I. THE LAW ON TIME AS ESSENCE IN CONSTRUCTION CONTRACTS: A CRITIQUE

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ABSTRACT

The concept of time as essence in construction contracts is a controversial topic. Even though parties routinely provide in their agreements that time is of the essence, these clauses inevitably figure in construction disputes. Arbitral tribunals and courts have mostly decided such disputes holding those clauses to be of no legal effect, mainly by relying on the decision of a three-judge bench of the Hon'ble Supreme Court in Hind Construction Contractors v. State of Maharashtra. This paper argues that Hind Construction was wrongly decided, that it is not good law and that it requires reconsideration given the changing times. The paper further notes that parties do not appear to have circumvented the adverse effect of Hind Construction. Usually, in such situations, there is a change in contracting behaviour by the use of appropriate contracting language. Perhaps, this is due to the lack of direction by courts as to what appropriate language could be used in contracts to make time as the essence of the contract. This paper concludes by suggesting possible methods by which courts and arbitral tribunals could validly enforce time-as-essence clauses.

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I. INTRODUCTION

The concept of time as essence in construction contracts is controversial. Time and again, courts and arbitral tribunals have been called upon to decide whether time is of the contractual essence. Most often than not, tribunals and courts have held that time was not of the essence or ceased to be so, even though the contracts relating to the disputes provided so.[1] Reliance has been placed on a three-judge Bench of the Supreme Court in *Hind Construction Contractors v. State of Maharashtra*[2] ("Hind Construction") in support of such conclusion. Further, although the court in *Hind Construction* has held that an express term that time is of the essence is not sufficient for the courts to hold so, it is observed through reported cases that there is hardly any change in contracting behaviour and parties continue to use the same contracting language, albeit with least success in terms of the effect sought to be produced by the said clause.

In view of the above, the following arguments are made in this paper: (1) *Hind Construction* is no more relevant to the current times and provides

[1] See, Part II of this paper.
[2] AIR 1979 SC 720: MANU/SC/0031/1979 [hereinafter *Hind Construction*].

incentives to inefficient contractors leading to delay in project completion; (2) *Hind Construction* was wrongly decided, is not good law, and requires to be reconsidered; (3) Contracting parties do not appear to have circumvented the adverse effect produced by *Hind Construction* through the use of appropriate language in their contracts despite various decisions following the said decision; and (4) One of such reasons for the phenomena appears to be a lack of direction by courts as to what contracting language could constitute future courts to construe a contractual condition providing that time is of the essence as such.

For this purpose, the paper is structured as follows: Part II deals with the law on time as essence in construction contracts. It analyses the relevant provisions in the Indian Contract Act, 1872 ("Contract Act") and various decisions of the Supreme Court of India and the High Courts, including the decision of the three-judge Bench of the Supreme Court in *Hind Construction*. Part III critically evaluates the law as it stands today on the subject. Part IV concludes by highlighting possible contractual clauses and contract management strategies that could further party intent that time is of the essence in construction contracts notwithstanding *Hind Construction* and later decisions following it.

II. TIME AS ESSENCE IN CONSTRUCTION CONTRACTS: THE LAW

A. Time as Essence in the Indian Contract Act, 1872

Section 55 of the Contract Act deals with the law on the subject. The first paragraph of the section deals with a situation where time is of the essence. The second paragraph contemplates a scenario where time is not of

the essence and the third paragraph covers a situation where the promisee accepts performance of a promise at any time other than the time agreed when the contract is voidable due to the Contractor's failure to perform at the agreed time. It states the effect of acceptance of performance at a time other than that was originally agreed upon.

Paragraph 1 of Section 55 provides that if the intention of the parties was that time should be of the essence in the contract, failure by a party to perform at or before a specified time makes such contract voidable at the option of the promisee. It also encompasses various kinds of agreements between the parties as regards performance, such as:

- Performance at a particular time;
- Performance before the deadline; and
- Performance milestones.

In contracts where performance within or at the time specified is critical, failure "to do any such thing" at or before the time agreed will render the contract voidable. In the context of contracts with performance milestones, para 1 of Section 55 makes the contract voidable in case performance is not as per the contractual timeline.

It may be noted that Section 2(i) of the Contract Act defines a voidable contract as an agreement enforceable by law at the option of the promisee, but not at the option of the promisor. Thus, the promisee can either enforce the promise or opt not to.

Para 2 of Section 55 deals with situations where time is not of the essence of the contract. It states that where parties do not intend time to be of

the essence, any failure by the contractor to perform the contract does not make the contract voidable. However, the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Thus, the game is to establish before the court or the tribunal that time was not of the essence. If the promisee terminates the contract and the contractor challenges it to establish that time was not of the essence, the rescission is held void. If the termination is valid, the promisee is entitled to compensation for the damage sustained due to non-fulfilment of the contract, as per Section 75 of the Contract Act.

