JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

RFA No.58/2002
Capital Development Authority through its Chairman & another
versus
M/s Karcon (Pvt.) Ltd., etc.

Appellants by:	Mr. Ghulam Shabbir Akbar, Advocate.
Respondents by:	Mr. Muhammad Azam Zafar, Advocate for Respondent No.1 (CDA) Ms. Kashifa Niaz Awan, Advocate for Respondents No.2 & 3 (NESPAK)

and

RFA No.47/2002
M/s Karcon (Pvt.) Ltd.
versus
Capital Development Authority, etc.

Appellant by:	Mr. Muhammad Azam Zafar, Advocate.
Respondents by:	Mr. Ghulam Shabbir Akbar, Advocate for Respondents No.1 & 2 (CDA) Ms. Kashifa Niaz Awan, Advocate for Respondents No.3 & 4 (NESPAK)
Date of Hearing:	28.04.2020.

MOHSIN AKHTAR KAYANI, J: By way of this common judgment, we intend to decide the captioned regular first appeals arising out of same subject and against the impugned judgment and decree, dated 04.12.2001, passed by learned Civil Judge 1st Class, Islamabad, whereby suit filed by M/s Karcon (Pvt.) Ltd., etc. for recovery of Rs.125,258,918/-, declaration and permanent injunction was partially decreed to the following effect:

> *"88. As result of my findings on the above issues, the suit of the plaintiff is decreed to the effect that the decision of the CDA Board dated 7-2-1998 and the action taken by the contesting defendants under clause 63 of the Contract against the plaintiff are null and void, ultra vires and of no legal consequences and incapable of being implemented against the plaintiff. He is also entitled to recover Rs.31,421,772/- from defendant No.1. The parties are left to bear their own costs."*

2. The Capital Development Authority (*hereinafter called the "**appellant**"*) is aggrieved with the impugned judgment and decree of the learned Trial Court and similarly, M/s Karcon (Pvt.) Ltd. (*hereinafter called the "**respondent**" or "**plaintiff**"*) is also aggrieved with same judgment and decree to the extent of non-awarding of compensation and damages as prayed for.

3. Learned counsel for appellant contends that CDA being statutory authority established under CDA Ordinance, 1960 had invited tenders from construction companies for construction of roads/pavements at Faizabad Faizabad Interchange, whereby respondent participated in bidding process, tender was opened on 20.12.1992 and respondent was declared as lowest and most responsive bidder, as a result whereof, contract was awarded to respondent through letter of acceptance dated 28.01.1993 Exh.P13, who are under obligation to complete the work within 18 months from date of order of commencement as referred in Clause 43 of the Contract; that in first 6 months diversion work (links) were required to be completed and in 12 months whereafter the works denominated as permanent work has to be completed in two stages; that the learned trial Court has incorrectly held that the CDA Board is equivalent to CDA and it could not give a binding decision while exercising clause 67.2 of the contract i.e. relating to breach of the contract, about which the respondent Company consented, therefore, findings of the learned trial Court on Issues No.2, 3 and 19 are illegal; that the CDA has rightly set-aside the decision of the Engineer (NESPAK) given on the dispute claim of the respondent company in terms of Clause 67.2 of the Contract and view of the learned trial Court declaring the CDA to be as a judge in its own cause is erroneous; that the CDA had provided to the respondent Company enough space of site for construction activity in terms of Clauses 73.9 and 73.11, but the learned trial Court has not appreciated the documentary evidence produced on record by the appellant in this regard; that findings of the learned trial Court on Issue No.17 regarding

extension of time in favour of respondent Company are contrary to Clause 73.9 of the Contract; that the appellant/CDA has not paid the IPC-30 on valid grounds and such decision was also upheld by the CDA Board, however interim payment had been made in favour of respondent Company; that learned trial Court failed to appreciate that notice dated 13.12.1997 by respondent Company under Clause 69.1 of the Contract was wholly illegal; that learned trial Court has also failed to appreciate that respondent Company has failed to bring on record any documentary evidence in their support, nor it had been relied upon by the Engineer for verification of the first interim claim; that the respondent Company had left out the work without any valid ground after notice of expulsion, which constrained the appellant/CDA to complete the same for a sum of Rs.1,54,29,289/-, to which the appellant is entitled but the learned trial Court has not appreciated this fact of the case, rather the learned trial Court erroneously held that respondent Company is entitled to recovery a sum of Rs.2,37,68,902/- in respect of its claim upto 31.12.1996; that the learned trial Court assumed the role of the Engineer (NESPAK) while verifying the claim of the respondent Company, therefore, decree awarded in favour of respondent Company is wholly illegal, therefore, the impugned judgment and decree dated 04.12.2001 may be set-aside and counter claim made by the appellant/CDA may be decreed in the interest of justice.

4. Conversely, learned counsel for respondent company contended that after notice of commencement of work when they had mobilized their staff as well as machinery for execution of work, it was discovered that the site contained obstructions, which fact was also admitted by the Engineer (NESPAK) and all those obstructions i.e. 4000 grown up trees, high tension wires, sui gas lines, telegraph and telephones lines, fiber optic cable, DSP traffic office, bazaar, mosque, post office, part of Madrassa Faiz-ul-Islam, personal property of one Raja Gherat, etc. were highlighted in correspondence, but the said obstructions

were not cleared by the appellant, resultantly the time had to be extended ordinarily; that the learned trial Court had allowed the claim of respondent Company upto 31.12.1996 on the basis of same method as adopted by the Engineer, though the learned trial Court has denied the claims of respondent Company from 01.01.1997 to 31.01.1997, which is contradictory view; that the learned trial Court has wrongly appreciated the terms of the Contract and did not award the amounts due in favour of respondent Company under Clause 65.8 of the Contract; that on demand of appellant/CDA the respondent Company had carried out additional work at site costing an amount of Rs.13,448,156/- as well as an amount of Rs.3,873,573/- having been spent on additional work on Link-5A, but the learned trial Court has not awarded the said amounts to the respondent Company; that the Engineer had also directed to deduct an amount of Rs.3,585,412/- from the bills of M/s Phillips on account of damages and pay the said amount in favour of respondent Company, but the learned trial Court has also failed to appreciate this fact of the matter while passing the impugned judgment; that the inordinate delays on the part of appellant/CDA in execution of the works the respondent Company has suffered loss to the tune of Rs.20 Million, approximately, but the learned trial Court has not awarded the said amount in favour of the respondent Company, which otherwise brought bad name and maligned the reputation of the respondent Company at the hands of the appellant/CDA, but the learned trial Court has not awarded the claim of Rs.20 Million as compensation made by respondent Company.

5. Arguments heard, record perused.

6. Perusal of record reveals that the Respondent/Plaintiff produced PW-1 Mehboob Alam, Resident Engineer of the Project, PW-2 Muhammad Zafar Hussain Siddiqui as well as PW-3 Muhammad Akhtar Ali Qureshi as attorney of Respondent/Plaintiff and produced documents pertaining to drawings, correspondence between the parties, approvals, instructions, memos, letters to

NESPAK or the CDA, payment details, interim payment certificate, additional works, decisions of NESPAK, letter of extension, CDA Board decision, letter of termination and letter of expulsion as Exh.P1 to Exh.P854.

7. On the other hand, the appellant/CDA has produced Muhammad Munir, Assistant Director (Civil) as DW-1, Abdul Jabbar, Deputy Director Roads, Division-III, CDA as DW-2, Sohail Ursani, Deputy Director Works-II, CDA as DW-3 and Asad Mehboob Kayani, Deputy Director Roads-III, CDA as DW-4, who submitted documents pertaining to correspondence, notices, letters, extensions, reports and decisions, available on record as Exh.D1 to Exh.D130.

8. The learned Trial Court after recording of issues, partially decreed the suit vide impugned judgment and decree, dated 04.12.2001, whereby the claim of respondent/plaintiff has partially been allowed to the extent of Rs.31,421,772/-, whereas the decision of CDA Board, dated 07.02.1998, as well as actions taken by the CDA under Clause 63 of the Contract against respondent/plaintiff were declared *ultra vires* and having no legal consequences. Hence, the captioned regular first appeals.

9. Perusal of record reveals that Issues No.2 & 3 relating to legal side and Issues No.4, 5, 6, 7, 19, 20, 21, 22, 24, 26 & 27 on factual side are key issues for adjudication of the matter. In order to resolve the controversy, it is necessary to dilate upon the core issues separately which form the basis of the impugned judgment on the following main factors:

a) Time for completion of the project

b) Primary dispute between the parties

c) Variation introduced in the work by the employer, accepted by respondent, its prices and losses due to variation.

d) Termination of contract

e) Expulsion notice by the appellant (CDA)

f) Determination of claim of M/s Karcon (Pvt.) Ltd. *viz-a-viz* set off claim of the appellant (CDA)

g) Decision of the CDA Board dated 07.02.1998 (Exh.P476)

TIME FOR COMPLETION

The CDA pursuant to invitation of tenders for construction of roads and pavement at Faizabad Interchange awarded the project to the respondent Company vide letter of acceptance Ex.P13 for being the lowest bidder. M/s National Engineering Services Pakistan (*hereinafter referred as "**NESPAK**"*) was appointed as Engineer by CDA for the contract vide clause 1.1 of the Contract (Exh.P633), whose estimated the cost of construction, completion and maintenance of the works as Rs.83,145,318/-, whereas the bid offered by the respondent Company was 5.3% below to that of Engineer's estimate. On the Engineer's direction and notice of commencement Exh.P14 the work commenced on 01.02.1993, whereas under clause 1.1(c)(i) of the Contract the commencement date means the point in time when the Contractor received the notice to commence the work, while clause 43.1 titled "Time for Completion" provides as under:

