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

**Date of Decision: 16<sup>th</sup> October, 2024**

+ W.P.(C) 4517/2023, CM APPL. 17295/2023

KINGSTON ENTERPRISES

.....Petitioner

Through: Mr. Prabhas Bajaj and Mr. Ankit Roy,  
Advocates.

versus

NBCC (INDIA) LTD. & ANR.

.....Respondents

Through: Mr. Kartik Nagarkatti, Advocate for  
R-1.  
Ms. Ira Singh, Advocate for  
Mr. Mukul Singh, CGSC for R-2.

**CORAM:**

**HON'BLE MR. JUSTICE SANJEEV NARULA**

**JUDGMENT**

**SANJEEV NARULA, J. (Oral):**

1. The Petitioner, a subcontractor engaged by NBCC (India) Limited/Respondent No. 1,<sup>1</sup> has approached this Court seeking a direction for the release of outstanding payments with interest, due for construction work carried out at the behest of the NBCC under a back-to-back contract arrangement. The Petitioner contends that both NBCC and Respondent No. 2, National Security Guard<sup>2</sup> (owner/ principal employer) have failed to release the payments owed to the Petitioner under the said contract, despite the completion of the project in accordance with the agreed terms. This case

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<sup>1</sup> "NBCC"

<sup>2</sup> "NSG"



raises significant questions regarding the applicability of the “pay-when-paid” clause, commonly seen in construction contracts, and its enforceability.

**Factual Background**

2. The facts leading to the initiation of the present proceedings are as follows:

2.1 A Memorandum of Understanding (MoU) dated 26<sup>th</sup> October, 2015 was executed between the President of India, through the DIG (Administration), Headquarters of NSG, and the NBCC (India), for the “*Construction of additional prefab structure for enhanced strength at the Regional Hub, Mumbai.*” Under the terms of the MoU, NBCC was tasked with managing and supervising the entire project on behalf of the NSG, acting as the principal contractor/ owner for the construction work.

2.2 In furtherance of this MoU, NBCC, on 31<sup>st</sup> August, 2015, issued a notice inviting tenders (NIT) from agencies and contractors that met the prescribed pre-qualifying criteria for the project titled “*Construction of additional pre-fab structures for providing accommodation (6 officers block, 26 AC block & 120 men’s barrack).*” The scope of work included the construction of large-scale prefabricated accommodations to meet the operational needs of the NSG. The Petitioner, a subcontractor, was selected by NBCC to execute the construction works under a back-to-back contract, wherein NBCC retained primary responsibility for the execution of the work while engaging subcontractors for on-ground execution.

2.3 Upon emerging as the successful bidder, the Petitioner was awarded the contract by NBCC through a Letter of Award (LoA) dated 5<sup>th</sup> November, 2015. This was followed by execution of a detailed agreement dated 5<sup>th</sup>



November, 2016,<sup>3</sup> which defined the scope of work, the contract price, and the general terms and conditions that would govern their contractual obligations.

2.4 The Petitioner is aggrieved by the fact that despite fulfilling their contractual obligations and completing the work to the satisfaction of NBCC, the payments due under the impugned agreement have been unjustifiably withheld. The Petitioner contends that NBCC, through various communications, has acknowledged the outstanding debt, and there is no genuine factual dispute regarding the Petitioner's entitlement to the payments. However, despite such acknowledgment, NBCC has failed to release the payment owed towards the Petitioner's Running Account (RA) bills.

2.5 In light of the above circumstances, the Petitioner has invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, 1950, seeking a writ of mandamus directing the Respondents to release the outstanding payment of INR 2,12,97,962/- along with interest calculated at 18% per annum from the date the payment became due, until the date of actual payment.

### **Petitioner's case**

3. Mr. Prabhas Bajaj, counsel for the Petitioner, makes the following submissions:

3.1 The Petitioner has duly completed the work as per the contractual terms stipulated. As a result, the Petitioner claims an unequivocal right to the payments due from NBCC, which have remained unpaid despite repeated requests and acknowledgment of the debt by the Respondent. The

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<sup>3</sup> "impugned agreement"



failure to release the payments, despite Petitioner's full compliance with the contractual terms, constitutes an arbitrary action and contractual breach.

