IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1325 of 1999

**M/s. China International Water &
Electric Corporation ---------- Plaintiff**

Versus

**Pakistan Water & Power
Development Authority (WAPDA)----------Defendant**

Dates of hearing:	**11.01.2017, 24.01.2017, 08.02.2017, 22.02.2017 & 22.03.2017.**
Date of Judgment:	**12.06.2017.**
Plaintiff:	**Through Mr. Muhammad Amin Bandukda, Advocate.**
Defendant:	**Through Mr. Badar Alam, Advocate.**

J U D G M E N T

Muhammad Junaid Ghaffar, J. This is a Suit in respect of an Award passed by the learned Sole Arbitrator dated 23.07.1999 and through this Judgment the objections raised on behalf of Defendant under Sections 30 and 33 of the Arbitration Act, 1940 against the validity of the said Award are being decided.

2. Precisely, the facts as stated appear to be that a Tender was floated by Pakistan Water and Power Development Authority **(Defendant)** for the construction of Rato Dero Pump Station **(Project),** wherein, the bid of China International Water & Electric Corporation **(Plaintiff)** was accepted. The contract price was Rs.108,668,800/- and the period of contract was 15 months from 28.06.1996 to 28.09.1997. After the Award of the Contract, some dispute arose between the Plaintiff and Defendant and for the present purposes it is only the dispute regarding running Bill No.5 dated 31.01.1997, and therefore, the facts are confined to that

extent only. The said running bill was verified by the Engineer on 08.03.1997 but payment was not made within the required period, therefore, the dispute arose. Thereafter the Plaintiff on 04.07.1997 filed an Application under Section 20 of the Arbitration Act, 1940, which was registered as Suit No.875/1997 and the same was decided vide order dated 21.10.1997 and the matter was referred to the learned Sole Arbitrator. Subsequently the Award was passed against which objections were filed by the Plaintiff as well as the Defendant. The said objections were decided by the learned Single Judge of this Court in this Suit vide Judgment dated 01.06.2005 and though the validity of the Award in favour of the Plaintiff was accepted but it was held that the Award was passed on an invalid Reference dated 21.10.1997, therefore, the Arbitrator had no jurisdiction to decide the dispute and pass the Award. The said order was challenged by the Plaintiff through High Court Appeal No.173/2005 and vide Order dated 26.03.2009, the Judgment of the learned Single judge was set-side and the matter was remanded for decision afresh after taking into consideration the objections raised by the Defendant in its Application under Section 30 of the Arbitration Act, 1940. The Defendant being aggrieved preferred a Civil Appeal No.133-K/2009 before the Honourable Supreme Court, which was dismissed vide Order dated 03.09.2012 and the order of Appellate Court was upheld. Under these circumstances, the matter is now before this Court for deciding the objections of the Defendant against the said Award only.

3. The learned Counsel appearing on behalf of the Defendant has contended that the Interim Payment Certificate ("**IPC**") regarding running Bill No.5 was certified by the Consultant on 08.03.1997 and was delivered on the same date, whereas, the payment was required to be made within 45 days as provided in Conditions of Contract ("**COC**") Part-II, Clause 60(5)(a). He has further submitted that such period stood extended for further 60 days in terms of Clause-69(1)(d) of the COC and the consequence thereof is that if the payment is not made within 45 + 60 days then the Plaintiff was entitled to terminate the contract; but only after giving 14 days prior notice, which per learned Counsel was never issued and considered. He has further contended that for

calculation of the period of 45 days and thereafter 60 days, the date of the IPC is to be excluded, however, the learned Sole Arbitrator has not taken into consideration such factual position. According to the Defendant, 45 days expired on 22.04.1997 and thereafter the 60 days' period was to end on 21.06.1997 and 21.06.1997 was a declared local holiday in view of Urs of Hazrat Shah Abdul Lateef Bhitai being 14th Safar and the next date, which is 22.06.1997, was Sunday. Whereas, the cheque dispatched on 20.06.1997 was received by the Plaintiff on 23.06.1997, which was encashed on 24.06.1997, therefore, there was no default on the part of the Defendant. He has further contended that without prejudice to this, the Plaintiff never complied with the terms of COC by issuing a proper legal notice for the alleged termination of the Contract and giving a 14 days' time to the Defendant, and therefore, all such acts done by the Plaintiff including stoppage of work etc. was in violation of the Contract for which the Plaintiff is not entitled for any of the relief(s) so granted in the Award. According to the learned Counsel even if the matter was referred for Arbitration as per the Contract, the work should not have been stopped; rather should have been continued, however the Plaintiff had no intention to carry out the second part of the Contract, which apparently was of less profit percentage, and therefore, they made out this unjustified reason for the alleged termination. Learned Counsel has further contended that the learned Arbitrator has not appreciated the material placed before him including the WAPDA Manual, which provides for the terms of payment and its procedure, whereas, the established practice, whereby, the Plaintiff used to collect their cheques on the due date, has not been considered and rather ignored without any plausible justification. Per learned Counsel it is a settled proposition that while calculating the limitation period first day is to be excluded and for that learned Counsel has also referred to Section 9 of the General Clauses Act 1897. Learned Counsel has also raised an objection that various payments including damages have been awarded to the Plaintiff by the learned Sole Arbitrator, however, there is no certification to all these payments as required under the Contract, and therefore, non-certification by the Engineer, is in violation of Clause 65(8) of the COC, hence invalid. Per learned Counsel

