthe department with regard to alleged mining.He categorically mentionedthat the provisions of Clause 3 of the Agreement cannot be invoked in thepresent facts as the Department cannot be allowed to misuse its dominantposition as a an owner and take benefit of its own wrong.

38. However, before the aforesaid reply could reach the Department,defendants illegally and arbitrarily rescinded the Contract vide letter dated 23.11.2006 (received by plaintiffafter 24.11.2006), forfeited the

security deposit by encashing the Bank Guarantees on the same day and further notifiedthat a new contractor would be engaged for the balance work which shall be done at plaintiff's risk and costof the plaintiff. Further,the plaintiff was directed to be present at site on 30.11.2006 for thejoint measurements of work done by plaintiff. Immediately on the receiptof the said letter, plaintiff vide his letter dated 29.11.2006 sent by speedpost refuted the contents of the said Order and informed that he shall begiving his detailed reply shortly and further requested for a fresh date forjoint measurement as he was not available on 30.11.2006.

39. Keeping in view the past illegal conduct of DDA and its Officers,the plaintiff's father Shri Kuldip Kalra went to the site on 30.11.2006 andremained there from 9.30 to 1.15(noon) but no official turned up atthe site for measurement. This was immediately informed by plaintiff's father todefendants by sending a telegram on the same day. DDA replied vide Telegram dated 1.12.2006wherein it was admitted that plaintiff's father was available at site butincorrectly stated that plaintiff's father, being non-technical person, was of no help. It was further mentioned that 4th and 5.12.2006were fixed as next dates for joint measurements.

40. According to the plaintiff,no officials were present at the site for the recording of measurements, asthe joint measurements had already been recorded aswork hadstopped way back in July, 2004 itself. The present letters of theDepartment for joint measurement were a farce and a gimmick to re-open the already recordedmeasurements to further cause loss to plaintiff.

41. The plaintiffvidehis Lettersdated 29.11.2006 and 16.01.2007 gave a detailed reply to the Recission Order dated 23.11.2006 stating that the entire

action of the Department from the very beginning was illegal and against the Clauses of Contract and further demonstrated the changing stand of the Department with respect to the alleged illegal mining and also the non-applicability of Clause 3 of the Agreementin the present facts.

42. According to the plaintiff, the illegality and arbitrariness on the part of the officials ofthe defendant is further highlighted from the fact that the Executive Engineer (SWD4), as an afterthought, vide its Letter dated 23.02.2007 informedplaintiff that some alleged measurements of the upto date value of workdone by plaintiff together with the stipulated material lying at the site ofwork, had been recorded at their own level, details of which had beenenclosed. However, to the shock of plaintiff no enclosures were foundalong with the said letter.

43. The plaintiff vide his letter dated20.03.2007 brought to defendants notice the details of the balancestipulated materials handed over to defendants as well as the details of themeasurement already available with the Department and further notifiedthat no enclosures have been found by him along with the said letter.

44. It was asserted that the defendants without any basis and as a strategy to further coerceplaintiff and increase the financial losses, insisted to handover of the balance stipulated material and accept the Department'sarbitrarymeasurements. Therefore, instead of clearing the dues of plaintiff, the defendant illegally adopted the strategy of effecting illegal recoveries.

45. The plaintiff through RTI, came toknow that this entire action of falsely implicating plaintiff in the alleged illegal mining, removing him from the list of approved contractors and thereafter rescission of Contract at the

risk and cost of plaintiff, was malafide act of some of the erring Officials of defendant's Department.Theyhad adopted a vindictive attitude against plaintiff when its own internalOfficials had in writing stated that there was no mining activitygoing on at the site as there is no evidence of the presence of any stonecrushing machine and thus, there is no involvement of agency.

46. Further, ithas also come on record that there is no applicability of Clause 3 of theAgreement to the present facts as there is no breach on the part of thecontractor and the action of rescission of Contract at the risk and costof plaintiff is also illegal, arbitrary and against the provisions of contract.

47. It was asserted that in fact, plaintiff by virtue of RTI also came to know thatdefendant's officials had falsely implicated plaintiff with maliciousintent and the same is evident from DDA's letter dated 14.09.2004 wherein the defendant No.1 through its CE(SWZ), had informed SE(CCI) that plaintiff may not be allowed to proceed with the work and the measurements may be finalized. It was alsointended by the CE that efforts be made to get prepared a NIT for the balance work. The aforesaid conduct of DDA's officials goes to showthat the stoppage of work on account of alleged mining was a maliciousact on the part of the officials to somehow oust plaintiff as theDepartment had way back in September 2004 decided to terminateplaintiff'sthe Contract.Thus, the post facto decision of first de-panelingplaintiff from the List of Approved Contractors and then recession ofcontract without providing any opportunity of hearing at any stage, weremere formalities to give a justification to their illegal acts. Having come to know about theillegalities committed by defendant's Officials, plaintiff reserves his rightto serve the said erring officials separate notices and initiate

appropriatelegal action for their illegal acts of maliciously maligning, defamingplaintiff and thwarting his career and business which has caused severefinancial, social and emotional loss and damages to him.

48. The plaintiff has claimed that the aforesaid illegal actions and un-contractual conduct aswell as breaches on defendants' part, has resulted in severe financial lossesand damages to plaintiff which are liable to be compensated by defendant.The plaintiff raised following claims in this regard which the defendanthad alreadybeen notified in the series of correspondence exchanged with the defendant including letter dated 8.08.2008. Vide Notice dated 4.03.2009, the defendants were called upon to make the payment of the aforesaid claims within a period of 2 months from the receipt of the present Notice, however, despite receipt of the said registered posts, the defendant has neither acknowledged or acted upon the said Notice.

49. The plaintiff has therefore, made the following **claims in para 38 of the plaint:-**

Claim	**CS(COMM) 249/ 2017**	**CS(COMM) 250/ 2017**
Claim no.1: Expenditure towards maintaining the site staff from 13.12.2002 to 17.12.2003 due to change in site.	Rs.2,06,534.30/-	Rs. 2,06.383.440/-
Claim no.2: Idle charges towards maintaining machinery, T&P etc. for the period from to 17.12.2003 due to proposal of change in site.	Rs.19,09,246.84/-	Rs.19,09,246.84/-

Claim no.3: Loss of profitability/ turnover for prolongation of the contract from 13.12.2002 to 17.12.2003 due to change in site.	Rs.7,74,038/-	Rs.7,73,473/-
Claim no.4:Loss of profit due to breach committed by the respondent for the portion of the work not allowed to be completed.	Rs.34,94,068/-	Rs.34,85,227/-
Claim no.5: Head Office overhead and profit for prolongation of the contract beyond the stipulated date.	Rs.24,61,544.35/-	Rs.24,59,745/-
Claim no.6: Site office overheads due to prolongation of the contract beyond the stipulated date.	Rs.36,92,316.76/-	Rs.36,89,617.13
Claim no.7: Cost due to rise in market in prolonged period of contract after the stipulated date over and above 10CC/escalation.	Rs.2,40,353/-	Rs.4,20,150/-
Claim no.8: Loss suffered on account of obtaining bank guarantee but the same was of no use.	Rs.1,50,141/-	Rs.1,49,878/-
Claim no. 9: Balance payment of the work done.	Rs.7,23,589/- (work done for an of amount Rs.6,14,568/- and Rs.1.09,021/- on account of 10CC upto 28.04.2004)	Rs.2,52,724/-
Claim no.10: Bank charges due to extension of bank guarantee in the	Rs.25,756/-	Rs. 25,765

prolonged period of contract.		
Claimno.11:Security Deposit/Bank guarantee illegally encashed by the department.	Rs. 2,00,000/-	Rs. 2,00,000/-
Claim no.12:Interest@ 18% p.a. on the delayed release of payments	18% p.a	18% p.a
Claim no.13:Loss due to non-execution of any work even though claimant mobilized their resources at site of work i.e. maintaining staff from 29.04.2002 to 27.07.2002.	Rs.51,633.57/-	Rs.52,466.25
Claim no.14:Idle charges towards maintaining machinery T&P from 29.04.2002 to 27.07.2002.	Rs.4,51,575/-	Rs.6.29,595/-
Claim no.15:A declaration that the act of DDA of removing Mr.Ajay Kalra from the approved list of Contractors is illegal and arbitrary and therefore the order dated 3.08.2005 is liable to be quashed and the agency/contractor is entitled to damages for illegally and arbitrarily removing him from the approved list of Contractors.	Rs.70,00,000/-	Rs.70,00,000/-
Claim no.16:A declaration that the order dated 23.11.2006 of the department in rescinding the contract is illegal and arbitrary and therefore is liable to be quashed and the plaintiff is entitled to damages for the said illegally and arbitrary rescission of contract.		
Claim no.17:Damages for loss of	Rs.50,00,000/-	Rs.50,00,000/-

goodwill due to the illegal and arbitrary acts of DDA and its officers (Since damages are claimed in Suit filed against defendant for Group no.II, the same are not being prayed for in the CS(COMM). 249/2017)		
Claim no.18:Interest @ 18% on all the above claims from the due date till the date of payment.	18%	18%

50. It is further asserted that the plaintiff is restricting his claim for interest from the date offiling of suit till the date of payment due to the financial crunch created by theillegal acts of defendant.