> *The whole of the works and, if applicable, any section required to be completed within a particular time as stated in the Appendix to Tender, shall be completed, in accordance with the provisions of Clause 48, within the time stated in the Appendix to Tender for the whole of the works or the section (as the case may be), calculated from the Commencement Date, or such extended time as may be allowed under Clause 44".*
> *Annexure – A to the Conditions of Tender contains Special Stipulations. Sl. No.4 titled "Time for Completion of the Whole Works" makes reference to Clause 43 of the Conditions of Contract and provides as follows:-*
> *18 (eighteen) calendar months from the date of Engineer's order to commence. However, the diversion works, which are to be undertaken with the start of work, must be completed within 6 (six) months from the order to commence.*

10. The above referred fact has also been reiterated by PW-3 Akhtar Ali Qureshi in his examination as well as by PW-1 Mahboob Alam in the following manner:

> *"The project was to be completed in phases, Phase-I diversion works to be completed in six months i.e. by 31st July 1993 and the total works including diversion in 18 months i.e. by 31 July 1994."*

11. Appellant/CDA's witnesses i.e. DW-4 Asad Kiyani and DW-2 Abdul Jabbar Milano have also acknowledged the same in the following manner:-

> *"The construction was required to be completed in two periods i.e. for diversion and for completion of permanent works".*
> *"Under the Contract, two phases were given for completion at different times. There are no separate dates for the completion of different parts of the project except two phases as stated above. To my recollection the Contract Provisions provides six months for completion in diversion. I do not remember whether the diversion stage was completed in 38 months".*

12. In view of above, it is undisputed fact that contract period was set as 18 months having been divided in two phases i.e. Diversion Works and Permanent Works, which were agreed to be completed in 06 and 12 months, respectively, as such, the contract does not provide for piecemeal completion of various segments and the project was agreed to be completed by 31.07.1994.

PRIMARY DISPUTE BETWEEN THE PARTIES

13. The dispute arose between the parties when the site was not handed over to the respondent Company due to certain obstruction and non-relocation of services. In this regard, the trial Court has framed Issues No.10, 11 & 12, which are as under:-

> ***10.*** *Whether the plaintiff before submitting the bid was not aware of existence of the utility lines, encroachments and other impediments? OPP.*
> ***11.*** *Whether the defendants failed to provide enough clear site to the plaintiff within appropriate time for commencement of the work? OPP.*
> ***12.*** *If issue No.11 is answered in affirmative, then what loss the plaintiff will have to suffer from? OPP.*

14. The above stated issues were decided against the appellant/CDA and delay caused in the completion of project was attributed to the appellant/CDA by the trial Court. In contrast, the appellant/CDA attributed the delay to the respondent Company on the strength of their correspondence (Ex.D1 to Ex.D12) regarding delay on the part of Contractor with highlighted defects.

15. Whereas, Clause 42.1 titled "Possession of Site and Access thereto" of the Contract provides as follows:-

> *"Save insofar as the Contract may prescribe:*
> *(a) The extent of portions of the Site of which the Contractor is to be given possession from time to time, and*

(b) The order in which such portions shall be made available to the Contractor.

and subject to any requirement in the Contract as to the order in which the work shall be executed, the Employer will, with the Engineer's notice to commence works, given to the Contractor possession of --....

(c) so much of the Site, and

(d) such access as, in accordance with the Contract, is to be provided by the Employer as may be required to enable the Contractor to commence and proceed with the execution of the Works in accordance with the programme referred to in Clause 14, if any, and otherwise in accordance with such reasonable proposals as the Contractor shall, by notice to the Engineer with a copy to the Employer, make. The Employer will, from time to time as the Works proceed, give to the Contractor possession of such further portions of the Site as may be required to enable the Contractor to proceed with the execution of the Works with due dispatch in accordance with such programme or proposals, as the case may be.

16. The respondent Company in order to prove their claim regarding possession of site has produced PW-3 Akhtar Ali Qureshi, who stated in his evidence that *"when the Plaintiff Company mobilized machinery at the site there was no place available free of encumbrances and hindrances"*. Similarly, the Engineer's representative i.e. PW-1 Mahboob Alam stated in his evidence that *"at the time of commencement on 1st Feb 1993 there was no place available to work for Contractor without impediments"*. Therefore, this Court with the able assistance of learned counsel for the parties has gone through Clause 12.2 of the Contract titled "Adverse Physical Obstructions or Conditions", which is as under:-

If, however, during the execution of the Works the Contractor encounters physical obstructions or physical conditions, other than climatic conditions on the Site, which obstructions or conditions were, in his opinion, nor foreseeable by an experienced contractor, the Contractor shall forthwith give notice thereof to the Engineer, with a copy to the Employer. On receipt of such notice, the Engineer shall, if in his opinion such obstructions or conditions could not have been reasonable foreseen by an experienced contractor, after due consultation with the Employer and the Contractor, determine:

(a) any extension of time to which the Contractor is entitled under Clause 44, and

(b) the amount of any costs which may have been incurred by the Contractor by reasons of such obstructions or conditions having been encountered, which shall be added to the Contract Price.

and shall notify the Contractor accordingly, with a copy to the Employer. Such determination shall take account of any instruction, which the Engineer may issue to the Contractor in connection

> *therewith, and any proper and reasonable measures acceptable to the Engineer, which the Contractor may take in the absence of specific instructions from the Engineer.*

Similarly, Clause 73.11 titled "Demolition and Disposal of Existing Structures, Roads & Paths" provides as follows:-

> *"The existing structures, if any, within the contract limits shall be got demolished by Capital Development Authority. However, the remains of structures, debris/bricks etc and the foundations shall have to be removed by the Contractor as directed by the Engineer.*

17. In view of above, the CDA was bound to handover possession of entire site to the Contractor for construction and completion of the diversions work in six months from the date of commencement, whereas sub-clause (2) titled "Site of Works" of Clause 1001 of the Technical Specifications, which forms part of the Contract, provides as follows:-

> *The site of the works is the area for the construction of Roads and Pavements, Faizabad Interchange at Faizabad Intersection, Islamabad, within the right of way lines, boundaries and limits shown on the drawings and such additional areas adjacent thereto as may be designated by the Engineer from time to time for the construction to be performed under the contract.*
> *The Employer will give to the Contractor possession of as much of the area designated and defined as the site and shown on the drawings as may be required to implement the works when the Engineer's Order to Commence work is given."*

18. The above referred clauses clearly commanded the appellant CDA to provide clear site to the respondent Company for completion of work. However, at this stage, we have to go through the evidence to determine as to whether the delay is attributed to the appellant CDA or respondent Company. Accordingly, PW-1 Mehboob Alam in his evidence stated that:

- *"work was delayed mainly because of non handing over of the site to the Contractor in time ..... The diversion could not be completed without removal of Raja Ghairat Hayat property portion of which was fallen under Link – 6 which was handed over 38 months later i.e. on 27/28-3-1996..... The Design of the project was changed/revised several times on instructions from CDA due to various reasons viz....."*

- *"after approximately 58 months with the date of commencement i.e. on 27th November 1997 when CDA could not acquire the areas falling under Link Nos.5, 1 and 6 and Rawalpindi-Murree and Murree-Rawalpindi Roads towards Rawalpindi and from Faizul*

Islam Madrasah, the said areas were deleted from the scope of works of the contractor which formed approximately 7 to 8% of the total length of the project."

- *"Diversion could not be completed without removal of Raja Ghairat Hayat Property worth portion of which was falling in the diversion Link-6 which was handed over 38 months later i.e. 27/28-3-1996 where-after, the diversion was completed by the Contractor on 17-4-1996 and opened the traffic same day."*

- *"work was delayed mainly because of non-handing over of the site to the Contractor in time". He further stated: "According to my memory not even 100 meter of site was available free from impediments for working".*

Similarly, PW-3 Muhammad Akhtar Ali Qureshi in his evidence stated that:

"due to breach committed by the defendant No.1, the diversion stage was delayed by 32 months from the original date of completion."
DW-2 in his X-Examination stated that "Yes the property of Raja Ghairat Hayat was acquired by CDA somewhere in 1996."

On the other hand, DW-2 Sohail Ursani in his cross examination admitted that:

"Yes it is responsibility of the CDA to hand over the site for working area to the Contractor".

"I do not recall it correctly when the last bit of area required for the construction of the diversion was handed over to the Contractor".

"when I was posted there were two pockets where the contractor did not operates due to encroachments/ obstructions....."

Likewise, DW-4 Asad Mehboob Kayani in his cross examination acknowledged that:

"clear possession of certain portions of the site was not available to the CDA at the time of award". He further stated that "it was probably in 1997. When the last portion was handed over to the .....".

19. The above referred position has also been acknowledged by the NESPAK being Engineer vide their letter dated 15.10.1997 (Ex.D19) regarding delayed possession of site and demolition of impeding structures, which is as under:

It is agreed that the possession of areas of the site pertaining to links-5 and 6 could not be handed over to you because of some administrative delays in removal of the encroachments which are being earnestly pursued by the Employer.
Accordingly, the extension of time with respect to the affected areas on Rawalpindi end will be granted to you as and when the same is handed over. This may please be noted that this part of the links / project forms a very small percentage of the project.

It is regretted to say that the contractor due to the reasons well known to him has caused deliberate delays on the execution of the project beyond 31 Dec 1996. The work mentioned in your para A-1 to A-8 and B-1 to B-3 of the above referred letter are of a very minor nature and quantum of work involved does not require the time extension demanded. Please give some solid / plausible and acceptable reasons to delay the project beyond 31 Dec 96 i.e. the extended date of completion.

