IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Writ Petition No.9558 of 2015 (O&M)
DATE OF DECISION: 15.12.2015

M/s VPN Buildtech Pvt. Ltd.

…..Petitioner

versus

State of Haryana and others

.....Respondents

2. **Civil Writ Petition No.9559 of 2015** (O&M)

M/s Desert Moon Realtors Private Limited

…..Petitioner

versus

State of Haryana and others

.....Respondents

3. **Civil Writ Petition No.9556 of 2015** (O&M)

M/s Jamvant Estate Private Limited

…..Petitioner

versus

State of Haryana and others

.....Respondents

4. **Civil Writ Petition No.9557 of 2015** (O&M)

M/s Rational Buildcon Private Limited

…..Petitioner

versus

State of Haryana and others

.....Respondents

5. **Civil Writ Petition No.8418 of 2015** (O&M)

SRC Buildtech Private Limited

…..Petitioner

versus

State of Haryana and others

.....Respondents

6. **Civil Writ Petition No.9560 of 2015** (O&M)

M/s Resolve Estate Private Limited

…..Petitioner

versus

State of Haryana and others

.....Respondents

7. **Civil Writ Petition No.9561 of 2015** (O&M)

M/s Headway Buildcon Pvt. Ltd.

…..Petitioner

versus

State of Haryana and others

.....Respondents

8. **Civil Writ Petition No.9562 of 2015** (O&M)

M/s Golden Glow Estate Private Limited

…..Petitioner

versus

State of Haryana and others

.....Respondents

9. **Civil Writ Petition No.9563 of 2015** (O&M)

M/s Adel Landmarks Limited

…..Petitioner

versus

State of Haryana and others .....Respondents

10. **Civil Writ Petition No.13024 of 2013** (O&M)

Dwarka Dass Goel …..Petitioner

versus

State of Haryana and others

.....Respondents

11. **Civil Writ Petition No.28277 of 2013** (O&M)

Mahesh Chandna and others

…..Petitioners

versus

State of Haryana and others

.....Respondents

12. **Civil Writ Petition No.9823 of 2013** (O&M)

Nidhi Jain …..Petitioner

versus

State of Haryana and others .....Respondents

13. **Civil Writ Petition No.9830 of 2013** (O&M)

Amravati Enclave Residents Welfare Association (Regd.)

…..Petitioner

versus

State of Haryana and others .....Respondents

14. **Civil Writ Petition No.2179 of 2015** (O&M)

Vibrant Buildwell Private Limited

…..Petitioner

versus

State of Haryana and others

.....Respondents

15. **Civil Writ Petition No.22770 of 2015** (O&M)

M/s Goldsouk Infrastructure Private Limited

…..Petitioner

versus

State of Haryana and others

.....Respondents

16. **Civil Writ Petition No.15072 of 2015** (O&M)

M/s S.R.P. Builders Limited

…..Petitioner

versus

State of Haryana and others

.....Respondents

17. **Civil Writ Petition No.18343 of 2015** (O&M)

M/s Raheja Developers Limited

…..Petitioner

versus

State of Haryana and others

.....Respondents

18. **Civil Writ Petition No.14035 of 2015** (O&M)

M/s Ansal Properties & Infrastructure Ltd.

…..Petitioner

versus

State of Haryana and others

.....Respondents

19. **Civil Writ Petition No.14883 of 2015** (O&M)

ABW Infrastructure Limited

…..Petitioner

versus

State of Haryana and others

.....Respondents

20. **Civil Writ Petition No.14854 of 2015** (O&M)

M/s ABW Infrastructure Limited

…..Petitioner

versus

State of Haryana and others

.....Respondents

21. **Civil Writ Petition No.16307 of 2015** (O&M)

M/s Piyush Colonisers Ltd.

…..Petitioner

versus

State of Haryana and others

.....Respondents

22. **Civil Writ Petition No.21574 of 2015** (O&M)

M/s Aerens Goldsouk Projects (Hissar) Private Limited

…..Petitioner

versus

State of Haryana and others

.....Respondents

23. **Civil Writ Petition No.20137 of 2015** (O&M)

M/s Jindal Infra Build Private Limited

…..Petitioner

versus

State of Haryana and others

.....Respondents

24. **Civil Writ Petition No.16312 of 2015** (O&M)

M/s Piyush Colonisers Ltd.

…..Petitioner

versus

State of Haryana and others

.....Respondents

25. **Civil Writ Petition No.15537 of 2015** (O&M)

M/s Unitech Limited and others

…..Petitioners

versus

State of Haryana and others

.....Respondents

26. **Civil Writ Petition No.9712 of 2015** (O&M)

M/s TDI Infrastructure Limited and others

…..Petitioners

versus

State of Haryana and others

.....Respondents

27. **Civil Writ Petition No.8627 of 2015** (O&M)

M/s Taneja Developers and Infrastructure Limited, etc.

…..Petitioners

versus

State of Haryana and others

.....Respondents

28. **Civil Writ Petition No.12678 of 2015** (O&M)

M/s Aerens Jai Realty Pvt. Ltd.

…..Petitioner

versus

State of Haryana and others

.....Respondents

29. **Civil Writ Petition No.20398 of 2015** (O&M)

M/s Magnolia Propbuild Private Limited and others

…..Petitioners

versus

State of Haryana and others

.....Respondents

30. **Civil Writ Petition No.11003 of 2015** (O&M)

M/s Ansal Properties & Infrastructure Ltd.

…..Petitioner

versus

State of Haryana and others

.....Respondents

31. **Civil Writ Petition No.10659 of 2015** (O&M)

M/s Countrywide Promoter Private Limited

…..Petitioner

versus

State of Haryana and others

.....Respondents

32. **Civil Writ Petition No.9234 of 2015** (O&M)

M/s Ansal Buildwell Ltd. and others

…..Petitioners

versus

State of Haryana and others

.....Respondents

33. **Civil Writ Petition No.5749 of 2015** (O&M)

M/s Countrywide Promoters Pvt. Ltd., etc.

…..Petitioners

versus

State of Haryana and others

.....Respondents

34. **Civil Writ Petition No.11489 of 2015** (O&M)

M/s St. Patricks Realty Private Limited

…..Petitioner

versus

State of Haryana and others

.....Respondents

35. **Civil Writ Petition No.8190 of 2015** (O&M)

Krrish Realty Nirman Pvt. Limited, etc.

…..Petitioners

versus

State of Haryana and others

.....Respondents

CORAM:- HON'BLE MR.JUSTICE S.J. VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE TEJINDER SINGH DHINDSA

Present: Mr. R. Ramchandran, Senior Advocate with
Mr. Hemant Saini, Advocate for the petitioners
in CWP No.5749 of 2015

Mr. Kavin Gulati, Sr. Advocate with
Mr. Hemant Saini, Advocate, and
Mr. R.Kartikeya, Advocate for
Mr. Sanjiv Bansal, Advocate,
for the petitioners in
CWP Nos.11489, 12678, 8627, 9712, 10659, 15537,
21574,20398,16312, 20137, 16307, 14883, 2179, 9562,
9561, 9560, 9557, 9559, 9556,14854, 18343, 8418 and
9558 of 2015

Mr. Hemant Saini, Advocate for the petitioners in
CWP Nos.8627, 9712 and 22770 of 2015

Mr. Adarsh Jain, Advocate, for the petitioner in
CWP Nos. 11003, 14035 and 15072 of 2015

Mr. Ashwani Chopra, Sr. Advocate with
Mr. Aashish Chopra, Advocate and
Ms. Rupa Pathania, Advocate for the petitioners in CWP No.8190 of 2015

Mr. Harsh Bunger, Advocate for the petitioners in CWP No.28277 of 2013

Mr. Munish Mittal, Advocate for the petitioner in CWP No.13024 of 2013

Mr. Deepinder Singh, Advocate for the petitioner in CWP No.9830 of 2013

Mr. Saurabh Arora, Advocate for the petitioner in CWP No.9823 of 2013

Mr. Arun Monga and Mr. Kanwal Goyal, Advocates for the petitioners in CWP No.9234 of 2015

Mr. Amar Vivek, Addl. Advocate General, Haryana,
Mr. Lokesh Sinhal, Addl. A.G., Haryana and
Mr. Arjun Singh Yadav, Deputy Advocate General, Haryana for the State of Haryana

Mr. Lokesh Sinhal, Addl. A.G., Haryana for HUDA in CWP Nos.13024 of 2013, 9712, 8190, 15072, 15537, 16307 and 16312 of 2015

Mr. Amar Vivek, Addl. Advocate General, Haryana with
Mr. Anshul Jain, Advocate for HUDA in CWP Nos.9563, 11003 and 15537 of 2015

Mr. Deepak Balyan, Advocate for HUDA
in CWP Nos.9556, 9557,
9558,9559,9560,9561,9562,9563,
5749,2179,11489,12678,8418,8627,10659,15072 and 16312 of 2015

Mr. Deepak Manchanda, Advocate
for respondent No.3 in CWP 2179 of 2015
Mr. Subhash Bhardwaj, Advocate
for respondent No.4 (in CWP No. 9557, 9558, 9562 of 2015)
Mr. G.S. Ahluwalia, Advocate
for respondent No.4 (in CWP No.14854/2015)
Mr. Manjit Saini, Advocate for
Mr. Sudeep Mahajan, Advocate, for respondent-HUDA in CWP Nos.9823 and 9830 of 2013

Mr. R.S.Longia, Advocate, for respondent-HUDA in CWP No. 10875 of 2013.

..

S.J. VAZIFDAR, ACTING CHIEF JUSTICE:

CWP No.9558 of 2015 was first taken up for hearing. Alleging that the external development works, to a large

extent, have not been carried out and that there is no present plan, proposal or intention to take the same up for completion, the petitioners contend that they are not liable to pay the tentative/*ad hoc* external development charges (EDC) as stipulated in the agreements between the parties. Mr. Sanjiv Bansal, learned counsel appearing on behalf of the petitioner in this writ petition, confined his arguments to this contention. Learned counsel appearing on behalf of the petitioners in the other petitions stated that this issue also arises in their petitions. We, therefore, heard the petitions together. The arguments of the learned counsel, appearing on behalf of the petitioners in the connected writ petitions, were not confined to this issue alone. They also challenged the quantum of EDC demanded by the respondents as well as the respondents' right to levy EDC in respect of certain works. We have decided only some of these contentions, leaving it open to the petitioners to raise the other contentions in separate proceedings.

2. These petitions are an attempt by the developers/colonizers to avoid paying the external development charges that they expressly undertook to pay in instalments in consideration of the licences granted to them by the respondents for developing colonies. Having derived benefits under the very agreements by developing the colonies and selling the premises therein, the petitioners now seek to avoid their financial obligations thereunder. The grant of any reliefs would be unfair to and financially disastrous for the respondents and hamper the development work in the State of Haryana.

The case in a nutshell is this. Each of the petitioners made an application for the grant of a licence to develop a colony under Section 3 of the Haryana Development and Regulation of Urban Areas Act, 1975, and in accordance with the rules made thereunder, namely, the Haryana Development and Regulation of Urban Areas Rules, 1976. Section 3(3) of the Act provides that the Director shall grant a licence in the prescribed form after the applicant has furnished a bank guarantee equal to 25 per cent of the estimated cost of development works and the applicant has undertaken to pay proportionate development charges if the external development works are to be carried out by the Government or any other local authority. Section 2(g) defines external development works. Rule 11(1)(c) requires the applicants to furnish a similar undertaking and to execute a bilateral agreement in Form LC-IV-A for group housing. The respondents forwarded a letter of intent (LOI) to the petitioners conveying their proposal to grant the licence, mentioning the external development charges payable and the amount in which the bank guarantee was to be furnished and that the external development charges were under review and the applicants would have to pay the enhanced rates as demanded. Under this agreement, each of the applicants undertook to pay the proportionate external development charges as per the rate, schedule and the terms & conditions mentioned therein. It is important to note that the agreement (i) stipulates the rate of the external development charges, (ii) states that the same is only tentative, (iii) permits the applicant to pay the same either in lumpsum within thirty days

from the date of grant of the licence or in eight equal six monthly instalments of 12.5 per cent each with interest thereon at 15 per cent per annum and (iv) imposes an additional interest of 3 per cent per annum in case of any default in payment of the instalments on the due date.

The petitioners entered into the agreements with open eyes. They have availed the benefits under the agreement by developing the colonies and selling the units to the purchasers thereof. They availed the facility of paying the external development charges in instalments. They, however, defaulted in the payment of instalments. The respondents *inter alia* sought to invoke the bank guarantee. It is only then that the petitioners filed these writ petitions in an attempt to wriggle out of their financial commitments. We are not inclined to permit them to do so.

3. We will for convenience refer to the facts from and the reliefs claimed in CWP No.9558 of 2015.

Respondent No.2 is the Director General, Department of Town and Country Planning, Haryana. Respondent No.3 is the Haryana Urban Development Authority (HUDA) and respondents No.4 and 5 are the Union Bank of India and the State Bank of India who have issued guarantees in favour of the other respondents at the petitioner's instance the invocation whereof has been challenged. The reference to the respondents in this judgment, however, will not include the banks.

The petitioner in CWP No.9558 of 2015, M/s VPN Buildtech Private Limited, seeks a writ of certiorari quashing the "prescription of clauses" pertaining to charge of EDC and interest thereon without being linked to the external

development being carried out by the respondents and a communication dated 25.02.2014. The petitioner has also sought a writ of mandamus directing the respondents to carry out the external development works in the sector concerned in terms of Section 2(g) of the Haryana Development and Regulation of Urban Areas Act, 1975 (hereinafter to be referred to as 'the Act'), and the rules framed thereunder within a period of time to be fixed by the Court; a writ restraining respondent No.2 – Director General, Department of Town & Country Planning, Haryana, from collecting further installments of EDC till the external development is carried out; a writ quashing the provisions in the agreement imposing interest on the delayed payment of instalments of EDC; a writ directing the respondents to refund the amount already collected on account of interest on the delayed payment of installments of EDC; a writ directing the respondents to treat the amounts collected on account of interest as the principal amount of EDC and a writ directing respondent No.2 to formulate the terms of the bilateral agreement framed under Rule 11(1)(h) of the Act and the LC-IV-A Agreement setting out the reciprocal agreements of the respondents.

4. Before referring to the facts, it would be convenient to collate the relevant provisions of the Haryana Development and Regulation of Urban Areas Act, 1975, and the Haryana Development and Regulation of Urban Areas Rules, 1976.