learned Sole Arbitrator while granting various payments, including damages has also failed to consider the material facts as well as the evidence on record and has in fact passed his Award on presumption, which is impermissible in law. In the circumstances, learned Counsel has prayed to set-aside the Award in favour of the Defendant. In support of his contention he has relied upon the cases reported as PLD 1959 Daaca 551 *(Dhirendra Nath Datta Roy and others v. Sundhindra Chandra Chakraborti),* 2002 CLD 1071 *(Shaukat Ali Mian v. Trust Leasing Corporation Ltd. through Chief Executive and 4 others)*, AIR 1952 Travancore-Cochin 181 *(Krishnan Neelakandhan v. Kerala Gilt Edged Security Life Assurance Co., Ltd. and others),* AIR 1954 S.C 236 *(Chatturbhuj Vithaldas Jasani v. Moreshwar parashram and others)*, AIR (23) 1947 Madras 122 *(Hairoon Bibi v. The United India Life Insurance Co. Ltd., Madras),* 2001 YLR 2191 *(China International Water and Electric Corporation and another v. Pakistan Water and Power Development Authority and another)*, AIR 1965 Orissa 71 *(Padma Charan Mohapatra v. Superintendent of Police, cum Taxing authority of Phulbani),* AIR 1953 Madras 602 *(In re Messrs N.M. Husain & Co. by Janab S.D. Ranguwalla)*, 2011 CLD 995 (Kar) *(Messrs Shahi Textiles and 3 others v. Askari bank Limited through President),* 1996 SCMR 1646 *(Muhamad Aslam and another v. Muhammad Amin),* 2002 SCMR 1903 *(Messrs Tribal Friends Co. v. Province of Balochistan),* AIR 1957 Madhya Bharat 83 *(Indore Iron and Steel Registered Stock-holders Association Ltd. Indore v. State of Madhya Bharat and others),* AIR 1957 Madhya Bharat 90 (DB) *(W.P Horsburgh and another v. Chandroji Sambajirao and another),* AIR 1989 SC 1553 *(K. Saraswathy alias K. Kalpana (dead) by LRs., v. P.S.S. Somasundaram Chettiar),* PLD 1969 Karachi 176 *(Sarfaraz Khan v. Muhammad Abdul Rauf),* PLD 1983 Quetta 36 *(Messrs Mahmood Ahmed & Sons v. M.A. Marker),* AIR 1954 SC 429 *(Commr. Of Income tax, Bombay South, Bombay v. Messrs Ogale Glass Works Ltd., Ogale Wadi),* AIR 1936 Patna 96 *(Deo Narain Singh v. Mt. Lila Kuer),* PLD 1977 SC 237 *(Brooke Bond (Pakistan) Ltd. v. Conciliator appointed by the Government of Sindh and 6 others),* PLD 1978 Karachi 585 (DB) *(Messrs Jaffer Bros. Ltd. v. Islamic Republic of Pakistan and another),* PLD 1974 Karachi 155 (DB) *(Pakistan through Secretary, Ministry of Industires v. Massrs Asian Associated Agencies),* AIR 1999 SC 2262 *(Grid Corporation of Orissa Ltd. and another v. Balasore Technical School),* 1991 CLC 66 (DB) (Kar.) *(Province of Sindh and 4 others v. Waseem Construction Co.),* 1988 CLC 430 (Kar.) *(Messrs*

Orient Builders v. the Chief Engineer Highways and another), PLD 1999 Karachi 112 *(Ghee Corporation of Pakistan (Pvt.) Limited v. Broken Hill Proprietary (Pvt.) Limited v. Broken Hill Proprietary Company Limited through their Local Agents),* 1992 SCMR 65 *(M/s. Awan Industries Ltd. v. The Executive Engineer, Lined Channel Division and another).*

4. On the other, learned Counsel for the Plaintiff at the very outset has raised an objection to the effect that this Court is not sitting in Appeal against the Award and is not required to fish latent errors. Per learned Counsel it is only the misconduct of the learned Sole Arbitrator, which can be looked into but even if a different conclusion is to be arrived at, even then, the reasoning of the learned Sole Arbitrator cannot be interfered with. Learned Counsel has contended that in the first round vide Judgment dated 01.06.2005 all the points on merits were upheld in favour of the Plaintiff and there can be no exception to such finding. He has further contended that the first day could not have been excluded as it remained practice between the parties to include the first day while calculating the limitation, and therefore, the last date according to the Plaintiff was 20.06.1997. Whereas, 21.06.1997 was not a Federal Government holiday, therefore, no benefit can be taken by the Defendant, being a Federal Government Entity. Learned Counsel has further contended that since the cheque was not received by 20.06.1997, therefore, in terms of Clause 69(1)(d) of the COC, the Plaintiff was within its rights to terminate the Contract and for such purposes the intimation given to the Defendant was a valid Legal Notice as the same also stands approved by the findings of the learned Sole Arbitrator. Per learned Counsel the Award of the learned Sole Arbitrator has given all the reasoning, and therefore, it is unexceptionable and must not be interfered with. In support of his contention he has relied upon the cases reported as PLD 2011 Supreme Court 506 *(Federation of Pakistan through Secretary, Ministry of Food, Islamabad and others v. Messrs Joint Venture Kocks K.G/Rist),* PLD 2006 Supreme Court 169 *(Mian Corporation through Managing Partner v. Messrs Lever Brothers of Pakistan Ltd. through General Sales Manager, Karachi),* PLD 1996 Supreme Court 108 *(M/s. Joint Venture KG/Rist through D.P. Giesler G.M Bongard Strasse 3, 4000, Disseldorf-30, Federal Republic of Germany, C/o 15-Shah Charagh Chambers, Lahore and 2 others v. Federation of*

Pakistan, through Secretary Food, Agricultural & Coop: and another), 2014 CLC 1519 *(Managing Director, Karachi Fish Harbour Authority v. Messrs Hussain (Pvt.) Ltd.,* 2016 MLD 506 (Sindh*) (Messrs Port Services (Pvt.) Ltd. v. Port Qasim Authority),* 2001 CLD 289 *(Messrs Alpha Insurance Co. Limited v. Messrs Ch. Nizam Din & sons and another),* 2013 CLD 1438 *(Communication and Works Department, Azad Government of the State of Jammu and Kashmir through Chief Engineer EEAP AJK v. Messrs Design and Engineering System and 4 others),* 2001 MLD 99 (Karachi) *(The Federation of Pakistan, Chambers of Commerce and Industry, Karachi v. Messrs Al-Farooq Builders),* PLD 1998 Karachi 79 *(Turner Morrison Garahams Group of Companies, London v. Rice Export Corporation Pakistan Ltd.),* PLD 2014 Lahore 424 *(Fauji Foundation through General Manager (Engineering) v. Mesrs Chanan Din and sons through Attorney and others),* 1999 MLD 2617 (Karachi) *Messrs Ghee Corporation of Pakistan Ltd. v. Messrs KUOK Oils and Grains (Pvt.) Ltd. through Local Agents M/s. Tradeswift),* PLD 1995 Karachi 301 *(Kashmir Corporation Ltd. v. Pakistan International Airlines),* 2004 SCMR 590 *(President of Islamic Republic of Pakistan v. Syed Tasneem Hussain Naqvi and others),* PLD 2003 Supreme Court 301 *(Pakistan Steel Mills Corporation, Karachi v. Messrs Mustafa Sons (PVT.) Ltd. Karachi),* PLD 1982 Quetta 52 *(Province of Baluchistan and another v. Malik Haji Gul Hassan)*, 1990 MLD 261 (Karachi) *(Messrs Design Group of Pakistan v. Clifton Cantonment Board),* 1980 SCMR 394 *(Haji Mushtaq Ahmad v. Mst. Hajra Bi and another),* PLD 1974 Karachi 155 *(Pakistan Through Secretary, Ministry of Industries v. Massrs Asian Auspicated Agencies)* 2014 SCMR 1268 *(A. Qutubuddin Khan v. CHEC Millwala Dredging Co. (Pvt.) Limited)*