20. The letters regarding the delay caused have been provided by the respondent Company vide Ex.P-18, dated 24.01.1993, Ex.P-24, dated 14.03.1993, Ex.P-43, dated 24.04.1993, Ex.P-49, dated 12.05.1993, Ex.P-52 dated 26.05.1993, Ex.P-53 dated 27.05.193, Ex.P-59 dated 26.06.1993, Ex.P-61 dated 29.06.1993, Ex.P-63 dated 05.07.1993, Ex.P-637, dated 12.07.1993, Ex.P-638 dated 20.07.1993, Ex.P-641 dated 22.08.1993, Ex.P-69 dated 16.09.1993, Ex.P-73 dated 05.12.1993, Ex.P-76 dated 27.12.1993, Ex.P-79 dated 01.01.1994, Ex.P-82 dated 11.01.1994, Ex.P-89 dated 25.01.1994, Ex.P-91 dated 06.02.1994, Ex.P-96 dated February, 1994, Ex.650 dated 08.03.1994 and Ex.101 dated March, 1994. All these correspondences have highlighted the core issues of delay, which has also been highlighted in another letter referred on record as Ex.P-266 in the following manner:-

a) *Link-5: partial occupied by shops, faizul Islam Madrassa, WAPDA Poles, lines foot path etc.*
b) *Link-6: occupied by Raja Ghairat Hayat House.*
c) *Link-1: partially not available for execution of work.*
d) *Link-2: occupied by Raja Ghairat Hayat Property.*
e) *Link-3, 4, 5 and 6: Partly occupied by Optic Fiber Cables, Kiosks, shops WAPDA Poles, Transformers O/H Lines etc.*
f) *Links-5A: Poles to be removed.*
g) *Islamabad Highway: Widening under taken main work after shifting of traffic on diversion.*
h) *Murree Road: Widening under taken main work after shifting of traffic on diversion.*
i) *Pirwadhai road: After diversion of traffic.*
j) *Loop-I, II, III & IV: adjacent to Bridge work cannot be executed because abutment and due to traffic at start points.*

21. The above referred stated position has also been acknowledged by the learned trial Court in its findings recorded in Paras-28 & 29 of impugned judgment, which are as under:-

On the other hand, the defence of defendants No.1 & 2 is that sufficient area of the site always remained available to the plaintiff but despite it he failed in executing the works of both the stages within the stipulated periods. Therefore, the plaintiff was not entitled to get any compensation

on this account. The DWs have reiterated this version in their depositions. However, during cross examination DW-2 has disclosed and admitted that the property of Raja Ghairat Hayat was acquired by the CDA some where in 1996. He has stated that he was posted for supervising the construction of the project in 1997 and when he was posted there were two pockets where the contractor did not operate due to encroachments/obstructions. DW-4 has also admitted that clear possession of certain portions of the site was not available to the CDA at the time of award of the Contract. He has further disclosed that it was probably I 1997 when the last portion of the site was handed over to the Contractor. It is an admitted position that the site of the project at the time of issuance of the order to commence dated 1-2-1993 (Ex.P-14) was not clear and the plaintiff was not handed over its vacant possession. Existence of the structures consisting of property of Raja Ghairat, Gas Sub-stations (PBS), shops, mosque, post office, cabins at pirwadhai road, trees on Rawalpindi-Murree Road, Workshops, hotels and Faiz-ul-Islam Madrisa within the area of the project being the hard facts cannot be denied by the contesting defendants. It is also an undisputed position that the services, requiring relocation consisting of Wapda overhead LT/HT Line & Electric Polls, Sui Gas Lines, Telephone Lines, Optical Fiber Cable and Traffic flow at link No.5-5-A, 6, Rawalpindi Road, Islamabad – Lahore Road. Islamabad-Murree-Rawalpindi Road were also working at the site at the time of issuance of the order to commence.

22. The learned trial Court has given the timeline in a tabulated manner before fixation of the liability qua the delay in work of demolition and disposal of the existing structures in terms of clause 73.11 (Part-II) of the Contract. The gist of the evidence is as under:-

S/ No.	*Name of the Structure*	*Required date of Clearance*	*Factual date of Clearance*	*The relevant document*	*Delay*
A	*Property of Raja Ghairat.*	*1-2-93*	*28-3-96*	*Ex.P 278 Ex.P 614*	*42 Months*
B	*Gas-sub-Station PBS.*	*"*	*5-10-94*	*Ex.P 157*	*20 Months*
C	*Shops, Cabins at Pirwadhai Road.*	*"*	*11-7-95*	*Ex.P 560*	*29 Months*
D	*Trees on Rwp-Murree Road*	*"*	*14-3-96*	*Ex.P 276*	*43 Months*
E	*Mosque & Post Office*	*"*	*28-11-97*	*Ex.P 550*	*58 Months*
F	*Shops, Workshops, hotels Faiz-ul-Islam Madrisa.*	*"*	*28-11-97*	*Ex.P 550*	*58 Months*

The area of the structures shown against column E & F was excluded from the scope of the project.

(ii) Relocation of the services.

Nature of the services	*Required date of clearance*	*Delay in months*	*Relevant documents*
Wapda over-head LT/HT Lines & Poles.	*1-2-1993*	*40 Months*	*Exp 266*
Sui-Gas lines	*"*	*35 Months*	*Exp 270*
Telephone Lines	*"*	*40 Months*	*Exp 279*
Optical Fiber Cable	*"*	*40 Months*	*Exp 303*
Traffic Flow at Link No.5, 5-A, 6 Pirwadhai Road.	*"*	*29 Months*	*Exp 313* *Exp 616*

			Exp 246
Traffic flow at Ibd-Lhr-Ibd and Murree-Rap-Murree-Rwp. Murree Road	"	*38 Months*	*Exp 263*

23. Keeping in view the above position, the responsibility of clearance of site in terms of relocation of services under clause 73.9 clearly stipulates "*the existing services and the proposed relocation are marked on the drawings. The relocation of the services shall not be the responsibility of Contractor*". Similarly, under clause 73.11 "Demolition and Disposal of Existing Structures, Roads & Paths" reads as under:-

> *The existing structures, if any, within the contract limits shall be got demolished by Capital Development Authority. However, the remains of structures, debris/bricks etc and the foundations shall have to be removed by the Contractor as directed by the Engineer.*
> *All existing roads and paths within the Contract limits coming in the way of the proposed roads and paths shall be demolished and disposed of in accordance with the drawings specifications and as per the directions of the Engineer.*

24. In addition to above stated position, DW-3 Sohail Ursani has acknowledged that CDA was responsible under the terms of contract for relocation of the services, whereas DW-2 Abdul Jabbar Milano admitted that "*no doubt some time has been consumed in relocation of services and clearing impeding structure*". Likewise, DW-4 Asad Mehboob Kayani has also admitted during the course of cross-examination that "*under the terms of contract the impediments have to be removed by the concerned agency*" and "*CDA was also responsible to remove the impediments*", therefore, there is no other opinion but to hold that evidence of PW-3 Muhammad Akhtar Ali Qureshi suggests that as per Contract the CDA had unequivocally agreed that removal of hindrances/impediments and relocation of services was the sole responsibility of the defendant/CDA. Hence, the plea taken by the appellant CDA that respondent Company was aware of existence of utility lines, encroachment and other impediments before submitting the bid is an afterthought and not acceptable in any manner as the CDA has failed to perform its obligation under the Contract.

VARIATIONS INTRODUCED IN THE WORK BY THE EMPLOYER, ACCEPTED BY THE M/S KARCON (PVT.) LTD., ITS PRICE AND LOSSES DUE TO VARIATIONS REFERRED IN ISSUES NO.14, 15, 16, 17 AND 18

25. The appellant CDA has raised serious concern upon the findings of the learned Trial Court on these issues by taking the stance that the learned Trial Court has not considered the relevant evidence while deciding Issues No.15 to 18 in favour of respondent Company. It has further been argued that there are two types of variation introduced by the Engineer in the work i.e. firstly the variation in existing work and secondly, the additional work, whereas the contractor was paid for the additional work on new agreed rates and the earlier were paid at the contract rates. The variation could be made under the terms of contract vide clause No.52.3 and the sanction of variation is also dealt with under 52.1. All the bills were being verified and approved for payment by the Engineer in connivance with these clauses.

26. As per CDA stance, the dispute arose when respondent Company submitted time barred bill in November, 1996 and same was admitted by PW-1 Mehboob Alam that Interim Payment Certificate (running bill of contractor) were being paid mostly on time except bills containing contractor's claim. It has also been referred by the appellant CDA that variation rates of additional work were not negotiated as per the stance of PW-3 Muhammad Akhtar Ali Qureshi and he acknowledged that rates suggested by respondent Company were fixed by the Engineer, whereafter additional extra work was accepted. Likewise, the appellant CDA contended that respondent Company has not suffered any loss due to variation of work, rather received a benefit at the current rate. The core issue revolves around the responsibility as to whether the variations or revisions affect the contract or its scope. The respondent Company in order to justify the delay on account of late issuance of drawings, their revision and change in design have placed their reliance upon Exh.D25 dated 16.03.93, Exh.P26 dated