(A) Relevant provisions of the Act:

> "2. Definition, - In this Act, unless the context otherwise requires,-
>
> ….. ….. ….. …..
>
> 2(c) "colony" means an area of land divided or proposed to be divided into plots or flats for residential, commercial,

industrial, cyber city or cyber park purposes or for the construction of flats in the form of group housing or for the construction of integrated commercial complexes, but an area of land divided or proposed to be divided—

(i) for the purpose of agriculture ; or

(ii) as a result of family partition, inheritance, succession or partition of joint holding not with the motive of earning profit ; or

(iii) in furtherance of any scheme sanction under any other law; or

(iv) by the owner of a factory for setting up of a housing colony for the labourers or the employees working in the factory; provided there is no profit motive ; or

(v) when it does not exceed one thousand square metres or such less area as may be decided from time to time in an urban area to be notified by Government for the purposes of this sub-clause, shall not be a colony;

(d) "colonizer" means an individual, company or association, body of individuals, whether incorporated or not, owning land for converting it into a colony and to whom a licence has been granted under this Act;

….. ….. ….. …..

(e) "development works" means internal and external development works;

(f) "Director" means the Director, Town and Country Planning, Haryana, and includes a person for the time being appointed by the Government, by notification in the Official Gazette, to exercise and perform all or any of the powers and functions of the Director under this Act and the rules made thereunder;

(g) "external development works" include water supply, sewerage, drains, necessary provisions of treatment and disposal of sewage, sullage and storm water, roads, electrical works, solid waste management and disposal, slaughter houses, colleges, hospitals, stadium/sports complex, fire stations, grid sub-stations etc. and any other work which the Director may specify to be executed in the periphery of or outside colony/area for the benefit of the colony/area;

….. ….. ….. …..

(hha) “infrastructure development charges” include the cost of development of major infrastructure projects;

(hhb) “infrastructure augmentation charges” includes the cost of the augmentation of major infrastructure projects;

….. ….. ….. …..

(i) "internal development works" mean—

(i) metalling of roads and paving of footpaths;

(ii) turfing and plantation with trees of openspaces;

(iii) street lighting ;

(iv) adequate and wholesome water-supply ;

(v) sewers and drains both for storm and sullage water and necessary provision for their treatment and disposal; and

(vi) any other work that the Director may think necessary in the interest of proper development of a colony;

….. ….. ….. …..

(jj) "major infrastructure projects" include national/state highways, transport, major water supply scheme and power facilities etc.;

….. ….. ….. …..

(n) "prescribed" means prescribed by rules made under this Act;

….. ….. ….. …..

(o) "urban area" means any area of land within the limits of a municipal area or notified area or the Faridabad Complex or situate within five kilometres of the limits thereof, or any other area where, in the opinion of the Government, there is a potential for building activities and the Government by means of notification declares.

….. ….. ….. …..

3. *Application for licence.*- (1) Any owner desiring to convert his land into a colony shall, unless exempted under section 9, make an application to the Director, for the grant of license to develop a colony in the prescribed form and pay for it such fee and conversion charges as may be prescribed. The application shall be accompanied by an income-tax clearance certificate:

….. ….. ….. …..

(3) After the enquiry under sub-section (2), the Director, by an order in writing, shall–

(a) grant a licence in the prescribed form, after the applicant has furnished to the Director a bank guarantee equal to twenty-five per centum of the estimated cost of development works in case of area of land divided or proposed to be divided into plots or flats for residential, commercial or industrial purposes and a bank guarantee equal to thirty-seven and a half per centum of the estimated cost of development works in case of cyber city or cyber park purposes as certified by the Director and has undertaken–

(i) to enter into an agreement in the prescribed from for carrying out and completion of development works in accordance with the licence granted;

(ii) to pay proportionate development charges if the external development works as defined in clause(g) of section 2 are to be carried out by the government or any other local authority. The proportion in which and the time within which, such payment is to be made shall be determined by the Director;

….. ….. ….. …..

(vi) to fulfill such terms and conditions as may be specified by the Director at the time of grant of

licence through bilateral agreement as may be prescribed:

Provided that the Director, having regard to the amenities which exit or are proposed to be provided in the locality, is of the opinion that it is not necessary or possible to provide one or more such amenities, may exempt the licensee from providing such amenities either wholly or in part;

….. ….. ….. …..

5. Cost of Development Works.- (1) The colonizer shall deposit thirty per centum of the amount realised, from time to time, by him, from the plot-holders within a period of ten days of its realisation in a separate account to be maintained in a scheduled bank. This amount shall only be utilised by him towards meeting the cost of internal development works in the colony. After the internal development works of the colony have been completed to the satisfaction of the Director, the coloniser shall be at liberty to withdraw the balance amount. The remaining seventy per centum of the said amount shall be deemed to have been retained by the coloniser, inter-alia, to meet the cost of land and external development works.

….. ….. ….. …..

24. Power to make rules.- (1) The Government may, by notification in the Official Gazette, subject to the condition of previous publication, make rules for carrying out the purposes of this Act and may give them prospective or retrospective effect.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :–

(a) fee, form and manner of making an application for obtaining licence under sub-section (1) of section 3;

(b) form of licence agreement under sub-section (3) of section 3;

(c) fee for grant or renewal of licence under sub-section (4) of section 3;

(B) Relevant provisions of the Rules:

"11. Conditions required to be fulfilled by applicant [Section 3 (3)]–

(1) The applicant shall:–

(a) furnish to the Director a bank guarantee equal to twenty five percent of the estimated cost of the development works as certified by the Director and enter into an agreement in form LC-IV for carrying out and completion of development works in accordance with the licence finally granted;

….. ….. ….. …..

(c) undertake to pay proportionate development charges if the main lines of roads, drainage, sewerage, water supply and electricity are to be laid out and constructed by the Government or any other local authority. The proportion in which and the time within

which such payment is to be made shall be determined by the Director;

….. ….. ….. …..

(h) execute bilateral agreement in Form LC-IV-A for group housing colony, in Form LC-IV-B for plotted colony, in Form LC-IV-C for industrial colony and in Form LC-IV-D for commercial colony.

(2) If the Director, having regard to the amenities which exist or are proposed to be provided in the locality, decides that it is not necessary or possible to provide such amenity or amenities, the applicant will be informed thereof and clauses (c),(d) and (e) of sub-rule(1) shall be deemed to have been modified to that extent."

(C) Relevant extract from Form LC-IV-A:

"Form LC-IV-A

[See rule 11(1) (h)]

Bilateral Agreement by owner of land intending to set up a Group Housing Colony

….. ….. ….. …..

NOW THIS DEED OF BILATERAL AGREEMENT WITNESSETH AS FOLLOWS:

1. In consideration of the Director agreeing to grant licence to the owner to set up the said colony on the land mentioned in Annexure to Form LC-IV and on the fulfilment of the conditions of this bilateral agreement, the owner, his partners, legal representatives, authorized agents, assignees, executors etc. shall be bound by the terms and conditions of this bilateral agreement executed by the owner hereunder covenanted by him as follows:

….. ….. ….. …..

(d)(i) That the owner undertakes to pay proportional external development charges (EDC) for the area earmarked for group housing scheme, as per rate, schedule and conditions annexed hereto."

5. The petitioner along with its joint venture partner owns about 30 acres of land in District Sirsa, Haryana. The petitioner by its application dated 30.01.2006 applied for the grant of a licence for setting up a residential colony under the Act. A letter of intent (LOI) dated 23.10.2006 was issued by respondent No.2 whereby the respondent conveyed a proposal to grant the licence and called upon the petitioner to fulfil the requirements of Rule 11 within 30 days failing which the petitioner was informed that the licence would be refused. The

communication, in so far as the EDC is concerned, reads as under:-

> "To furnish the bank guarantee on account of external development charges for the amount calculated as under:-
>
> | | | |
> |---|---|---|
> | i) | Area under plotted development | =28.74 acres |
> | ii) | Interim rate of EDC | =Rs.20.40 lacs per acre |
> | iii) | Cost of EDC | =Rs.586.30 lacs |
> | iv) | Area under Commercial use | =Rs.1.197 acres |
> | v) | Interim rate of EDC | =Rs.94.94 lacs per acre |
> | vi) | Cost of EDC for commercial area | =Rs.113.64 lacs |
> | vii) | Total cost of EDC (iii+vi) | =Rs.699.94 lacs |
> | viii) | 25% bank guarantee required | =Rs.174.91 lacs |
>
> The rates of external development charges are under review and are likely to be finalized soon. In the event of increase of rates of external development charges, you will have to pay the enhanced rates of external development charges as and when demanded by the DTCP Haryana.
>
> To execute two agreements i.e. LC-IV and Bilateral Agreement on non-judicial stamp paper of Rs.3/-. Two copies of specimen of the said agreements are enclosed herewith for necessary action."

Rule 11(1)(a) *inter alia* requires an applicant to enter into an agreement in Form LC-IV-A for carrying out and completing the development works in accordance with the licence finally granted. An agreement in Form LC-IV-A was entered into between the parties. Clause (b) thereof, which falls for consideration in these petitions, reads as under:-

> "NOW THIS DEED WITNESSETH AS FOLLOWS:
>
> a. In consideration of the Director agreeing to grant license to the Owner to set up the said Residential Colony on the land mentioned in Annexure hereto on the fulfilment of all conditions laid down in Rule-II of the Haryana Development and Regulation of Urban Areas Rules, 1976 by the Owner, hereby covenants as follows:
>
> ….. ….. ….. …..
>
> b) That the Owner undertakes to pay proportionate External Development Charges as per rate, schedule, terms and conditions hereto:
>
> (i) That the Owner shall pay the proportionate External Development Charges at the tentative

rate of Rs.20.40 Lacs per acre for plotted area measuring 29.937 acres and at tentative rate of Rs.94.94 lacs per acre for 1.197 acres for commercial area. These charge shall be payable to Haryana Urban Development Authority through the Director, Town & Country Planning< Haryana, either in lump-sum within 30 days from the date of grant of license or in eight equal six monthly installments of 12.5% each.

(a) First installment shall be payable within a period of 30 days from the date of grant of license.

(b) Balance 87.5% in seven equal six monthly installment along with interest at the rate of 15% per annum, which shall be charged on unpaid portion of the amount.

(ii) The EDC rates are under review are likely to be finalized soon. In the event of increase in EDC rates the colonizer shall pay the enhanced amount of EDC and the interest on instalments from the date of grant of license and shall furnish the Additional Bank Guarantee, if any, on the enhanced EDC rates.

(iii) In case the coloniser asks for a completion certificate before the payment of EDC they would have to first deposit the entire EDC and only thereafter the grant of completion certificate would be considered.

(iv) The unpaid amount of EDC would carry an interest of 15% per annum and in case of any delay in payments of installments on the due date an additional interest of 3% per annum (making the total payable interest 18% (simple) per annum would be chargeable.

(v) In case the HUDA executing external development works completes the same before due date and consequently requires the charges for the same, the DTCP shall be empowered to call upon the Colonizer to pay the EDC even before the completion of four years period and the Owner/Colonizer shall be bound to do so.

(vi) Enhanced Compensation on land cost, if any, shall be payable extra decided by Director from time to time."

The parties also entered into a bilateral agreement. The same, however, does not refer to EDC.

6. The first submission on behalf of the petitioners is that the liability to pay EDC arises only upon the completion

of the external development works. The external development works have not been completed and, therefore, the demand for payment of EDC, according to the petitioners, is unsustainable.

The alternate submissions are as follows:

The scheme under the Act provides for payment of proportionate development charges with respect to the external development works and, therefore, the practice and procedure adopted by the respondents requiring the colonizer to pay the entire amount of EDC without linking the same to the extent of development being carried out is illegal and unjustified. A colonizer is liable to pay EDC only in proportion to the external development works completed and, in any event, the work in respect thereof actually and physically commencing. In any event, some of the external development works have not even been taken up for implementation and, therefore, there is no question of any external development charges being payable in relation at least to such works.

The contentions were sought to be supported on the basis of Section 3(3)(a)(ii), Rule 11(1)(c) and the bilateral agreement in Form LC-IV-A as follows: The word “proportionate” in these provisions indicates that the EDC is payable only in proportion to the external development works being carried out. The scheme of the Act and the rules, according to the petitioners, link the payment of EDC to the immediate need for the actual and physical development upon utilization of or proposed utilization of the EDC for the external development works. EDC is a fee and not a tax and, therefore, there must be a *quid pro quo* in relation thereto. Thus, if the colonizer

is bound to pay the EDC, the Government is also bound to execute the external development works. The term "proportionate" in the above sections, rules and the agreements relates not to the ultimate cost of external development works upon the completion thereof but to the expenses actually incurred or to be incurred periodically, from time to time.

Mr. Saini submitted that the words in Section 3(3)(a)(ii) "The proportion in which and the time within which, such payment is to be made" indicate that the time for payment is when the external development works are actually carried out.

In any event, the liability to pay EDC is dependent upon the completion of certain basic and essential works, such as, those specified in Rule 11(1)(c). A view to the contrary would render the requirement of payment of EDC irrespective of whether the external development works are completed or not arbitrary, unfair, unreasonable and unconstitutional.

Under Clause 1(b)(v), the HUDA can raise the demand for EDC if it completes the external development works earlier. It follows, therefore, that if the HUDA completes the works later it must be entitled to claim the EDC only later. Thus, the liability to pay EDC is proportionate to the external development works actually carried out.

Mr. Saini sought to rely upon documents to illustrate that HUDA had itself interpreted the term "proportionate" under the provisions of the Act to mean in proportion to the external development works carried out.

Mr. Ramchandran and Mr. Saini submitted that the term “proportionate” is with respect to the time as also the extent of the external development works carried out.

They submitted that this in any event, is a possible interpretation. If two interpretations are possible, the fairer one and the one in favour of the citizens must be followed. The two variables, namely, the proportion and the time are to be determined by the Director.

The submissions on behalf of the petitioners regarding the provision in the said agreement relating to interest on the instalments of EDC and penal interest for delay in payment of the instalments are as follows:

The only justification and reason for the provision of interest in the agreement is if the State has gone out of pocket in relation to the external development works and, therefore, the colonizer must compensate it by payment of interest. This pre-supposes that the external development works must be carried out prior to the demand of EDC from time to time.