3.2. Although the present matter stems from a contractual dispute, the Respondents, as instrumentalities of the State, falling within the purview of Article 12 of the Constitution of India, are constitutionally obligated to act in a fair, just, and reasonable manner, even in the realm of commercial dealings. It is contended that when a State entity engages in a contractual relationship, its actions must be assessed not only by the principles of contract law, but also through the lens of constitutional values, which demand fairness, transparency, and reasonableness in all transactions. In this regard, reliance is placed on the decisions of the Supreme Court in *GAIL v. Petrochemicals Corpn. Ltd.*<sup>4</sup> and *ABL International Ltd. v. Export Credit Guarantee Corp. of India Ltd.*<sup>5</sup>

3.3. The counter affidavit submitted by NBCC, along with the accompanying documents, unequivocally confirms that the amounts of INR 64,31,194.74/- and INR 88,47,080/- are admitted dues, leaving no room for dispute regarding these sums. Pertinently, reliance is placed on a communication dated 14<sup>th</sup> January, 2023, wherein NBCC explicitly acknowledged the outstanding payment of INR 88.47 lakhs, stating, “*our record on 31st December, 2022 shows a balance of Rs. 88.47 Lacs payable to you.*” Thus, while the original prayer sought the release of a total amount of INR 2,12,97,962/- along with interest, in view of the admissions made in NBCC's counter affidavit, the Petitioner has, for the time being, limited the relief sought to the amounts expressly admitted by NBCC. This categorical

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<sup>4</sup> (2023) 3 SCC 629.

<sup>5</sup> (2004) 3 SCC 533.



admission, coupled with the absence of any valid defence or contention, unequivocally places the obligation on the Respondents to discharge the admitted dues owed to the Petitioner.

3.4 Further, the grounds advanced in the counter affidavit for withholding the payments due to the Petitioner are legally unsustainable. The *inter se* dispute between NBCC and the NSG, along with any deductions that NSG may have made against the dues payable to NBCC, cannot serve as a valid justification for NBCC's failure to meet its contractual obligations towards the Petitioner. In such circumstances, the invocation of this Court's writ jurisdiction is both appropriate and necessary to compel the Respondents to fulfil their obligations under the impugned agreement.

#### **Respondents' Case**

4. Contrarily, Mr. Kartik Nagarkatti, counsel for Respondent No. 1, makes the following submissions:

4.1. The relief sought by the Petitioner pertains to the recovery of monetary dues arising from a contractual dispute, which is beyond the scope of a writ petition under Article 226 of the Constitution of India. Such disputes, involving complex questions of fact and law, require a detailed examination of evidence, which can only be appropriately adjudicated through a civil suit before a court of competent jurisdiction. The writ remedy is not intended to substitute for a civil court trial, particularly in cases involving enforcement of contractual rights.

4.2. The Petitioner has failed to disclose critical terms of the impugned agreement and has selectively referred to provisions that support their case. Specifically, Article 2 of the impugned agreement clearly stipulates that contractual obligations shall be strictly performed as per the terms and



conditions in the ‘Contract Documents’, which includes the Conditions of the Contract.<sup>6</sup> As per Clause 24.2 of the GCC, the Petitioner’s entitlement to payment is contingent upon NBCC receiving the requisite funds from the NSG. Since NSG is yet to remit the payments to NBCC, the Petitioner cannot, in law, seek a mandamus to compel the release of the dues.

4.3 The GCC forms an integral part of the impugned agreement, effectively indicating that the Petitioner is fully aware that NBCC is not obligated to release any payments to the Petitioner until the corresponding amounts are received from NSG. The Petitioner’s failure to disclose these critical aspects is an attempt to mislead the Court and undermines their claim for immediate payment.

4.4 The Petitioner is misconstruing the averments made in the counter affidavit. While the affidavit acknowledges an amount of INR 88,47,080/- as due, this sum is conditional upon NBCC first receiving the corresponding payment from NSG. Furthermore, the Petitioner’s assertion regarding the amount of INR 64,31,194.74/- is misplaced. This figure relates to liquidated damages unilaterally imposed by NSG on NBCC in an unrelated project in Kolkata. NSG has deducted this amount from the payments owed to NBCC, and NBCC has merely informed the Court of this situation. This cannot, in any manner, be construed as an admission of a debt owed to the Petitioner under the impugned agreement. Therefore, the Petitioner’s claim lacks legal or contractual foundation, and is based on a misunderstanding of the terms of the impugned agreement.