30.03.1993, Exh.P28 dated 20.04.1993, Exh.P29 dated 05.04.1993, Exh.P34 dated 30.04.93, Exh.P36 dated 12.04.93, Exh.P41 dated 13.04.93 Exh.P44 dated 24.04.93, Exh.P55 dated 22.06.93, Exh.P65 dated 20.0793, Exh.P70 dated 21.09.93, Exh.P73 dated 05.12.93, Exh.P74 dated 14.12.93, Exh.P75 dated 18.12.93, Exh.P76 dated 27.12.93, Exh.P81 dated 01.01.94, Exh.P82 dated 11.01.93, Exh.P83 dated 11.01.94, Exh.P89 dated 25.01.94, Exh.P103 dated 30.04.94, Exh.P106 dated 09.05.94, Exh.P108 dated 04.05.94, Exh.P112 dated 18.05.94, Exh.P138 dated 20.07.94, Exh.P145 dated 22.08.94, Exh.P156 dated 05.10.94, ExhP181 dated 09.01.95, Exh.P242 dated 16.10.95, Exh.P263 dated 24.12.95, Exh.P281 dated 11.04.96, Exh.P194 dated 02.04.95, Exh.P199 dated 22.04.95, Exh.P389 dated 20.02.97, Exh.P428 dated 03.06.97, Exh.P444 dated 04.07.97, Exh.P450 dated 20.07.94, Exh.P459 dated 05.06.97, Exh.P490 dated 29.08.97, Exh.P509 dated 17.09.97, Exh.P535 dated 23.10.97, Exh.P571 dated 02.01.98, Exh.P762 dated 25.08.97, Exh.P763 dated 23.08.97, Exh.P767 dated 10.09.97, whereby all these documents disclose the late supply of drawings, revision of drawings, decision of Engineer, request for early submission of drawing or revised drawings and continuous request for submission of diversion drawing on different portions, draining drawings, and site grading drawings. Perusal of the said letters reflect that the delay in submission of these drawing affected the working of project assigned to respondent Company. In case of delay in project, clause 6.4 of Contract comes into play which provides the concept of determination as well as time and cost of such extension, which could be added to project price. The learned Trial Court while dealing with Issue No.17 in this regard has held the following opinion:

> *"Hence, it is observed that the work was also delayed due to the changes & revision in the designs and drawings and the plaintiff suffered from loss. Thus the plaintiff is entitled to the extension only which can be determined under clause 6.4 (a) of the Contract. Clause 6.4 (b) ibid has been deleted in GCC – Part – II. Therefore, no claim for costs can be put forward by the plaintiff in this respect. This issue is partly decided in favour of the plaintiff."*

27. The findings of the learned Trial Court while dealing with the Issues No.15 and 16 have not been answered by the appellant/CDA and there is no denial that respondent Company accepted the payment of varied work, therefore, the last important aspect highlighted in Issue No.18 qua the role of NESPAK/Engineer as to whether they varied the claim of respondent Company in view of terms of contract. The onus is upon both the parties to highlight their point of view and the evidence brought on record in this regard has thoroughly been scanned, whereby it has been observed that delay suffered due to non availability of drawings and due to frequent changes in designs/drawings, which sets in motion Clause 6.4 of the Contract, which is as under:

Clause 6.4 of the Contract provides as follows:-

> *6.4 If, by reason of any failure or inability of the Engineer to issue, within a time reasonable in all the circumstances, any drawing or instruction for which notice has been given by the Contractor in accordance with sub-clause 6.3, the Contractor suffers delay and/or incurs costs then the Engineer shall, after due consultation with the Employer and the Contractor, determine:*
>
> *(a) any extension of time to which the Contractor is entitled under clause 44, and*
>
> *(b) the amount of such costs, which shall be added to the Contract price,*
>
> *and shall notify the Contractor accordingly, with a copy to the Employer.*

Clause 9 titled "Construction Drawings" of Technical Specification provides as follows:-

> *"After the award of the Contract, the tender drawing will be replaced with the construction drawings issued for construction....."*

As Order to Commence work was issued on 01.02.1993 (P-14) the CDA was bound to provide such construction drawings by 01.02.1993. Since, the diversion stage of the project was required to be completed within the period of six months, all the drawing pertaining to such diversions were required to be provided to Contractor in time and prior to the commencement of the works, though the respondent Company was not provided with any construction

drawings when they mobilized at the site. The first construction drawing, which was with respect to Link-4 only, was provided to the respondent Company on 28-02-1993 (Ex-P-19). The following documentary evidence is relevant in this regard.

- Vide (Ex. P-26) the profile for Link –3 and 4 were changed and modified.
- Vide letter at (P-28) the plaintiff informed the Engineer that the drawings provided to it were incomplete.
- Vide letter dated 5-4-1993 (P-29) the Engineer provided the plaintiff with yet another revised drawings for Link-4.
- Vide letter dated 12-4-1993 (P-36) the drawings for section of culvert have been provided for.
- Vide letter dated 13-4-1993 (P-41) plaintiff informed the Engineer that as per clause 9 and 10 of the Technical Specifications the Engineer is under an obligation to replace the tender drawings into the construction drawings and provide the contractor with letter of award.
- Vide letter dated 24-4-1993 (P-44) the Engineer revised the drawings for Link-3 and the drawings of part of Link-4.
- Vide letter dated 22-6-1993 (P-55) provided the drawings for Link-5 and 5A.

28. The design/drawings were frequently revised and changed by the employer i.e. the appellant/CDA, which were substantial in nature and caused delay in completion of the Contract. In essence, the revisions/changes made to the project are as follows :-

i) Revision in design of Bridge No.1 and lowering of its level by 2 meter.

ii) Revision in design of Bridge No.4 twice.

iii) Reduction in length of Bridge No.2.

iv) Revision in the layout of Link-2, Link-6 and Loop-II due to then problems in removal of certain houses.

v) Revision in the levels and profiles of Link-1, 5 and 6 due to existing encroachments.

vi) Revision in the levels and profiles of Loop I, II, Ill and IV due to change in the levels of Bridge No.1..

The above referred position is also evident by Engineer's letter dated 26-9-1996 (Exh.P302). The respondent Company has also highlighted all these aspects through the evidence brought on record by PW-1 Mehboob Alam during his examination dated 20.09.2000 in the following manner:

> *"the design of the project was changed revised several times on instructions from CDA due to various reasons viz (a) revision of then height of bridges No.1, 2 and 3 by 1 meter and Bridge No. 4-A and 4-8 by 4.5 meters (b) shifting of Bridge No.4-A by 8 meters northwards (c) deletion of 300 meters long concrete ramp under Link 5A westwards and introduction of a retaining wall in between Links 5 and 5A, introduction of retaining walls west of Link5 around grave yard for its protection. (d) changing the radius of Loop-I1 to accommodate Raja Ghairat's property interference partially (e) changing the alignments of Link-2 and 6 etc. the vertical as well as horizontal profiles of almost the entire project with the exception of Islamabad Highway were changed. The width of the road of Loop-Ill and IV were changed from single lane to double lane in consideration of the design perhaps by the NESPAK design Engineers. Due to increasing the width of the road the loops Ill and IV did not fall over the links 3 and 4. The retaining walls was probably necessitated due to lowering of the deck levels of bridge No.4-A and 4-8 by approximately 4.5 meters."*

29. On the other hand, the appellant CDA has acknowledged these factors through the evidence of DW-2 Abdul Jabbar Milano in the following manner:

> *"changes in design has affected the scope of work to some extent. Changes in design of Bridges necessitated revision in the levels /profiles of the roads."*

While considering the above, it has been observed that the respondent Company/ plaintiff could not complete the works until the abutments and the bridge walls of the bridges were complete, which was the obligation of the appellant CDA to have completed the construction of bridges before the earth works on the roads and pavements could take place, as such, the contract for

construction of bridges was awarded to M/s Moinsons seventeen (17) months after the award of Contract to the respondent Company/plaintiff for construction of the roads and pavements. As the works on the bridges was substantially completed on 21.03.1997, it was not possible for the respondent Company to complete the works prior to this date. This aspect has also been acknowledged by witnesses of the CDA in the following manner:

> *DW-1 Muhammad Munir in cross examination stated that:*
> *"when 1 joined as Sub-Engineer on 17-7-1996, the Engineer was present at Construction site. As this date Bridges were not complete. The abutments of the bridges were almost complete."*
>
> *DW-2 in his X-examination stated:*
> *"changes in design of Bridges necessitated the revision in the levels /profiles of the Roads."*
> *He further states that changes in design has affected the scope of work to some extent.*
>
> *DW-3 in his X-examination on 29-9-2001 states:*
> *"during my posting the Bridges were not complete."*

The evidence suggests that the respondent Company had written numerous letters to the Engineer and CDA calling upon them to provide necessary drawings/designs so as to enable them to carry out the works in a systematic manner and complete the works within the period provided in the Contract. For the purpose of reference the essential correspondences between the parties are listed in Para-27 of this judgment.

30. There is no dispute between the parties about measurement of work done by respondent company, however the appellant CDA has raised the issue regarding non-consideration of contemporary record but both these issues have already been dealt with by the learned Trial Court with reference to termination of contract and completed work against the appellant/CDA. When there is no dispute qua verification or determination by the Engineer, its findings could not be objected to at later stage, even it is not case of CDA that they have disputed any evaluation or determination of the Engineer in the measurement of the work

done. Evidently, the delay has been proved on the part of appellant CDA and same has rightly been decided by the learned Trial Court in Issue No.18 against the CDA, therefore, arguments rendered by the appellant CDA have no substance in it.

EXTENSION OF TIME

31. The learned Trial Court has framed Issue No.13 regarding extension in period of completion of project, which has been decided against the CDA in Para-37 of the impugned judgment. We have gone through the terms of the contract i.e. Clauses 12.2, 42.2 and 6.4, whereby the Engineer is the person authorized to grant extension in time under Clause 44. It has further been observed from these provisions of the contract that as a result of breach of contract qua the stipulated clauses, the Engineer may grant extension in time for completion of contract, however such extensions are granted or recommended by the Engineer, although it has not been mentioned that extension was granted due to fault of respondent Company or any late/delayed charges were imposed. The respondent Company also sought extension in time in terms of Clauses 41.1, 42.2, 12.2, etc. which entitles the Contractor to claim compensation/damages along with extension in time.