7. The extreme submission that no EDC is payable till the external development works are fully carried out requires merely to be stated to be rejected. It is contrary to the terms of the agreement and the LOI. The LOI and the agreement indicate the diametric opposite which is evident from the option to the developers to pay the tentative EDC in lumpsum. We will deal with this aspect further while considering the other submissions also.

8. This brings us to the alternative submissions.

The agreement dated 28.06.2007 in Form LC-IV is clear. It is set out earlier. It contains the petitioners' undertaking to pay proportionate EDC as per the rate, schedule, terms and conditions mentioned in Clause (b) thereof. This proportionate EDC is computed at a tentative rate per acre for completed area and for commercial area. The rates are tentative as considering the nature, complexity and enormity of the external development works it is not possible for the authorities to calculate the exact amount at the stage when the agreements are entered into and licences are granted. The agreement entitles the owner to pay the tentative EDC either in lumpsum within 30 days from the date of the grant of the licence or in eight equal six monthly instalments.

The term "proportionate" in the agreement is clearly not in respect of the amount of external development works carried out at any given point of time before the final completion thereof. In other words, it does not indicate the amount of EDC payable to be proportionate to the extent or quantum of the external development works carried out from time to time. A view to the contrary would be contrary to the plain language of the clause which stipulates the exact date on which the lumpsum payment is to be made as well as the dates on which the instalments are to be paid. The dates of payments being fixed, there is no question of the term "proportionate" indicating a correlation between the tentative EDC payable and the quantum of external development works carried out. The condition that the lumpsum payment is to be made within thirty days of the licence establishes beyond

doubt that the term “proportionate” does not refer to and indeed cannot refer to the same.

9. Faced with this, it was submitted that the term “proportionate” refers only to the liability to make payments of the EDC in instalments.

10. The term “proportionate” in Clause (b)(i) is used in respect of the EDC irrespective of whether it is paid in a lumpsum or in instalments. It is not used only in relation to payments in instalments. The interpretation suggested on behalf of the petitioners is again contrary to the plain language of the clause.

It would also be unfair to those owners who opted to pay the tentative EDC in lumpsum. Such owners are deprived of the use of their money. The clause does not confer an additional benefit upon the owners who opt to pay the amount in instalments. The clause gives them the facility of time to pay the EDC upon payment of interest. The clause does not suggest or even remotely indicate any reason why the owners who opt to pay in instalments would be absolved of the obligation of paying the EDC till after the external development works are completed or would be liable to pay the EDC only in proportion to the external development works carried out from time to time. Nor did the learned counsel appearing on behalf of the petitioners suggest any reason why the owners who pay in lumpsum ought to be treated so differently from the owners who opt to pay the EDC in instalments. The clause does not make the payment of EDC

dependent upon the completion of the external development works. The payment of instalments is not made subject to the same. We are not entitled to re-write the clause which is precisely what we would be doing if we were to accept the petitioners' interpretation thereof.

11. This interpretation on behalf of the petitioners was not even contemplated by the parties when the agreement was entered into. There is nothing that indicates or even suggests that the respondents represented to the petitioners or that the petitioners were for any reason under an impression that the external development works would be completed by the end of the period within which the instalments were to be paid. The instalments were to be paid in eight equal six monthly instalments. It has neither been pleaded nor suggested that the petitioners were given to understand that the external development works would be completed by the respondents within four years or that they would progress in proportion to the instalments paid.

12. A party is entitled to demand payment under a contract in advance. The parties can always provide for payment of consideration prior to the performance of the obligation. This is precisely what the parties have done in this case. The respondents indeed must execute the external development works. However, it was agreed between the parties that the tentative EDC would be paid before the external development works are completed or even taken up to be implemented.

13. It was then contended that the contract, though not contrary to the Contract Act or to general law, is contrary to the provisions of the Act and the Rules and being a statutory contract, the provision for payment of EDC before the actual execution of the external development works is illegal. In this regard, strong reliance was placed upon Section 3(3)(a)(ii) and Rule 11(1)(c).

14. The contention that under the provisions of the Act EDC is not payable at least till the external development works are taken up for being carried out is not well founded either. Section 3(3)(a)(ii) provides that the Director shall grant a licence provided that the applicants/petitioners herein have *inter alia* undertaken to pay proportionate development charges if the external development works, as defined in Section 2(g), are to be carried out by the Government or any other local authority. This section refers not to the quantum of external development works done from time to time but to each owner's proportionate share with respect to the EDC qua the others. In other words, the word "proportionate" in Section 3(3)(a)(ii) is with respect to the quantum of EDC payable and does not relate to the time when the payment of EDC is to be made. It is not linked to the amount/quantum of external development works carried out at any given point of time prior to the completion of the external development works.

15. Rule 11(1)(c) also does not support the petitioner's case in this regard. It requires an applicant to undertake to pay the proportionate development charges if the

works mentioned therein are to be laid out or constructed by the Government or any other local authority. The rule is in accordance with Section 3(3). The contention that the word "proportionate" in Rule 11(1)(c) indicates that the EDC is to be paid only proportionate to the external development works carried out from time to time is rejected for the same reasons that we furnished for rejecting the contention based on Section 3(3)(a)(ii).

16. The learned counsel appearing on behalf of the petitioners placed considerable reliance upon Rule 11(1)(c) in support of this interpretation of the word "proportionate" on the basis that the undertaking to pay proportionate development charges is subject to the specific works mentioned therein being carried out.

17. The error in this submission is on account of ignoring the words "are to be laid" in Rule 11(1)(c) and reading in their place the words "are laid". Rule 11(1)(c) provides that the applicant shall undertake to pay the proportionate development charges if the works mentioned therein are to be laid out and constructed by the Government or any other local authority. These works are the main lines of roads, drainage, sewerage, water supply and electricity. The undertaking to be furnished by the applicant is to pay the proportionate development charges if the works mentioned therein "are to be laid out and constructed by the Government or any other local authority". The words "are to be" indicate the execution of the external development works in future. They indicate not the actual carrying out of the works but the

responsibility and obligation to do so. In other words, the undertaking to pay the proportionate development charges is in relation to the cases where the said works “are to be” laid out and constructed by the Government or any other local authority and not upon the same being laid out and constructed by the Government or any other local authority. The undertaking, therefore, is not to pay the proportionate development charges only if these works are actually carried out, but even if they are to be laid out and constructed by the Government.

18. Admittedly, in the case before us, these works are to be laid out and constructed by the Government. The undertaking, therefore, applies irrespective of whether the works are carried out or not when the liability to pay the tentative EDC arises. The undertaking, admittedly, has not been complied with. Indeed, the petitioners, in effect, seek to be relieved of this undertaking. The non-completion of the other external development works, in any event, does not absolve the petitioners of their liability to pay the EDC.

19. Mr. Saini relied upon the second sentence in Section 3(3)(a)(ii) to contend that even tentative EDC is to be paid only in proportion to the external development works carried out from time to time. The second sentence reads: “The proportion in which and the time within which, such payment is to be made, shall be determined by the Director.” Mr. Saini submitted that a duty has been cast upon the Director to determine not the proportion in which EDC is to be paid but the time within which such payment is to be made. The time

within which the payment is to be made is a variable factor which, therefore, requires determination. He contended that on the other hand the proportion of EDC is not a variable factor as it is the same for all licencees and, therefore, requires no determination. He, therefore, submitted that the word "proportion" in Section 2(g), Section 3(3)(a)(ii) and Rule 11(1)(c) relates only to the time and not the proportion of EDC. In other words, he contended that the word "proportion" only indicates that the payment is proportional to the works to be executed which has to be decided by the Director and not to the quantum of EDC payable.

20. Section 3(3)(a)(ii), read as a whole, negates this contention. The reference to the time within which the EDC is to be paid is not linked to the completion of the external development works. The term "proportion" is used both in relation to the quantum of EDC payable by the applicant for the licence and the time for such payment. The Director is entitled to determine the time within which such proportionate payment is to be made. The section would have been worded entirely differently if the intention was to link the quantum of payment to the extent of the external development works carried out as suggested by the petitioners. Section 3(3)(a)(ii) entitles a Director to determine the proportion in which the development charges are to be paid as also the time within which such payment is to be made. The first part of the second sentence of Section 3(3)(a)(ii) requires an applicant for the licence to pay proportionate development charges. It clearly refers only to the quantum of the development charges payable by the applicant for a licence. The second part of the

second sentence entitles the Director to determine the time within which such payment is to be made. In fixing the time for payment, he may take into consideration a proposed schedule for undertaking or completing the external development works.

Mr. Saini's submission is contrary to the plain language of Section 3(3)(a)(ii) and Rule 11(1)(c). The amount of EDC payable by each developer/owner is not the same as contended by Mr. Saini. The proportion of each developer would vary depending upon the extent of the property to be developed under the licence. What is fixed is that each developer must pay his proportionate share. The actual proportionate share, however, still has to be determined by the Director. The Director must determine the numerator and the denominator. The Director must determine the extent of the area developed by the colonizer/developer and the total area in which the external development works are to be carried out. Upon such determination, the Director would be in a position to determine the proportionate share of EDC of the developers. The Director, therefore, has to determine the proportionate share of EDC payable by each developer/colonizer and based thereon the amount of EDC actually payable by it.

21. The contention that the word "proportionate" in the above provisions must mean not only proportionate with respect to the ultimate cost but proportionate from time to time is rejected.

22. One of the major grievances of the petitioners is that though the external development works had not been

carried out to any appreciable extent the colonizers are required to pay substantial amounts towards EDC.

23. It is not disputed that the entire external development works have not been carried out. Indeed, considering the nature and extent of the external development works, it is difficult for the respondents to complete the entire external development works at this stage. This has been explained in *M/s Sweta Estates Pvt. Ltd., Delhi vs. Director, Town & Country Planning, Haryana and another, (2003) 4 RCR (Civil)335.* For instance, the external development works include the provision of schools, shopping complexes and abattoirs. These works cannot possibly be completed in a hurry. It would be unreasonable to expect the State to execute the remaining external development works without being funded for the same. The parties obviously knew this and, therefore, agreed for the payment of tentative EDC in advance. They must be held to their bargain.

24. Mr. Raju Ramchandran fairly and, in our view, rightly stated that the liability to pay tentative EDC as per the agreement cannot depend upon the completion of every last bit of every external development work that the respondents are liable to carry out. He submitted that there are, however, certain basic external development works which ought to be carried out before the liability to pay EDC, even tentative EDC arises and can be enforced. It was contended, therefore, in the alternative that the liability to pay EDC is dependent at least upon the completion of certain essential external development works.

25. This argument also requires our reading provisions into the agreement which would alter drastically the terms and conditions thereof and modify substantially the rights and liabilities of the parties thereto which is not permissible. The agreement makes no distinction between the types of external development works. In fact, the agreement does not make the payment of tentative EDC dependent upon the completion of any particular type of external development works at any particular stage. The liability to pay the tentative EDC is fixed by the agreement both with respect to the amount payable and the time for making the payment.

26. That this could never even have been the understanding of the parties is clear from the agreement itself. The agreement entitles the parties to pay the amount in a lumpsum or in instalments. The purpose for which the payment is to be made is the same, namely, in respect of EDC. A party making payment in advance knows and, in any event, ought to be deemed to know whether the major external development works have been carried out or not. Assuming that major external development works are not carried out, the parties such as the petitioners would have been aware of the same. In that event, the requirement of paying the amount in one lumpsum would militate against the contention that the tentative EDC was to be paid only upon the completion of the work for the lumpsum amount was to be paid within thirty days. There is no reason why the applicants such as the petitioners, who opted to pay the amount in instalments, ought to be placed

on a better footing than those who opted to pay the amount in a lumpsum.

27. The error in the submission on behalf of the petitioners is clear for another reason. While dealing with the agreement, we noted that the developers have the option of paying EDC in a lumpsum within thirty days or to pay the same in instalments. This clause, therefore, contemplates the payment of tentative EDC before the completion of the external development works. The clause is unambiguous and clear. The parties being developers would know and, in any event, must be deemed to have known the position regarding the extent of the external development works that had been carried out when the agreements were entered into. They entered into the agreements with open eyes. The parties who paid the EDC in a lumpsum could not possibly have asked for a refund of the EDC the next day on the ground that the external development works, even the bare minimum external development works, have not been carried out. There is no reason to place the developers who opted to pay the tentative EDC in instalments on a different, more advantageous footing.

28. The petitioners contended that in view of Section 11(2) the undertaking contained in Rule 11(1)(c) stands modified as the Director has decided that it is not necessary or possible to provide the amenities in clause (c) of sub-rule(1) of rule 11.

29. We held earlier that the term “proportionate” in Section 3(3)(a)(ii) and in Rule 11(1)(c) is qua each party’s liability to pay EDC and not qua or in relation to the amount

of external development works done from time to time. The EDC charges are liable to be paid in proportion to the area of each colonizer. It is difficult to appreciate the reliance on behalf of the petitioners upon Rule 11(2) in support of their contention to the contrary. The contention proceeds on the erroneous basis that the external development works not having been carried out to date, sub-rule(2) of Rule 11 comes into play. The very basis of this submission is erroneous for in the cases before us the Director has not decided that it is not necessary or possible to provide the amenities referred to in Rule 11(1)(c). Rule 11(2) merely provides that if the Director decides that it is not necessary or possible to provide certain amenities, Clauses (c),(d) and (e) of sub-rule (1) would be deemed to have been modified to that extent. In the cases before us, the Director has not decided that it is not necessary or possible to provide the said amenities. That certain external development works have not been carried out to date does not indicate that the Director has decided that it is not necessary or possible to provide the same. A decision that it is not necessary or possible to provide the amenities is an entirely different matter from the amenities not having presently been provided. Merely because the external development works have not been completed to date, it does not follow that the Director has decided that it is not necessary or possible to provide the same. Such a decision has not been taken by the Director expressly. There is nothing on record that indicates that such a decision has been taken even impliedly. Rule 11(2), therefore, does not support the

petitioners' interpretation of the term "proportionate" in the said provisions and the agreement.

30. It was then contended that the word "possible" in Rule 11(2) ought to be read as "feasible". We are not entitled to re-write the rule. The rule has not been challenged. In any event, there is nothing to suggest that it is not feasible for the respondents to complete the external development works including those referred to in Rule 11(1)(c). It is not the petitioners' case that it is not possible for the respondents to complete the said works. Merely because the external development works are not completed at a particular point of time, it does not follow that it is not feasible for the respondents to complete the same for all time to come. The record does not indicate that the respondents would be unable for all times to come or even in the foreseeable future to complete the same.