5. Ms. Ira Singh, counsel for Respondent No. 2, strongly opposes the petition, asserting that there is no privity of contract between the Petitioner

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<sup>6</sup> “GCC”



and NSG. She emphasizes that the counter affidavit filed by NSG specifically addresses the contractual relationship between NBCC and NSG, which is entirely independent of any claims raised by the Petitioner. Ms. Singh argues that the Petitioner's rights, if any, arise solely under the subcontract with NBCC, and NSG has no direct contractual obligation towards the Petitioner. In the absence of any privity of contract, the Petitioner cannot seek any relief or directions against NSG, as it would be legally untenable to impose obligations on a party with whom the Petitioner has no direct contractual relationship.

**Analysis and findings**

6. The contractual obligations between the Petitioner and NBCC are governed by the impugned agreement. Article 2.0 of the agreement outlines the key 'Contract Documents' that stipulate the detailed terms and conditions. These documents, including the Notice Inviting Tender (NIT), the General Conditions of Contract (GCC), and the Special Conditions of the Contract (SCC), among others, are clearly established as forming an integral part of the agreement as per Para 2.3.

7. The provisions of the GCC constitute an essential and binding component of the impugned agreement. The GCC *inter-alia* defines the rights and obligations of the parties including terms relating to payments, timelines, and other essential aspects of the contract. At this juncture, it would be appropriate to refer to Clause 1.0 (1) of the GCC, which defines the term "Owner/Client" as follows:

*"Owner/Client" means the Government, Organisation, Ministry, Department, Society, Cooperative, JV Entities (whether incorporated or unincorporated or registered as the case may be) etc. who has awarded the work/project to NBCC and/or appointed NBCC as Implementing/Executing*



*Agency/Project Manager and/or for whom NBCC is acting as an agent and on whose behalf NBCC is entering into the contract and getting the work executed.”*

8. This definition clarifies the structure of the contractual relationship between the parties, where the NSG is the “Owner/Client” and the NBCC acts as an intermediary entity responsible for executing the works on behalf of the NSG. The significance of this definition becomes apparent when considering the ‘back-to-back’ nature of the contractual obligations, particularly with regard to payments. This understanding further becomes evident from the payment clause stipulated in the GCC:

*“24.2 It is clearly agreed and understood by the Contractor that notwithstanding anything to the contrary that may be stated in the agreement between NBCC and the contractor; the contractor shall become entitled to payment only after NBCC has received the corresponding payment(s) from the client/ Owner for the work done by the contractor. Any delay in the release of payment by the client/ Owner to NBCC leading to a delay in the release the corresponding payment by NBCC to the contractor shall not entitle the contractor to any compensation/ interest from NBCC.”*

9. The term ‘Contractor’ in the impugned agreement and the GCC means the Petitioner. The ‘pay-when-paid’ clause in Clause 24.2 must be interpreted in conjunction with Clause 1.0(1). Together, these clauses establish a clear hierarchy of obligations: NBCC is contractually bound to pay the Petitioner only after it has received the corresponding payment from NSG, who is the ultimate owner and financier of the project. This layered contractual framework not only defines NSG’s overarching role in the payment process, but also clarifies that the risk of delayed payments by the NSG is effectively passed down to the Petitioner. Therefore, the Petitioner’s entitlement to payment is directly contingent upon NBCC receiving the corresponding payments from NSG. These provisions expressly bar the





Petitioner from seeking payment of dues or interest from NBCC in the event of NSG's failure to make timely payments. Therefore, while the payment(s) sought by the Petitioner may have been acknowledged by NBCC, Clause 24.2 precludes the Petitioner to insist for immediate release of these payments until the corresponding amounts have been received from NSG.

### **Case Law**

10. On the issue of back-to-back contracts, it is pertinent to note that both counsel failed to cite relevant judicial precedents that would assist this Court. Mr. Bajaj, appearing for the Petitioner, sought to rely on the judgment of the Supreme Court in *Surya Constructions v. State of U.P.*,<sup>7</sup> arguing that NBCC bears a contractual obligation to settle the outstanding dues owed to the Petitioner, especially considering that the amount payable remains undisputed. This judgment deals with the State's obligation to act fairly in fulfilling its contractual duties, particularly concerning monetary claims. However, since this judgment does not delve into the specific issue of back-to-back contracts—a critical feature of the present case, it is not of much help to the discussion in the present case.