51. Hence,CS(COMM.) No. 249/2017 &CS(COMM.) No. 250/2017 have been filed with the following **prayers**:

Prayer in CS(COMM.) No. 249/2017	Prayer in CS(COMM.) No. 250/2017
(i) pass a money decree of Rs.2,06,534.30/- being the expenditure towards maintaining the site staff from 13.12.2002 to 17.12.2003 due to change in site.	*(i) pass a money decree of Rs.2,06,383.40/- being the expenditure towards maintaining the site staff from 13.12.2002 to 17.12.2003 due to change in site.*
(ii) Pass a money decree of Rs. 19,09,246.84/- being the idle charges towards maintaining machinery, T&P etc. for the period from 13.12.2002 to 17.12.2003 due to proposal of change in site.	*(ii) Pass a money decree of Rs.19,09,246.84/- being the idle charges towards maintaining machinery, T&P etc. for the period from 13.12.2002 to 17.12.2003 due to proposal of change in site.*
(iii) Pass a money decree of Rs.7,74,038/- being the loss of	*(iii) Pass a money decree of Rs.7,73,473/- being the loss of*

profitability/ turnover for prolongation of the contract from 13.12.2002 to 17.12.2003 due to change in site.	*profitability/ turnover for prolongation of the contract from 13.12.2002 to 17.12.2003 due to change in site.*
(iv) Pass a money decree of Rs.34,94,068/- being the loss of profit due to breach committed by the respondent for the portion of the work not allowed to be completed.	*(iv) Pass a money decree of Rs.34,85,227/- being the loss of profit due to breach committed by the respondent for the portion of the work not allowed to be completed*
(v) Pass a money decree of Rs. Rs.24,61,544.35/- being the Head Office overhead and profit for prolongation of the contract beyond the stipulated date.	*(v) Pass a money decree of Rs. 24,59,745/- being the Head Office overhead and profit for prolongation of the contract beyond the stipulated date.*
(vi) Pass a money decree of Rs.36,92,316.76/- being the site office overheads due to prolongation of the contract beyond the stipulated date.	*(vi) Pass a money decree of Rs.36,89,617.13/- being the site office overheads due to prolongation of the contract beyond the stipulated date.*
(vii) Pass a money decree of Rs.2,40,353/- being the cost due to rise in market in prolonged period of contract after the stipulated date over and above 10CC/escalation.	*(vii) Pass a money decree of Rs.4,20,150.40/- being the cost due to rise in market in prolonged period of contract after the stipulated date over and above 10CC/escalation.*
(viii) Pass a money decree of Rs.1,50,141/- being the loss suffered on account of obtaining bank guarantee but the same was of no use.	*(viii) Pass a money decree of Rs. 1,49,878/- being the loss suffered on account of obtaining bank guarantee but the same was of no use.*
(ix) Pass a money decree of Rs.7,23,589/- (work done amount Rs.6,14,568/- and Rs.1.09,021/- on	*(ix) Pass a money decree of Rs.2,52,274/- being the balance payment of the work done.*

account of 10CC upto 28.04.2004) being the balance payment of the work done.	
*(x) Pass a money decree of **Rs.25,756/- being the bank charges** due to extension of bank guarantee in the prolonged period of contract*	*(x) Pass a money decree of **Rs.25,756/- being the bank charges** due to extension of bank guarantee in the prolonged period of contract*
*(xi) Pass a money decree of **Rs.2.00 lacs being the Security Deposit/Bank guarantee** illegally encashed by the department*	*(xi) Pass a money decree of **Rs.2.00 lacs being the Security Deposit/Bank guarantee** illegally encashed by the department*
*(xii) **Grant interest@ 18%p.a.** on the delayed release of payments*	*(xii) **Grant interest@ 18%p.a.** on the delayed release of payments*
*(xiii) Pass a money decree of **Rs.51,633.57/- being the loss due to non-execution of any work** even though claimant mobilized their resources at site of work i.e. maintaining staff from 29.04.2002 to 27.07.2002.*	*(xiii) Pass a money decree of **Rs.52,466.25/- being the loss due to non-execution of any work** even though claimant mobilized their resources at site of work i.e. maintaining staff from 29.04.2002 to 27.07.2002.*
*(xiv) Pass a money decree of **Rs.4,51,575/- being the idle charges towards maintaining machinery T&P** from 29.04.2002 to 27.07.2002.*	*(xiv) **Pass a money decree of Rs.6,29,595/- being the idle charges towards maintaining machinery T&P** from 29.04.2002 to 27.07.2002*
*(xv) **Declare that the act of DDA in removing Mr.Ajay Kalra from the approved list of Contractors is illegal and arbitrary** and therefore the order dated 3.08.2005 is quashed*	*(xv) **Declare that the act of DDA in removing Mr.Ajay Kalra from the approved list of Contractors is illegal and arbitrary** and therefore the order dated 3.08.2005 is quashed and **a sum of Rs. 70,00,000/- (estimated) be awarded as damages** in favour of plaintiff for illegally and arbitrarily removing plaintiff from*

	the approved list of contractors vide order dated 3.08.2005.
(xvi) ***Declare that the order dated 23.11.2006 of the defendants in rescinding the contract of the plaintiff is illegal and arbitrary*** *and therefore is liable to be quashed and the plaintiff is entitled to damages for the said illegal and arbitrary rescission of contract.*	*(xvi)* ***Declare that the order dated 23.11.2006 of the defendants in rescinding the contract of the plaintiff is illegal and arbitrary*** *and therefore is liable to be quashed and the plaintiff isentitled to damages for the said illegal and arbitrary rescissionof contract.*
(xvii) ***Grant interest @ 18%*** *on all the claims as enumerated in para no.38 of the plaint from the date of filing of suit till the date of payment*	*(xvii) Pass a money decree of* ***Rs. 50,00,000/- (estimated) as damages*** *for loss of goodwill due to illegal and arbitrary acts of DDA and its officers including the illegal recission of contract vide order dated 23.11.2006.*
(xviii) ***Award costs of the suit*** *in favour of the plaintiff and against the defendants.*	*(xviii)* ***Grant interest @ 18%*** *on all the claims as enumerated in para no.38 of the plaint from the date of filing of suit till the date of Payment.*
(xix) pass any other or further order(s) which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.	*(xix)* ***Award costs of the suit*** *in favour of the plaintiff and against the defendants.*

52. **The defendant in the Written Statement** took a preliminary objection that the suit is based on concealment and suppression ofmaterial facts, which amounts to an abuse of the process of the Court.Further, there is no cause of action disclosed by the plaintiff and the suit is liable to be

rejected. Moreover, the suit has been wrongly valued for the purpose of Court fees and is insufficiently stamped.

53. **On merits,** it is asserted that the site in question belonged to DDA and was free from encroachment and litigations. The site was handed over to the plaintiff on 27.04.2002 through site order book; noting made to this effect at Serial No. 1. However, the plaintiff failed to mobilize the resources at the start of the Contract as the essential equipment such as Vibrator needle, Surface vibrator. Machine for rubbing,Steel shuttering plates. Steel Props, Scaffolding pipes with cup locks, column steelplinth beam footing shuttering were not there at the Site.

54. It is further asserted that the soil testing was conducted twice, once by M/s. Magma Soil & Foundation Pvt. Ltd. and again by M/s. Cengers Geotechnics Pvt. Ltd. In addition to this, all bidders were suitably required through Special Condition No. 6 of the NIT to satisfy themselves about the characteristics of the soil at site through their own soil investigation before submitting the Tender and no claims due to the variation in the soil data were to be entertained at a later stage. The plaintiff was required to familiarize himself of the site and then only bid.Thus, it is the plaintiff who failed to perform its obligations.

55. It was claimed that the work for laying of services such as water supply, sewerage, SW drain etc. were usually taken up after the completion of the structure. It was denied that the defendant since inception of the contract failed to honour its fundamental reciprocal obligations under the Contract.In fact, defendant diligently and earnestly performed its obligations, which is inter alia as under:

Stipulated date of start of the work

as per agreement was	*29.04.2002*
layout plan handed over	*29.04.02,17.05.02,17.12.02*
architectural drawings handed over	*29.04.02*
structural drawings handed over	*01-08-02, 28-08-02, 05-10-02, 18-05-04*

56. It is submitted that the layout and the drawings were handed over to the plaintiff as and when required, as per schedule.It is denied that the entire Site was located in localized back-filled ditches as plaintiff himself stated in his Letter dated 03.10.2003 that the work could be resumed with the readjustment of a few blocks within the Site itself. Thus, it is denied that the alleged site was not fit for construction.

57. It is explained that Revised Layout Plan for construction of 136 houses against proposed construction of 160 houses was received on 17.12.2003 and the same was handed over to the plaintiff on 17.12.2003.The Revised Layout Plan was made after making adjustment within the existing site itself. As there were some ditches filled with malba in the alignment of some of the blocks, at plaintiff's instance, vide letter dated 13.12.2002, he was informed that a proposal for alternative site was under consideration which was duly recorded in the Hindrance Register. The Revised Layout Plan was issued on 17.12.2003 and structural drawings good for construction, were issued on 05.04.2004 and 18.05.2004.

58. Furthermore, as per the terms of the contract, plaintiff was not entitled to any compensation or damages in the event the site was not available for any reason as the Agreement only provided for modification of the program of construction. It is submitted that the defendants had repeatedly made it clear, including by letter dated 03-07-04, thatplaintiffwas not entitledfor anyclaims/ compensation on account ofthe site. Despitethe clarification.

Plaintiff at no stage requested for closure/termination of theAgreement.For the first time, he sought closure of the Agreement on 30.01.2006 and 13.02.2006. It is denied that the plaintiff had incurred any expenditure as alleged.

59. The defendanthad asserted that the plaintiff as per the provision of Clause 19D of the Agreement, was required to submit by the 4th and 19th of every month to the Engineer-in-Charge a statement in respect of second half of the preceding month. However, no such statement was ever submitted.

60. It is submitted that ***Clause 19G*** *of the Agreement* clearly provided that construction of labour huts near the workplace was to be avoided. The prior approval of the Engineer in Charge was required to beobtained by Plaintiff by submitting details on the layout planwhere heproposed to construct site office, labour huts, steel yards. No such approval was ever obtained.

61. Further, **Clause 10CC** makes provision for the compensation for only in the increase in prices of material and wages of labour required for execution of the work during stipulated period of the contract including such period for which the contract is validly extended. As per the provisions of the Agreement, the plaintiff is not entitled to compensation in any other circumstance.