31. It was then submitted that the words "not possible" would include even a temporary inability to provide amenities mentioned in Rule 11 (1) (c), (d) and (e). Accordingly, he submitted that phrase "deemed to have been modified" in Rule 11(2) would include even a temporary or tentative modification.

32. What the petitioners ask of the Court is to re–write Rule 11. Rule 11(2) requires the Director to come to the conclusion that it is not possible to provide the amenities that are proposed to be provided. The language of the rule requires the Director to come to the conclusion that the external development works cannot be carried out at any given

point of time. The work would obviously be carried out in phases. Even if there were a plan specifying a tentative schedule for the completion of external development works, it cannot be said that it is not possible to carry out the works till the time that they are to be carried out. What rule 11(2) refers to is a decision that it is not possible at all to carry out such works. To hold that the words "not possible" would include a temporary absence of amenities would be reading words into the rule which were deliberately and advisedly not used. The authorities would certainly be entitled to fix the schedule for payment.

33. Indeed, if ultimately certain external development works are not done and it is found that they will never be done, the EDC would stand reduced proportionately. That, however, does not absolve the petitioners of their liability to pay the tentative EDC under the agreement. As we mentioned earlier, as on date, there is nothing to indicate that the external development works or any of them are not to be carried out. If the position changes in future, adjustments can always be made in the final accounts pertaining to EDC.

34. The petitioners relied upon clause 1(b)(v) of the agreement which provides that in case the HUDA completes the external development works before the due date, the DTCP shall be empowered to call upon the colonizer to pay the EDC even before the completion of the four years period during which instalments are to be paid and the owner/colonizer shall be bound to do so. The contention is that as HUDA can accelerate the demand for payment, it follows conversely that if the

external development works are not carried out the time for payment of the EDC stands postponed.

35. These are contractual stipulations which the parties were entitled to agree to. There is nothing illegal about them. It would have been open to the parties that the tentative EDC ought to be paid in a lumpsum even on the date of the signing of the contract itself. Such an agreement/contractual stipulation would not be illegal either under the said Act and the rules or under the general law relating to contracts. The mere provision for instalments cannot carry the petitioners' case any further. The parties could have provided for the payment of the tentative EDC in proportion to the completion of the external development works. They, however, did not do so. We are not entitled to vary the contract between the parties. These are contractual stipulations agreed to by the parties. The petitioners derived benefits under the agreements. They are not entitled now to question the same.

The liability to pay the tentative EDC as per the instalments stipulated in the agreement does not get extended on account of the external development works not being carried out merely because the HUDA has a right to have the payment of EDC accelerated in the event of it completing the external development works earlier. That would be varying the bargain between the parties substantially and vitally.

36. The presumption in any event is erroneous as a matter of law and as matter of interpretation of the contractual provisions. Contracts often provide for a liquidated damages clause for a delay in completing the work.

This does not lead to the presumption that in the event of the work being completed the contractor ought to be paid an incentive. Absent a specific provision for payment of incentive for early completion of work, a contractor is not entitled to the same. Even in the absence of a liquidated damages clause the party for whom the work is done is entitled to compensation under Section 73 of the Contract Act for the delay in construction, if it has suffered damages, it does not follow that if the contractor completes the work earlier it is entitled to an incentive absent a provision for the same.

37. The agreement contains no representation by the respondents as to when the external development works would be completed. We will assume, therefore, that it must be completed within a reasonable period of time. That, however, would not support the petitioners' interpretation of the contract or the aforesaid provisions of law.

38. Mr. Saini sought to rely upon documents of HUDA to establish that the HUDA itself interpreted the term "proportionate" in Section 3(3)(a)(ii) in the manner suggested by the petitioners. He, in fact, invoked the doctrine of contemporaneous expositio. We do not think it necessary to examine these decisions for we are not inclined to invoke this rule of construction in the present case. The rule, however, must give way where the language of the statute is plain and unambiguous. Thus, even assuming that the administrative interpretation was as contended on behalf of the petitioners, we are not inclined to accept the same.

39. On behalf of the petitioners, reliance was placed upon the definition of the words ‘bilateral agreement’ from the Wharton’s Law Lexicon (Sixteenth Edition) and Black’s Law Dictionary (Eighth Edition) to contend that both the parties are to comply with their respective obligations under the contract.

That is so. However, both the parties are bound to comply with their obligations as per the terms of the contract and in accordance with law. As we have seen, neither the terms of the contract nor the provisions of law support the petitioners’ contention. The liability to pay the EDC is not denied. The only question is when the tentative EDC is to be paid. That, as we have seen, is determined by the bilateral agreement in Form LC-IV to be either in lumpsum or in eight equal six monthly instalments. The respondents’ demand for payment of the tentative EDC is precisely as per the terms of the agreement. They demand nothing more and are not bound to accept anything less.

40. The learned counsel appearing on behalf of the petitioners submitted that we must read the agreement so as not to make it unconstitutional, unreasonable or arbitrary. According to them, a view contrary to the one, suggested by them, would render the agreement unconstitutional, unreasonable and arbitrary. According to them, if we were to interpret the agreement to the effect that the respondents can refuse to do the external development works despite recovering the EDC, it would be arbitrary and unfair.

41. The submission is based on the erroneous presumption that by rejecting the petitioners' contention we absolve the respondents of the liability to complete the external development works. That is not so. The respondents are bound and liable to complete the external development works. We did not understand the learned counsel appearing on behalf of the respondents to contend to the contrary either. The petitioners, on the other hand, are bound to pay the tentative EDC as provided under the agreement. If the respondents do not complete the external development works, the owners/colonizers *i.e.* the petitioners are always at liberty to adopt proceedings in that regard. The respondents have not refused to complete the external development works. Nor is there anything to suggest that they do not intend completing the external development works.

42. This was a contract between the parties. Parties, such as the petitioners, who enter into such contracts with open eyes, are aware not only of the effect of the terms and conditions thereof but of the ground-realities. They would have been undoubtedly aware of the fact that external development works to this extent may not be completed within the period for the payment of instalments. The petitioners did not enter into the agreement on a representation that the external development works would positively be completed by the end of the period during which the instalments were to be paid. It is not unknown for parties to enter into an agreement where the entire consideration is required to be paid in advance. There is nothing unconstitutional, arbitrary or unreasonable about the same.

43. We will assume as suggested by Mr. R. Ramchandran that if two interpretations are possible, the one in favour of the citizen must be accepted. The aforesaid provisions of the Act, the rules and the agreement are, however, according to us, not capable of two interpretations.

44. The authorities also support the view that we have taken.

45. In *Gulmohar Estates Limited vs. State of Haryana, 1997(3) R.C.R.(Civil) 415*, a Division Bench of this Court held:-

> "23. The justification offered by the petitioner for non-payment of the external development charges, namely, the failure of the official respondents to fulfil their obligation to carry out development works is without any substance. In none of the letters written by the petitioner to the respondent No. 2, any indication was given by the petitioner about its inability to pay external development charges on the ground of alleged non-fulfilment of the conditions by the authorities of the Haryana Urban Development Authority. It is only at the last stage of the proceedings that the petitioner tried to create a false plea to save itself from the liability of payment of external development charges. In our opinion, such a plea cannot be entertained by this Court in view of the conditions of the licence/agreement, the affidavit submitted by the petitioner on 21.7.1987 and the undertaking given by it to the official respondents to make payment of the external development charges. In our considered opinion, such a plea deserves to be termed as vexatious and nothing but an attempt to deprive the public authority of its right to recover the public money which the petitioner had undertaken to pay as a part of the contract entered between the parties. We are further of the opinion that the petitioner cannot challenge the terms and conditions of the contract which it had entered with the Haryana Urban Development Authority and on the basis of which it amassed wealth by developing a colony and allotting flats an other residential apartments to private individuals. No doubt, the licence was issued to the petitioner under the provisions of '1975 Act' and the rules framed thereunder, but only on that account the petitioner cannot invoke the provisions of Article 14 of the Constitution of India for the purpose of being relieved of its burden to pay the amount due to the public authority in terms of the

> agreement and in any case the writ jurisdiction under Article 226 of the Constitution of India cannot be allowed to be invoked in such like matters.
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> …. …. …… …… …… …… …… …… …… …… …… …… …… ……
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> 29. Apart from our conclusion that the petitioner cannot invoke jurisdiction of this Court under Article 226 of the Constitution of India to relieve itself of the burden which it had voluntarily incurred on the basis of the agreement, the licence, the affidavit and the written assurance given to the officials of the Haryana Urban Development Authority, we find that the claim of the petitioner regarding failure of the official respondents to undertake the external development works is far from truth. In paragraph 9 of their written statement, the official respondents have set out the details of the external development works taken up for providing external sewerage on Gurgaon-Mahrauli road upto the colony of the petitioner. It has been categorically stated by the official respondents that 10 metres metalled road has already been constructed. A dedicated water supply channel having length of 69 KMs. has been constructed from Sonepat to Gurgaon. The land for water treatment plant has been acquired and one unit of Treatment Plant of 20 mgd. capacity is already functioning. Street lighting has already been provided on National Highway as well as on the main roads of the town with an expenditure of Rs. 177 lacs. The Haryana Urban Development Authority has prepared a master sewerage disposal scheme for Gurgaon Town which covers the estate of the petitioner. Storm water drainage has been completed by spending Rs. 188.92 lacs and further budget provision of Rs. 73.50 lacs has been made. The total works completed upto March, 1995 have already cost the Haryana Urban Development Authority to the tune of Rs. 73.70 crores and another sum of Rs. 6.32 crores is being invested by it. The official respondents have also given out that failure of the coloniser like the petitioner has prevented the completion of various other works and in the act due to such failure other segments of the population also suffer. This shows that the petitioner and similarly situated persons are responsible for thwarting development works. It appears to us that after having collected money from the purchasers the petitioner wants to usurp the same which it was bound to pay to the Haryana Urban Development Authority for the purpose of the external development works. This conduct of the petitioner is an additional ground for our refusal to exercise writ jurisdiction in a matter like the present one." (*emphasis supplied*)

The judgment negates the submission on behalf of the petitioner that it was not entitled to pay the EDC on the ground that the respondents had failed to fulfil their

obligation to carry out the external development works. The attempt to distinguish the judgment on the ground that in that case the Division Bench found that the external development works had in fact been carried out must fail. The rejection of the petitioner's contention therein that it was not liable to pay the EDC on the ground that the external development works had not been carried out was not based only on the finding that the external development works had in fact been carried out. As noted in paragraph-23, the opinion of the Division Bench was based also in view of the conditions of the licence/agreement, the affidavit submitted by the petitioner and the undertaking given by it to the respondents to pay the EDC. The learned Judges, in fact, noted that they were further of the opinion that the petitioner cannot challenge the terms and conditions of the contract which it had entered into with HUDA and on the basis of which it had amassed wealth by developing a colony and allotting premises to the private individuals. Thus, the rejection of the contention was also on the basis of the terms of the agreement.

Paragraph-29 also does not support the attempt to distinguish the judgment on the ground that in that case the petitioner's claim regarding failure of the official respondents to undertake the external development works was found to be untrue. This is clear from the opening words of paragraph-29, "Apart from our conclusion that the petitioner cannot invoke the jurisdiction of this Court under Article 226 of the Constitution of India to relieve itself of the burden which it had voluntarily incurred on the basis of the agreement, the licence, the affidavit and the written

assurance given to the officials of the Haryana Urban Development Authority. ….. …. …". The last sentence in paragraph-29 also makes it clear that the rejection of the writ petition in view of the conduct of the petitioner was only an additional ground for the refusal of the Court to exercise its jurisdiction.

46. Apart from being bound by it, we are in respectful agreement with the judgment. The terms and conditions of the agreement are clear and unequivocal. The petitioners were bound to pay the tentative EDC in the manner mentioned in the agreement. As we have already held, the agreement is not illegal. The respondents were, in fact, entitled to seek the payment of the tentative EDC in advance. The respondents merely afforded the colonizers/owners the facility of paying the same in instalments. Having accepted the benefit, the petitioners cannot now challenge the same.

47. We would, in any event, unhesitatingly refuse to exercise our extra-ordinary jurisdiction under Article 226 of the Constitution of India to support the attempt by the petitioners to avoid their contractual obligation which they readily and voluntarily undertook.

48. In *M/s Sweta Estates Pvt. Ltd., Delhi vs. Director, Town & Country Planning, Haryana and another, 2003(4) R.C.R.(Civil) 335*, the petitioners sought an order restraining the respondents from charging interest and penal interest on account of delayed payment/non-payment of instalments of EDC and an order directing the respondents to re-schedule the payment of EDC. One of the contentions raised on behalf of the

petitioners was that the external development works were to be commensurate with the recovery of EDC from the colonizers. Rejecting the contention, the Division Bench held:-

> "19. A conjoint reading of the statutory provisions reproduced above together with the format of LC-IV agreement required to be executed by the person who wants to set up a colony shows that the coloniser is required to pay the cost of external development works if the same are required to be carried out by the government or local authority. The Director has the power to determine the proportion and the time within the payment of EDC is to be made. The expression 'external development works' as defined in Section 2(g) includes sewerage, drainage, roads and electrical works which may have to be executed in the periphery of or outside the colony for the joint benefit of two or more colonies. This, however, does not mean that such works are confined to one or more colonisers. In its very concept, the external development is meant for the community at large and is not confined to a person who may develop a colony for the benefit of a group of individuals, i.e., plot holders. All those including the coloniser who are benefited by external development works are required to pay for it. Of course, the government has the discretion to grant exemption to economically weaker sections and similar other groups. The use of the words 'in the periphery' or 'or outside' in the definition of the expression 'external development works' is a clear indication of the intention of the Legislature not to confine the external development works to the particular colony. If the Legislature wanted to confine the external development works to the particular colony or colonies, then the definition of the said expression would have been differently worded. The reason why the external development works are not confined to the particular colony or colonies is not far to seek. The works, like laying of roads, sewerage, drainage and electrical lines involve huge expenditure. If these works are to be confined to few individuals who may purchase the land for setting up a colony, then such persons and ultimately the plot/flat owners would be burdened with exorbitant cost and the very object of urbanisation of the area of involving private entrepreneurs, i.e., colonisers would be frustrated. So far as the coloniser is concerned, he can realise this amount from the plot holders in advance. Even if he/it pays for the external development works from his/its own resources, then the cost of external development works can be realised from those who are allotted plots after completion of the colony. However, there is nothing in the scheme of the 1975 Act, the Rules and the format of LC-IV agreement from which it can be inferred that the coloniser can avoid the payment of EDC on due dates on the pretext of

> non-sanction of building plan or non-renewal of licence or the failure of the competent authority to provide particular facility which forms part of the external development work.
>
> 20. In the light of the above analysis of the relevant provisions, we shall now consider whether the petitioners are justified in not paying the balance instalments of EDC and other charges on the pretext of alleged non-execution of external development works by respondent No. 2 or non-renewal of licenses and non-release of building plan. A careful reading of various sub-clauses of the two agreements executed by them shows that the petitioners had undertaken to pay EDC at the rate of 30.25 lacs per gross acre of the HUDA through respondent No. 1. They had the option of paying the entire amount in lump sum within 30 days from the date of grant of licence or in eight equal six monthly instalments of 12.5% and also pay interest at the rate of 18% on unpaid portion of the amount. In terms of clause (e)(iii), they were required to pay penal interest at the rate of 3% for delayed payment of instalments. They had also undertaken to take electric connection from the Haryana State Electricity Board. These payments were not subject to the completion of particular external development work which the HUDA was required to undertake as per the terms of agreement. The provision for payment of EDC in eight equal six monthly instalments is indicative of the fact that external development works were to be completed within a period of 4 years. The payment of instalments of EDC were not subject to the completion of particular item of external development work at a particular point of time. However, the fact of the matter is that after paying first two instalments in respect of licence No. 2, the petitioners have regularly delayed the payment of EDC and entered into a maze of correspondence blaming the respondents for delaying the project. Of course, in various communications, they admitted delay on their part in depositing the instalments of EDC etc. and projected the financial stringencies as the reasons for non-payment of instalments of EDC etc. and also undertook to pay the amount with interest." (*emphasis supplied*)

The observations in paragraph-20 that the provision for payment of EDC in eight equal six monthly instalments is indicative of the fact that the external development works were to be completed within a period of four years, does not support the petitioners' contention that the EDC was payable only upon the completion of the external development works.