11. The Court has independently reviewed caselaw related to back-to-back contracts, which are prevalent in large-scale infrastructure and construction projects. These contracts often tie the subcontractor's (such as the Petitioner's) obligations directly to the principal contractor's (NBCC's) receipt of payments from the principal employer or owner (in this case, NSG). Further analysis shows that disputes arising from back-to-back contracts frequently undergo scrutiny in arbitration proceedings under the Arbitration and Conciliation Act, 1996. In such cases, judicial review is

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<sup>7</sup> (2019) 16 SCC 794.



sought under Sections 34 and 37 of the Act, where courts have adopted a cautious and restrained approach. The Courts have consistently emphasised the need to respect the findings of arbitral tribunals, intervening only in exceptional circumstances, such as when the award is grossly unjust, patently illegal, or in violation of public policy. Therefore, while such jurisprudence provides valuable guidance, it must be acknowledged that these judgments predominantly reflect the principle of minimal judicial intervention in arbitration and do not, by themselves, undermine the enforceability of explicit ‘pay-when-paid’ clauses in commercial contracts.

12. For instance, this Court in *National Projects Construction Corporation Ltd. v. Harvinder Singh & Company*,<sup>8</sup> observed that back-to-back clauses should not be interpreted in a manner that denies the subcontractor payment for their work, merely because the contractor has not received payment from the owner/ principal employer. In the said case, HSCL (the subcontractor), *inter-alia* aggrieved by the non-payment of dues by NPCC (the contractor), had approached the Arbitration Tribunal seeking recovery of their dues. NPCC, placing reliance on the back-to-back clauses of the MoU and contract with HSCL, contended that NPCC’s agreement with COCNCOR (the owner) had been terminated, resulting in the extinguishment of NPCC’s liabilities towards HSCL. The Arbitration Tribunal rejected this submission and held that there was no privity of contract between CONCOR and HSCL, and that the liability to make payments to HSCL rested with NPCC. NPCC challenged the arbitral award before this Court, whereby the Single Judge made the following observations:

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<sup>8</sup> 2018 SCC OnLine Del 9573.



“15. The learned Arbitrator while interpreting the above clauses has noted that there is no privity of contract between the Contractor and CONCOR. The privity of contract is between the parties to the present proceedings. Work has been got executed at the instance of NPCC. In case there is any liability to pay it would be that of NPCC and not of CONCOR. The Award also holds that in case no amount is released by CONCOR and no action is taken by NPCC for realization of the amount, the Contractor cannot be without any remedy as he cannot approach CONCOR directly by filing appropriate judicial proceedings. It cannot be said that in such a situation the Contractor would be deprived of his amount which is admittedly due as per the contract and he would be remediless. The Award notes that interpretation of various clauses of the contract has to be a reasonable one. The Award further concludes that it would be the obligation of NPCC to pay the amount to the contractor and later, seek remedy against CONCOR.

16. Even otherwise a perusal of the terms shows that there is no provision which specifically states that in case of failure of CONCOR to release payments to NPCC which are legitimately due and payable, the liability of NPCC to release payments to the contractor gets extinguished. The above noted provisions, namely, clauses 22, 29 and 35 merely stress that the terms and conditions of the contract between NPC and CONCOR will apply back to back to the contractor. Specifically clause 29 which was stressed upon by the learned senior counsel for the NPCC merely states that payment when received by NPCC shall be released to the contractor within five working days. It is not implicit in this clause that in case the payment is not released by CONCOR for the work done, the contractor is not entitled to any payment.”