32. DW-4 Asad Kiyani i.e. appellant's witness in his examination-in-chief stated that the Engineer used to give extensions in time to the contractor and that *"I do not recall, whether the Engineer ever stated that the extension is due to the default of the contractor."* Similarly, DW-3 Sohail Ursani in examination-in-chief stated that no penalty was imposed by the CDA upon the Contractor while approving extension in execution of the works, however extension of time has been proved from testimony of DW-2 Abdul Jabbar as referred follow:

> *"So far as I recalled the last extension was granted upto Dec 1996. Subsequently also requests for extension were also received from the Contractor. The Engineer had recommended extension upto Dec 1997".*
>
> *"No penalty was imposed on the contractor by the CDA while granting extension in the execution of the work."*

The entire record is silent qua imposition of penalty of any nature or LDs upon the respondent company whenever extension has been granted by the Engineer or the CDA. It is admitted fact on record that the delay in execution of work was not occasioned by any breach or fault on the part of Contractor. DW-2 Abdul Jabbar also acknowledged that:

> *"as far as I recalled there is a provision under the agreement LD in specific circumstances. I do not recalled that Engineer recommended LD to be imposed on the Contractor during my period."*

33. Even otherwise, the documentary evidence produced by respondent Company has not been denied by the appellant CDA as reflected from Exh.356, whereby the Engineer granted extension of time upto 31.12.1996 to the respondent Company under Clause 44 of the Contract. Similarly, DW-2 Abdul Jabbar in his testimony has also acknowledged the extension of time upto December, 1997 in the following manner:

> *"Under the Contract the Engineer grants extension in time with consultation of the Employer. It is correct that the Engineer had recommended extension in completion period of the project upto December, 1997."*

The respondent Company also highlighted the testimony of DW-2 Abdul Jabbar, whereby the D.G. Works (Project Director) in meeting held on 06.01.1998 had requested to grant interim extension in the following manner:

> *"During the meeting in January 1998, the D.G. Works (Project Director) had requested to grant interim extension followed by the firm extension without mentioning date."*

34. While considering the above aspects of extension in time given to respondent company/contractor, there is no opinion that appellant/CDA and the Engineer both had admitted that extension in time was granted to Contractor without referring any fault on the part of Contractor or imposition of any penalty upon the Contractor. The respondent Company has also produced documentary evidence to justify the extensions as referred in letter dated 16.09.93 Exh.P69, letter dated 27.12.93 Exh.P76, letter dated 10.11.94 Exh.P168, letters dated

12.12.94 Exh.176, dated May, 1996 Exh.P79, dated 23.09.96 Exh.P333, dated 29.09.96 Exh.P338, dated 13.04.96 Exh.P352, dated 15.07.97 Exh.P356 , dated 04.07.97 Exh.444, dated 17.09.97 Exh.P511, dated 09.10.97 Exh.P524, dated 10.10.97 Exh.P525, dated 24.10.97 Exh.P539, dated 10.11.97 Exh.P543, dated 26.11.97 Exh.P547, dated 28.11.97 Exh.P550, dated 03.12.97 Exh.P552, dated 18.12.97 Exh.P557, dated 21.01.98 Exh.P574, whereby the respondent Company had requested for extension in time on different pretexts, even the NESPAK corresponded in this regard for extension in time being Engineer with the CDA. While considering this background, Issue No.13 has rightly been decided by the learned trial Court against the appellant CDA in the following manner:

> *"38. While determining the extension it had never been complained that the reasons put forward by the plaintiff were against the facts or the delay had happened to his fault or slowness in execution of the works. It will not be out of place to mention here that 1st Interim Claim of the plaintiff was certified by the Engineer to the extent of Rs.23,768,902/- which was enough to say that the delay was not attributable to the plaintiff. It is also pertinent to refer here that the Employer did not resort to invoke the provisions of the Contract authorizing him to impose liquidated damages upon the Contractor on the basis of the delay attributable to the Contract. Hence, this issue is decided in favour of the plaintiff."*

TERMINATION OF CONTRACT

35. The learned trial Court has framed Issue No.5 to ascertain *"whether termination of contract by plaintiff was justified?"* and Issue No.20 *"Whether the plaintiff abandoned the work by terminating the contract as a stage which was difficult and expensive and the plaintiff was unable to execute the same?"*, hence both these issues require a joint discussion. The respondent Company has taken the stance that appellant/CDA has failed to provide the site and did not perform the obligations in terms of the Contract and the delay caused by appellant in this regard while handing over clear site or relocation of services frustrated the contract despite extensions of time, even otherwise, the non-payments were also referred as causes for issuance of notice of termination, whereafter respondent

Company invoked Clause 69.1, which provides the concept of termination by giving 14 days notice due to default of employer in making the payments to the Contractor i.e. the amount due under certificate of Engineer within 56 days of expiry of time as stated in Clause 60.11.

36. The Engineer in his letter dated 23.12.97 Exh.P794 has given expert opinion on validity and effects of termination notice while considering relevant provisions of the contract. The observations clearly spell out that expiry of notice period was 27.12.97 and the employer under clause 69.3 of the Contract was bound to make payment to Contractor in accordance with procedure specified under Clause 65.8, which in addition to payment for termination could include compensation for contractor's losses or profit. Although, the Engineer recommended the amicable solutions of issues and recommended the withdrawal of contractor's termination notice after making the payments due to the Contractor under IPC-30, however the respondent Company has not withdrawn the notice of termination as numerous letters had been written by respondent Company before issuance of termination notice i.e. letter dated 30.08.97 Exh.P492, regarding Bill No.30, including First Interim Claim as per Clause 60.1(e) for certification and payment under Clause 60.2, Exh.P506 dated 10.09.97, on the same 30th Interim Payment Certificate Exh.P776, dated 09.10.97, regarding amount of First Interim Claim determined by Engineer and subsequently certified by Engineer for payment in IPC No.30, vide letter dated 15.10.97 Exh.P779, issued to CDA and notice of termination by Contractor in terms of Clause 69.1 due to non-payment of certified amount dated 13.12.97 Exh.P790 for serving 14 days notice, even the Engineer vide letter dated 23.12.97 Exh.P794 referred that termination at this stage would not be in interest of both parties. The other letters and correspondence in this regard as referred on record are letters dated 24.12.97 Exh.P564, dated 30.12.97 Exh.P569 and dated 30.12.97

Exh.P568, whereafter finally a meeting was held on 06.01.98 with CDA, whereby the following minutes of meeting have been referred:

> *"Meeting held on 6-1-98 with CDA the Engineer and Contractors (P-798)---*
>
> *a) Member Engineering, CDA declared that the project has been substantially completed but still issues are pending settlements. This situation has compelled the road contractors to terminate his contract and the meeting is called with the objective to resolved the issues and get the remaining works completed expeditiously.*
>
> *b) Member Engineering informed that certified claim of M/s Karcon for Rs.23.786 Million are already under process and likely to be decided by the CDA board in few days.*
>
> *c) For other issues related to Engineer Member Engineering asked the Engineer for time schedule for settlement. The Engineer gave the following schedule:-*
>
> 1. *Time extension 1 week that is 13-1-98. D.G. requested to grant interim time extension immediately.*
> 2. *Variation orders with in two weeks i.e. by 20.1.98.*
> 3. *2nd interim claim upto December 97 within two weeks from 06.01.1998 i.e. upto 20.01.1998.*
> 4. *3rd interim claim upto May 97 before 8.2.98.*
> 5. *Other issues before 8.2.98.*

37. While considering the above referred documentary evidence, it has been observed from the record that PW-1 Mehboob Alam, Resident Engineer of the Project agreed to extend period of notice by 10 days on request of Deputy Director General Works. Even this aspect has been brought on record by PW-3 Muhammad Akhtar Ali Qureshi in his evidence that notice was extended subject to condition that amount certified by Engineer would be released by CDA and all pending issues including Contractor's compensation would be payable to the respondent company, but despite such commitment the CDA did not fulfill conditions for extension of notice, which obligates the contractor to terminate the same on 27.12.97. DW-2 Abdul Jabbar also acknowledged this fact that after service of termination notice of contract by the Contractor, initially they went slow and after about a month they stopped the work. While considering these aspects the work which was substantially completed has been recognized by DW-4 Asad Kayani in his evidence that on 06.01.97, Member Engineer stated that

"project is substantially completed". The record further reflects that appellant did not impose any penalty upon Contractor as provided under Clause 47.1 Part-II while extending the time upto 31.12.96 without alleging any default on the part of Contractor followed by another extension upto 31.12.97, even the interim claim of respondent Company for additional cost was certified in the year 1997 through Exh.P506 and the learned Trial Court has clearly stipulated in the impugned judgment that extension was granted to the respondent Company by the CDA by their expressed will. Evidently, the CDA had failed to perform their part despite extension in contract period and they have not honoured their commitment regarding release of payment as agreed between the parties. Such state of affairs left nothing for respondent Company except to terminate the contract or stand on their termination notice. Eventually, the learned Trial Court has concluded Issue No.5 in the following manner.

> *".....But even if it is accepted that the period of effectiveness of the notice was validly extended up to 8-2-1998 then again it is not going to undo the notice of termination for the following reasons. Firstly, the extension did not amount to withdrawal of the notice. Secondly, the decision of CDA Board declaring the notice of termination as of no legal effect had no validity. (The detailed findings in this respect have already been given while deciding issues No.3 & 19). Thirdly, the settlement resulting in extension of the time of effectiveness of the notice created reciprocal rights and obligations but none of them was honoured and discharged respectively by the CDA. Exh.P-798 the minutes of the meeting are relied upon in this respect. Resultantly, it is concluded that the notice of termination became effective on 8-2-1998 (the extended date). Its issuance was eminently just and within the framework of GCC Part-I & Part-II. Hence, this issue is decided in favour of the plaintiff."*

The above referred conclusion of the learned Trial Court is in accordance with provisions of contract and there is no second opinion but to hold that the termination was validly made by respondent company and same has taken effect on 08.02.98. In the light of findings on Issue No.5, the Contractor has abandoned the work of the project and the CDA has failed to prove that stoppage of work by the respondent Company was at a stage which was difficult and expensive to be

executed by the respondent Company, therefore, the learned Trial Court has rightly decided Issue No.5 and Issue No.20 against the appellant CDA.