This is clear from the sentence that preceded this observation as well as the sentence that followed it. The Division Bench expressly held that the payment of EDC was not subject to the completion of external development works at a particular point of time. That observation would assist the petitioners only to the extent of entitling them to seek an order directing the respondents to complete the external development works within a stipulated period. The observation does not dilute the ratio that payment of the instalments of EDC is not subject to the completion of external development works at any particular point of time. These observations were not based merely upon the facts of the case but upon an interpretation of the agreement and the statutory provisions.

It would be useful to set out the operative part of the judgment which is as under:-

> "Hence, the writ petition is disposed of in the following terms:
>
> (i) The petitioners, prayer for restraining the respondents from making recovery of EDC with interest specified in agreement LC-IV is rejected. However, they are allowed two months' time to deposit the balance instalments of EDC with interest.
>
> (ii) Within two months of the deposit of arrears of EDC with interest in terms of LC-IV agreement, respondent No. 2 should carry out/undertake developments in terms of paragraphs 2 to 5 of affidavit dated 29.5.2003 of Shri R.C. Taneja, Chief Engineer, HUDA.
>
> (iii) The respondents shall not charge penal interest from the petitioners till the completion of development works in terms of the affidavit of Shri R.C. Taneja.
>
> (iv) The respondents are also restrained from charging compound interest on the delayed payment of EDC. If they have already realised the compound interest, then the petitioners shall be entitled to refund of the same.
>
> Order accordingly."

We will refer to this order again while dealing with the petitioners' contention regarding interest. For the present purpose, it is relevant to note that clause (i) of the operative part of the order and judgment also negates the petitioners' contention that they are not liable to pay the instalments of EDC on the ground that the external development works have not been carried out.

49.(A) The judgment of the Supreme Court in *Municipal Corporation, Chandigarh and others vs. Shantikunj Investment (P) Ltd. and others, (2006) 4 Supreme Court Cases 109* is of no assistance to the petitioners in so far as the liability to pay the instalments is concerned. Firstly, this was a case under different enactments, namely, The Capital of Punjab (Development and Regulation) Act, 1952 and the Chandigarh Lease-hold of Sites and Buildings Rules, 1973. We will presume, however, that the observations and the ratio of the judgment would apply to the case before us. Far from supporting the petitioners' case, the judgment in fact supports the respondents' case.

In that case, the plots were allotted by the Chandigarh Administration and the Municipal Corporation of Chandigarh on certain terms and conditions of the sale of residential and commercial sites and buildings by auction on lease for 99 years. The question was whether grant of amenities was a condition precedent or not. The petitioners contended that the basic amenities had not been provided and that therefore the respondents were not entitled to charge interest on non payment of instalments and penalty on the unpaid/delayed payment. The Supreme Court rejected the

contention as is evident from the following observations in the judgment:-

> "26. We have bestowed our best attention to the provisions of the Act and the Rules. On a plain reading of the definition "amenity" [in Section 2(*b*)] read with Rule 11(2) and Rule 12, it cannot be construed to mean that the allottees could take upon themselves not to pay the lease amount and take recourse to say that since all the facilities were not provided, therefore, they are not under any obligation to pay the instalment, interest and penalty, if any, as provided under the Act and the Rules. It is not possible to accept a sweeping proposition that if all the facilities or amenities are not provided, then the allottees/lessees can take upon themselves not to pay the lease amount, interest and penalty, would be going too far. It has never been the condition precedent. It is true that in order to fully enjoy the allotment, proper linkage is necessary. But to say that this is a condition precedent, that is not the correct approach in the matter. "Amenity" has been defined under Section 2(*b*) of the Act which includes roads, water supply, street lighting, drainage, sewerage, public building, horticulture, landscaping and any other public utility service provided at Chandigarh. That is a statutory obligation but it is not a condition precedent as contended by learned counsel for the respondents. It is true that the word "enjoy" appearing in the definition of the word "premium" in Rule 3(2) of the Rules means the price paid or promised for the transfer of a right to enjoy immovable property under the Rules. It was very seriously contended before us that the word "enjoy" immovable property necessarily means that the Administration should provide all the basic amenities as appearing under Section 2(*b*) of the Act for enjoying that allotment. The expression "premium" appearing in the present context does not mean that the allottees/lessees cannot enjoy the immovable property without those amenities being provided. The word "enjoy" here in the present context means that the allottees have a right to use the immovable property which has been leased out to them on payment of premium i.e. the price. This is only the price to enjoy that allotted/leased property. Otherwise, walking over that property will mean to trespass. This is only a permissive possession. Since the allottees had paid the price or promised to pay after the transfer of the right to enjoy the immovable property, this cannot be construed that the property cannot be enjoyed without providing the basic amenities. It is the common experience that for full development of an area it takes years. It is not possible in every case that the whole area is developed first and allotment is served on a platter. Allotment of the plot was made on an as-is-where-is basis and the Administration promised that the basic amenities will be provided in due course of time. It cannot be made a condition precedent. This has never been a condition of the auction or of the lease. As per the terms of allotment upon payment of 25 per cent, possession will be handed over and rest of the 75 per cent of

the lease amount to be paid in a staggered manner i.e. in three annual equated instalments along with interest at the rate of 10 per cent. If someone wants to deposit the whole of the 75 per cent of the amount, he can do so. In that case, he will not be required to pay any interest. But if a party wants to make payment within a period of three years then it is under the obligation to pay 10 per cent interest on the amount of instalment. This is the obligation on the part of the allottee as per the condition of lease and he cannot get out of it by saying that the basic amenities have not been provided for enjoying the allotted land, therefore he is not entitled (*sic* liable) to pay the interest. This construction is not borne out from the scheme of the Act and the Rules. It is true that the Administration has an obligation but it is not a condition precedent in the present case.

…. …. …. …. …. …. …. ….…. …. …. …. …. …. …. ….…. ….

28. It is true that once allotment of the land has been made in favour of the allottee, he can take possession of the property and use the same in accordance with the Rules. That does not mean that all the facilities should be provided first for the so-called enjoyment of the property as this was not the condition of auction. The party knew the location and condition prevailing thereon. The interpretation given by the Division Bench of the High Court of Punjab and Haryana and contended before us cannot be accepted as a settled proposition of law. In the present case, as per the Act and the Rules it is never a condition precedent of the auction or as per the lease that all the facilities like road, water supply, street lighting, drainage, sewerage, public building, horticulture, landscaping shall be a condition precedent. Nowhere in the conditions of lease or in the auction is it provided that this will be done first though it had been contended by the Administration that the basic amenities have already been provided. Be that as it may, in the present context it cannot be construed that it is a condition precedent. In this connection, our attention was drawn to a decision of this Court in *Sector-6, Bahadurgarh Plot Holders' Assn. (Regd.)* v. *State of Haryana* [(1996) 1 SCC 485] which has an important bearing. In this case, the Punjab Urban Estates (Sale of Sites) Rules, 1965, the Punjab Urban Estates (Development and Regulation) Act, 1964 and the Haryana Urban Development Authority (Disposal of Land and Buildings) Regulations, 1978 came up for consideration and in that context, a three-Judge Bench of this Court categorically held as follows: (SCC pp. 489-90, para 8)

> "*8*. To decide the aforesaid submission of Shri Bhandare we would really be required to find out as to whether the offer was of developed plots or undeveloped plots. As the offer had stated that modern amenities noted above 'will be provided', it cannot be held that till the amenities as mentioned have become fully functional, the offer is incomplete. It is for this reason that the fact that full development has not yet taken place, even if that be the position as contended by Shri Bhandare, cannot be a ground to hold that

> interest has not become payable. It is true that the applicants were given to understand that the amenities noted above would become available (and within reasonable time), the fact that the same did not become available to the desired extent could not be a ground not to accept delivery of possession. From the order of the High Court which we have quoted above, we find that the offer of possession of the undeveloped plot was not accepted by the counsel of the appellant. That order being of 17-10-1980, we are of the view that interest did become payable from that date. The fact that the plot has not yet been fully developed, as is the case of the appellant, has, therefore, no significance insofar as charging of interest is concerned. We are not in a position to accept the submission of Shri Bhandare that equity would not demand charging of interest, even though the plots are yet to be fully developed. When parties enter into contract, they are to abide by the terms and conditions of the same, unless the same be inequitable. In the present case, question of equity does not really arise inasmuch as the condition relating to interest is founded on a statutory rule, vires of which has not been challenged. The provision in a cognate rule cannot alter the consequence which has to follow from the rule which holds the field. In the present case, it being the Punjab Rules under which the allotment was made, we are not in a position to agree with Shri Bhandare, despite his forceful submission, that the appellants may not be asked to pay interest, despite there having been no offer of delivery of possession of fully developed plots." *(emphasis supplied)*

(B) Assuming that the judgment applies to the case before us, the ratio thereof on a parity of reasoning negates the petitioners' contention that they are entitled to avoid their contractual obligation of payment of instalments and interest due thereon. Even in the case before us it is not as if the occupants of premises constructed by the petitioners are unable to enjoy their respective properties. They have admittedly been put in possession of their respective premises and have been in use and occupation thereof. It is true that certain external development works have not been completed. For instance, the *pucca* roads have not been constructed in some cases. In some cases, the land upon which the road is to

be constructed has not been acquired. It is nobody's case, however, that there is no access to the premises. The purchasers cannot, therefore, refuse to pay the amount as per the contractual liability on the ground that they are unable to use their properties in the best possible manner.

The observations in paragraph-26 make it clear that the petitioners were not entitled to refuse payment of the lease amount on the ground that the facilities had not been provided. It was held that providing the facilities was not a condition precedent. It was further held that although it was a statutory obligation on part of the respondents to provide the facilities, it was not a condition precedent to the payment of the lease amount. Even in the case before us, the completion of the external development works has not been made a condition precedent to the liability to pay the EDC whether in lumpsum or in instalments.

(C) The petitioners, however, placed reliance upon paragraph-38 of the judgment which reads as under:-

> "38. In this background, we are of the opinion that the interpretation of the Act and the Rules given by the Division Bench of the Punjab and Haryana High Court in the impugned judgment [Shanti Kunj Investment (P) Ltd. [Shanti Kunj Investment (P) Ltd. v. U.T. Administration, Chandigarh, AIR 2001 P&H 309]] cannot be sustained. It has been contended by the counsel for the Chandigarh Administration that all necessary facilities have been provided and some of the allottees have already constructed their buildings and have rented out the same and some allottees have applied for construction of hotels also. It is not possible for us to examine all these facts individually. Some of the sectors have been fully developed and some sectors have been less developed. Therefore, it is not possible to work out that in one case it has been fully developed and in the other case it is still not developed. However, in some cases full payment has been made, in some cases two instalments have been made. Therefore, all these disputed facts have to be adequately dealt with by the High Court. We make it clear that though it was not a condition precedent but there is obligation on the part of the Administration to provide necessary facilities

> for full enjoyment of the same by the allottees. We therefore, remit the matter to the High Court for a very limited purpose to see that in cases where facilities like kutcha road, drainage, drinking water, sewerage, street lighting have not been provided, then in that case, the High Court may grant the allottees some proportionate relief. Therefore, we direct that all these cases be remitted to the High Court and the High Court may consider that in case where kutcha road, drainage, sewerage, drinking water facilities have been provided, no relief shall be granted but in case any of the facilities had not been provided, then the High Court may examine the same and consider grant of proportionate relief in the matter of payment of penalty under Rule 12(3) and (sic interest for) delay in payment of equated instalment or ground rent or part thereof under Rule 12(3-A) only. We repeat again that in case the above facilities had not been granted then in that case consider grant of proportionate relief and if the facilities have been provided then it will not be open on the part of the allottees to deny payment of interest and penalty. So far as payment of instalment is concerned, this is a part of the contract and therefore, the allottees are under obligation to pay the same. However, so far as the question of payment of penalty and penal interest is concerned, that shall depend on the facts of each case to be examined by the High Court. The High Court shall examine each individual case and consider grant of proportionate relief." *(emphasis supplied)*

The observations in paragraph-38 do not support the petitioners' case at all. The main contention regarding the liability to pay interest was negated. The Supreme Court remitted the matter to the High Court for the limited purpose of seeing whether "some proportionate relief ought to be granted in cases where the facilities for full enjoyment of the same by the allottees are not in place". This proportionate relief is only in respect of the interest. The High Court was directed, upon remand, to consider granting some proportionate relief in cases where certain essential facilities had not been provided but only "in the matter of payment of penalty and (sic interest for) delay in payment of equated instalments or ground rent or part thereof under Rule 12(3-A) only". Moreover, the last three sentences of the

paragraph make it clear that so far as the payment of instalments is concerned, the same is a part of the contract and, therefore, the allottees are under an obligation to pay the same.