62. Moreover, it has been asserted that the plaintiff would not be entitled to any compensation for prolongation of the Contract. The falsity of the claims of the plaintiff can be evinced from its two Letters dated 06.05.2002 and 23.06.2004 where the plaintiff had raised claims by varying idling of the mobilized resources, despite the fact that no work had taken place between that period. The differences in the claims have been produced below:

a. The no. of concrete mixers has been indicated as two in the letter dated 06-05-02 whereas the same has been raised to four in the letter dated 23-06-04. Only one concrete mixer would have been sufficient as design mix for which weigh batching plant was to be installed. The same was never installed by Plaintiff.
b. As per letter dated 06-05-02 mentions vibrator needle two in Nos. and surface vibrator one in no. whereas in letter dated 23-06-04 the same has been stated as 4 in nos. The work was only at the excavation stage and these were not even required much less requisitioned.
c. Similarly the claim made for submersible pump does not hold ground as permission for sinking of the tubewell is granted by the DC, Revenue & no such permission was obtained.
d. The allegedly false claims made regarding making arrangements for Steel shuttering plates. Steel pipes. Scaffolding pipes with cuplock are also baseless as the same were required at a later stage.
e. The work after the rescission of the contract was awarded to another agency. No building material such as bricks, stone aggregate or coarse sand was available otherwise it would have been mentioned in the NIT for the balance work to be carried out at the risk & cost of Plaintiff.

63. It is further asserted that the plaintiff was engaged in *pilferage of grinded soft rock at the site* and was *actively involved in illegal mining* with a stone crushing machine installed at Site. The work was stopped w.e.f. 9.7.2004 as the matter was under investigation and *status quo* had to be maintained so that evidence could be obtained. Therefore, the plaintiff was asked to renew the Bank Guarantees, which it tried to avoid, and thus the DDA had to write a letter to the Bank to encash the same.

64. It is claimed thatthe findings of the enquiry conducted by the Vigilance Cell also corroborated the fact that plaintiff was a party to the ongoing illegal mining and pilferage of grinded soft rock. Consequently, the

plaintiffwas removed from the panel of the Approved List of Contractors by the Contractors Registration Board (CRB) vide Office Order dated 03.08.2005 issued by Secretary, CRB due to his own illegal activities.

65. The request of the plaintiff vide letter dated 15.09.2004 to transfer the cement to some other works so that losses could be mitigated, was conceded and accordingly, the requisite cement was transferred to other Works and the balance was made NIL. Despite the balance being NIL, the plaintiff vide Letter dated 30.01.2006,requested the foreclosure of the Agreement and clear his pending dues/claims.It is evident that the plaintiff sought closure of the Contract to avoid his liability which was not accepted by the defendant.

66. It is reiterated that the plaintiff was involved in the illegal mining and grinding of soft rock resulting in him getting blacklisted from the Approved List of Contractors. Therefore, Clause 3(a) of the Agreement was invoked, and the Contract was terminated. Along with the Termination, the security deposit was forfeited and the balance work was got completed at plaintiff's risk and cost as per the Contract.

67. It is further asserted that the provision of joint measurement is to ensure that the parties agree on the record of measurements for the balance work and physical verification of balance stipulated material to rule out any possibility of the dispute at a later stage. Accordingly, defendant vide letter dated 01.12.2006 called upon plaintiff to be present at the site on 04.12.2006 and 05.12.2006. The defendant vide Letter dated 06.12.2006 informed the plaintiff that neither plaintiff nor his authorized representative was present though Engineer in Charge attended the site on the scheduled date for joint measurement. The physical verification of the balance quantity of steel was to be done by the defendants for which, it had to be weighed. It was asserted

that updated measurements together with material lying at the site of the work were recorded and conveyed throughLetter dated 23.02.2007. The defendant has acted in accordance with the provisions of the Agreement. The recording of measurements and physical verification of balance quantity of stipulated material and conveying the same to the plaintiff was done lawfully and properly and is binding on both the parties.

68. The defendant has further asserted that in the 11th Meeting of the Work Advisory Board held on 20.10.2006, after due deliberation and discussion,it unanimously decidedto rescind the Contract and get the work executed at the risk and cost of original Agency. The Board directed the CE to convey the decision to the plaintiff. The rescission was done due to the acts, omissions and breaches of the plaintiff.

69. The defendant has claimed that the plaintiff was not entitled to any of the claims that have been raised in the two suits and both the suits are liable to be dismissed.

Counter Claim (COMM) 130/2017 in CS (COMM) 249/2017

70. It was asserted that the cause of action specifically arose in favour of counter-claimant on 14.03.2007 when the tender was opened at the risk and cost of plaintiff and on 01.06.2007 when the said tender was awarded to M/s. Shree Durga Construction Co. The recovery amount has been determined based on the differential rate quoted by Shree Durga Construction Co. The defendant-DDA in their counter-claim has sought recovery of ***Rs.1,13,90,588/-*** along with the pendente lite and future interest under Clause 3 of the Agreement.

Counter Caim (COMM) 129/2017 in CS (COMM) 250/2017

71. Similarly, the defendant-DDA in the counter-claim filed in the suit sought ***recovery of Rs.1,12,32,213/-***for the completion of work at the site by M/s. Shree Durga Construction Co.

72. **Identical issues** were framedin both the suits as vide Order dated 22.12.2010:-

CS (COMM)249/2017 *(i) Whether the contract dated 19th April, 2002 was validly terminated? OPP* *(ii) Whether the plaintiff is entitled to the claims set out in paragraph 38 of the plaint? if so to what extent? OPP* *(iii) Whether the plaintiff is entitled to pendent-e-lite and future interest? If so, the rate and the period for which it is payable? OPP* *(iv) Reliefs.*	**CS(COMM) 250/2017** (i) *Whether the contract dated 19th April, 2002 was validly terminated.? OPP* *(ii) Whether the plaintiff is entitled to the claims set out in paragraph 38 of the plaint? if so to what extent? OPP* *(iii) Whether the plaintiff is entitled to pendent-e-lite and future interest? If so, the rate and the period for which it is payable? OPP* *(iv) Reliefs.*
CC (COMM) 130/2017 (i) *Whether the counter claimant was justified in getting the remaining work, envisaged under the agreement dated 19th April, 2002, completed through another contractor? OPP*	**CC COMM. 129/2017** (i) *Whether the counter claimant was justified in getting the remaining work, envisaged under the agreement dated 19th April, 2002, completed through another contractor? OPP*

(ii) *Whether the counter claimant is entitled to a recovery of a sum of Rs. 1,13,90,588/- in terms of Clause 3 of the agreement dated 19th April, 2002? OPP*	(ii) *Whether the counter claimant is entitled to a recovery of a sum of Rs.1,12,32,213/- in terms of Clause 3 of the agreement dated 19th April, 2002? OPP*
(iii) *Whether the counter claimant is entitled to interest? If so the rate and the period for which it is payable? OPP*	(iii) *Whether the counter claimant is entitled to interest? If so the rate and the period for which it is payable? OPP*
(iv) Reliefs.	*(iv) Reliefs.*

73. Initially, the evidence was recorded separately for CS(COMM) 249/2017. However, from 26.02.2013, common evidence was recorded in both the suits.

74. The plaintiff adduced evidence of himself as PW-1 and tendered his evidence by way of affidavit Ex.PW1/A.

75. Defendant No. 2, the Executive Engineer of DDA, had tendered his evidence by way of affidavit Ex.DW1/A.

76. **Submissions heard and the record and evidence perused.**

77. It is an admitted case that DDA had invited Tenders for construction of 160 HIG Category II houses (Four storeyed) and 160 scooter garages in LIC Pocket II, Sector B, Vasant Kunj which were sub divided into two grounds i.e. internal development and construction of 80 HIG Category II

houses and 80 Scooter Garages (**Group I**) and internal development and construction of another 80 HIG Category II houses and 80 Scooter Garages **(Group II**). The estimated cost of Group I was Rs.2,93,35,245/- for which the plaintiff submitted his item rate Tender for a sum of Rs.2,55,24,764/- after giving a rebate of 0.5% on the quoted rates for the Group I houses. Likewise, he quoted the item rate Tender for a sum of Rs.2,95,25,621 for which the plaintiff submitted his item rate Tender for a sum ofRs.2,56,34273/- after giving a rebate of 0.5% on the quoted rates for Group II houses it came to Rs.2,55,06,102/-.

78. The Tender for the Group I and Group II was awarded to the plaintiff by two separate letters dated 19.04.2002 and a formal Agreement dated 26.04.2002 was executed in respect of the two Contracts. As per the agreed terms the stipulated date for commencement was 29.04.2002 and the work was to be completed within 24 months.

In CS(COMM) 249/2017 & CS(COMM) 249/2017:

Issue No.1*:"Whether the contract dated 19th April, 2002 was validly terminated?" OPP*

79. The plaintiff has deposed that on being given the contract, he immediately mobilized his resources including men, material and machinery and reached the site on 28.04.2002 about which he duly notified the defendants vide letter dated 06.05.2002 ExP6.The layout plan, structural drawings were handed over to the plaintiff on 29.04.2002 but the same were recalled on the same day due to deficiencies. Thereafter, another layout plan was issued on 17.05.2002 and only one structural drawing was given on

01.08.2002.Even the Hindrance Register Ex.P8 records the non-availability of Layout Plan on 29.04.2002 which was cleared on 17.05.2002.

Breaches committed by DDA:

80. The plaintiff has deposed that the execution of the Contract was dependent on the reciprocal obligations to be fulfilled by DDA for timely completion of the Contract. The detailed drawings, structural as well as architectural, were mandatorily required to be provided. The plaintiff started the earth work but soon found that the site was not conducive for construction as most of the blocks were located on localized backfilled ditches and the strata was filled up or erratic in nature.As a result, the Foundation bed/ground was not firm. Consequently, the plaintiff who had already mobilized his men, material and machinery as per the Schedule requirement of the work had to keep his labour, machinery and establishment idle at site, which resulted in losses.