5. I have heard both the learned Counsel and perused the record. First I would like to deal with the objection raised by the learned Counsel for the Plaintiff that this Court cannot set-aside an Award on the ground that a different conclusion can be drawn. To this, I am of the view that there is no cavil and it is settled law that while hearing objections to the Award under Section 30 and 33 of the Arbitration Act, 1940 this Court does not sit as a Court of appeal nor it is required to undertake reappraisal of evidence recorded by the Arbitrator in order to discover the error or infirmity in the award. However, there is an exception to this rule as well. If the error or infirmity in the award rendering it invalid is appearing on the face of the award and is discoverable by reading the award

itself, then the same can be looked into for either setting aside or modifying it. It can also be interfered with in certain exceptional circumstances when the finding of the Arbitrator is not based on the evidence on record Reference may be made to the case reported as ***Joint Venture KG/Rist v. Federation of Pakistan***-**PLD 1996 SC 108**, ***Ghee Corporation of Pakistan (Pvt.) Limited v. Broken Hill Proprietary Company Limited***-**PLD 1999 Karachi 112**) and ***J.F.C. Gollaher v. Samad Khan*** (**1993 MLD 726**).

6. In the case of ***Allah Din & Company V. Trading Corporation of Pakistan*** **(2006 SCMR 614),** the Hon'ble Supreme Court has been pleased to observe as under;

> ....The learned Division Bench in the impugned judgment had aptly rejected the above claim on the ground that compensation for loss of goodwill or reputation is generally not awarded, particularly in the absence of tangible evidence showing additional loss and further that since the purchaser was already awarded Rs. 1 million by the arbitrator as compensation for the anticipated loss of profit further compensation on account of loss of goodwill and reputation was not justified. We find ourselves in agreement with the reasoning of the learned Division Bench. The learned counsel appearing for the purchaser was unable to show any discussion by the arbitrator in the award regarding the loss suffered by the purchaser on account of reputation or goodwill. Apart from a bare claim of the purchaser, the learned counsel could not even refer to any evidence produced by the purchaser before the arbitrator on this issue. The finding of the arbitrator on the issue reproduced above indicates the absence of such evidence as he had awarded compensation on the item simply on the ground that the purchaser was not questioned on behalf of the Food Department on the issue. Such failure by the department does not go to prove the loss caused to the purchaser. It was the burden to the purchaser to have produced independent evidence of the damage caused to his reputation and goodwill on account of non-performance of the contract by the Food Department. Bald statement of the petitioner, without more, that he had suffered loss on this account was not sufficient to establish the claim. In this view of the matter the purchaser was rightly denied damages for loss of goodwill and reputation.
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> **6. The contention of the learned counsel for the purchaser that the Court is not entitled to disagree with the findings of the arbitrator is without force. It is true that the trial Court does not sit in appeal from the finding of the arbitrator but at the same time the Court is empowered to reverse the finding of the arbitrator on any issue if it does not find support from the evidence. The very incorporation of section 26-A of the Arbitration Act requiring the arbitrator to furnish reasons for his finding was to enable the Court to examine the soundness of the reasons. As already held the arbitrator in the case before us had granted damages for loss of reputation and goodwill without there being any evidence to that effect. The Court were, therefore, justified in denying this claim to the purchaser.**

7. Similarly in the case of ***IBAD & Co v. Government of Pakistan*** **(PLD 1981 Karachi 236)** a learned Single Judge of this Court has been pleased to hold as under;

> 9. The third challenge of learned counsel for the defendant was that it was a case of no evidence. As observed earlier, the contention was that admittedly this was a case of damages but no evidence was adduced by the plaintiffs for proving any damage suffered by them. Counsel, in the circumstances, urged that the record be perused by the Court to determine whether there was evidence before the arbitrator that the plaintiff had suffered the damages which had been awarded by the Arbitrator. *To the extent that where there is an allegation that the award is based on no evidence, the Court can, even in a case of non-speaking award, peruse the record including the evidence while considering the objections/application under sections 30 and 33 of the Arbitration Act, 1940 the contention of learned counsel is correct. And if the Court on such perusal finds the award is based on no evidence, will be lawfully exercising jurisdiction in setting aside the award* . . . . . However, it is also settled law that insufficiency of evidence or that on the evidence adduced before the arbitration the Court would have reach a different conclusion is not a ground for setting aside or interfering with the award. Keeping these principles of mind, I have perused the record of the arbitration proceedings in this case.

8. Even otherwise, in this matter the crux of the dispute is regarding interpretation of contract document and the period of limitation as to whether the cheque was issued within time and further that whether issuance of a cheque would amount to making of payment within the period of limitation or not. It further requires to be interpreted that whether the cheque, which was issued within the period of limitation but was encashed thereafter, would amount to discharge of liability within time or not. This is a pure legal question, which has been decided by learned Sole Arbitrator and merely for the fact and reasoning so advanced on behalf of the Plaintiff that ordinarily the Court must not interfere in the Award, which is given on the basis of appraisal of evidence, I am not inclined to agree with it as in my view this case is an exception inasmuch as it is to be looked into that whether inference drawn by the learned Sole Arbitrator is legal or otherwise. In fact this is not a case wherein only on appraisal of evidence some finding of fact is given, which ordinarily is not to be disturbed by the Court while hearing objections to the award; but a case wherein primarily a legal view has been taken by the learned Sole Arbitrator for passing of award in favor of the plaintiff. In such view of the matter, this Court needs to appraise the findings of learned Sole Arbitrator in this regard. Reliance in this regard may be placed

on the case of ***Province of Sindh v. Waseem Construction Co***. (**1991 CLC 66**) wherein a learned Division Bench of this Court has been pleased to hold that when the provisions of a *contract document* have not been properly appreciated by the Arbitrator, then it is a case of an error apparent on the face of the award, and therefore, can be interfered with.

9. Though the facts have already been stated hereinabove; but for recapitulating, the dispute appears to be in respect IPC No.5, which was certified by the Engineer on 08.03.1997. The period of 45 days after excluding 08.03.1997 would have ended on 22.04.1997 and further grace period of 60 days again excluding 22.04.1997 would have ended on 21.06.1997. Whereas, if 08.03.1997 is included then the period of 45 days would have ended on 21.04.1997 and similarly the period of 60 days if 22.04.1997 is included would have ended on 20.06.1997. The learned Sole Arbitrator had framed the following consent Issues available at Page-7:-

I)	Whether the statement of claim was filed in these proceedings is covered by the reference made to the Sole Arbitrator and if so to what extent?
II)	Whether the statement of claim as filed is maintainable particularly in view of clause 67 of the COC and if so to what extent?
III)	Whether the claimants were justified in invoking clause 69 of the COC and if so to what extent and effect?
IV)	Whether the claimants notice dated 21st June 1997 terminating the contract R.T.D-1 is contractually valid under the provision of clause 69(1) of COC?
IV)-(V)	Whether the claimants are entitled to the sum of Rs.8,48,79,270/- as damages or any other amount due under the contract?
V)	What the Award should be?