[Emphasis Supplied]

13. NPCC, thereafter, challenged the judgement of the Single Judge before the Division Bench, whereby, this Court *vide* order dated 23<sup>rd</sup> April, 2018 remarked as follows:

“24. We are in entire agreement with learned Sole Arbitrator, as well as with the learned Single Judge, that there was no privity of contract between the respondent and CONCOR. The various clauses, on which Mr. Bhambhani relies, merely stipulate that, out of the payment received by the appellant from CONCOR, the appellant was entitled to deduct its profit and commission, before making payment to the respondent. These clauses cannot be interpreted in such a way, as to disentitle the respondent to payment for work rendered by it, as instructed of the appellant and in accordance with the agreement



*between the appellant and the respondent, merely because the appellant did not receive payment from CONCOR. Any such interpretation would be grossly unjust, inequitable and against public policy, as it would amount to holding that the services rendered, and work done, by the respondent for the appellant, in terms of a bilateral contract duly drawn up between them, would have to be treated as rendered gratis, without any payment therefor. Such an interpretation, needless to say, cannot be adopted or accepted, by any court of law. The appellant may conceivably have its rights against CONCOR, which it would have to prosecute separately; the grievances of the appellant against CONCOR cannot, however, be allowed to spill over and engulf the respondent, leaving the respondent effectively in the lurch.”*

*[Emphasis Supplied]*

14. The Division Bench, in the aforementioned judgment, interpreted the clause regarding profit and deductions for subcontractors as unjust, particularly where it sought to deprive the subcontractor of payment for work rendered. However, in contrast, before us, Clause 24.1 of the GCC clearly outlines the back-to-back arrangement, expressly providing that the payment of the Petitioner’s dues is contingent upon the NBCC receiving corresponding payment from NSG. The explicit and unequivocal language of the provision makes the contingency abundantly clear, leaving no room for any other interpretation of the said clause.

15. In another case pertaining to back-to-back contracts, this Court in ***Gannon Dunkerley and Co. Ltd. v. Zillion Infraprojects Pvt. Ltd.***<sup>9</sup> explored the implications of such arrangements in the context of contracting and subcontracting parties. In the said case, the subcontractor invoked the arbitration clause of the contract, alleging that the contractor had failed to pay their bills, despite having received the corresponding payments from the owner/ principal employer. The contractor, referring to the MoU executed

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<sup>9</sup> 2023 SCC OnLine Del 4815.



with the subcontractor, contended that since the subcontract was executed on ‘back-to-back’ basis, the subcontractor’s bills would not be due for payment by the contractor until the same were paid by the owner. The Arbitration Tribunal rejected the said contention of the contractor, subsequent to which the contractor challenged the award before this Court. Examining the clauses of the MoU as well as the ‘back-to-back’ arrangement stipulated therein, this Court made the following observations:

*“41. It is seen that the expression ‘back-to-back’ is freely used by the Contractor to deflect is liability on to the PE. However, ‘back-to-back’, in the absence of a general legal definition, would have a certain meaning and connotation. Terms of the MOU dated 02.07.2011 must be seen, as to what extent MOU between Contractor and PE has been incorporated by reference. Clause 3 of the MOU dated 02.07.2011 says that all the terms of the Main Contract shall be applicable for the execution of works by the Sub-contractor. Clause 4 uses the expression ‘back-to-back’ basis, to state that all the terms of the Main Contract shall apply to the MOU between Contractor and Sub-contractor. Clause 6 says that the payments received from PE shall be passed on to the Sub-contractor by the Contractor. In Clause 10, it is stated that since the MOU is executed on ‘back-to-back’ basis, all labour licences shall be obtained by Sub-contractor and all liabilities pertaining to VAT shall be that of the Sub-contractor.*

*42. ‘Back-to-back’ obligations would only mean what has been incorporated by reference from the LOA into the MOU, is applicable to the parties to the MOU. No doubt, in terms of Clause 5 of the LOA, the bills raised by the Sub-contractor are subject to the certification of the Contractor's bills by the PE, but the Contractor has not claimed that the bills had been rejected by the PE. The only defence raised was that the bills were pending reconciliation by the PE and that the claims by the Sub-contractor were therefore premature. As noted above, the Contractor itself had claimed the amount under RA Bill-05, in its own notice, invoking arbitration against the PE.*

**43. Pendency of the bills with the PE for certification could be a ground for Contractor to defer payments to Sub-contractor, until certification is complete. This is a mechanism to be followed in the regular course during the execution of the works. However, once the parties are in a dispute, in relation to the bills claimed by the Subcontractor, Contractor cannot defer payments in perpetuity on the ground of the pendency of certification, when it has not otherwise disputed the correctness of the bills.”**



*[Emphasis Supplied]*

16. This Court, in the referenced case, held that while back-to-back contracts often stipulate that a subcontractor's payment is contingent upon the principal employer's payment to the contractor, this condition is enforceable only during the course of the contract. The Court further observed that contractors cannot indefinitely withhold payments to subcontractors solely due to non-receipt of funds from the owner, particularly when there is no dispute regarding the accuracy or certification of the subcontractor's bills. In that case, the subcontractor's dues hinged on certification by the owner, and not on the delay in actual payment. However, in the present case, the contractual clause specifically conditions NBCC's obligation to pay the Petitioner on the actual receipt of payment from NSG, making the scenario materially different. Here, the obligation to release payments is linked to the actual inflow of funds from the NSG, the principal employer, to NBCC, rather than mere certification.