EXPULSION NOTICE BY THE APPELLANT CDA

38. The appellant CDA has also argued their case with reference to expulsion notice served by them upon the respondent Company, regarding which Issue No.21 was framed by the learned Trial Court. The appellant CDA in order to prove its case regarding valid expulsion in terms of Clause 63.1 of the Conditions of Contract, has produced DW-1 Muhammad Munir/Deputy Director Roads, Division-III, who stated before the court that respondent Company had refused to execute the work and closed down the offices from site, even DW-2 Abdul Jabbar/Deputy Director CDA also acknowledged the termination notice as discussed in the preceding paragraph of this judgment. The appellant CDA intends to prove their case through their letters dated 01.03.95 Exh.D32, dated 26.03.95 Exh.D33 and dated 17.04.95 Exh.D34, whereby directions were issued to the respondent Company for non-completion of the project and it has been highlighted by the appellant CDA that the left out work of the respondent Company will be completed at their risk and cost, which was calculated by the CDA upto Rs.15 Million. There is no dispute that the contract was earlier terminated by the respondent Company in terms of Clause 69.1 on 13.12.97 followed by the notice period ended on 27.12.97. The appellant being employer when realized this fact that respondent Company has issued termination notice, the CDA issued notice dated 21.05.98 Exh.P835 to the respondent Company, which clearly stipulates that the action proposed by the CDA is an afterthought. Even otherwise, the learned Trial Court has concluded the said issue in Para-56 of the impugned judgment in the following manner:

> *"56. While deciding Issue No.5, it has been observed that the notice for termination by the plaintiff was just and within the framework of GCC Par-I and Part-II. It became effective on 8-2-1997, while dealing with issues No.3 and 19, the decision of CDA Board allegedly invalidating the notice for termination has been found as void and ultra*

vires. Therefore, the action taken by the Employer under Clause 63.1 was meaningless. The expulsion notice dated 21.05.1998 has been based on certificate of Engineer dated 24.4.1998 (Exh.D-129). The Engineer vide Exh.P794 and 574, had already rated the plaintiff's entitlement for termination as justified. It may be pointed out that the notice of termination was never withdrawn by the plaintiff and the contract had also not been revived. Therefore, the notice under Clause 63.1 of the Contract and action taken thereunder was nothing but to create a defence against the rights of the contractor. Since the contract had already been terminated w.e.f. 8.2.1998, as has been observed while deciding Issue No.5, therefore, defendant No.1 was not justified to get the left out works completed at risk & cost of the plaintiff. Resultantly, the issues under disposal are decided against defendants No.1 & 2."

39. The above referred conclusion of the learned Trial Court is based upon the findings which were earlier discussed i.e. delay in handing over of sites, revisions of drawings, clearance of sites, changes in main project, non-payment of due amounts and IPC as well as earlier termination of the contract by respondent Company, whereby the fault was attributed to the appellant CDA in all these findings, therefore, in the light of detailed discussion made above, the action of the appellant CDA by issuing expulsion notice is not validly defended or justified in any manner and such notice is just an eyewash to create a ground of defence by the CDA in their favour, which is not approved from the testimony of witnesses as well as from record.

CLAIM OF M/S KARCON (PVT.) LTD. VIZ-A-VIZ SET OFF CLAIM OF CDA

40. While considering the entire background of this case, the entitlement to recovery of any amount by plaintiff against CDA/appellant, following issues including counter claim of CDA as a set off as well as the issues dealing with completion of remaining work at the cost of M/s Karcon (Pvt.) Ltd. have been framed.

6. *At what cost defendant No.1 got completed the work? OPD-1&2*
7. *Whether defendant No.1 is entitled to recover the cost adjudged under issue No.6 if any along with damages as set off? OPD-1&2*
25. *Whether defendant No.1 is entitled to recover any amount from the plaintiff? OPD 1 & 2*
26. *Whether the plaintiff is entitled to recover Rs.125,258,918.00 as detailed in Paragraph No.57 of the plaint from defendant No.1? OPP*

41. The respondent Company has given the details of their claim in Para-57 of their plaint, whereby the claim has been bifurcated in different headings which includes the payment to contractor on termination of contract due to default of employer under Clause 65.1. The respondent Company through their testimony brought on record the loss or damage to contractor arising out of or in connection with or by consequence of such termination due to default of employer i.e. CDA. On the other hand, it is settled that compensation for loss of damage due to termination/breach of contract, which naturally arose in the usual course of things from such breach under Section 37 of the Contract Act shall apply in such circumstances pursuant to Clause 5.1(b) of the Conditions of Contract. Similarly, the amount of additional cost was certified by the Engineer on 10.09.97 pursuant to Clause 60.2 in exercising the authority specified in contract approved by the employer, but despite that employer has not cleared the liability till 20.11.97. The total amount claimed against the employer including extra work executed through variation orders pursuant to Clauses 51 and 52 of the Contract certified by the Engineer is Rs.31,843,814.00. Besides this claim the compensation for losses and damages to the tune of Rs.3,691,486.00 has also been claimed. Similarly, respondent Company in their prayer has also claimed loss of profit consequential to termination, value of interest, retention of money, compensation on account of inconvenience, loss of business and goodwill to the tune of Rs.125,258,918/- with mark up @ 16% from filing of suit till its realization. On the other hand, the appellant CDA has submitted their counter claim of set off to the tune of Rs.3,10,37,348.98 on the ground that appellant is entitled for damages from respondent Company in terms of Clause 63.1(a) and (d) due to illegal and unilateral termination of contract by the plaintiff/respondent Company, whereafter the remainder of work had to be executed by the appellant CDA at the risk and cost of respondent Company. Resultantly, an amount of

Rs.10 Million has been spent for completion of remainder work over and above the contracted amount.

42. While considering these pleadings in juxtaposition with reference to their evidence, PW-1 Mehboob Alam, Resident Engineer of the Project in his evidence stated that the assessment of IPC amounting to Rs.23.7 Million was forwarded to CDA for its consent, later on, the Engineer on 21.08.97 notified its determination of said amount to the contractor with copy to the CDA, referred as Exh.P476. The delay on the part of appellant claimed by respondent Company was of 22 months upto May, 1996 besides the contract period of 18 months, which comes up to 40 months. The cost for deployment of machinery for 40 months was Rs.52,592,410/- having been calculated on the basis of Rs.1,312,310x40. Similarly, the slow pace of deployment of machinery the Engineer awarded 75% of the amount and respondent Company claimed for the delay of 22 months equal to Rs.15,474,723/- on the basis of method adopted by Engineer regarding determination of claim No.1, the same was included in IPC No.30 and submitted to the Engineer. The respondent Company further asserts that Bill No.30 was certified by Engineer through Exh.P506 and IPC No.30 was submitted by the Engineer to the CDA for payment to the respondent Company.

43. The learned Trial Court has given detailed findings on the basis of counter claim of parties while deciding Issues No.22 and 26 in the following manner:

> *"84. As for as, the claims of the plaintiff mentioned on Serial No.1, b & c are concerned the evidence led by him consisting the statements of PW-1 and his attorney as PW-3, coupled with the documents Exh.P616 and Exh.617, proves that the said claims of the plaintiff are genuinely payable by defendant No.1. The amount mentioned against the claims a & b are contained in sheet No.6/103 and the Engineer has stated about its deposit with the defendant and entitlement of the plaintiff to get the same. The claim mentioned at Serial No. c is mentioned in the letter of the Engineer, Exh.P617, dated 29.05.1998 sent by the NESPAK to the CDA regarding the status of work done at the site by the plaintiff. Therefore, it is observed that the amount mentioned against the claims*

bearing Serial No. a, b & c, is proved to be paid by defendant No.1 to the plaintiff. The amount payable under the said claims is Rs.12,011,837/-.

85. As to the other claims bearing Serial No. d, e, f, g, h, i, j & k are concerned, the available record does not show their certification or otherwise entitlement of the plaintiff to recover the same from defendant No.1. These claims do not get sufficient support from the evidence having come on the record. Hence, it is observed that the plaintiff is not entitled to recover the claims bearing Serial No. d, e, f, g, h, i, j & k.

86. Now for the findings recorded supra, it is concluded that the plaintiff is entitled to get Rs.34,409,935/- for his first and second interim claims and Rs.12,011,837/- on account of retention money work done. The total amount of his entitlement comes as Rs.46,421,772/-. He has already received an amount of Rs.15,000,000/- as an adhoc payment from defendant No.1 and the same has not yet been adjusted. Therefore, this amount is to be deducted from the total entitlement of the plaintiff. In this way the net due amount to the plaintiff comes as Rs.31,421,772/. Hence, this issue is accordingly decided in favour of the plaintiff."

44. The respondent Company through the captioned RFA No.47/2002 disputed the impugned judgment to the extent of rejection of their claim by taking the stance that the Engineer certified IPC No.30 on 30.08.97 and submitted the same to CDA on 10.09.97 for payment to the respondent Company. The time stipulated in contract i.e. 14 days for payment of certified IPC, expired on 24.09.97. The respondent Company has also taken the stance that their Claim No.1 and IPC No.30 have never been paid and the amount determined and certified by the Engineer in this regard is also included in IPCs No.31 and 35, all of which were certified for payment by the Engineer, hence the amount of Rs.23,768,908/- regarding Claim No.1 of the respondent Company has not been paid despite request. The respondent Company has also raised the ground in their appeal that IPC No.30 was submitted by Engineer to the employer on 10.09.97 vide Exh.P506 with recommendation for payment to the respondent Company but no such payment was made by the appellant CDA including IPCs No.30 to 35. The respondent Company have also argued their case that the Second Interim Claim for Rs.11.2 Million for period w.e.f. 01.06.96 to 31.12.96 coupled with Third Interim Claim for Rs.22.08 Million for period w.e.f. 01.01.97 to

31.05.97 have not been determined by the Engineer, even after issuance of termination notice dated 13.12.97 Exh.P790.