10. Insofar as Issues No. I & II are concerned no further deliberation is required inasmuch on the basis of Order dated 26.3.2009 passed in HCA No. 173/2005 in the first round of

litigation, it is only the objections of the Defendant, which are to be dealt with and decided; and therefore, both these Issues need not be discussed and decided.

11. Insofar as Issues No. III & IV are concerned these Issues are crucial Issues and if the answer to these Issues is given in favour of the Defendant then there would be no need to give any finding on Issues No. V & VI. As discussed hereinabove, the opinion through this Judgment revolves around above Issues No. III & IV and precisely it is to the effect that whether the first day is to be included or not; and secondly whether the Plaintiff was justified in terminating the Contract. Insofar as Issues No. III & IV are concerned the relevant finding of the learned Sole Arbitrator is as under:-

> "20. On the interpretation of clauses 60 & 69 COC, both the parties seem to be of the same view. The only difference is about the method of computation of the period. Clause 60(I)(a) provides that the Engineer can approve or amend the AIP and when the Engineer has determined the amount due to the contractor he shall issue to the employer and the contractor a certificate called Interim Payment Certificate certifying amount due to the contractor therefore on certification the amount becomes due to the contractor. Such interim payment certificates are proof of the amount due as certified by the Engineer. In sub-clause 5(a) payment is to be made within 45 days of such certificate being delivered to the employer. Under clause 69 as amended by Part II if the employer fails to pay the amount due under any certificate of the Engineer within 60 days after the same shall have become due under the terms of the contract the contractor shall be entitled to terminate his employment under the contract after giving 14 days prior notice to the employer.
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> 21. The next question is whether the payment through cheque was made within the situated time. Admittedly the payment has been made through cheque dated 20th June, 1997. The Learned Counsel for the claimants has referred to the meaning of the word payment as defined in (I). the Lexicon by P Ramanath Aiyar 1997 edition as discharge of an obligation by delivery of money or its equivalent and is generally made with the assent of both parties to the contract (2). In Black Law dictionary, it has been defined as "In a more restricted legal sense, payment is the performance of the duty, promise or obligation or discharge of a debtor liability by the delivery of money." (3) In Ballantine's Law Dictionary "payment of cheque has been defined as:-
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> > "The act of the drawee bank in handing over money the amount in which the cheque is drawn, to a payee or endorse….accepted unconditionally by the payee or endorsee."
> > Reference has also been made to Negotiable Instrument Act by Bhashayam & Adiga (1997 Ed) Pagits Law of Banking (10th Ed) and AIR Cal 1994 459 (Borojender Coomar Banerji V. Shrish Chandra Chterjee).
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> Relying on these definitions the Learned Counsel for the claimants has contended that as the cheque deposited in the account of the claimants which was credited on 24th June 1997 this should be treated as the date of payment. The Learned Counsel for the respondents contended that the date when the cheque was issued should be the date of payment. Reliance has been made on

M/s Mahmood Ahmed Vs. M. A. Marker, PLD 1983 Quetta 36. In this judgment reliance has been placed on Sarfraz Khan PLD 1969 Karachi 176 and Peoples Sheet Mills, PLD 1991 Karachi 379. All the referred judgments are under the provisions of West Pakistan Urban Rent Restriction Ordinance. It was observed that cheque received by landlord on dates mentioned on cheque the date of payment of rent shall be deemed to be made on such date (as mentioned on the cheque). In Sarfraz Khan case it was observed that if the deposit is made in the Controller office by cheque and payment on the cheque is received by the Controller then the tenant cannot be deemed to be in default unless the deposit of cheque itself was made after expiry of the date prescribed in the Controller's orders. Therefore it is the date of deposit of cheque which is relevant for determining the date of payment. In the present case the date on which cheque was received by the claimants should be the date for payment provided it has been deposited and encashed the next day. The date of cheque itself may not be treated as date for payment of the cheque. In this regard I would refer to a very exhaustive judgment of the Supreme Court of India – Renu Sagar Power Company Vs. General Electric Company and another AIR 1985 SC 1156. It was observed that the bill or promissory note can never go in the discharge of debts unless it is a part of the contract that it should be so. In this regard reference was made to Negotiable Instruments Act, by Beshayam and Adiga 14th Edition where principle has been summarized that:-

"It is always a question of intention of parties whether a bill or promissory note or cheque taken on account of a debt, operates as an absolute discharge of the debts, or only as conditional payment of it. Generally speaking a bill or note can never go in discharge of a debt un less it is a part of the contract that it should be so, for, a mere promise to pay, cannot be regarded as an effective payment. This rule may also be based on a general principle of law that one simply executor contract does not ordinarily extinguish another, the presumption in such cases is that the bill or promissory note is taken only as a conditional payment."

Reference can also be made to Commissioner of Income Tax Vs. Kameshwar Singh of Darbhanga AIR 1933 PC 108 where it was observed that, "a debtor who gives his creditor a promissory note for the sum he owes can in no sense be said to pay his creditor, he merely gives him a document of voucher of debt possessing certain legal attributes. In Keshar Mill Co. Limited Vs. Commissioner of Income Tax AIR 1950 Bombay 166 where cheques and Hundis were issued in payment of price for goods sold and delivered, the question arose whether such cheques amounted to payment resulting unconditional discharge of liability to pay the price. Chagla Chief Justice observed, "now I should have thought that ordinarily the payment of debt by cheque never results in the discharge of the debtor. A cheque merely represents an order by the drawer of the cheque to his banker to pay the amount to the person named in the cheque and till that payment is made, the debt is not discharged. Therefore, the sending of the cheque as it said before ordinarily is not unconditional discharge of the liability." It was further observed that there may be arrangement between a creditor and a debtor that the receipt of a cheque or hundi not being honoured the creditor would have no right to sue on the original cause of action but only on the cheque or hundi." Apply these principles to the facts of the case, I find that there was no such arrangement between parties that issuance, dispatch or receipt of cheque would amount to payment. Since cheque was received on 23rd June 1977 which was honoured on 24th June 1997 payment shall be deemed to have been made on 24th June 1997. In view of the above discussion the respondent have failed to pay AIP 5 within the time stipulated by the contract. The claimants were entitled to invoke clause 69 and seek remedies provided therein. The notice dated 21.6.1997 was valid."