17. Another key distinction between the judgments referenced above and the present case lies in the explicit clarity of the 'pay-when-paid' clause. In the cases noted above, the clauses were ambiguous, failing to definitively link the contractor's liability to pay the subcontractor with the receipt of payment from the principal employer. This lack of clarity in language allowed room for judicial interpretation, as seen in *NPCC v. HSCL*, where the Single Judge noted that the contract did not explicitly condition the contractor's liability on receiving payment from the owner. Such ambiguity led to a more flexible reading, where the courts could balance the contractor's obligation to pay. However, in the present case, the clause in question is unambiguous and explicitly makes NBCC's liability contingent



upon receiving payment from NSG. This precise wording leaves no room for interpretative flexibility, firmly fixing NBCC's obligation on actual payment by NSG.

18. On this issue, a recent judgment in *PSK Engineering Construction and Co. v. National Projects Construction Corporation Limited & Anr.*,<sup>10</sup> has come to the Court's notice. While this judgment is currently under challenge before a Division Bench, it provides valuable insight into the interpretation of a 'pay-when-paid' clause, identical to the one in the present contract. The clause under scrutiny in that case stipulated the following:

*"37.3 It is clearly agreed and understood by the Contractor that notwithstanding anything to the contrary that may be stated in the agreement between NPCC and the contractor, the contractor shall become entitled to payment only after NPCC has received the corresponding. payment(s) from the client/ Owner for the work done by the contractor. Any delay in the release of payment by the client/ Owner to NPCC leading to a delay in the release of the corresponding payment by NPCC to the contractor shall not entitle the contractor to any compensation/ interest from NPCC."*

19. This clause, which mirrors the one in the present case, unequivocally links the subcontractor's entitlement to payment to the principal contractor's receipt of payment from the owner. In *PSK Engineering*, the subcontractor sought a direction for both the contractor and the owner to release payments for work completed, while also challenging the validity of the 'pay-when-paid' clause on the grounds that it was arbitrary and violative of Article 14 of the Constitution of India. The Court, however, observed that the subcontractor had willingly entered into the agreement, fully aware of the payment terms stipulated in the 'pay-when-paid' clause, and had accepted this scheme of payment with full knowledge of its implications. Therefore,

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<sup>10</sup> 2024 SCC OnLine Del 998.



the subcontractor could not later challenge the very clause he had agreed to, under a writ petition. The Court further emphasized the binding nature of contracts, noting that when a party knowingly and willingly consents to a contract, they are legally bound by its terms unless the provisions are in direct conflict with statutory obligations or principles of natural justice. It must, however, be noted that *PSK Engineering* featured a significant distinction from the present case. In that instance, the contractor had disputed the amounts due to the subcontractor, citing deficiencies in their work that needed rectification. This dispute over the quality of work added a layer of complexity, and the Court, taking this into consideration, held that a writ petition was not the appropriate remedy for the recovery of dues. Instead, the subcontractor was advised to pursue a suit for recovery.

20. In the present case, while the factual circumstances differ in the sense that a part of the dues claimed by the Petitioner is undisputed, the overarching legal principle remains the same. The enforceability of the ‘pay-when-paid’ clause, as upheld in *PSK Engineering*, applies equally to the present dispute. The binding nature of this clause indicates that the subcontractor must wait until the owner has fulfilled its payment obligations to the contractor. This contractual arrangement, entered into voluntarily by the Petitioner, governs the relationship between the parties, and the Court cannot override this agreement, simply because one party now finds the terms unfavourable.

21. It is also important to emphasize that the Petitioner, in the present case, has not challenged the validity of the impugned ‘pay-when-paid’ clause, either on grounds of arbitrariness or unconscionability. The relief sought in this petition is strictly confined to the recovery of outstanding dues





from the Respondents. The Court's focus, therefore, remains on ensuring that the parties honour their contractual commitments within the framework established by the agreement, without imposing extraneous terms or conditions that are not part of the original contract.