81. The plaintiff has further explained in his testimony that there was a marked difference in the levels of adjoining blocks and therefore the belated structural drawings provided to the plaintiff were of no use.In all the blocks expansion joints were to be provided and it was not clear from the said Drawing as to how the cross walls and plinth Beam could be provided as there was a level difference between the adjoining Blocks. The plaintiff wrote aLetter dated 08.08.2002 ExP7 seeking necessary clarifications regarding the same. The request for clarification was admittedly recorded in the Hindrance Register of DDA on 21.09.2002 Ex P8 as well. The demand for revised Drawings was reiterated by the plaintiff vide letter dated 04.10.2002, Ex. P 9.

82. The excavation work was commenced immediately thereafter as is mentioned in the Site Order Book Ex. P11 wherein staff of DDA have also noticed that surplus excavated material is being disposed of as per the directions. Similarly, observations in regard to the excavation work in progress in Block A3 and B3, was noticed on 20.06.2002 and the plaintiff was advised to arrange proper barricading to avoid any mishappening. The noting of the Inspecting Staff on 13.12.2002 reflects that because of the soil condition the Contractor had been told not to execute any work till further Order. *The work was stopped completely from 13.12.2002*.

83. Thereafter, DDA initiated a fresh soil investigation and the site was also inspected by the Senior Officers including CE (CDO) and CE (SWZ) of DDA. SWD-4Executive Engineer vide his letter dated 13.12.2002 Ex.P10 directed the plaintiff not to execute any work at the already allotted site as the proposal for alternative site was being considered by the Competent Authority in Vasant Kunj. This is not denied or challenged by the defendant.

84. The evidence and the admitted documents, therefore proved that immediately after the commencement of work, the progress became abysmally lethargic because of the initial hic-ups due to non availability of Structural Drawings etc., and thereafter due tosoil strata condition which was acknowledged by DDA. The work was directed to be stopped completelyby the plaintiff within eight months vide letter dated 13.12.2002 Ex.P10 as alternative site was being explored.

85. Pertinently, the plaintiff received no further information regarding the alternative site from the defendants for several months.Subsequently, in Office Noting dated 13.10.2003 Ex.PW1/10, while considering the proposal for construction of 160 houses, it was proposed that if the adjoining area

which has been earlier marked for Green can be interchanged with this area where the houses were previously marked while ensuring that the Green is not reduced, the scope of works is likely to get reduced to 112 to 120 houses against the sanctioned 160 houses. A request was made to modify the Lay out Plan accordingly, by the Chief Architect. The proposal was considered and eventually it was decided that the number of houses be reduced to 136 and the Lay out Plans be accordingly prepared vas was informed to the plaintiffthrough letter dated 20.01.03 Ex P13.

86. The revised Lay out Plan with the flats reduced to 136 was supplied on 17.12.2003 i.e. after almost one year, when the work recommenced.The factum of DDA providing an unconducive site is further corroborated from the admitted Soil Investigation Report by Cengrs Geotechnica Pvt Ltd. dated 31.12.2003 Ex P64 which records that the ground level varies over different parts of the Site and several pockets the Site, the soil contains loose materials that needs to be removed.**It is, therefore, proved that the work remained stopped for one year, from 13.12.2002 till 17.12.2003, due to the DDA's delay in finalizing an alternative site or reducing the scope of the work based on the soil conditions.**

Allegations against the plaintiff:

87. It may be noted at the outset that there were infact, two breaches noted by the DDA; one was of *grinding and pilferage of soft rock* and the other was of *illegal mining*. While the Work was stopped on the allegations of *grinding and pilferage of soft rock*, the **removal of the contractor from the approved *List of contractors*** on the ground of *illegal mining*. However, the action of ***termination of Contract*** was taken on the ground of grinding

and pilferage of soft rock; though significantly both the grounds could not be substantiated. The chain of events in regard to these two alleged breaches and two penal consequences of termination of contract and removal from the list of Contractors are analysed below.

Pilferage of grinded rock:

88. The revised structural drawings were provided on 18.05.2004 and the work had barely re-commenced at the site and continued for two months when DDA sent a letter dated 16.07.2004 ExP17 to the plaintiff claiming that allegedlythere was *pilferage of grinded soft rock (fine aggregate)* from the site and the Departmental Enquiry is in progress. *He was requested to stop the work and to maintain status quo till further orders.* He was also requested to carry out joint measurements of the work with the field staff. The allegation against the plaintiff thus, was of *pilferage of grinded soft rock (fine aggregate).*

89. The plaintiff responded through his letter dated 03.08.2004 Ex.P18 stating that stoppage of work would adversely affect their finances and also stated that joint measurements for most of the works done, had already been recorded and they would join the DDA for the remaining measurements. Since no further intimation was forthcoming after the stoppage of work, the plaintiff again wrote theletter dated 15.09.2004 Ex.P19 to the Department.

90. As the defendant had allegedly noticed *pilferage of grinded soft rock (fine aggregate),* the investigationwas carried out by SE (Vig.)in regard to alleged *soft grinding of stone*.The Vigilance Department found three DDA Officers working on site viz. JE, AE and Ex.E responsible who were suspended and after holding Disciplinary Inquiry, major penalty was

imposed upon them. The Vigilance Committee had also recorded that there was perhaps the involvement of the Contractor i.e. the plaintiff in this soft stone grinding.

91. After, the Vigilance was concluded and with the approval of CVC major penalty Charge Sheet was issued to JE, AE and EE, the Superintendent Engineer (Vig) vide letter dated 03.06.05 Ex.P-48 recommended that the action as deemed fit, may be initiated against the Agency and the matter may be referred to CRB.

92. The complaint allegedly received by the defendant which had mobilized the department to initiate the enquiry and the final report of the Vigilance Department holding the plaintiffresponsible, has not been produced on record. Finally, the defendant alleged some involvement of the plaintiff in soft stone grinding and pilferage**, but neither the Vigilance Committee concluded positively about the alleged role of plaintiff in being involved in soft stone grinding or the pilferage nor any evidence whatsoever to corroborate the evidence has been led by the defendant in the present suit. The allegations against the plaintiff in this regard remained in the realm of suspicion and have not been proved by the defendant.**

Illegal Mining: removal from the List of Contractors

93. While the work had been stopped on the allegations of Stone grinding made against the plaintiff, Chief Engineer (Z) gave a Report vide letter No. PS/CE(SWZ)/2004/Conf./2245 dated 16.09.04 for taking Disciplinary action against the Agency in regard to its involvement in the ***illegal mining at the Work site***. (This Report dated16.09.04 has not been produced by the

defendant but finds mention in the Termination Letter dated 03.08.05). Pertinently, till now the allegations were of soft grinding of stone and recommendation for action against the plaintiff was on this ground but interestingly the allegations got transformed to that of illegal mining.

94. The matter was then referred to Contractors Registration Board (CRB) which then served the plaintiff with a Show Cause Notice dated 22.09.2004 Ex P20wherein it was claimed that *plaintiff was* ***actively involved in illegal mining****and to Show Cause why disciplinary action be not taken against it within 15 days.*

95. The plaintiff in *response to the Show Cause Notice,* sought all the documents which formed the basis of the allegations in order to give a detailed reply by his Letter dated 01.10.2004 Ex P21. He then gave a *detailed Reply 06.10.2004 Ex P22*, vehemently denying presence of stone crushing machine or of illegal mining at the site. It was claimed that the site was constantly inspected by DDA Officers as well as Vigilance Cell of DDA and at no point of time any such activity was ever found to be carried out.

96. He further explained in the Reply that because of the revision of Lay out Plans, location of some blocks had to be shifted. Some temporary structures like water tanks, steel yards, etc. were also shifted from one location to another. All excavations were carried out as were necessary for laying foundations for the buildings as per revised Plans and as directed by the Competent Authority. The excavated earth, rock and malba were dumped at the demarcated sites by DDA during the period from July to September, 2004.

97. The case in its entirety along with the response of the plaintiff dated 02.06.04,was placed before Contractors Registration Board (CRB) in its Meeting held on 03.06.05. The Minutes of this Meeting Ex.P41 recorded that CE(SWZ)DDA vide Letter dated 16.09.04 reported illegal mining and also three officers of DDA namely JE,AE and EE were placed under suspensionon account of illegal mining.It was further recorded that the EM recommended Blacklisting of the plaintiff vide his Letter dated 20.07.04 which was reiterated by the CE (SWZ) vide Letter dated 29.10.04.Furthermore, the CE(SWZ) was also advised by the CRB in its Meeting held on 29.11.04 to pursue the matter with the Vigilance Deptt about the final decision, but the same was not forthcoming.

98. The Vigilance Department was finally able to conclude in first week of June,2005 that along with the officers of DDA, plaintiff was also involved in illegal mining at site. The Departmental Enquiry was initiated against the officers and all the records were forwarded to the Vigilance Department.

99. CRB in the Meeting held on 03.06.05 further recorded that SE (Vig.) had finally arrived at a conclusion that there was *illegal mining going on at the site of work* in which not only the Field Engineers i.e JE, AE and EE (*who all had been put under suspension*) *but also the Contractor were associated*. Since the allegations made against the plaintiff were found to be of serious nature and prima facie appeared to be true, it decided to remove the Plaintiff from the DDA's approved list of contractors.

100. Thereafter, ***the plaintiff was removed fromthe approved list of contractors vide Office Order dated 03.08.2005 Ex. P24 issued by Secretary, CRB, DDA,***which records that the CRB had duly considered the

Report received from CE (SWZ) vide Letter dated 16.09.2004 for taking disciplinary action against the Agency in regard to its involvement in the illegal mining at the site of work, in its Meeting held on 03.06.2005 and decided to remove the plaintiff from the DDA's approved List of Contractors.