12. The learned Sole Arbitrator has come to the conclusion that the first date was to be included, and therefore, the last date of

payment of IPC No.5 was 20.06.1997, whereas, though the cheque was issued on 20.06.1997 but the same was received on 23.06.1997 and was encashed on the next date i.e. 24.06.1997, and therefore, admittedly there was a default on the part of the Defendant. After coming to this conclusion, the learned Sole Arbitrator has further held that the Notice dated 21.06.1997 was a valid Legal Notice in terms of COC. In coming to this conclusion i.e. to include the first day as well as to hold that the payment made through a cheque is only valid when the cheque is encahsed and not from the date of issuance of cheque, reliance has been placed on three Judgments from the Indian jurisdiction i.e. **AIR 1985 Supreme Court 1156** ***(Renusagar Power Co. Ltd., v. General Electric Company and another)*** **AIR 1933 PC 108** ***(Commissioner of Income-tax Behar and Orissa v. Kameshwar Singh of Darbhanga)*** and **AIR 1950 Bombay 166** ***(Keshav Mills Co. Ltd. v. Commissioner of Income-tax, Bombay Mofussil)***. With respect I may observe that none of these three Judgments have any relevant facts as compared to instant matter. The Judgment in the case of ***Reno Sagar Power Company (supra)*** has perhaps been wrongly cited in this matter as it relates to the Foreign Arbitration Award and perhaps to my understanding has not dealt with the controversy regarding validity of the payment from the date of cheque or its encashment. The other two judgments have also dealt with altogether different set of facts regarding the levy of Income Tax and the inclusion of the payment or Promissory Note received in lieu of a debt. I may observe that the accounting systems vary from an Assessee to Assessee, whereas, even otherwise they are of no relevance inasmuch as Income Tax Law at the relevant time has not been discussed by the learned Sole Arbitrator viz-a-viz the terms of Contract between the parties. The relevant portion in the Conditions of the Contract was stipulated in Clause-60(5) of Conditions of Contract Part-II, which reads as under:-

"Interim Payment Certificates

60. (1) (a) The Contractor Shall submit …….
(b) …….
(c) …….

"Materials for the Permanent Works

(2) …….
(a) …….
(b) …….
(c) …….
(d) …….
(e) ……..
(f) ……

Lump Sums

(3) …….

Retention Money

(4) (a) …….
(b) …….
(c) …….

Payments and Interest

(5) (a) Payment to the Contractor of the amount due under each of Interim Payment Certificate issued by Engineer shall be made by the Employer ***within 45 days of such certificate*** being delivered to the Employer.

(b) In the event of nonpayment within the said period, interest shall accrue to the Contractor at a rate of ten percent per annum upon all sums unpaid from the date upon which the same should have been paid."

"69. (1) In the event of the Employer:
(a) failing to pay to the Contractor the amount due under any certificate of the Engineer within thirty days after the same shall have become due under the terms of the Contract, subject to any deduction that the Employer is entitled to make under the Contract, or
(b) Interfering with or obstructing or refusing any required approval to the issue of any such certificate, or
(c) becoming bankrupt or, being a company, going into liquidation, other than for the purpose of a scheme of reconstruction or amalgamation, or
(d) giving formal notice to the Contractor that for unforeseen reasons, due to economic dislocation, it is impossible for him to continue to meet his contractual obligations the Contractor shall be entitled to terminate his employment under the Contract after giving fourteen days prior written notice to the Employer, with a copy to the Engineer."

13. Clause-60(5)(a) provides that payment to the Contractor of the amount under each of the IPC's duly issued by the Engineer shall be made by the Employer (Defendant) within 45 days of such Certificate being delivered to the Employer, whereas sub-clause (b)

provides for accrual of interest to the Contractor, at the rate of 10%. Similarly Clause-69 of COC deals with default of Employer (Defendant) and it provides that in the event of the Employer failing to pay to the Contractor the amount due under any Certificate of the Engineer within 30 days (admittedly extended to 60 days), after the same shall have become due under the terms of the Contract subject to any deduction that the Employer is entitled to make under the Contract; and Clause (d) thereof provides that the Contractor shall be entitled to terminate his employment under the Contract after giving 14 days prior notice to the Employer with a copy to the Engineer. In nutshell, the first part i.e. Clause-60 provides a period of 45 days after issuance of IPC, and the same stands extended to a further 60 days and there appears to be no dispute that the total number of days is 105 in the aggregate. The only question is that how the word "***within***" is to be interpreted i.e. whether the date on which IPC was delivered is to be included or excluded. In the case of M/s. ***Shahi Textile (supra)*** a learned Division Bench of this Court had the occasion to interpret more or less similar and analogous provision as contained in Section 10(2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001, which reads as under:-

> "The defendant shall file the application for leave to defend ***within thirty days of the date of first service*** by any one of the modes laid down in subsection (5) of section 9...."

14. The aforesaid provision provides that the Defendant shall file the application for leave to defend ***within 30 days*** of the date of first service by any one of the modes laid down in Subsection (5) of Section 9 of FIO, 2001. The case before the learned Division Bench was to the effect that how this 30 days period is to be calculated or counted and whether or not the date of service would be included or excluded in counting the limitation. The terms of the contract in this matter between the parties is more or less on the same footing, and therefore, I am of the considered view that the interpretation arrived at by the learned Division Bench in the aforesaid case squarely applies to this case as well. The learned Division Bench also had the occasion of taking assistance from Section 9 of the

General Clauses Act 1897. The relevant finding of the learned Division Bench is as under:-