22. In so far as the liability of NSG towards the Petitioner is concerned, it is imperative to refer to Paragraph No. 11 of the MoU dated 26<sup>th</sup> October, 2015, executed between NBCC and NSG, which stipulates as follows:

**“11. NO RESPONSIBILITY TO THE NSG**

*11.1 The NSG shall not be responsible or accountable to NBCC for the employees agents, technicians and labourer employed by NBCC who shall work on the project site and Its premises and NBCC shall be exclusively responsible for all such personnel engaged on the works for such matters as payment of salary, wages, bonus & compensation in the event of death and accident.*

*11.2 There shall be no contractual nexus or privity between the NSG and the Technicians, employees, engineers, architects labourers and contractors and such personnel shall not be the employees of the NSG and NSG shall not be liable in any way (employer – employees relationship legal and financial) to such personnel who shall be exclusive liability and responsibility of NBCC.”*

23. A plain reading of the aforesaid provision makes it amply clear that NSG is not, in any manner, liable to clear the outstanding dues of the Petitioner, given that the Petitioner has been deployed by NBCC, and that there is no privity of contract between the Petitioner and NSG. In this regard, the Supreme Court in *Ircon International Ltd. v. Vinay Heavy Equipments*,<sup>11</sup> has held that without a contractual provision making the owner liable to pay the subcontractor, the relationship between the owner and contractor, and between the contractor and subcontractor, remains distinct. Even ‘back-to-back’ liability clauses in the contract between the contractor and subcontractor do not bind the owner unless expressly agreed

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<sup>11</sup> (2015) 13 SCC 680.



to. Therefore, NSG is not responsible for the Petitioner's dues, which remain the liability of NBCC.

**Conclusion**

24. Judicial precedents consistently uphold the enforceability of 'pay-when-paid' clauses in back-to-back contracts, provided these clauses are clear and unambiguous. Courts only intervene where there is gross unfairness or ambiguity. In this case, the language of the 'pay-when-paid' clause leaves no room for interpretation: NBCC's obligation to pay the Petitioner is strictly contingent upon receiving payment from NSG.

25. Clause 24.2 of the GCC explicitly stipulates that NBCC's liability to pay the Petitioner arises on its receipt of funds from NSG. The NBCC, in its counter affidavit, acknowledges an outstanding sum of INR 88,47,080/-, but it is clear that this payment is contingent on receipt of funds from NSG. Given the unambiguous terms of the contract, the Court finds no basis to interfere, and the Petitioner's right to payment is accordingly tied to NBCC's receipt of funds from NSG.

26. It is a well-established principle of contract law that parties are bound by the terms to which they voluntarily agree. Once a contract is executed, neither party can contest its terms unless they are arbitrary or violate public policy. In this case, the Petitioner was fully aware of the contractual condition linking their payment to NBCC's receipt of funds from NSG and willingly entered into the agreement. There is no challenge to the terms of the impugned agreement. Moreover, the Petitioner cannot challenge the enforcement of the impugned contractual stipulation under Article 226 of the Constitution. The Court finds no merit in the Petitioner's claim for direct payment from NBCC when NBCC's obligation to pay is dependent on



receiving funds from NSG.

27. The Court acknowledges the difficult position in which the Petitioner finds itself, caught between NBCC, which has not released payments, and NSG, with whom it has no contractual relationship. The “back-to-back” structure, particularly the ‘pay-when-paid’ clause, makes the Petitioner’s claim contingent upon NBCC’s receipt of funds, leaving the Petitioner without any direct recourse to payment from NSG. However, given that this matter is being adjudicated in a writ petition, the Court is constrained to interpret the contractual obligations strictly as they stand, without delving into questions of fairness or unconscionability that may require a more detailed examination, potentially available in civil or arbitral proceedings. Accordingly, liberty is granted to the Petitioner to pursue alternate remedies, either through civil proceedings or arbitration, if such avenues are available under law. In those forums, the contractual clauses and their effect, including any concerns over unconscionability, can be fully examined. The petition is dismissed with no order as to costs.

**SANJEEV NARULA, J**

**OCTOBER 16, 2024**

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