(D) It is important to note that in paragraph-9 of the judgment, the Supreme Court noted that the terms of allotment entitled the appellant therein to charge interest at 7%. However, by a notification, this was increased to 10%. Moreover, the appellant charged interest at 18%, although there was no notification in that regard. The judgment does not refer to any contractual provision for penal interest. In the case before us, the contract itself provides for 15% interest on the balance instalments and 3% interest as penalty for delay in payment of the instalments. The provisions for interest and penal interest are, therefore, a part of the contract in the case before us. The judgment of the Supreme Court, therefore, establishes that the contractual terms must be obeyed. The judgment upholds the petitioners' liability to pay interest and penal interest as the same were provided for in the contract. The Supreme Court did not hold in paragraph 38 that even the interest which was stipulated by the contractual terms and by the statute was not liable to be paid on the ground that the allottee was unable to fully enjoy the property. In view thereof, we do not consider it necessary to even grant the petitioners liberty to make an application for proportionate relief in payment of interest which has been demanded as per the contract. Compound interest, however, is not payable under the contract.

50. The judgment of this Court dated 18.04.2006 in the case of *Ansal Housing & Estates Pvt. Ltd. & Ors. Vs. State of Haryana and another, CWP No.10943 of 2005* does not carry the matter further. The Division Bench merely followed the judgment of this Court in *M/s Sweta Estates Pvt. Ltd., Delhi vs. Director, Town & Country Planning, Haryana and another (supra)* and directed that penal interest from the petitioners till completion of the development works in terms of the affidavits filed therein shall not be charged.

51. Mr. Sinhal's reliance upon the judgment of a Division Bench of this Court in *The Government Employee Co-operative House Building Society Limited vs. State of Haryana and others, CWP No.15550 of 2011* is well founded. The petitioner therein challenged the demand notice for payment of outstanding amount of EDC. It was contended on behalf of the petitioners therein that they had paid substantial amount towards EDC but proportionate development had not been carried out by the respondents. The Division Bench by an order and judgment dated 25.09.2012 rejected this contention holding as under:-

> "Once the petitioner-society has clearly understood the above said terms and conditions of the agreement and then undertook to pay the EDC, it cannot be permitted to take a somersault to say that since the terms and conditions of the agreement are not suitable to it or they are harsh, they may not be applied to it, being arbitrary. It is clear from the pleaded case of the petitioner-society that it wants to enjoy its rights and benefits flowing from the agreement, but when it comes to discharge its financial obligation, petitioner wants to avoid it. When the respondent authorities reminded the petitioner-society raising its legitimate demand for payment of EDC, in terms of that very agreement, the petitioner society finds fault with the terms and conditions of the agreement.
>
> In our considered view, it is not permissible in law to allow the petitioner-society to enjoy all the benefits and

> allow it to deny its liability. Thus, the argument raised by the learned Senior counsel in this regard has been found without any force and the same deserves rejection."

We are bound by and are also in respectful agreement with the observations of the Division Bench.

52. The reliance placed by Mr. Lokesh Sinhal, learned Additional Advocate General, Haryana, upon the judgment of the Supreme Court in the case of *Joshi Technologies International Inc. vs. Union of India and others, 2015(7) SCC 728* is also well founded. The Supreme Court held:-

> "56. As noted above, the contention of the respondent is that PSCs are in the nature of a contract agreed to between the two independent contracting parties. It is also mentioned that before the signing of the PSCs, the approval of Cabinet is obtained which reflects that the PSC as submitted to the Cabinet has the approval of one of the contracting parties, namely, Government of India in this case. When it is signed by the other party it means that it has the approval of both the parties. Therefore, a contracting party cannot claim to be oblivious of the provisions of the law or the contents of the contract at the time of signing and, therefore, later on cannot seek retrospective amendment as a matter of right when no such right is conferred under the contract. Even the doctrine of fairness and reasonableness applies only in the exercise of statutory or administrative actions of the State and not in the exercise of contractual obligation and issues arising out of contractual matters are to be decided on the basis of law of contract and not on the basis of the administrative law. No doubt, under certain situations, even in respect of contract with the State relief can be granted under Article 226. We would, thus, be dealing with this aspect in some detail.
>
> …. …. …… …… …… …… …… …… …… …… …… …
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> 69. Further legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to the contracts entered into by the State/public Authority with private parties, can be summarized as under:
>
> …… …… …… …… …… …… …… …… …… ……
>
> (iv) Writ jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.
>
> (v) Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in

> performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business."

53. There is nothing unreasonable about the agreement in the case before us. There is no ambiguity regarding the relevant terms of the agreement. The petitioners have, admittedly, failed and neglected to fulfil their obligation thereunder. There is no warrant whatsoever for invoking the writ jurisdiction which, in effect, would absolve the petitioners of their financial obligations under the agreement which they undertook with open eyes and fully aware of the relevant facts and circumstances of the case.

54. The petitioners' grievance is that the respondents have discriminated against them as they had granted relief against the payment of interest till the land is acquired for the purpose of the external development works in respect of the areas considered to be of low potential. They contend that the agreement in so far as it requires them to pay EDC before the completion of the external development works is discriminatory.

55. The State Government has divided areas into high potential, medium potential and low potential areas. There is nothing illegal in the State's action. The areas have been differentiated on a rational basis. The apprehension was that in the absence of any incentive being granted in respect of low potential areas, the developers may not find it

financially feasible to develop the same. It was to encourage persons undertaking projects and ventures in the low potential areas that the facility was granted. This is a valid and intelligible policy. The concessions and incentives are given on a rational basis. It is true that the absence of external development works affects all inhabitants. That, however, does not prevent the State Government from providing incentives to ensure the development of low potential areas. The incentives granted to the colonizers would enable them to sell the premises at more competitive rates and possibly encourage people to invest in these areas. This would further the economic and commercial prospects of the low potential areas. Moreover, such a policy would also spread out the development instead of having the same concentrated in the high potential areas. The policy, therefore, would also have inherent environmental advantages.

56. The petitioners contended that they were discriminated against as the Haryana State Industrial and Infrastructure Development Corporation (HSIIDC) had not paid the EDC.

The lands in possession of the HSIIDC must indeed be taken into consideration in determining the proportionate EDC payable by each party. However, even assuming that they have not been compelled to pay their share of EDC, at this stage, it would make no difference to the petitioners' liability to pay the tentative EDC. That is a matter between the respondents and the HSIIDC. The HSIIDC being a government enterprise stands on a different footing. The petitioners cannot avoid their contractual liability on this ground.

57. The petitioners sought to establish that the EDC paid by them thus far has been used for purposes other than the external development works. They submitted that the respondents were bound to use the EDC paid by them for the purpose of external development works. They contended that EDC is a fee and not a tax and, therefore, the developers and the purchasers of premises from them are entitled to a *quid pro quo* in respect of the EDC paid.

58. We will, for the purpose of this judgment, presume that the amounts received towards EDC have not yet been utilized completely for the purpose of external development works. It makes no difference. Once an amount is paid by the petitioners, it loses its identity qua the entire reserves of the respondents. There is no doubt that the quantum of EDC paid must be utilized for the external development works. However, it is not the rupee paid towards EDC that must be the rupee spent for the execution of the external development works. So long as a rupee is spent by the respondents, it is sufficient. It matters little where that rupee comes from. Even assuming that the amount received towards EDC is kept in a separate account, it would make no difference. The respondents would be entitled to use the same for any purpose.

59. The reliance on behalf of the petitioners on the respondents' admission in the pleadings that the amounts received towards EDC have been used for purposes other than external development works is, therefore, of no relevance.

60. We do not intend dealing with each case on merits regarding the extent of the external development works done and not done. The hearing of these petitions commenced with CWP No.*9558* of 2015 essentially on the question whether the tentative EDC is liable to be paid or not. The learned counsel appearing in the other petitions were heard, as they contended that the issues raised in their petitions were identical. In some of the petitions, the respondents may not, therefore, have filed affidavits on the merits of this issue. As regards this contention, we have proceeded on the footing that the external development works have not been carried out. However, as rightly pointed out by Mr. Lokesh Sinhal, the learned Additional Advocate General, Haryana, it is not as if the occupants of the constructions put up by the developers are unable to enjoy their premises on account of the external development works not having been completed. There indeed remains much to be done. For instance, some of the lands required for constructing the roads have not been acquired and/or the acquisition proceedings have been stalled. In some cases, there are only “Kutcha” roads and the “pucca” roads are still to be constructed. The parties concerned are, however, not without any access to their premises.

61. This view of ours, however, would not prevent the parties in each individual case from seeking relief directing the respondents to complete at least the bare minimum external development works. This would depend upon the facts of each case to be determined after the respondents are given an

adequate and a proper opportunity of dealing with the contentions on facts. The petitioners are at liberty to adopt separate proceedings seeking orders directing the respondents to complete the external development works. Whether the relief ought to be granted or not depends upon the facts of each case. For instance, a writ court may or may not entertain such an application if it finds that the EDC has not been paid by a particular party. In certain cases, the liability to pay EDC may be of more than one party in which case it would be necessary for the court to balance the equities and pass consequential orders. For instance, orders may be passed against a developer in a petition filed by another developer against the official respondents. The petitioners must, however, pay the tentative EDC before seeking any such reliefs.

62. As we noted earlier, there is an undertaking to pay the EDC if the works referred to in Rule 11(1)(c) are to be laid out and constructed by the Government or any local authority. There is no warrant for relieving the petitioners from this undertaking given freely, fully aware of all the facts and in view whereof were granted valuable rights which they have exploited in full measure.

63. Having said that, however, we must enter a very strong caveat. Having received the amounts towards EDC and being bound to utilize the like amount for the execution of external development works, a contention on behalf of any of the respondents in future of their inability to carry out external development works on account of want of funds would

be unfortunate, in the extreme, indicative of a fraudulent misappropriation of the EDC. Having received the EDC and being bound to utilize the like amount for external development works, it is the responsibility of the State to ensure that the amount is available at every given point of time when the external development works are to be carried out. It would not be open to the respondents to contend at any stage that the works cannot be carried out for want of funds to the extent of the EDC received and the accretion thereto.

64. Mr. Bansal submitted that the Act and the rules do not provide for the levy of interest or penal interest for non-payment or delayed payment of EDC. He submitted that the provision for interest in the bilateral agreement is, therefore, contrary to the Act and the rules.

65. As we have repeatedly mentioned, the terms and conditions in the bilateral agreement are binding between the parties. Neither the Act nor the rules prevent the parties from agreeing to a term regarding interest on delayed payment. The Act and the rules do not provide for every conceivable term and condition. So long as there is no prohibition regarding a particular term, there is nothing that prevents the parties from agreeing to the same.

66. Faced with this, it was submitted that the interest that has accrued on the EDC, already paid ought to be credited to the petitioners' account. This submission is based on the contention that EDC is a fee and not a tax. Thus, for instance, if ultimately it is found that the EDC paid together with interest thereon exceeds the amount actually spent on the

external development works, the balance accrues to the credit of the party paying the EDC.

67. We do not intend expressing a final opinion on this issue, although, *prima facie*, it appears to be well founded. We will, for the purpose of this judgment, proceed on the basis that it is well founded. Even so, it would make no difference to the petitioners' liability to pay the tentative EDC stipulated in the agreement.

68. At the cost of repetition, the amount payable towards EDC under *the* agreement is only tentative. It would be subject to the EDC finally computed. Under the agreement, the petitioners had agreed to pay the tentative EDC even before the external development works were completed or even taken up for completion. The reasons for such a stipulation are not far to seek. The respondents must ensure the payment of EDC in advance. There are several developers in the field. The external development works being capital intensive and extremely extensive both in terms of quantum and space, it is not unreasonable for the respondents to make sure that a substantial part is paid in advance and from time to time. The mere furnishing of a bank guarantee is not sufficient. Bank guarantees do not fill the coffers of the State. Moreover, after the developers complete their respective projects, it will be difficult for the respondents to recover the amount of EDC.

69. We keep the issue as to whether the interest earned on the EDC paid by the developers accrues to the credit of the developers or the respondents open. The issue can be decided upon or at the time of final determination of the EDC. The contention that the Government cannot enrich itself at the cost of colonizers on account of the non-adjustment of the interest accrued on the unspent EDC does not, therefore, arise at this stage.

70. Mr. Arun Monga, the learned counsel appearing on behalf of the petitioners in CWP No.9234 of 2015, submitted that the penal charges and interest can be justified only when the external development works are actually carried out. The submission is not well founded. Even assuming that interest is ultimately to be credited to the account of the developers that paid the EDC, interest and penalty can always be recovered on the tentative EDC. The respondents are entitled to insist upon the EDC being paid in advance and from time to time. The amounts are to be utilized for the purpose of carrying out the external development works. If the developers are permitted to pay the tentative EDC at any time and contrary to the terms of the agreement, the very purpose of collecting the tentative EDC would be defeated and, in any event, diluted to a large extent. Moreover, such a stipulation would lead to complete arbitrariness between developers. It would put a premium on defaulting developers and put the developers who honour their contractual commitment at a disadvantage. It would destroy the sanctity of the contract.

71. Moreover, if this contention is accepted, it would lead to several unnecessary complications which the respondents obviously intended avoiding by making a provision for payment of tentative EDC and interest and penalty on account of the delayed payment thereof. Several complicated situations would arise which would be extremely difficult to determine. One of the questions, for instance, which would arise, is the extent of the external development works to be done in order to entitle the respondents to claim reimbursement of EDC. The developers could conceivably also raise disputes regarding the quality of the external development works and on that ground seek to avoid payment of even the tentative EDC. The respondents were within their right to introduce terms to avoid such contingencies. The payment being only tentative, the petitioners' rights and contentions are not foreclosed by being compelled to pay the same subject to the accounts being finalized. It must be remembered that during all this time the developers have been and continue to enjoy the benefit of the agreement. They cannot pick and choose those clauses that are favourable to them and reject those that cast a duty and obligation upon them.

There is yet another danger with potentially disastrous consequences. The entire external development works may well continue till after some owners/colonizers complete the development of the colony and hand over the same to the purchasers of the premises. It would be difficult then for the respondents to chase the petitioners to recover the EDC. It is

safe and prudent, therefore, to insist upon the strict adherence to the terms of the contract.