> As is clear from the foregoing, whenever the word "from" is used, the first day has to be excluded. This does not however mean that if the word "from" is not used; the first day has to be included. It is to be noted that there is no requirement under the General Clauses Act that the use of the word "of' would cause the first day to be included. Whether or not the first day is to be included or excluded would therefore depend on the statutory provisions and the context in which they appear. On a consideration of the 2001 Ordinance, we are of the view that the correct interpretation of section 10(2) is that the day on which the summons is served is to be excluded. As correctly pointed out by learned counsel for the appellants, the summons must be in a specific form, and that form uses the word "from". The requirement that the summons be in the form specified is expressly stated in section 9(5). Thus, section 10(2) becomes applicable if and only if, service is affected by a summons in the form prescribed by section 9(5), and in one of the modes specified in that provision. **It would in our view, be most inequitable to serve a summons on the defendant which informs him that he may file his leave to defend application within 30 days "from" service, and then compute the period of limitation on a basis that includes the day of service. A conjoint reading of these provisions therefore leads to the conclusion that the day of service of summons should be excluded from consideration. Secondly, and more generally, "a court ought not to put such an interpretation upon a statute of limitation by implication and inference as may have a penalizing effect unless the court is forced to do so by irresistible force of the language used"; Makhanlal Roy Pramanick and others v Pramathanath Basu and others AIR 1953 Cal 50, 52. In our view, this principle can be usefully applied to the present situation. There is nothing expressly stated in section 10(2) that would require the inclusion of the day of service while computing the period of limitation, and inasmuch as such inclusion can have a penalizing effect by debarring the defendant from appearing in the suit, the preferable interpretation would be that the day of service should be excluded. Unless the relevant statutory language is clear, and admits to only one meaning, provisions relating to limitation should be construed in favour of preserving the rights of parties, whether that be the right of a plaintiff to sue or the right of a defendant to appear in the suit and defend himself. There is nothing in section 10(2) that points in one direction alone. Accordingly, the proper interpretation of this provision is as noted above.**
>
> 7. We therefore conclude, with respect, that even under the 2001 Ordinance, **the day of service of summons (through whichever mode is first effective) is to be excluded from consideration**. On that basis, since summons in the present case was served through publication on 27-1-2010, the last day of limitation was 26-2-2010. That day was admittedly a holiday, and the first working day thereafter was 1-3-2010 on which date the leave to defend application was filed. Accordingly, it was within time, and the learned single Judge, with respect, erred materially in coming to the contrary conclusion. The leave to defend application ought therefore to have been heard and decided on its merits. Since this had not been done, the appeal had to be allowed and the matter remanded to the learned single Judge in terms as stated in our short order.

15. There is another provision, which is more or less similar in nature as provided in the Sindh Rented Premises Ordinance, 1979 i.e. Section 10 under the head "Payment of Rent". This provision has been interpreted by various decisions of this Court as well as by the Honourable Supreme Court. In my view the same is also relevant to adjudicate the controversy in hand. Section 10 of SRPO, 1979 reads as under:-

> "S. 10 Payment of rent.—(1) The rent shall, in the absence of any date fixed in this behalf by mutual agreement between the landlord and tenant, be paid not later than the tenth of the month next following the month for which it is due.
> (2) The rent shall, as far as may be, be paid to the landlord, who shall acknowledge receipt thereof in writing.
> (3) Where the landlord has refused or avoided to accept the rent, it may be sent to him by postal money order, be deposited with the Controller within whose jurisdiction the premises is situate.
> (4) The written acknowledgement, postal money order receipt or receipt of the Controller, as the case may be shall be produced and accepted in proof of the payment of the rent:
> Provided that nothing contained in this section shall apply in the case pending before the Controllers on the commencement of this Ordinance."

16. Though apparently one could say that there is no exact similarity of words in the aforesaid provisions under the SRPO, 1979 viz-a-viz the provisions of the Contract in dispute. However, since in this matter there is also one issue that as to whether a payment would be deemed to be made within time, if a cheque is issued within the limitation period or on the date on which the limitation expires and whether such tender of payment through a cheque would result in default or not. There is a series of judgments that in the context of Section 10 of SRPO, 1979, the tender of payment through a cheque on the last date as provided therein would amount to a payment within due date irrespective of the fact that it was encashed subsequently after such date had expired. If any authority is needed, one may refer to the cases of (***Messrs Mahmood Ahmad & sons v. M.A. Marker)*** reported in **PLD 1983 Quetta 36**, (***Sarfaraz Khan v. Muhammad Abdul Rauf)*** reported in **PLD 1969 Karachi 176** and ***(Messrs Peoples Steel Mills Ltd., Karachi v. Hafizuddin and 7 others)*** reported in **PLD 1981 Karachi 739**.

17. In the case of ***Muhammad Aslam & another v Muhammad Amin*** (**1996 SCMR 1646**), the Honourable Supreme Court had the

occasion to compute the period of 60 days and while doing so the date from which it was to be computed was excluded. The relevant finding reads as under:-

> "4. We have heard the learned counsel for the petitioners and have also gone through the cases cited in the impugned judgment of the High Court which fully support the view taken by the learned Single Judge. In all these cases, it has been held that the principle embodied in section 9 of General Clauses Act and section 12 (1) of Limitation Act namely, the date from which the period prescribed is reckoned is to be excluded, is a principle of equity which should generally be applied for interpreting/construing the decrees and orders of the Courts. Section 9 of General Clauses Act in its relevant aspect provides "In any Central Act ----------, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word 'from' ---------". This provision camp up for consideration in Puran Chand v Muhammad Din and others (AIR 1935 Lahore 291) wherein it was held by a Division Bench of Lahore High Court that General Clauses Act embodies a principle of equity which should be applied to decrees apart from Statutes and that the date from which the period specified in the decree was to be reckoned should be excluded. Again in Ramchandra Govind Unavne v. Laxman Savleram Ronghe (AIR 1938 Bombay 447), the Bombay High Court while construing a decree, dated 23rd January, 1936 directing the defendant to pay Rs.200 "within fifteen days frog, this day" held that if these words occurred in a statute, the first day would be excluded by virtue of section 9 of General Clauses Act and the fifteenth day would expire on 7th February. It was further observed that section 9 would not apply in terms as the words did not occur in a statute "but it is desirable for the sake of uniformity that the same interpretation should be given to an expression occurring in a judicial order as would be given to it in a statute, and I think, therefore, the expression 'fifteen days' would mean fifteen clear days; and that the date of making the order should be excluded". Similar view was taken by Dacca High Court in the case of Abdus Sattar and others v. Abdul Khaliq and others (1971 DLC 239) wherein it was held that from a bare reading of the provisions of section 9 of the General Clauses Act and section 12(1) of the Limitation Act; it appeared °that in computing the period prescribed in any order passed by' the Court, "the- date on which the order was passed shall have to be excluded. It was also observed that there have been a series of decisions for the view that the equitable principle contained in section 9 of General Clauses Act should ordinarily be applied to the construction of decrees and orders passed by the Courts unless there is something repugnant in the subject or context. Support for the view that in computing the period mentioned in the order, the date of. The order should be excluded was also drawn from Halsbury's Law of 'England 2nd Edition, Volume 32, p.138 which is reproduced hereunder:-
>
> > "When a period of time running from a given day or event to another day or event is prescribed by law or, fixed by contract and the question arises whether their computation is to be made inclusively or exclusively of the first mentioned or of the last mentioned day, regard must be had to the context and the purpose for which the computation has to be made. Where there is room for doubt, the enactment or instrument ought to be so construed as to effectuate and not to defeat the intention of Parliament or of the parties, as the case may be, expression such as ' from such a day' or 'until such a day' are equivocal since they do not make it clear whether the inclusion or the exclusion of the day named may be intended. As a general rule, however, the effect of defining a period in such a manner is to