101. The Office Order dated 03.08.2005 Ex. P24 was issued by CRB which gave the reason for removal from the approved list of contractors as *illegal mining* taking place at Site, even though there was no such conclusive finding by the Vigilance Department. The relevant part of the Office Order reads as under:

> *"F4 (8) 80/19/93/1 (BNR)/SECY/538*
>
> *OFFICE ORDER NO 57/2005*
>
> *Whereas a Reportwas received from CE (SWZ) vide letter dated No. PS/CE(SWZ)/2004/conf./2245dated 16.09.2004* ***for taking disciplinary action against the agency in regard to its involvement in the illegal mining at the site of work.***
>
> *Whereas in view of above a show cause notice was served to the agency vide office this letter dated F4(8)80/19/93/(B&R)/Secy/701 dated 22.09.2004 and reply of which was received vide agency's letters dated 01.10.2004 & 06.10.2004 respectively.*
>
> *Whereas the said reply of the agency was sent to CE (SWZ) for his specific comments and his response has been received vide his office letter No. PS/CE(SWZ)/05/confd/1547 dated 02.06.2005.*
>
> *Whereas the case in its entirety was placed before the CRB in its meeting held on 03.06.2005.*
>
> ***Now after careful consideration, the CRB has decided to***

remove the above referred agency i.e. Shri AJAY KALRA, B-7/13/2, Safdarjung Enclave, New Delhi - 110029 from the DDA's approved list of contractors.

No tender paper shall be issued and no work shall be awarded to Shri AJAY KALRA from the date of issue of this order.

102. Interestingly, the only basis for making allegation of illegal mining was *as a stone crushing machine was installed on the site that belonged to him.* The plaintiff in his affidavit of evidence Ex. PW1/A had deposed that a Stone Crusher Machine is of huge dimensions which is especially installed for crushing boulders of huge dimensions into small stone aggregate of different sizes and in the process, it also produces Stone Dust; and this Machine cannot be used for mining activity. The machine is used only for crushing stone and no excavation or mining or any other operation is possible through this machine. Except making bald allegations, no cogent evidence had been led by the DDA in support thereof.

103. Further, regular inspections of the site were being done by the DDA officials and notings were made in the Hinderance Register Ex. P 8 by the officials of the defendant but there is no mention of any stone crushing machine belonging to the plaintiff or being used by him. The plaintiff all throughout, denied the allegations of illegal mining. Admittedly, there was also no mention of any activity of stone mining mentioned in the Hindrance Register. Rather, the plaintiff wrote a letter dated 25.06.04 to the Executive Engineer informing that "*the stone aggregate lying near Block B has been removed and not used in the Work"*.

104. The consistent assertion of the plaintiff was that the site had been inspected by the officers of DDA which finds corroboration from the Letter bearing No. PS/CE(SWZ)Confl./04/1731 dated 28.07.04 Ex.P46 written by the Chief Engineer (SWZ) wherein he stated that *he had inspected the site on 9.06.04 and did not find any stone crushing machine at site and there were no telltale signs of mining being done.* The defendant did not deny that the inspections were not carried out, rather a suggestion was given to the plaintiff in the cross-examination that surprise inspection was made in July, 2004, thereby confirming the inspection by CE(SWZ). There is no explanation forthcoming in regard to this contradictory stand of the Defendant which itself corroborates the stand of the plaintiff. There is no rebuttal of this entire evidence.

105. The callousness and arbitrariness of the acts of DDA further gets manifested from the Technical Committee Report dated 21.06.06 and the CLA report Ex.P.54 issued after the removal of the plaintiff from the approved list of contractors, unequivocally concluding that there has been no illegal mining at the Site.

106. From the above discussion, it emerges that the Defendant insisted on somehow penalizing the plaintiff for an alleged illegal mining on the specious ground of the Stone crushing Machine belonging to the plaintiff being found on the site, as is also evident from the Office Noting of Dy. CLA and CLA Ex. P. 54. The defendant has not been able to substantiate its allegations of illegal mining which is negatived by its own documents.

107. *In light of this, it is held that the conclusion of the department/ defendant for his Removal from the List of Approved Contractors vide Office Order dated 03.08.2005 on the ground of illegal mining was arbitrary, capricious, non- justified and illegal being contrary to its own findings.*

Permanent Removal from the approved list of Contractors:

108. The plaintiff was removed from the approved list of Contractors, by Office Order No.57/05 F4 (8) 80/19/93/1 (BNR)/SECY/538 dated 03.08.2005 issued by SECY, CRB, DDA. Ex P24issued by Secretary, CRB, DDA, the relevant part of which reads as under:

> "*….. No tender paper shall be issued and no work shall be awarded to Shri AJAY KALRAfrom the date of issue of this order."*

109. Pertinently, the plaintiff hadnot been debarred for a definite period, but his name had been removed permanently from the list of Contractors.Thus arises the question:*whether a person/ contractor can be penalized for his entire life*.

110. The Apex Court has expounded the effects of blacklisting or debarment in *M/s Erusian Equipment & Chemicals Ltd. vs. State of West Bengal and Another* (1975) 1 SCC 70 wherein it was observed as under:

> *"Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."*

111. In*Gorkha Security Services vs. Government (NCT of Delhi)* 2014 SCC OnLine SC 599 the Supreme Court had observed as under:

> *"With blacklisting many civil and/or evil consequences follow. It is described as "civil death" of a person who is foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person from participating in government tenders which means precluding him from the award of government contracts."*

112. In *Medipol Pharmaceutical India Private Limited* (supra), the Apex Court observed that the blacklisting has the effect of preventing a person from the privilege of entering into a lawful relationship with the Government for the purpose of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist. It was thus concluded that the only legal limitation upon the exercise of such an authority by the State is to act fairly and rationally without being arbitrary in any way.

113. In the case of *B.B. Biyani Projects Pvt. Ltd vs State of Madhya Pradesh and ors*, Civil Appeal No. 6632 of 2016 decided on 22.07.2016 as well the Apex Court had similarly observed that the blacklisting which is indefinite in nature, is impermissible under the law.

114. It is thus settled in law, as discussed above, that there cannot be a penalty in a commercial Contract which is permanent in nature. This is more so when the basis of removal of the plaintiff from the list of Contractors itself is specious and essentially targeted to save the Department

from the claim of compensation that the plaintiff in the circumstances, may raise. It is known that *being offensive is the best defence*, which is clearly demonstrated in the present case.

115. The Technical Committee Report dated 21.06.2006 and the CLA issued subsequently, exonerated the plaintiff. The Department on one hand was conducting the Enquiry, but on the other hand was in a great rush to blacklist the plaintiff. **It clearly spells out malafide on the part of the Department. In view of this analysis, the order of removing the plaintiff from the approved list of contractors is hereby held to be illegal and not sustainable.**

Termination of Contracts:

116. The plaintiff was removed from the approved list of Contractors, by Office Order No.57/05 F4 (8) 80/19/93/1 (BNR)/SECY/538 dated 03.08.2005 issued by SECY, CRB, DDA, Ex P24. ThisOffice Order dated 03.08.05 though indicates the name of the plaintiff in the end on left side but there is no indication if the copy of this Order was ever served upon the plaintiff. The plaintiff was apparently totally ignorant of the alleged action taken against him. This is evident from the fact that the plaintiff then wrote a Letter dated 30.01.06 Ex. P25 stating that more than 18 months had passed since the Work was stopped and no communication was being received from the Department. The plaintiff in his testimony deposed that while the defendant was not divulging any information to the plaintiff, he came to know that the defendant was contemplating to foreclose the Contract and impose penalties upon him and thus, sought to close the existing Contract to avoid any legal complications vide his letter received in the office of

defendant on 30.01.06. Thus began the journey for the termination of the Contracts.

117. An Agenda Meeting was held in the Office of Chief Engineer on 24.03.06 and it was recorded vide Minutes Ex.P52 that since no decision could be taken to restart the Work as all Measurement Books and site registers were with the Vigilance Department, and the Agency was already penalized with debarment, no further action was warranted under any of the Clauses of the Agreement. *Significantly, it was also observed that except for not scrupulously adhering to the time specified for performance of the contract, there was no other omission on the part of the plaintiff.* It was thus, recommended that the request of the plaintiff may be acceded to and both the contracts may be foreclosed. Such Foreclosure would not entail any cost to DDA as the cost of construction would be borne by the purchasers of the Flats while in turn of Foreclosure, the plaintiff would forgo all his Claims for Loss of Profit, damages,etc. To safeguard the interest of Department, sufficient amount, commensurate with the quantum of illegal mining be withheld from the dues that would become payable to the Agency.

118. This recommendation of Chief Engineer Ex. P52 was submitted for the consideration of the Works Advisory Board(WAB).The WABin its Meeting held on 30.03.06 decided to seek the opinion of CLA regarding action under Clause 3(a) and also toconstitute a Technical Committee of three named Technical Officers,to assess the quantum of material allegedly mined by the Contractor. Accordingly, a Technical Committee was constituted by EM vide Letter dated 04.05.06 and the Chief Engineer was informed about the same through Letter dated 04.07.06 Ex.P-52.

119. ***The Technical Committee conducted physical inspection and gave their Final Report dated 21.06.2006 Ex. P 53 and held that no mining was done at the site though grinding of soft rock could not be ruled out.***

120. The ***Dy. CLA gave the opinion*** dated 13.09.06 Ex. P54 that the observations of EM DDA about the active involvement of the contractor was based on the fact that the stone crushing machine belonged to the contractor.However, the Committee of experts had also reported that there was no illegal mining carried out on the site. Further, the Department had not mentioned any specific breach of any Terms and Conditions of the Contract attracting Clause 3 of the Contract Agreement. It was thus, recommended that if no violation is made out, DDA can close, abandon or curtail the contract.Pertinently, the Dy. CLA Ex P54 opined that it was for the Engineering Department to examine if there was any violation of Terms and Conditions as mentioned in Clause 21 and whether Clause 3 of the Contract Agreement could be invoked.If no such breach is to be found, the DDA can close, abandon or curtail the Contract under Clause 13 of the Contract Agreement.