72. The clauses in the agreement that entitle the respondents to interest and penal interest are valid. There is no law that prohibits a term for interest on account of delay in payment of instalments of tentative EDC. For the reasons we have just stated, the requirement to pay interest, far from being arbitrary and unreasonable, is justified and reasonable as also prudent. The absence of such a clause would put a premium on defaulters and be discriminatory against those colonizers who honour their commitments by paying the EDC.

73. The authorities on this issue support our view and the submission on behalf of the respondents. In 1997 *Gulmohar Estates Limited vs. State of Haryana (supra),* a Division Bench of this Court rejected the challenge to the charging of interest and penal interest. This Court held that the liability to charge interest due to failure to pay the instalments of EDC was legal. The Court also did not find any illegality in the charging of penal interest from the petitioners therein particularly when they had voluntarily agreed to pay the same as have the petitioners in the case before us.

74. The petitioners relied on the last paragraph of the judgment of the Division Bench of this court in *M/s Sweta Estates Pvt. Ltd., Delhi vs. Director, Town & Country Planning, Haryana and another (supra)*, which we set out earlier. The petitioners relied upon a part of the order which

directed the respondents not to charge penal interest from the petitioners therein till the completion of the development works in terms of the affidavit filed by the respondents therein. Paragraph (iv) of the order restrained the respondents from charging compound interest.

One thing is clear, therefore. The liability to pay interest was not interfered with at all. The Court only prohibited the charging of compound interest. Even in the case before us, there is no provision for charging compound interest and, therefore, compound interest cannot be charged. The only question is whether we ought to restrain the respondents from charging penal interest till the external development works are completed.

In this judgment, the Court did not strike down the provision that required the developers to pay penal interest. The direction in the operative part of the order only restrained the respondents from charging the penal interest till the completion of the external development works. This was an exercise of discretion. The judgment does not specify the reasons for this exercise of discretion. In any event, the exercise of discretion would depend upon the facts and circumstances obtaining in each case.

The reliance upon paragraph-15 of the judgment does not carry the matter further. Paragraph-15 does not contain the views of the Court. In paragraph-15, the Court has merely recorded the submissions on behalf of the petitioners. It was contended on behalf of the petitioners that in *Gulmohar Estates Limited vs. State of Haryana (supra),* as a matter of fact, the external development had been completed by an

external agency i.e. HUDA. The Division Bench did not deal with this matter any further. The Division Bench in pagraph-30 of the judgment in *Gulmohar Estates Limited vs. State of Haryana (supra)* expressly upheld the validity of the provisions in the contract requiring the owners/colonizers to pay interest on the instalments and penal interest on account of the delay in payment of the instalments.

75. Mr. Monga then submitted that in *Gulmohar Estates Limited vs. State of Haryana (supra)* the Division Bench did not deal with the question as to whether the liability to pay interest as per the agreement comes to an end in the event of the external development works not being carried out.

We do not agree. The judgment, read as a whole, makes it clear that the Division Bench upheld the liability to pay interest and penal interest as per the provisions in the contract therein which is similar to the one before us. The Division Bench in paragraph-23 rejected the contention that EDC is not liable to be paid in the event of respondents' failure to carry out the external development works. The Division Bench held that the petitioner therein could not challenge the terms and conditions of the contract which it had entered into with the Haryana Urban Development Authority and on the basis of which it amassed wealth by developing a colony and allotting flats and other residential apartments to private individuals. In the same breath, in paragraph-30, the Division Bench negated the challenge to the provisions in the contract levying interest and penal interest. The observations

in paragraph-30 were general in nature pertaining to the contractual obligations and were not in view of the observations in paragraph-20 that the external development works had, in fact, been carried out. Even in that case, admittedly, all the external development works had not been carried out as is evident from what is stated in the paragraph-29 itself.

76. In any event, we are of the view that the liability to pay interest on the instalments and penal interest in the event of delay in *payment* thereof is valid and cannot be avoided on the ground that the external development works have not been carried out to any extent. As we noted earlier, the liability to pay the tentative EDC was independent of the external development works being carried out. Once the liability to pay the instalments, even before the works are completed, is upheld, the liability to pay interest and penal interest as per the terms of the contract is axiomatic.

77. Another grievance raised on behalf of the petitioners is that some of the amounts paid towards EDC were appropriated towards interest and/or penal interest, whereas, the same ought to have been adjusted toward the EDC payable.

78. The covering letters, if any, indicating the terms and conditions on which such payments were made were not relied upon. Absent anything to the contrary, the respondents were entirely within their right to adjust the amounts first towards interest, regular and penal, and then towards the principal which, in this case, would be towards the EDC. If,

as contended by the petitioners, the entire external development works are to be carried out on no profit no loss basis and EDC is a fee and not a tax, it would be open to the petitioners to contend, upon final determination of the EDC, that the principal and interest paid by them ought to be taken into consideration and the balance amount, if any, ought to be refunded to the petitioners.

79. Mr. Gulati submitted that in any event the respondents' calculation of the EDC is contrary to law as the cost of several items of work which do not constitute external development works within the meaning of that expression in Section 2(g) are included by the respondents. This contention can also be raised by the petitioners at the final taking of accounts of EDC and ought not, therefore, be raised at this stage to permit the petitioners to avoid their contractual liability to pay tentative EDC as per the agreement. Mr. Gulati, however, submitted that if a majority of items do not constitute external development works resulting in a substantial decrease of the projected final EDC, it would follow that the tentative EDC was also computed on an unfair, irrational and erroneous basis.

80. In view of this contention, we intend deciding whether these works fall within the definition of external development works in Section 2(g). We have come to the conclusion that most of these works do constitute external development works as defined in Section 2(g). In respect of certain items, the respondents may not be entitled to charge

EDC finally. However, there is nothing to establish that even if the costs of these items are to be deducted the final EDC will be less than the tentative EDC. In that view of the matter, there is no question of relieving the petitioners from their obligation to pay the tentative EDC.

81. Mr. Gulati submitted a statement culled out from the affidavits filed by the respondents to indicate how the EDC has been computed. According to him, the total cost of external development works as per the notification dated 25.05.2011 is Rs.10530.29 crores. He contended that the respondents had inflated EDC to the extent of 62.33 per cent. For instance, according to him, an amount of about Rs.5,000 crores was wrongly added as EDC towards the cost of administrative and unforeseen charges, cost of maintenance and energy charges, escalation costs towards maintenance and energy charges and cost of excess land under the head “Roads”, although a large part of the land was not used for external development works to a large extent and development of such roads. He further submitted that even the cost of land does not fall within external development works. We will now deal with each of these items.

82. Firstly, Mr. Gulati submitted that the cost of land upon which the external development works are to be carried out cannot be included in EDC. Relying upon the judgment of the Supreme Court in *Larsen & Toubro vs. State of Karnataka, (2014) 1 SCC 708, Paras 69 and 70*, he submitted that land does not fall within the term “works” referred to in Section 5 of

the Act. He submitted that EDC and cost of land are separately referred to and, therefore, the cost of land cannot be included in EDC.

83. "External development work" is defined in Section 2(g). It is an inclusive definition. It includes sewerage, drains, roads, electrical works, solid management and disposal, slaughter houses, colleges, hospitals, stadium, sports complex, fire station, grid station, etc. The question is whether the cost of land must be included in the cost of the external development works. We have no doubt that it must.

All inputs required for providing external development works also constitute and are an integral part of the external development works. What the colonizer is required to and undertakes to pay under Section 3(3)(a)(ii) is the "development charges" in respect of external development works as defined in Section 2(g). Thus, whether land falls within the terms "works" or not is irrelevant. If the external development work requires land, the cost of the land must be included in the development charge. Section 2(g) merely indicates what constitutes developments works. The "cost" of the external development works is not defined.

It would be totally illogical to hold that if any of the external development works requires or have required the use of land, the cost of the land would not be included in the development charges of the external development works. If drains are to be put up over land or underground, land is required. To provide the drains labour is also required. If

the contention on behalf of the petitioners is upheld, the cost of labour to provide drains must also be excluded. All the external development works referred to in the inclusive definition contained in Section 2(g) require or may require the use of land. Colleges, hospitals, sports complexes, fire stations are built upon land. The infrastructure for electrical works are embedded in the land. Clearer still is the inclusion of roads in Section 2(g). If there is no land, there would be no roads. At least to a large extent, all roads are not on bridges and roads cannot be on bridges alone. And bridges are held up by supports which in turn are constructed upon and embedded in the land beneath. If the petitioners' contention is correct, who then pays for the land upon which the roads are constructed. This would be so in respect of all external development works. The cost of land would understandably be a major component of the EDC.

84. The reliance upon Section 5 is unfounded. Section 5(1) reads as under:-

> "5. Cost of Development Works-(1) The colonizer shall deposit thirty per centum of the amount realised, from time to time, by him, from the plot-holders within a period of ten days of its realisation in a separate account to be maintained in a scheduled bank. This amount shall only be utilised by him towards meeting the cost of internal development works in the colony. After the internal development works of the colony have been completed to the satisfaction of the Director, the coloniser shall be at liberty to withdraw the balance amount. The remaining seventy per centum of the said amount shall be deemed to have been retained by the coloniser, *inter-alia*, to meet the cost of land and external development works."

85. Learned counsel appearing on behalf of the petitioners emphasised the concluding words in sub-section (1) of Section 5: "……. cost of land and external development works" to submit that the cost of land is different from the cost of external development works.

86. These words must be read in the context of Section 5(1). Section 5(1) requires the colonizers to deposit 30 per cent of the amount realised from the plot holders in a separate account to be utilized towards meeting the cost of internal development works. It further provides that if the internal development works are completed, a colonizer would be at liberty to withdraw the balance amount. Lastly, sub-section (1) provides that the remaining 70% of the amount shall be deemed to have been retained "by the colonizer" *inter alia* to meet the cost of land and external development works. The cost of land and the external development works referred to in the concluding part of Section 5(1) are the costs incurred by the colonizer itself for the land on the one hand and external development works on the other. In other words, the deeming provision is with respect to the cost of land purchased by the developer. "Land" referred to in Section 5(1) is not the land upon which the external development works are carried out. Section 5(1), therefore, is entirely irrelevant to the present point raised on behalf of the petitioners.

87. Mr. Gulati then submitted that 104 acres of land which formed part of the sector roads had been handed over free of cost by the petitioners till 25.05.2011. Despite the

same, the calculations referred only to 37.975 acres. He submitted that the cost of the balance 77 acres has been wrongly included in the EDC. The cost attributable to this 77 acres of land ought not to be included in the cost of EDC.

88. Mr. Lokesh Sinhal fairly agreed that if the additional land had been handed over free, the petitioners would be entitled to credit for the same. We do not express any opinion as to the extent of the land handed over by the petitioners free cost. We only accept Mr. Lokesh Sinhal's statement that the cost of land handed over free of cost by the petitioners would not be considered as a part of the EDC.

89. Mr. Gulati then contended that the total cost of the land has been taken as Rs.2806.896 crores. This amount was arrived at by considering the total land requirement of 3101.645 acres. Out of this, 1630.64 acres was considered to be required for building roads and bridges. He submitted that in fact the land actually acquired for roads was only 1169.98 acres. Further, out of this 199.90 acres was released from acquisition under Section 48 of the Land Acquisition Act, 1894, by a notification dated 26.08.2010. An award was pronounced only for 970 acres. Further still, out of this 970 acres, the land actually used for roads is only 561 acres as allegedly 408.44 acres had been illegally diverted as marginal land. Mr. Gulati submitted that the respondents had, therefore, included the land in the EDC calculations which had neither been acquired nor was being used for external development works.

90. We will assume that to date the entire land as proposed has not been acquired. Even if the land is not acquired, it would make no difference whatsoever to the liability of the petitioners to pay the tentative EDC under the agreement. The agreement to pay the tentative EDC was not dependent upon the land actually being acquired or the external development works actually having been executed. It is possible that further land would be acquired in future. It is possible that it may not be acquired at all. What we are concerned with today is the tentative EDC under the agreement. The amounts paid would be subject to adjustments at the final stage when the EDC is determined finally. It is only at that stage that it would be possible to know the exact area of the land that has been acquired and the amount paid in respect thereof. The petitioners, therefore, cannot be absolved of their liability to pay tentative EDC in the beginning on this ground. Similarly, nor can the petitioners be relieved from their liability to pay the tentative EDC on the ground that respondents have taken a higher amount into consideration as the value of land than that paid by them for the same in respect of acquisition. These are issues of fact which must be raised when the final EDC is to be determined.

91. Mr. Gulati submitted that the EDC has been calculated by including a sum of Rs.1202.55 cores towards the cost of maintenance and energy charges. He submitted that these expenses are *de-hors* the power vested in the respondents under Section 2(g) of the Act. The cost of maintenance and

energy charges, according to him, do not constitute external development work as defined in Section 2(g). Relying upon the judgment of the Supreme Court in *J.H. Wadia vs. Board of Trustees, Port of Mumbai, (2004) 3 SCC 214*, paras 14, 16 and 19, he submitted that the State ought not to be allowed to be a profiteer.

92. As Mr. Gulati pointed out, maintenance and energy charges are not defined in the Act. It is necessary, therefore, to interpret the provisions of the Act to determine whether they may be included. The external development works are carried out from time to time. They cannot be ignored and neglected once they are carried out. They must be maintained, preserved and protected. The cost of maintenance and energy charges are an integral part of the cost incurred in respect of the external development works. If the external development works are not maintained, they would deteriorate rapidly. More important, the preservation and maintenance of the external development works must be ensured even during the course of the execution thereof. In other words, they must be protected, preserved and maintained throughout at least till the completion thereof. Such works are an inherent part of the external development works themselves. Thus, even assuming that once the external development works are completed, maintenance and energy charges in respect thereof cannot form a part of EDC, such costs undoubtedly form a part of the EDC at least in so far as they relate up to the stage of the completion of a particular external development work.

93. Mr. Gulati then submitted that the external development works had not even been undertaken till 2011 and, therefore, the recovery towards the cost of maintenance and energy charges of non-existent works is illusory and sham.