45. A meeting on 06.01.98 was convened between the CDA and the respondent Company to resolve the contractual dispute which was recorded in Exh.P798, whereby following things have been settled:

1. Extension of time is to be granted upto December, 1997,
2. The Engineer would issue variation order in second week latest by 20.01.98;
3. Second Interim Claim upto December, 1997 within two weeks from 06.01.98 i.e. upto 20.01.98; and,
4. Third Interim Claim upto May, 1997 would be cleared before 08.02.98.

The other issues including the payment in favour of respondent Company will have to be cleared by 08.02.98. The above referred aspects clearly resolve the major issues and assurance given by the appellant CDA that the amount would be released to the respondent Company and the Claims No.2 and 3 would be considered and determined by the Engineer within period agreed by Engineer as set out in Para-4 of the Minutes of Meeting, dated 06.01.98. The respondent Company conditionally agreed to extend the period of its termination notice up to 08.02.98, however the matter was not resolved. The record further reflects that the Engineer kept the Second Interim Claim and other consolidated claims of the respondent Company pending and there was no decision on the part of CDA or Engineer.

47. Letter Exh.P616 also refers that the Engineer prepared detailed account and status of work done up to 29.05.98 which was prepared under the provisions of contract pertains to measurement of work and its assessment, whereby the Engineer concluded that respondent Company is entitled to receive Rs.8,074,906/- Similarly, the Engineer also allowed the CDA a substantial amount under the heads of bitumen, MC-I, steel, cement, curbs stones and undue

hire charges, which were adjusted by the Engineer in favour of the CDA on account of work done against the amount due to respondent Company and the learned Trial Court has held that respondent Company is entitled for amount to the tune of Rs.8,074,906/- as determined by the Engineer under Clause 56 of the Contract. This entire background and arguments rendered by the respondent Company have been considered by this Court and we are of the view that the decision taken by the learned Trial Court in impugned judgment is in accordance with law qua the calculation of amounts, losses and compensation, however the findings given by the learned Trial Court in respect of Claims No.2 and 3 were not determined on the formula initially agreed as the Engineer has not verified the said claims, even the learned Trial Court has not attended to the evidence of DW-2 Abdul Jabbar, who admitted the following factors:

i.) *Under the contract the Engineer grants extension in time with consultation of the employer. It is correct that Engineer had recommended and completion period of project up to December 1997.*

ii.) *During the meeting held in January 1998 the D.G. Works (Project Director) had requested to grant extension followed by firm extension without mentioning the date.*

iii.) *The bills submitted to the CDA were certified by the consultant.*

iv.) *The CDA did not make payment of claims to the contractor.*

v.) *Engineer subsequent to the determination of the claims of the contractor and prior to decision of the CDA Board did not disown their determination of the claims.*

DW-2 Abdul Jabbar was specifically asked a question regarding the completion of work, to which he answered in the following manner:

Question: *Did Karcon substantially complete the project?*
Answer: *Work upto 70 to 80% was complete when a notice of termination was served.*

48. We have gone through the findings of the learned Trial Court while determining Issues No.22 and 26, referred at Para-72 of the impugned judgment, which have rightly been calculated by the learned Trial Court and counsel for the parties have failed to dispute this part of the impugned judgment in any manner, however the respondent Company has a grievance towards the non-inclusion of

their claim for period w.e.f. 01.01.97 to 27.12.97, which has been addressed by the learned Trial Court in Para-26 of the impugned judgment that the respondent Company had applied for extension of time in the year 1997 and correspondence of parties were referred through various exhibited letters. There is no denial to the proposition that extension was granted up to 31.12.96 and even it has not been denied that the Contractor kept on executing the work and he was not restricted or stopped by the Employer or Engineer. Accordingly, the learned Trial Court has categorically held that:

> *"Therefore, I am of the opinion that an employed extension has been allowed to contractor in the year 1997. But the benefit of said implied extension was that it kept protected the contractor from penal action which might have been taken under the provision of the contract. Such an implied extension is unable to arm the contractor to claim additional cost from the employer. It has already been opined supra in the year 1997 there had been no factor obstruction at the site. The services have already been relocated and material change in the drawing or design was introduced. Hence, it is observed that plaintiff is not entitled to get any claim as additional cost against his third claim pertaining to period w.e.f 01.01.97 to 31.12.97.*

49. The learned Trial Court has rightly observed in Para-81 of the impugned judgment that respondent Company is only entitled for Second Interim Claim for the period we.f. 01.06.96 to 31.12.96 and as such, all those payments have been awarded as referred in Para-86 of the impugned judgment.

50. The set off claim by the CDA has not been proved, even half-heartedly been claimed without any basis, especially when the termination of contract was already justified due to delayed action of clearance of site, even the termination of contract is attributed to appellant CDA due to its own faults and as such, they are not entitled to claim any set off nor they have submitted any such claim in this regard. Hence, the findings of the learned Trial Court pertaining to claims of plaintiff have rightly been settled. The respondent Company tried to convince this court for their remaining claims but they had failed to draw any verification

of their claims by the Engineer, which could have been decided by the learned Trial Court but as such, the entire judgment and the evidence is silent to that effect.

DECISION OF THE CDA BOARD (ISSUES NO.19 & 27)

51. The respondent Company has specifically assailed the decision of the CDA Board, dated 07.02.98, referred as Exh.P476, whereby they have produced the evidence of PW-2 Muhammad Zafar Hussain Siddique, who stated that:

> *"The action by the CDA Board denying the payment is un-contractual and unlawful. There are three basic pre-requisites for action to be taken by the Board of CDA. Firstly, there has to be a dispute raised by the Contract Under Clause 67.1 GCC Part II, on the determination and certification by the Engineer. Secondly, the contractor has to refer the dispute if any to the Engineer under Clause 67.2 as instructed under Clauses 67.1 ibid. Thirdly, the Engineer has to give a decision under 67.2 ibid within the specified period of 84 days or abstain from giving a decision. If the party of the parties under the Contract do not agree with the decision of the Engineer or the Engineer does not give his decision, a reference is to be made. None of the above procedure were followed by the defendant and the decision given by the Board is pre-mature, un-called for and un-contractual."*

52. Contrary to the above, the appellant's witnesses have not justified the decision of CDA Board in unequivocal terms, whereas the learned Trial Court while jointly deciding Issues No.3 & 19 referred Clauses 67.1 and 67.2, which deal with decision and settlement of disputes, in the following manner:

> ***"Clause 67.1. CERTAIN DECISION TO BE FINAL.***
> *Wherever in the contract provision is made for any question, arrangement, amount, matter or thing being settled, decided certified or determined by the Engineer or the Engineer's Representative or resting upon or being governed or controlled by or submitted to the judgment or opinion of either of them, his assessment, decision, certificate, determination, judgment or opinion shall be final and conclusive for all purposes and shall be binding on the Contractor unless within FOURTEEN DAYS OF THE RECEIPT THEREOF THE CONTROVERSY by notice in writing disputes and refers the same for the decision of the Engineer in accordance with para 67.2 hereof.*
>
> ***Clause 67.2. SETTLEMENT OF DISPUTES-ARBITRATION.***
> *If a Contractor or the Employer is dissatisfied with the decision of the Engineer or if the Engineer, fails to give notice of his decision on or before the eighty fourth day after the day on which he received the reference, then the dispute shall be referred to the Board of the Capital*

Development Authority, Islamabad whose decision shall be final and binding on the parties.

53. The above referred provisions of the contract clearly stipulate a process for determination of any issue through the Engineer, which shall be final and conclusive for all purposes as well as binding on the contractor unless within 14 days of the receipt thereof the matter is referred in writing as a dispute. Similarly, Clause 67.2 gives a timeline of 84 days after the day on which reference has been received then the matter shall be referred to the Board of CDA, whereas the witnesses of CDA i.e. appellant have never highlighted this portion in any manner nor they have taken the stance that the decision of the Engineer was not acceptable to the employer and same was referred to the CDA Board under this provision, although the respondent Company was called for representation of their case, which they did before the CDA Board, but technically the CDA Board has no authority to take up the matter in a mode and manner in which they have adjudicated upon the issues through Exh.P798, hence the learned Trial Court has rightly decided Issue No.27 in the light of findings given on Issues No.3, 4, 5 and 19, whereby the CDA Board decision has rightly been held *void* and *ultra vires* having no legal effect.