121. This opinion of the Dy. CLA was followed by the Noting of the CLA who observed that the Department itself had stopped the work and disabled the Contractor from further work despite which the Contract has not been rescinded. Thus, option of rescission in the circumstances was closed. However, since the Department has expressed ***loss of faith in the Contractor***, the Department cannot get the work completed from this Agency after four years from the contract date. The Report of Technical Committee did not support invoking of Clause 3 i.e. of rescission. A reference was made to Section 53 of Indian Contract Act, 1872 providing for

reciprocal promises according to which when one party is prevented by the other from performing the Contract, such party has a right to avoid the Contract. It was, therefore, ***recommended that the contractor be relieved of his obligations and loss due to mining, if any, was determined may be recovered from him.This was signed by EM on 10.10.06.***

122. Significantly,despite finding of "no illegal mining" and CLA Opinion advising against the rescission of the Contract, with all its tenacity and adamancy, the WAB in its Meeting held on 20.10.06 Ex.DW1/5 considered the Agenda Note dated 11.10.06, *and decided to rescind the Contract and get the Balance work executed at the cost and risk of original Agency under Clause 3 of the Agreement.*

123. The Letter dated 04.11.06 Ex. P-26 was then issued to the plaintiff to Show Cause why the action under Clause 3 (a)(b)(c) be not taken against him for the reason of breach of terms and conditions of the Contract. A reference was also made to the allegations of pilferage and grinding of soft rock at the site.

124. Finally, vide Letter dated 23.11.06 Ex. P28, the plaintiff was informed about the decision of DDA to rescind the Contract and to get the uncompleted work by another Contractor at his risk and cost.

125. Interestingly, there is no mention in the Show Cause Notice or the Rescission Order of any specific breach of terms and conditions of the Contract attracting Clause 3 of the Contract Agreement which provides for rescission of Contract if any breach of terms and conditions of the Contract is committed by the Contractor.

126. DDA, in the most arbitrary manner,rescinded the Contract vide letter dated 23.11.2006 Ex.P28 stating that there was breach in terms and

condition of the Contract and the work has not been completed. The Termination Notice addressed to the plaintiff reads as under**:**

> *"Sub: C/o160 HIG Cat. II & 160 Scooter Garages four storeyed houses in LIC Pocket-II, Sector B, Vasant Kunj*
>
> *SH.- C/o80 HIG Category-II Houses & 80 Scooters Garages Internal Development(Group-I)*
>
> *Agmt. No. 6/EE/SWD-4/DDA/2002-2003*
>
> *D/Sir,*
>
> *Whereas under Clause-3 of the aforesaid agreement the* ***Engineer-in-charge shall have powers to take action under one or more of the sub-clause 3(a), 3(b) & 3(c) in the event of committing breach in terms & conditions of the contract*** *of the aforesaid work by the contractor as a result of which in the opinion of the Engineer-in-Charge (which shall be final and binding) the* ***work had to be got stopped by DDA and thus could not be got completed and whereas on A/c of your alleged association in pilferage and grinding of soft rock at the site of work the work had to be got stopped by the DDA and as per the opinion of the under-signed by reason of your committing breach interms and conditions of the contraction this a/c, the work had to be got stopped and thus could not be got completed****, and whereas you were served with a show cause notice in this regard under this office letter No. F5 (252) SWD-4/DDA/1427 Dt. 4/11/2006 which was however returned undelivered to this office. Later the same was sent to your new address at N-1, 2nd Floor, Green Park Extn. New Delhi through special messanger but the same was refused. This notice was therefore again sent to you on this address through Regd. A.D. on 14/11/06 which has not been replied to the satisfaction of the Engineer-in-Chief till date, therefore under powers delegated to me under clause 3(a), 3(b), & 3(c), I.H.O. Chauhan the Engineer-in-Chief of the above*

said work under the aforesaid agreement for and on behalf of D.D.A. hereby.

a) Rescind the contract as aforesaid upon which ***rescission your security deposit stands absolutely forfeited to the D.D.A. and,***

b) Take out such part of the work out of your hand, as remains unexecuted, for giving it to another contractor to complete the same in which case any expenses which may be incurred in excess of the sum which would have been paid to you if the whole work had been executed by you in terms of the agreement *(the amount of excess certified in writing by the Engineer-in-Chief shall be final and conclusive) shall be borne and paid by you on demand/of may be deducted from any money due to you by DDA under this contract or any other contract whatsoever or from security deposit or the proceeds of sales thereof or a sufficient part thereof as the case may be without prejudice to the right of the DDA to realise said excess amount by suit or otherwise. You are also hereby served with notice to the effect that the work are also hereby served with notice to the effect that the work executed by you will be measured up on 30/11/06 for which you are asked to attend for joint measurement failing which the work will be measured by the department unilaterally in your absence and result of measurement will be final, and will be binding on you.*

This is without prejudice to DDA's right to take action under any other clauses or sub-clauses of the agreement and to realise DDA's dues and losses and damages whatsoever under such clauses or sub-clauses.

Yours faithfully

(H.O. Chauhan)

Engineer-in-Chief

S.W.D. 4/D.D.A.
For and on behalf of the DDA"

127. A bare reading of the Termination Notice clearly reflects that defendant was conscious of its slippery ground for termination of Contract as it merely states that there was also an allegation of alleged association of the plaintiff in the pilferage and grinding of soft rock at the site on account of which the work has to be stopped by DDA.However, in the subsequent paragraph it states that in view of the breach of terms and conditions DDA rescinded the Contract and claimed to forfeit the security deposit.

128. Pertinently, it does not state that the rescission is on account of pilferage of soft rock. As already discussed above, it emerges clearly from the opinion of CLA that there was no breach committed by the plaintiff and it was defendant who had prevented the plaintiff from timely conclusion of the Project. Candidly, it was concluded that since there was *loss of faith*, defendant was unable to ask the plaintiff to complete the Project.

129. Merely to save its own skin and put the compel the plaintiff to give up his legitimate claims, the defendant demonstrated its might against a simple, vulnerable person by choosing to rescind the contracts rather than admitting its lethargy and indecisiveness in taking timely decisions and to accept the foreclosure of the contracts.

130. This rescission of the Contract by DDA is contrary to its own internal findings as had been observed in its Investigation Committee and CLA reports. In fact, the EM, DDA had also accepted these findings of CLA in its

Noting. It was the defendants who had stopped the plaintiff from continuing the work from 22.09.2004 by issuing a Show Cause Notice and order that status quo be maintained Ex P20.

131. When the plaintiff sought foreclosure of the Contract vide letter dated 30.01.2006 Ex P25, he could not have been penalized by way of rescission of Contract and forfeiture of his security. This act of DDA is clearly vindictive, arbitrary and capricious.It is apparent that DDA intended to save its officials who were involved in the malpractices and illegal acts.

132. It may be reiterated here that there was no dereliction on the part of the plaintiff in execution of work but the work was hampered by the extraneous circumstances. Soon after the work was commenced by the Contractor in May-June, 2002, the soil substrata was not found suitable for raising the construction, despite which the plaintiff continued to do some work as was possible. He was not provided with the layout plans and structural drawings in time and they were revised from time to time. The plaintiff was able to work from June till about 17.12.2002 when he was prevented to continue further because the revision of the layout plans and change in Site was required.

133. The revised layout plans were provided to the plaintiff in December, 2003 when he commenced the work, but in April, 2004 he was served with a Notice directing him to stop the work on account of the Vigilance Inquiry that had been initiated by the DDA. In all the plaintiff has been able to work barely for about ten months and most of the time he was rendered unable to continue with the work because of the supervening circumstances and the revision of plans etc. Rather, his evidence coupled with the Hindrance Register reflects that he was working on the site vigilantly as per the work

schedule. **Therefore, it is established that the delay in execution of work as awarded to the plaintiff was not on account of his conduct.The plaintiff, therefore, committed no breach of the terms of the Agreement which could justify rescission of Contract**.

134. The Order of Recission made by DDA was on the ground of Loss of faith which also is not established from the record of the defendant itself. **The termination of contract is therefore, held to be unlawfuland the consequences/ penalties including forfeiture of the securityamount, thus imposed are liable to be set aside.**

135. **It is thus, held that the termination of Contracts as well action of removal of the plaintiff from the List of Contractors were illegal.**

136. **The issue is decided in favour of the plaintiff.**

In CS(COMM) 249/2017 & CS(COMM) 249/2017:

> *Issue No.2: "Whether the plaintiff is entitled to the claims set out in paragraph 38 of the plaint? if so to what extent?" OPP*

137. The claims raised by the plaintiff have been categorized as under for the sake of convenience:

a. Loss of Profitability
b. Loss of Profits
c. Overheads and Expenses/Escalation due to prolongation of the Contract
d. Unlawful encashment of Bank Guarantee
e. Dues payable under the Contract
f. Damages for loss of goodwill and unlawful rescission

138. "**Loss of Profits**" and "**Loss of Profitability**" has often been interchangeably used in recovery cases. The former stands for the loss incurred due to the non-completion/ prevention from completing of the contract on account of breach committed by the respondent. The latter refers to the loss incurred due to the delay in the project attributable to the respondent, due to which the claimant has lost the opportunity to earn profits through other projects after the contractual period.