94. As it is pointed out earlier, what we are really concerned with in this case is the liability to pay the tentative EDC as per the agreement. We have already held that the EDC could be calculated in advance. Thus, even if the external development works have not been completed or taken up, the respondents were entitled to demand and recover the tentative EDC. It follows, therefore, that the maintenance and energy charges, which we have held are part of the EDC, can also be recovered. The final liability would be determined subsequently. This would entail consideration of several highly disputed facts including on accounts between the parties. It is not possible especially at this stage to speculate in this regard. We, in any event, are not inclined to speculate in favour of the petitioners, who seek to wriggle out of their contractual obligations on grounds which are a mere afterthought.

95. We are not inclined at this stage to consider as to whether the rate at which the cost of maintenance and the cost of energy has been considered is too high. It is not necessary to do so at this stage. That exercise must be undertaken at the final determination of the EDC.

96. Mr. Gulati submitted that maintenance and energy costs have been added on an *ad hoc* basis ranging between 30 per cent to 50 per cent of the estimated cost of works and that such a high percentage is unprecedented and not supported by any law, rule or guidelines.

97. This argument suffers the same infirmity. Firstly, it is an afterthought only with a view to the petitioners' avoiding their contractual liability. Secondly, the petitioners never objected to the quantum of the tentative EDC payable under the agreement. It is only when the time came for payment that they had started raising these objections. There is no reason or warrant for assisting the petitioners in avoiding their contractual obligations. Moreover, it is not possible at this stage, especially in these proceedings, to determine the amount that ought to be allocated towards maintenance.

98. Mr. Gulati submitted that addition of administrative charges and charges towards unforeseen expenses as well as price escalation is without jurisdiction and is also contrary to law and the agreement. He submitted that at every stage the respondents had increased the cost of external development works by adding administrative charges, price escalation and unforeseen charges at the rate of 49 per cent. He submitted that the respondents had illegally added 25 per cent as administrative charges towards the cost of grid sub-stations. There is also, he stated, an addition on account of an alleged increase in cost due to density increase and increase in FAR.

He contended that administrative charges are in the nature of tax and can be charged only if supported by statute.

99. Firstly, the administrative charges are certainly a part of EDC. They relate to the cost on account of administrative work done pertaining to the external development works. If it is established that the administrative expenses were in respect of and relatable to external development works, they are an inherent part of the EDC for they are costs, charges and expenses incurred for carrying out the external development works. Price escalation, in any event, is a part of the EDC, if the escalation is in respect of costs pertaining to the external development works. It does not change the nature of the cost, if the original cost is part of the EDC. It is axiomatic that an escalation thereof is equally a part of the EDC.

100. Whether the quantum of administrative cost and escalation pertains to the external development works or not and whether the quantum thereof is justified or not are issues of fact which must be determined later. The very nature of the charge and the very nature of the work make it impossible for the respondents to determine at this stage the cost that would be incurred by them finally and charged accordingly. The colonizers and developers were obviously well aware of the same. It is for this reason that till the finalization of accounts an *ad hoc* or tentative amount had been determined. The developers had agreed to the same. It is too late in the day for them to avoid their responsibility at this stage.

101. Mr. Gulati submitted that in EDC the respondents have also included the cost of grid sub-station expenses. He submitted that a grid sub-station falls within major infrastructure projects and not under the external development works. He further submitted that HUDA had sought a double recovery in this respect. It was contended that DHBVN/HVPNL continue to demand the share of cost for these sub-stations even before the release of electric load for the colonies being developed by the petitioners on the one hand and HUDA also seeks to recover the charges for the same on the other. The petitioners, therefore, are being made to pay twice over for the same facility.

102. The submission is not well founded. As Mr. Sinhal rightly pointed out, a grid sub-station does not fall within the definition of “major infrastructure projects” in Section 2(jj) of the Act. Section 2(jj) defines major infrastructure projects to include major power facilities. A grid sub-station is not a major power facility. It, therefore, falls within the definition of external development works in Section 2(g). Section 2(g), in fact, expressly includes “grid sub/station”. There is no doubt, therefore, that grid sub-station falls within Section 2(g) and not in Section 2(jj).

103. Mr. Gulati, however, submitted that despite the same DHBVN/HVPNL continue to demand the payment of the grid sub-station expenses from the developers. In that event, it is for the petitioners to adopt appropriate proceedings against such a demand. The petitioners cannot refuse to pay the amounts

which are rightly due to the respondents on account of grid sub-station expenses.

104. The expenses for the metro train, however, do not fall within the definition of external development works in Section 2(g). They fall within Section 2(jj) which expressly includes transport.

105. There are two questions of considerable importance which we have kept open. The first is as to when the liability to pay EDC ends. The Second concerns the numerator while calculating EDC i.e. the entire area to be taken into consideration while determining the EDC. The petitioners contended that the respondents are themselves not certain about the same.

106. We intend keeping both the questions open for more than one reason. Firstly, it is not relevant while deciding the issue that was raised *viz*. the petitioners' liability to pay the tentative EDC. This question can and must appropriately be decided while determining the final EDC. The case is not such that if the petitioners' case is accepted their liability to pay the tentative EDC would be affected. In other words, there is nothing to suggest that the final EDC would be less than the tentative EDC payable after giving credit for the tentative EDC already paid with accretions thereto.

107. The learned counsel appearing on behalf of the respondents was unable to indicate with certainty when the final EDC in respect of a particular developer is to be

computed. He *stated* that in some cases the final amount has already been determined and that if the same is paid together with interest and penalty, the respondents would treat the matter as settled. That still does not answer the question.

108. There, it is contended, is uncertainty as to the total area in respect whereof the external development works are concerned. The petitioners contended that the respondents have taken different stands at different places regarding the area in respect to which proportionate share of EDC of each developer is to be determined. They stated that the respondents have, at various stages, contended that the external development works are executed keeping in view the needs of the whole of the town. In other words, the respondents have contended that cost is divided by the total area of the town proposed to be developed. In other places, the respondents have stated that the external development works are provided keeping in view the needs of the area inhabited. The respondents have contended that while fixing the proportionate cost of EDC, the expenditure likely to be incurred on the total area of the town is considered. The petitioners have also contended that there is no certainty as to the charge at which the external development works are to be calculated.

109. These difficulties and uncertainties are expressed only to wriggle out of the obligation to pay the tentative EDC. No enquiries in this regard were made by the petitioners when they entered into the agreements. They entered into the agreements with open eyes. They derived full benefits under

the agreement by furnishing the undertakings. They were only required to pay the tentative EDC in view of the undertaking. It is not open to them to avoid these obligations by raising such issues at this stage. They are bound to pay the tentative EDC as agreed upon. If the wrong parameters are taken into consideration in the final calculation of the EDC, the petitioners are at liberty to challenge the same. There is nothing to suggest that the amounts stipulated in the agreement are so skewed on account of patently incorrect parameters that the amount of EDC already paid would be sufficient to cover the external development works to be implemented even in future.

110. The contention on behalf of the petitioners is that the term “periphery” used in Section 2(g) is not defined in the Act or in the rules. They contended that the word “periphery” or “periphery of or outside colony/area for the benefit of the colony/area” indicate that the words “outside colony/area” are not important and the important words that fall for consideration are “for the benefit of the colonies/areas”. They submitted that the proportionate EDC should be worked out in relation only to the neighbouring area. The question, however, then would be what is the neighbouring area. The respondents, as we mentioned earlier, contend that the entire area would be the town. We leave this issue open. The same would be relevant not at this stage while considering the petitioners’ liability to pay the tentative EDC but when the final EDC is computed.

111. Having said that one thing is clear. The term “periphery” cannot possibly mean an area immediately proximate to the outer boundaries of the colonies. The EDC must be in

respect of all external development works which are relatable to the colonies. The suggestion that the external development works would only include those works which are immediately outside the boundaries of the colonies is unsustainable. There cannot possibly be a college abutting every colony. Nor can there be a hospital abutting every colony. There certainly cannot be a sports complex immediately outside every colony.

112. Keeping this in mind, it cannot be said with any degree of certainty that the tentative EDC would be less than the final EDC that is determined. The onus to establish the same even *prima facie* and for the limited purpose of avoiding the liability to pay the tentative EDC as agreed must rest heavily upon the petitioners. The onus must be upon the petitioners for they entered into the agreement with open eyes and without any demur or protest as to the quantum of the tentative EDC payable by them.

113. We, therefore, leave these issues open to be decided at the final taking of accounts on the EDC with liberty to the petitioners to challenge the same. As and when the respondents determine the final EDC, it would be open to the developers to raise all contentions including as to the stage at which the computation of their share of EDC is to take place. Similarly, we must leave the issue of the numerator open at this stage. Several questions arise including as to how the EDC is to be distributed/ apportioned between those liable to pay it. Who is liable to pay/contribute? Where is the boundary-line to be drawn? How is it proposed to be ultimately apportioned? It has been averred on behalf of the respondents that EDC is liable

to be paid in proportion to the area of the colonizer and the total weighted area of the town. The question then is what is the total weighted area of the town.

114. The determination of the final EDC payable is still to take place. Even assuming that there is uncertainty in their mind regarding these two issues, it would not make any difference to the petitioners' liability to pay the tentative EDC under the agreement. They obviously must have made their own calculations, enquiries and projections. They, in any event, ought to have done so. It is, in fact, difficult to believe that they would not have done so. It is not open then to them at this stage to contend on this ground that they are not liable to pay the tentative EDC.

115. The petitioners contended that the respondents have a large amount of unutilized EDC with them and that they, therefore, ought not to be permitted to recover any further EDC.

116. This argument ought not to be accepted for two reasons. Firstly, the respondents, as we have repeatedly stated, were entitled to insist upon the entire tentative EDC being paid in advance. Having agreed to pay the same, it is not open to the petitioners to raise this contention. This contention is a mere afterthought and an attempt to wriggle out of the obligation to pay the tentative EDC as per the agreement.

Secondly, various colonizers have paid various amounts. The defaults are also of varying amounts. Some of the colonizers may have paid the entire amount in advance. There

is no justification to, in effect, confer a benefit upon a defaulter by permitting him to avoid his contractual liability because others have paid certain amounts. The defaulters are not entitled to take the benefit of those who have honoured their obligations either fully or in part. They are not concerned with those payments. That would be discriminatory and unfair in the extreme to those who have honoured their obligations. We see no reason to put the parties who opted for the instalments on a different footing which is what we would be doing if we were to accept the petitioners' contentions. That would be unfair to the developers who paid the amount in a lumpsum.

117. Mr. Aashish Chopra submitted that invocation of the bank guarantee is illegal and contrary to the terms thereof. He submitted that the respondents are not entitled to invoke the guarantee on the ground of a breach of the said contract including for non-payment of the EDC as stipulated therein. In support of his contention, he relied upon paragraph-2 of the guarantee which reads as under:-

> "(2) That the bank further irrevocably guarantees and undertakes that if the Owner/Colonizer commits any defaults in observance of any of the terms and conditions of this guarantee, the Bank shall on demand and without any demur pay to the Government a sum of Rs.2,50,00,000/- (Rupees Two crores Fifty lacs only) loss. The decision of Government as to whether the Owner/Colonizer has failed and neglected to observe any of the terms and conditions of this guarantee and as to the amount payable by the bank to the government hereunder shall be final and binding on the bank."

He submitted that the bank undertook to pay the respondents only if the owner/colonizer commits any default in observing the terms and conditions of the guarantee. He submitted that the respondents are, therefore, not entitled to invoke the

guarantee in the event of default in the observance of the terms and conditions of the agreement.

118. We entirely agree that a guarantee must be read strictly. However, the construction placed on the guarantee on behalf of the petitioners is contrary to the terms of the guarantee. The error arises on reading Clause (2) in isolation. The guarantee must be read as a whole, giving it commercial efficacy rather than rendering it unworkable. The guarantee is given by the banks in favour of the respondents, though given at the request of the owners/colonizers i.e. the petitioners. There is no question of the owners/colonizers committing a breach of the terms of the guarantee itself. To read it in the manner suggested by the petitioners would render Clause (2) and the words “this guarantee” therein otiose. The term “guarantee” in Clause (2) refers to the guarantee given by the owners/colonizers as referred to in the guarantee issued by the bank. The recital to the guarantee refers to the Director General, Town and Country Planning having announced a policy for recovery of EDC and interest dues from the colonizers in case of default in payment of the scheduled instalments and further states that the owners/colonizers concerned in view thereof had agreed to furnish a bank guarantee equal to 25 per cent of the EDC in respect of the external development works. It is clear from this recital that the guarantee was issued to secure the payment of the EDC which the owners/colonizers had agreed to pay. A view to the contrary would denude the guarantee of any commercial sense or efficacy. It is clear from this that the words “this guarantee” in Clause (2) refer to the guarantee

inter alia to pay the EDC as per the agreement. This is clearer still from the opening part of Clause (1), which reads as under:-

> "1) In consideration of the Director agreeing to grant license to the owner/colonizer to setup the Group Housing Colony on the above mentioned and subject to fulfillment of all the conditions laid down in Rule – 11 of the Haryana Development and Regulation of Urban Areas Rules, 1976 by the owner/colonizer, hereby covenants as follows:-
>
> …. …… …… …… …… …… …… …. …."

To reiterate, there is no question of the owners/colonizers committing any default in the observance of the terms and conditions of the bank guarantee for the guarantee has been issued not by the owners/colonizers but by the bank. Clearly, therefore, the words "this guarantee" refer to the guarantees furnished by the owners/colonizers to the respondents one of which is the undertaking to pay the EDC. The banks are, therefore, bound and liable to honour the guarantee in the event of the owners/colonizers not paying the EDC.

119. It would be convenient at this stage to note the statement on behalf of all the petitioners before us that this litigation is being prosecuted not for the benefit of the colonizers/developers but for the benefit of the purchasers of the premises from them. The petitioners as developers/colonizers are entitled to recover from them the external development charges paid by the petitioners to the respondents. Learned counsel appearing on behalf of the developers agreed and undertook to credit the accounts of the purchasers of the premises from them with interest on the EDC, if any, recovered from them. They further stated that they would not charge the purchasers EDC unless and until they pay the same. They also stated that if any EDC is refunded to them

at any stage, they would in turn hand the same over to the flat purchasers.

120. In the circumstances, the petitions are dismissed but subject to the observations in this judgment.

The applications for leave to appeal to the Supreme Court are rejected.

Interim relief(s), if any, shall continue up to and including 29.02.2016, but with the following modification. The respondents shall be entitled to invoke the bank guarantees forthwith, but shall not be entitled to receive any amounts thereunder up to and including 31.03.2016.

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

15.12.2015
parkash*

(TEJINDER SINGH DHINDSA)
JUDGE

Note: Whether reportable: YES