> exclude the first day and to include in the last day. Both days must be included if the word 'inclusive' is added."
>
> Peshawar High Court in the case of Sher Muhammad and 6 others v. Gulfraz (1989 CLC 1344) also affirmed the aforenoted view. Learned counsel appearing for the petitioners was unable to cite any decision to the contrary nor did he dispute the factual position that if 8th of March, 1993 was excluded from computation of sixty days period, the deposit made on 8th May would be within time as 7th May happened to be Friday. He, however, sought to contend that the equatable principle relied upon by the learned Judge in the High Court could not justifiably be invoked in the instant case so as to exclude 8th of March because it was decided with the agreement of the parties that the period of sixty days would commence from the said date. This contention is not borne out froth the proceedings recorded and the order passed by the Court on 7-3-1993 which shows that it was directed/clarified by the Court that the period of sixty days would commence from 8-3-1993. In any case, it was a part of the Court's c order/decree. The learned Judge in the High Court was, therefore, right in holding that while computing the period of sixty days, 8th of March must be excluded in view of the settled legal position aforenoted.
>
> 5. Upshot of the above discussion is that there is no merit in these petitions, which are accordingly dismissed and the leave sought is refused."

19. In the case of (***Messrs Mahmood Ahmad & Sons v. M.A. marker)*** reported as **PLD 1983 Quetta 36**, the relevant finding reads as under:-

> "6. The next question which falls for determination is whether the rent had been paid on the specified date as mentioned in the order of Controller? The learned counsel for the respondent has stated that the payment would be considered from the date of receipts. It has not been disputed by the respondent that the cheques were delivered to the respondent on the dates mentioned in the cheques. If we accept the dates of the cheques, then the rent for the months of June 19.77 was paid in time. Similarly the rent for the month of April and May 1980 had been paid in time. The payments would be considered from the date of cheque as held in Commissioner of Income-tax, Bombay v. Messrs Ogal Glass Works Ltd. (A I R 1954 S C 429) it has been observed :-
>
> > "The position, therefore, is that in view of the matter there was, in the circumstances of this case, an implied agreement under which the cheques were accepted unconditionally as payment and on another view, even if the cheques were taken conditionally, the cheques not having been dishonoured but having been cashed the payment related back to the dates of receipt of the cheques and in law the dates of payments were the dates of the delivery of the cheques."

20. In the case of (***Messrs Peoples Steel Mills Ltd., Karachi v. Hafizuddin and 7 others)*** reported as **PLD 1981 Karachi 739**, the relevant finding reads as under:-

> "This Ordinance does allow payment of rent by cheque as between landlord and tenant as stated above but' does not Disallow such mode of payment under section 13 (6). In these, circumstances it can be said that in compliance of the tentative rent order if the payment of rent is made by the tenant by way of cheque and that is accepted and the cheque is honoured and no objection is raised then it is valid tender otherwise if the cheque is dishonoured or objection is raised to such mode of payment then the tender will not be considered as valid and the tenant will be liable for default. Presentation of cheque may be considered a valid payment in contractual liability but not in statutory liability as contemplated under section 13 (6) of the Ordinance."

21. In the case of (***Sarfaraz Khan v. Muhammad Abdul Rauf)*** reported as **PLD 1969 Karachi 176**, the relevant finding reads as under:-

> "The rule that tender should be in current coins or in currency notes rests on the old English decisions which were given at the time when tender of cheques was not the popular or universally recognised mode for discharge of liabilities. It will be noted, however, that with the passage of time, the Courts, both in England as well as in this sub-continent, evolved important exceptions to this rule. The question is, whether there is no scope to evolve any further exception to the rule now when it has become an established and universally recognised practice to discharge liabilities by tender of cheques. In my opinion, in the context of the modern conditions, it will be reasonable to hold that tender of cheque is a valid tender, unless the creditor expressly objects to such tender, or unless there is an express provision in the arrangement between the creditor and the debtor that the latter should discharge his liability only by tender of money in current coins or currency notes issued under the authority of some statute. In adopting this rule, I would venture to say that I am not departing from the rules which have been laid down from time to time by the Courts in England and in this sub-continent on the point under consideration. I feel that I am only extending the scope of the exceptions, which have been established by judicial consensus, to the present day conditions. If this view is taken of the question, then tender by the appellant of the arrears of rent and of the rent for August 1964, by cheque cannot be rejected as invalid tender, because it has not been shown that the landlord, in his dealings with the appellant, ever raised any express objection to payment of rent by cheque, nor has it been shown that the agreement between the parties required that tender of rent should be only in current coins or currency notes.
>
> 7. In the instant case, the question which really arises for decision is not whether the appellant made a legal tender of the arrears of rent due from, but whether the appellant made default in complying with the order of the Controller made under section 13(6) of the West Pakistan Urban Rent Restriction ordinance, 1959. In my view, if deposit is made in the Controller's office by cheque and payment en this cheque is received by the Controller, then the tenant cannot be deemed to be in default, unless the deposit of the cheque itself was made B after the expiry of the date prescribed in the Controller's order. This, I would venture to say, would be a correct and sensible approach to the question of valid or invalid payments of rent and arrears to the landlord or to the Controller under section 13(6) of the aforesaid Ordinance."

22. The Hon'ble Supreme Court in the case of ***Ibrahim Trust, Karachi V. Shaheen Freight Services*** **(P L D 2011 SC 331),** had

the occasion to examine a somewhat similar provision under the SRPO 1979 and so also the orders of the learned Rent Controller who had directed the tenant to deposit further monthly rent of every month on or before 10th of each calendar month. The precise question was to the effect that whether the order would stand complied with if Pay Order of the rent is furnished to the Court on 10th or on the date when such Pay Order is actually released and credited in the account of the landlord. The relevant observations of the Hon'ble Supreme Court are as under:-

> "10. We may also observe here that although there is no ambiguity to this legal position, but even if for argument sake, we examine the question of default qua striking off the defence of a tenant on the premises as claimed by the appellant, firstly, when two equally logical interpretations of a rent order, entailing penal consequences were possible, as may be in the instant case, then the one favourable to the subject was to be given preference i.e. no contemplation for payment of any advance rent was to be deduced from the language of such rent order to the prejudice of tenants, **secondly, as rightly held by learned Single Judge in Chambers of the High Court of Sindh in his impugned judgment dated 19-2-2010, deposit of pay orders in the Bank on the 10th of each month, under valid challans issued by the Nazarat office was due compliance of the rent orders by the tenants, irrespective of the fact when payment of such pay orders was collected or realized from the concerned Bank by its encashment."**