Loss of profitability:

Claim No. 3:*Loss of profitability/ turnover for prolongation of the contract from 13.12.2002 to 17.12.2003 due to change in site.*

139. The plaintiff has claimed "**Loss of Profitability**", that he could potentially earned through other works had there not been a prolongation of the Contract. In order to appreciate this claim, the concept of "**Loss of Profitability**" needs to be analysed.

140. In the case of *NTPC Limited v. Sri Avantika Contractors (I) Limited*, O.M.P. (COMM) 370/2017 decided on 08.06.2020, the Co-ordinate Bench of this Court has elaborated on the twin test applicable for the grant of "**Loss of Profitability**". The relevant extract from the judgement reads as under:

> "*18. ... In other words what a person would have earned if he had not pursued the activity in question but had deployed his resources in another venture.* ***This claim must satisfy the twin criteria of assessing damages resulting from breach of contract: proximity and measure****. A person claiming such damages must establish that* ***he had the opportunity to deploy his resources in another venture*** *- which in this case the Arbitral Tribunal holds has been proved as HCC had other contracts in hand - and that*

> *venture would have yielded profits.It does not appear that the Arbitral Tribunal had any material to assess the profitability of those contracts; the opportunity that HCC had lost.* ***Another aspect is whether the equipment/resources were hired or owned by HCC. Clearly, if the resources blocked by HCC in the agreement in question were hired, there would be no opportunity costs as similar equipment/resources could also be hired for other contracts and possibly there would be no opportunity costs as there is no loss of opportunity****."*

141. Similarly, the Apex Court in the case of *Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corpn. Ltd.,* 2023 SCC OnLine SC 1208 observed that *when the completion of a contract is delayed and the contractor claims that s/he has suffered a loss arising from depletion of her/his income from the job and hence turnover of her/his business, and also for the overheads in the form of workforce expenses which could have been deployed in other contracts, the claims to bear any persuasion before the arbitrator or a court of law,* ***the builder/contractor has to prove that there was other work available that he would have secured if not for the delay, by producing invitations to tender which was declined due to insufficient capacity to undertake other work.*** *The same may also be proven from the books of accounts to demonstrate a drop in turnover and establish that this result is from the particular delay rather than from extraneous causes.* ***If loss of turnover resulting from delay is not established, it is merely a delay in receipt of money, and as such, the builder/ contractor is only entitled to interest on the capital employed and not the profit, which should be paid.***

142. The essential elements for granting a claim for "**Loss of Profitability**" has been succinctly delineated in *Unibros vs All India Radio*, 2023 SCC OnLine SC 1366 as

(i) Delay in the completion of the contract;

(ii) Delay is not attributable to the claimant;

(iii) Claimant has a status as an established contractor, handling substantial projects; and

(iv) Evidence to substantiate the claim of loss of profitability.

143. In the present case, the plaintiff was required to lead evidence to show that he was engaged in other projects or had signed other Contracts where he could have better deployed his resources to earn profits. While the plaintiff has exhibited several a Letters of Appreciation from the Chief Engineer (SWZ) Ex P1 and Certificates of successful completion of work in several projects from defendant No. 1 in Ex P3, Ex P4, Ex PW1/1, Ex PW1/2, such letters do not prove that the plaintiff had other projects during the contractual period in the present case.

144. However, at this juncture, it is pertinent to observe that when the defendant, after rescission of the Contract of the plaintiff, floated a fresh tender through a Press Tender Notice for the completion of the project, the plaintiff had applied for the said Tender vide letter dated 03.03.2007 Ex. P 38 in order to mitigate their losses. The plaintiff has also sent the earnest money through a demand draft.

145. DDA rejected this application of the plaintiff vide letter dated 06.03.2007 Ex. P 55 intimating that the plaintiff had been removed from the DDA's approved list of contractors and therefore no tender paper would be

issued in his favour. Thus, the demand draft sent by the plaintiff was also returned.

146. While, the plaintiff had attempted to apply for the fresh tender to complete the project, it was the defendant who completely decapitated him from participating in the bidding process or any other project with the DDA for that matter; resulting in the plaintiff suffering from "**Loss of Profitability**". Albeit it is not certain if the plaintiff would have won the bid for completing the project had he not been blacklisted,for the repute and success rate of the plaintiff as evinced from the Letters of Appreciation, it is certain that the he has suffered loss of profitability on account of not being able to participate in the tender floated by DDA.

147. **ThePress Tender Noticeestimated the cost for the entire project ie.e Group I and Group II asRs. 2,82,50,467/- which amounts to Rs. 14,12,523.35/-.In view of the value of the fresh Tender and considering that the plaintiff was not allowed to participate in the bidding process, a sum of Rs. 6,00,000/-** ***(i.e. about 2 of the Tender Value)*****is awarded for the loss of opportunity to participate in the Tender (Loss of Profitability) together for both the suits.**

Loss of Profits:

Claim no.4:*Loss of profit due to breach committed by the respondent for the portion of the work not allowed to be completed.*

148. Section 73 of the Indian Contracts Act, 1872 provides for unliquidated damages for any loss or damage suffered for breach of contract which reads as under:

> *73.**Compensation for loss or damage caused by breach of contract**.—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, **compensation for any loss or damage caused to him thereb**y, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*
>
> *Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.*
>
> *Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.*
>
> *Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."*

149. In the case of *A.T. Brij Paul Singh v. State of Gujarat*, (1984) 4 SCC 59, it was held that there is a reasonable expectation of profit in any Tender contract. Thus, when there is a breach on the part of the party entrusting the work, the contractor would be entitled to loss of profit that he would have

been entitled to earn. However, the measure of profit would vary based on the facts of each case. Similar to the present case, the government in *A.T. Brij Paul Singh* (supra) had unlawfully terminated the contract that was partly performed. Thus the "**expected loss of profit**" for breach of contract was awarded to the contractor.

150. In *Dwarka Das v. State of M.P.*, (1999) 3 SCC 500 a works contract was terminated on account of non-completion of the work. On the court finding that the contract had been terminated unlawfully, it was held that the contractor was entitled to loss of profits that he was expected to earn under the contract. Such a claim cannot be denied if the material on record fails to show the actual loss suffered. Similar findings were made by the Apex Court in *J.G. Engineers vs Unions of India*, (2011) 5 SCC 758 where the Apex Court upheld the award of 10% of the construction contract value considering it as a standard estimate for loss of profit.

151. Since it has been established that the defendant is responsible for the non-completion of the Contract and its rescission is held to be illegal and arbitrary, the plaintiff is entitled to "**Loss of Profits**".

152. **In view of the settled law on "Loss of Profits" and due to the unlawful termination of contract, this Court finds that it would be reasonable to award 10% of the total contractual value for Group I and Group II towards this claim**i.e. Rs. 25,52,476.4 in CS(COMM) 249/2017 and Rs 25,50,610.2 in CS(COMM) 250/2017**.**

Overheads and Expenses/Escalation due to prolongation of the Contract:

Claim no.1: *Expenditure towards maintaining the site staff from 13.12.2002 to 17.12.2003 due to change in site*

aim no.2: *Idle charges towards maintaining machinery, T&P etc. for the period from to 17.12.2003 due to proposal of change in site.*

Claim no.5: *Head Office overhead and profit for prolongation of the contract beyond the stipulated date.*

Claim no.6: *Site office overheads due to prolongation of the contract beyond the stipulated date.*

Claim no.14:*Idle charges towards maintaining machinery T&P from 29.04.2002 to 27.07.2002.*

153. Though these variousclaims have been made, no evidence whatsoever, has been led by the plaintiff to prove the actual expenditure incurred by him under the aforementioned heads. The claims reproduced are with respect to specific expenses that the plaintiff claims to have actually incurred.Since these are claims not based on any notional losses, it required the production ofrelevant evidence to prove the same.

154. Towards the proving the claims for idling charges and maintenance of plant, machinery and resources, the plaintiff has produced Ex PW1/16 which is the Hire charges for the plants and Ex PW1/17 which is the quotation for shuttering material on a hire basis.

155. Though, he has claimed mobilization of resources, machinery, all his calculations are on provisional basis on the basis of the proposed rate list. Such provisional calculations cannot entitle the plaintiff to claim any amount unless he was able to prove the actual amounts/ expenditure incurred by him for the work done in the Site for approximately ten months.

156. The plaintiff has also claimed the overheads incurred for itsHead Office and Site Office during the period when the contract was prolonged.Even in this regard, no expenses in form of invoices or bills have

been produced to establish this claim.The plaintiff has provedhis Bank Statement PW1/8, but from this statement it cannot be held to establish that the transactions recorded in the bank statements were for the hire of resources for the present Contract or expenses to maintain the Site Office and Head Office.

157. **Thus, the plaintiff has not been able to substantiate these claims.**

Unlawful encashment of Bank Guarantee:

Claim no.8: *Loss suffered on account of obtaining bank guarantee but the same was of no use.*
Claim no.10: *Bank charges due to extension of bank guarantee in the prolonged period of contract.*
Claim no.11:*Security Deposit/Bank guarantee illegally encashed by the department.*

158. Admittedly, two Bank Guarantee Nos. 39/5 and 39/6 for Rs. 2,00,000 eachfor Group I and Group II Project were issued by Central Bank of India, on behalf of the plaintiff for the period of the Contract. These Bank Guarantees were later renewed on the asking of the defendant upto 15.07.2015, which was communicated by the plaintiff to the defendants vide letter 15.07.2015 Ex P16.

159. Subsequent to the rescission of the Contract on 23.11.2006, the defendant encashed the Bank Guarantees on the very same day by writing to the Manager of Central Bank of India Ex P29. **Having concluded that the rescission of the contract by DDA in the present case is arbitrary, the plaintiff shall be entitled to the amount so forfeited dueto encashment of the Bank Guarantees during the illegal rescission.**

160. Further the plaintiff has claimed the Bank Charges incurred for maintaining Bank Guarantees for a Project, the non-completion of which was due to the impediments created by the defendants at every level. The plaintiff has thus claimed a sum of Rs. 51,512/- as expenses for keeping the Bank Guarantee alive from 2002 to 2006.