CONCLUSION

54. While thoroughly scanning the above referred evidence, the claim of appellant CDA is not convincing and they could not hide behind their own faults as the appellant CDA issued letter of acceptance on 28.01.1993, followed by the Engineer's order, dated 01.02.1993, to commence the work. The contract was bifurcated under two general heads i.e. the diversion and permanent work, which was to be completed in six (06) and 12 months, respectively. The NESPAK (Respondents No.3 & 4) being Engineer (Respondents No.3 & 4) had to provide drawings but the initial dispute started when the CDA

had failed to provide clear site due to existing WAPDA HT/LT lines/poles, Kachi Abadi, markets and shops, even office of the DSP Traffic was also situated within the site area. The delay was caused due to inaction on the part of CDA and extension of time was applied by the Engineer till November, 1997 and it is clearly settled in earlier part of the judgment that the time for completion of contract could not be followed due to fault of CDA and the learned Trial Court has rightly adjudicated upon the same. The appellant CDA in their evidence has acknowledged their delay and the learned Trial Court has rightly determined the delay on the part of CDA, even there is no denial that work variation has been made by the employer CDA and the respondent Company accepted the same as a new work, whereby the relevant Issues No.14, 15, 16, 17 and 18 were adjudicated upon against CDA in a proper manner as there is no dispute between the parties regarding measurement of work done by the respondent Company and as such, the IPC No.30 was declared in favour of respondent Company. The extension of time was admitted and the respondent Company has exercised its authority for termination of contract due to non-payments by the appellant CDA in accordance with procedure specified in Clause 65.8 through letter dated 30.08.97, Exh.P492. The CDA i.e. appellant being Employer initially tried to resolve the controversy through meeting held on 06.01.98, Exh.P798, whereby the Engineer and the Contractor made certain reciprocal promises i.e. the time was extended till 13.01.98, payments were to be cleared upto December, 1997 within two weeks i.e. by 20.01.98 and similarly Third Interim Claim will also be cleared before 08.02.98, but the employer CDA has failed to comply with their own commitment and then they had obtained the decision from the CDA Board, dated 07.02.98, Exh.P476, whereafter they expelled the respondent Company from the project. Whereas, respondent Company has not withdrawn

their termination of contract letter Exh.P492 which is prior to the CDA Board decision.

55. This entire background persuaded this Court to view the entire issue through the judicial prism in terms of Section 75 of the Contract Act, 1872, which is as under:

> *75. A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfillment of the Contract."*

The above referred provision refers the phrase *"rightly rescinds"*, which means that a party is not a guilty of any contemptuous delay, breach of terms, and has exercised its authority within the terms provided in the contract i.e. in this case the plaintiff is a party who claims the rescission due to the act of appellant CDA and as such, there is no violation on the part of respondent Company. Accordingly, the respondent Company has rightly rescinded the contract and as such, entitled to compensation for damages which has been sustained by the respondent Company due to non-fulfillment of terms of contract, however the damages are to be assessed not from the date of breach but from the date on which it was rescinded.

56. In view of above, the appellant CDA has failed to justify their actions which have already been adjudicated upon by the learned Trial Court as well as by this Court in previous part of this judgment. This Court truly believes that the contract was rightly terminated by the respondent Company due to fault of CDA, but the calculation of compensation for any damage, which has been sustained by the respondent Company through non-fulfillment of contract, has to be proved through positive evidence, although no such evidence is visible on record except the generalized claim. The calculation of damages has not been brought on record in a manner required on parameters of the Qanun-e-Shahadat

Order, 1984. No doubt the default and breach of contract is on the part of the appellant CDA, but the claim of damages is required to be proved through positive evidence, which is missing. Reliance is placed upon ***2020 MLD 213 Karachi (Abdul Qadir vs. Mrs. Ameer Zadi)*** and ***2009 SCMR 276 (Aziz Ullah Sheikh vs. SCB Ltd.)***. It was the duty and obligation of the respondent Company to prove the loss which they suffered due to breach of terms of contract and the onus was upon the respondent Company to justify the same. Reliance is placed upon ***2016 CLC 1677 Islamabad (Atlas Cables (Pvt.) Ltd. vs. IESCO)***. The claim of appellant CDA is also not justiciable on the ground that the time for performance of contract was extended time and again and as such, time is not essence of agreement/contract, therefore, claim of appellant CDA is not tenable.

57. We have also gone through Section 73 of the Contract Act, 1872, which deals with compensation and loss of damages caused due to breach of contract, but the same has to be seen in the light of Section 37 of the Contract Act, 1872, where the parties to a contract must either perform or offer to perform their respective promises and each party is bound to perform his obligation under the contract unless the performance is dispense with or excused under the provision of the Contract Act, 1872 or of any other law, whereas it is clearly proved from evidence that the contract was terminated due to non-payment on the part of the CDA i.e. the employer, therefore, termination by the respondent Company is justified as the appellant CDA has failed to perform his obligation under the contract. Such aspect has also been observed in ***2001 YLR 2240 Karachi (Rehman Feeds (Pvt.) Ltd. vs. Agriculture Development Bank of Pakistan)***.

58. It is settled by now that every breach of duty arising out of contract gives right to an action for damages. However, the damages are reciprocal to loss sustained and in case where loss could not be demonstrated with mathematical

certainty, especially in cases where it is incapable of precise measurement, the presumption is against the defendant i.e. CDA in this case and burden is on the CDA to wriggle out from the said estimate. It is also settled that where the quantum of compensation for breach has been provided in agreement, the parties are only entitled to the award of damages to the extent provided in the agreement. Reliance is placed upon ***PLD 1985 SC 69 (Aslam Saeed vs. Trading Incorporation Pakistan)***. Therefore, while applying these principles the question of measurement of damages where two parties made a contract, the same was breached by one of them, the damages which other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably considered either arising naturally in usual course of things.

59. The initial onus is upon the respondent Company (plaintiff) to prove that due to breach of contract he had suffered a loss and entitled to damages and to what extent, which were *sine qua non* for grant of damages under Section 73 of the Contract Act, 1872, however the principle for ascertaining the quantum of special and general damages has to be considered in the light of evidence brought on record while ascertaining as to whether the plaintiff is able to prove which kind of damages i.e. nominal, general, or special damages, all three kinds of damages have different requirements under the law, whereas in this case the special damages could only be awarded if a future claim was justified on the strength of an independent evidence which is missing in this case, therefore, we are not inclined to grant any special damages, hence the only case made out is for general damages according to usual course of things from breach of contract, therefore, at this stage, we have considered Para-57 of the plaint which provides the claim raised by the respondent Company i.e. Contractor whereby Section 73 of the Contract Act, 1872 comes into play even Clause 5.1(b) of the Conditions of

Contract (Exh.P633) for loss of damage which naturally arose in usual course of things for breach of contract have been evaluated in terms of Clauses 12.2, 42.2, 73.9, 73.11, 60.10, and 69.1 of Exh.P633, which provide due protection to the Contractor for failure to give possession of site, relocation of services, demolition and disposal of existed structures, and failure to release the payment in time which justified the breach and negligent conduct of employer i.e. the appellant CDA, therefore, the respondent Company is entitled for general damages on account of inconvenience, illegal acts of CDA, amounting to Rs.20 Million as prayed for by the respondent Company.

60. The other point mainly argued by both sides is the meeting held on 06.01.98, between the CDA (employer) and the Contractor, referred as Exh.P798, in which extension of time was agreed by the D.G. Works and variation orders, Second Interim Claim and Third Interim Claim were also agreed, therefore, Section 51 of the Contract Act, 1872 comes into play where promisor is not bound to perform, unless reciprocal promisee is ready and willing to perform his part. In such situation, simultaneous performance is required and the actions of promisor is based upon the readiness and willingness of the other side, therefore, the effect to such conditions in Exh.P798 has also been considered in the light of Section 54 of the Contract Act, 1872 where the appellant CDA i.e. employer has to perform his part at the first instance under this arrangement of reciprocal promises. It is trite law that bilateral contracts have to be performed by respective parties step by step as also held in ***2020 CLC 291 Lahore (Ijaz Ahmad Chaudhry vs. Learned Civil Judge)***. However, the employer has not performed their obligation agreed by them in Exh.P798 and reciprocally respondent Company has not performed their part, but the assurance given by the appellant/CDA in the abovementioned letter discloses their intention whereby

they have agreed the payments, hence principle of estopple comes into play. The appellant/CDA cannot wriggle out from their commitment however the second and third IPC payments referred in Exh.P798 could not be settled at this stage when the Engineer has not verified the same, who undertakes to settle those issues held in meeting dated 06.01.1998, therefore, these amount could not be awarded, but fact remains the same that conduct of appellant/CDA entitles the respondent Company for damages.

61. While considering these legal aspects and detailed view given by the learned Trial Court, we are of the view that the appellant CDA has failed to make out their case on any legal and factual ground as they are guilty party for not having observed the contractual obligations in accordance with law, even the decision of the CDA Board is beyond any comprehension as the same is in violation of Clauses 67.1 and 67.2 of the Contract, which provide a complete mechanism before reference of the matter to the CDA Board. On the other hand, the respondent Company has also failed to justify their special damages *viz-a-viz* pecuniary losses in unequivocal terms and the learned Trial Court has rightly settled the entitlement of recovery in favour of the respondent Company. The claims raised in cross appeal of the respondent Company could only be considered to the extent of general damages of Rs.20 Million, whereas the respondent Company has failed to demonstrate from record the special damages on the touchstone of Qanun-e-Shahadat Order, 1984 as the onus to prove in terms of Article 117 has not been justified by the respondent Company through any positive evidence. However, the general damages for breach of terms by the CDA appellant regarding their contractual obligations under Exh.P633 is apparent on record whereby the respondent Company is entitled for general damages which arose in usual course of things and Rs.20 Million was claimed in

this regard is the relief earned by the respondent Company at this moment, which was not appreciated by the learned Trial Court.

62. In view of above position, *RFA No.58/2002 (CDA through its Chairman & another v. M/s Karcon (Pvt.) Ltd., etc.)* is hereby ***DISMISSED*** for being meritless. Similarly, the captioned *RFA No.47/2002 (M/s Karcon (Pvt.) Ltd. v. Capital Development Authority, etc.)* is hereby ***PARTLY ALLOWED*** to the tune of Rs.20 Million as general damages against the CDA in favour of respondent Company. The office is directed to draw decree sheet in favour of respondent Company to that extent.

(LUBNA SALEEM PERVEZ)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 07th July 2020.

JUDGE

JUDGE

Khalid Z.