23. Similarly in the case reported as ***Khursheed Begum and others V. Inam-ur-Rehman Khan and others*** **(P L D 2009 Lahore 552)**, a learned Division Bench of Lahore High Court had the occasion to examine a situation that as to whether a payment made through a cheque could be treated as a valid payment on issuance of such cheque within the contemplation of Order 21 Rule 84 CPC. The relevant observations are as under:-

> 19. About the question raised by the Court auctioneer that the payment of 1/4 amount on the date of the auction could be received by him through cheque, though this has not been controverted by Mr. Kazmi, however, it may be held according to Order XXI, Rule 84, C.P.C. "On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent, on the amount of his purchase-money to the officer or other person conducting the sale and in default of such deposit, the property shall forthwith be re-sold." Thus it is mandatory provision that 1/4th should be deposited with the Court auctioneer and if not he is bound to re-sell the property forthwith; this conforms to the spirit of the law that quite steps and legal formalities are undertaken before the auction is conducted and if the successful bidder runs away and the auction remains unsuccessful on that count, again all the legal niceties have to be followed, which shall be an abuse of the process of law and the chance of re-sale there and then

> shall be gone and frustrated; it is in the above context that the law envisages a cash payment and even m otherwise when the law (the Code of Civil Procedure 1908) was enforced, the banking system as it is today, was not in place, therefore, the payment through cheque could not be conceived, however, because of the change circumstances, now a days it is a real risk and peril to carry huge money, thus the payment through cheques can be read into the provision as this shall not militate against the spirit of Order XXI, Rule 84, C.P.C, but the successful bidder along with the cheque should also establish by providing the latest Bank statement to the Court auctioneer that he has the requisite funds in the account from where the cheque is issued and if it is otherwise, the Court auctioneer in the light of the command of law should re-sell the property forthwith, otherwise the law for the resale shall be infringed; besides the consequences of Order XXI, Rule 71, C.P.C. shall get waste and frustrated.

24. In the case reported as ***K. Saraswathy alias K. Kalpana v P.S.S. Somasundaram Chettiar*** **(1990 MLD 413)**, the Honorable Supreme Court of India had the occasion to examine the deposit of amount in Court on certain directions, through cheque, and it was held that tender of cheque on the last day stipulated in the order of the Court, realized subsequently, would be a valid payment within time. The relevant observation reads as under;

> 5. It is contended before us on behalf of the appellant that the cheque for Rs.6;02,000 was tendered in Court on 29th May, 1980 and that it was duly honoured by the Bank and money was realised under the cheque, and therefore it must be taken that payment had been effected by the appellant on 29th May, 1980 within the time stipulated by this Court in its order dated 29th November, 1979. **In Commr. of Income-tax, Bombay South, Bombay v. Ogale Glass Works Ltd. Ogale Wadi, A I R 1954 S C 429 it was laid down by this Court that payment by cheque realised subsequently on the cheque being honoured and encashed relates back to the date of the receipt of the cheque, and in law the date of payment is the date of delivery of the cheque. Payment by cheque is an ordinary incident of present day life, whether commercial or private, and unless it is specifically mentioned that payment must be in cash there is no reason why payment by cheque should not be taken to be due payment if the cheque is subsequently encashed in the ordinary course.** There is nothing in the order of this Court providing that the deposit by the appellant was to be in cash. The terms of the order dated 29th November, 1979 are conclusive in this respect and it is the intent of that order which will determine whether payment by cheque within the period stipulated in that order was excluded as a mode in satisfaction of the terms of that order. The time for payment is governed by the order of this Court.
>
> 6. It is alleged on behalf of the respondent that there was no money on the date of delivery of the cheque to support payment of it and that it was subsequently when arrangements were made that the cheque was realised. Now, the High Court has not found that if the cheque was presented for encashment on the date it was delivered the cheque would not have been encashed. **There is nothing to suggest also that the cheque was not honoured in due course and that the Bank had at any time declined to honour it for want of funds in the ordinary course. In any event, there is nothing to suggest that, under the arrangements made for payment of the cheque, even if it had been encashed on the date it was delivered the cheque would not have been encashed. There is no finding by the High Court that on 29th May, 1980 the cheque would not**

> **have been realised.** That being so, the question whether the appellant had wrongly stated that her counsel had offered to pay cash to the High Court office on 29th May, 1980 ceases to be relevant. We also see no substance in the objection taken before the High Court that in the letter dated 29th May, 1980 addressed by counsel for the appellant forwarding the cheque for Rs.6,02,000 there was a request for the return of the cheque in case it was found that the appellant was entitled to the set-off claimed by her. The application of the appellant claiming adjustment was pending in Court, and no conclusion can be drawn against her on the ground that she had requested a return of the cheque in the event of the adjustment being allowed by the Court.
>
> 7. We are of the view that the conditions set forth in the order of this Court dated 29th November, 1979 in the facts and the circumstances of the case have been complied with by the appellant substantially and she is entitled to the benefit of that order.

25. The upshot of the above discussion is that the last date for payment of IPC No.5 duly certified by the Engineer on 8.3.1997 was **21.6.1997** and not **20.6.1997** as concluded by the learned Arbitrator. The 1st day i.e. 8.3.1997 is not to be included but is to be excluded for calculation of the total period of payment (45+60=105 days), and therefore, the payment could have been made by 21.6.1997, whereas, admittedly the cheque was duly issued on 20.6.1997 (the question of its delivery now being academic in view of the above discussion). The said cheque was accepted and encashed by the Plaintiff on 24.6.1997 without any obstacle and or delay by the Bank, therefore in view of the above discussion and precedents of various Courts, the date of payment will be deemed to be 20.6.1997 on which date the cheque was issued and was subsequently encashed. Therefore, there was no default on the part of Defendant in payment of IPC-5, and plaintiff had no cause of action to invoke or exercise the option of termination of Contract in terms of clause 60 and 69 of COC. Since I have come to a definite conclusion that payment made was within the period specified in the contract, therefore, there is no need to give any finding with regard to the issue that whether the notice issued by the plaintiff duly fulfilled the conditions of the contract or not. Accordingly the entire claim lodged on the basis of such alleged default falls on ground as the contract could not have been terminated for such alleged default; consequently no damages as claimed could have been granted or even considered. This conclusion responds to Issue Nos. III & IV, whereas, in view of this conclusion no further discussion is required in respect of remaining Issues. Accordingly

the objections raised by the defendant under Sections 30 & 33 of the Arbitration Act, 1940, are sustained and the impugned Award dated 23.07.1999 is hereby set aside.

26. Award is hereby set-aside.

Dated: 12.06.2017

JUDGE

Ayaz