161. On a perusal of the Bank Statement of the plaintiff Ex PW1/18, it is apparent that a total sum of Rs. 27,112/- (i.e. Rs 13444 on 15.07.2005 and Rs 13668 on 20.07.2006) has been spent on Bank Charges to keep the Bank Guarantee alive beyond the contractual period. **Thus, a sum of Rs. 27,112/- is awarded in favour of the Plaintiff together in both the suits i.e. a sum of Rs.13,556/- in each suit.**

Dues payable under the contract:

Claim no. 9: *Balance payment of the work done.*

Claim no.7: *Cost due to rise in market in prolonged period of contract after the stipulated date over and above 10CC/escalation.*

Claim no.13:*Loss due to non-execution of any work even though claimant mobilized their resources at site of work i.e. maintaining staff from 29.04.2002 to 27.07.2002.*

162. With respect to the expenditure for maintaining the staff from 29.04.2002 to 27.07.2002, the Fortnightly Labour Reports for the months from May to August 2002 Ex DW1/2 to Ex DW1/8 submitted by the plaintiff from time to time with the Labour Department, which have been produced by the defendant reflect that labour charges totaling to Rs.2,67,652/- has been incurred by the plaintiff.As per these documents, a total of Rs.2,67,652/- was the expenditure incurred by the plaintiff on the

labour. However, this expenses has only been incurred towards Group I of the Project in CS(COMM) 249/2017.

163. The defendant had admitted that the work done at the site was about 5 to 7% while awarding the Contract upon termination of the Contract.An amount of Rs.12,84,778/- in CS(COMM) 130/2017 and Rs. 13,67,654/- CS(COMM) 129/2019 has been deducted as the quantum for the work done by the plaintiff in the defendant's Counter Claim Statement. The labour charges paid by the plaintiff from time to time with the Labour Department as mentioned above, have been subsumed in the total cost as reflected by the defendant towards the completed work by the plaintiff.

164. **From the admissions of the DDA, it can be reasonably concluded that the plaintiff has executed the works totaling to Rs.26,52,423/- i.e. Rs.12,84,778/- in CS(COMM) 249/2017 and Rs. 13,67,654/- CS(COMM) 250/2019,to which he is held entitled.**

Damages for loss of goodwill and unlawful rescission:

Claim no.15:*A declaration that the act of DDA of removing Mr.Ajay Kalra from the approved list of Contractors is illegal and arbitrary and therefore the order dated 3.08.2005 is liable to be quashed and the agency/contractor is entitled to damages of Rs. 70,00,000/- for illegally and arbitrarily removing him from the approved list of Contractors.*

Claim no.16:*A declaration that the order dated 23.11.2006 of the department in rescinding the contract is illegal and arbitrary and therefore is liable to be quashed and the plaintiff is entitled to damages for the said illegally and arbitrary rescission of contract.*

Claim no.17:*Damages for loss of goodwill due to the illegal and arbitrary acts of DDA and its officers*

165. At the risk of repetition, it is observed that the defendants in the present case have acted maliciously and have left no stone unturned in causing problems and complications in the business of the plaintiff. Not only was he permanently removedon specious grounds from the Approved List of Contractors, decapacitating him from contracting with the DDA thereafter; but also made him to suffer the financial consequences of the unlawful and arbitrary rescission of Contract that followed.

166. The perpetration of such baleful conduct of DDA and its Officials, resulting in the plaintiff's torment, certainly calls for accountability in the form of reparations. Not only has the plaintiff suffered heavy financial losses during the course of the contract and thereafter seeking redressal through litigation, but has also suffered severe attrition to his goodwill and reputation due to the unjustified blacklisting.

167. **In light of the malafide and arbitrary conduct of the defendants, the plaintiff is hereby awarded lumpsum damages of Rs. 10,00,000/-.**

<u>In CS(COMM) 249/2017 & CS(COMM) 249/2017:</u>

> *Issue No. 3: "Whether the plaintiff is entitled to pendent-e-lite and future interest? If so, the rate and the period for which it is payable?" OPP*

168. The Contracts were commercial transactions and the amounts as held above were payable but wrongly withheld by the Defendant, The plaintiff is thus, entitled to pendente lite and future interest at the rate of 7% per annum on the due amounts.

In CC(COMM) 130/2017:

Issue No. 1: "Whether the counter claimant was justified in getting the remaining work, envisaged under the agreement dated 19th April, 2002, completed through another contractor?" OPP
Issue No. 2. Whether the counter claimant is entitled to a recovery of a sum of Rs. 1,13,90,588/- in terms of Clause 3 of the agreement dated 19th April, 2002? OPP

In CC(COMM) 129/2017:

Issue No. 1: "Whether the counter claimant was justified in getting the remaining work, envisaged under the agreement dated 19th April, 2002, completed through another contractor?" OPP
Issue No.2: "Whether the counter claimant is entitled to a recovery of a sum of Rs.1,12,32,213/- in terms of Clause 3 of the agreement dated 19th April, 2002?" OPP

169. The defendant in his Counter claim had asserted that on account of the default of the plaintiff to complete the project, the Contract was rescinded by DDA on 23.11.2006 ExP28 and thereafter the Contract was awarded to M/s Shri Durga Construction Company on 01.06.2007. Firstly, it has already been held that the plaintiff was not at fault and the Contracts could not have been rescinded and granted to another contractor as was done by the defendant. Secondly, despite being at fault, the defendant has filed the Counter Claim.

170. The quoted rates by the plaintiff in his Tender were 13.58% below Delhi Schedule of Rate, 1997 while M/s Shri Durga Construction Company quoted the rates which were 26.74% above the estimated cost of 1997 rates.

The Contract therefore, was awarded to M/s Shri Durga Construction Company at a rate which was higher by 40.32%.

171. The provisional difference of the amount was calculated by multiplying the contract value of Rs.2,82,50,467/- on which the tender was awarded to the plaintiff by taking 40.32% of the value of Rs.28250467/- on which the plaintiff had agreed to execute the Contract which came to Rs.1,13,90,588/-. The defendant thus, claimed this amount of Rs.1,13,90,588/-by way of counter-claim in CS(COMM) 130/2017and Rs. 1,12,32,213/- by way of counter-claim using the same method of calculation in CS(COMM) 129/2017.

172. The calculation of this amount has been made on provisional basis. However, no document proving the award of tender to M/s Durga Construction Company has been produced by the defendants. Further, it is the own admission of the DW1/ SK Sharma SWD-4 DDA in his cross examination that M/s Durga Construction Company failed to execute the project and the Contract with the said company was terminated. Therefore, there remains no basis for the counter claims of the defendant.

173. The entire counter-claim of the defendant is based on conjectures and provisional calculations to be able to claim the actual losses it suffered because of the non-completion of the project by the plaintiff.Neither was there any willful default of the plaintiff, nor any actual loss was caused to the defendants.

174. The defendant has miserably failed to lead any evidence whatsoever, to prove that it had to incur additional cost as claimed on account of the conduct of the plaintiff.

175. **The issues are, therefore, decided against the defendant.**

In CC(COMM) 129/2017 & CC(COMM) 130/2017

Issue No. 3: "Whether the counter claimant is entitled to interest? If so the rate and the period for which it is payable?" OPP

176. In view of the findings on issue No.1 and 2, it is held that once the principal amount has not been proved, there is no question of grant of interest.

Relief:

In CS(COMM) 249/2017 & CS(COMM) 250/2017:

1. In light of the findings on the Issues discussed above, the Suit filed by the plaintiff for Declaration is allowed and thereby Orders dated 03.08.2005 and 23.11.2006 are declared as illegal and arbitrary.

2. Consequently, the following reliefs for recovery is awarded:

CLAIMS	CS(COMM) 249/2017	CS(COMM) 250/2017
Claim No. 3 for Loss of Profitability	Rs. 6,00,000/-	NIL
Claim Nos. 4 for Loss of Profits	Rs. 25,52,476.4/-	Rs 25,50,610.2/-
Claim Nos. 1, 2, 5, 6, 13, 14 for Overheads and Expenses/Escalation due to prolongation of the Contract	Rejected	Rejected
Claim Nos. 8, 10, 11 for Unlawful encashment of Bank Guarantee	Rs. 2,13,556/-	Rs. 2,13,556/-
Claim Nos. 9, 7, 13 for Dues payable under the contract	Rs.12,84,778/-	Rs. 13,67,654/-

Claim Nos. 15, 16, 17 for Damages for loss of goodwill and unlawful rescission	Rs. 10,00,000/-	NIL
Total	Rs. 56,50,810.4/-	Rs. 41,31,820.2/-

3. The suit of the plaintiff bearing No. CS(COMM) 249/2017 is decreed in the sum of Rs. 56,50,810.4 (Rupees fifty-six lakhs fifty thousand eight hundred and ten and forty paise) along with interest at the rate of 7% per annum from the date of institution of the suit till the date of payment.

4. The suit of the plaintiff bearing No. CS(COMM) 259/2017 is decreed in the sum of Rs. 41,31,820.2/- (Rupees forty one lakh thirty one thousand eight hundred and twenty and twenty paise) along with interest at the rate of 7% per annum from the date of institution of the suit till the date of payment.

5. Parties to bear their own cost.

6. Decree Sheet be prepared separately.

In CC(COMM) 130/2017 & In CC(COMM) 129/2017: Counter Claims of the defendant:

7. In light of the findings on the Issues discussed above, the Counter-claims of defendant No. 1 are hereby dismissed.

8. Parties to bear their own cost.

9. Decree Sheet be prepared accordingly.

(NEENA BANSAL KRISHNA)
JUDGE

DECEMBER 20, 2023
Ek/S.Sharma/va