Para 3 of Section 55 states that even where a contract is voidable on account of the contractor's failure to perform his promise at the time agreed (which is of the essence), the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed. Such a bar from claiming compensation arises if the promisee accepts the performance of such promise at any time other than the time previously agreed. It provides for an exception to this rule: at the time of acceptance of performance, the promisee gives notice to the contractor of its intent to claim compensation for the loss.

As regards construction contracts, considering the inherent uncertainties in the completion of construction projects, historically, time was not regarded as of the essence.[3] Indian law, derived from English law, has presumptions regarding the types of contracts where time is presumed to be of the essence. In agreements relating to the sale and purchase of immovable

[3] GAIL S. KELLEY, CONSTRUCTION LAW: AN INTRODUCTION FOR ENGINEERS, ARCHITECTS, AND CONTRACTORS 113 (2013); Madden Phillips Const. v. GGAT Development, 315 S.W.3d 800, 818 (Tenn. Ct. App. 2009).

property, time is not of the essence.[4] These presumptions are, in effect, default rules, and parties are free to choose the contrary, either by express or implied agreement. In line with English law, in construction contracts in India, it is presumed that time is not of the essence.[5] However, where the contract is commercial in nature, some courts have held that time is of the essence.[6]

B. Hind Construction Contractors v. State of Maharashtra

The precedent that occupies the field on the subject is the decision of a three-judge bench of the Hon'ble Supreme Court of India in *Hind Construction*. Therefore, the decision warrants a detailed analysis, especially on the subject in question.

The dispute arose out of a contract issued by the State of Maharashtra in 1955 for the construction of an aqueduct. As per the contract, the work was to commence by July 5, 1955, and the duration of twelve months for completion of the contract was to be reckoned from that date. As such, the contract was to be completed by July 4, 1956. However, the contractor could not complete the work and therefore the State of Maharashtra rescinded the contract with effect from August 16, 1956.

A suit was filed against the termination and certain claims were made. The contentions of the parties assume great significance to put things in context and are worth detailed consideration. The case of the contractor was that the date of the commencement of the work (July 5, 1955) was itself nominal and that the area where work was to be done had heavy rainfall

[4] Chand Rani (Dead) by Lrs. v. Kamal Rani (Dead) by Lrs., (1993) 1 SCC 519, ¶ 18.
[5] Mcdermott International Inc. v. Burn Standard Co Ltd., (2006) 11 SCC 181, ¶ 86.
[6] Citadel Fine Pharmaceuticals v. Ramaniyam Real Estates (P) Ltd., (2011) 9 SCC 147, ¶ 43.

thereby, making it impossible to carry out work till November that year. Consequently, it was argued that the Public Works Departments as a practice deducted that period of monsoon for these types of works and that the contractor was orally informed that this period would be not taken into account while reckoning the period of completion. Therefore, it was contended that the contractor commenced his work in December 1955. Further, the contractor argued that in any case, time was not of the essence due to several issues such as monsoon, lack of roads, etc. over which the contractor had no control which delayed completion of the work.

The contractor argued that these issues were not taken into consideration while refusing contract extension and that the contract was wrongfully terminated thereby, entitling him to damages.

The State of Maharashtra argued that time was of the essence and the duration fixed was not nominal. It was also contended that the contractor knew well about the situation at the site of construction and there was no excuse for not performing the task. The Government contended that since the contractor failed to carry out the proportionate work activities during the periods fixed therefor, the contractor rendered himself incompetent to complete the work on time. Consequently, the government asserted that they were right in rescinding the contract.

The trial court rejected the first contention of the contractor that the commencement date (July 5, 1955) fixed was not nominal. However, the court accepted the contention that time was not of the essence of the contract between the parties and therefore, the government had wrongfully terminated the contract.

Both parties preferred appeals. In the appeal, the Bombay High Court did not deal with the question as to whether time was of the essence but considered the issues that the contractor had cited for wrongful rescission. On consideration, the High Court held that the contractor did not provide the existence of these issues or that these factors did not lead to a conclusion of wrongful rescission. The High Court held that the government was right in rescinding the contract in view of the court's finding that the contractor had completed only one-third of the work to be undertaken and would not be able to complete the work within the next three months. The High Court concluded that the rescission was not mala fide or arbitrary.

The Contractor appealed to the Supreme Court and argued the following points:

- The High Court fell in error in not deciding the main issue as to whether time was not of the essence.
- The High Court should not have examined the issue of whether the rescission was mala fide or unreasonable as the contractor did not contend this.
- The contractor's stance was that time was not of the essence of the contract. Consequently, the Government had to grant the contractor either just before the expiry of the initial twelve months or immediately thereafter, a reasonable time for completion of work, especially when such a request from the contractor was pending with the government.
- The contract was akin to a building contract, where time is not usually regarded as of the essence.

- The High Court fell in error in assuming that the contractor would not have been able to complete the work in the next three months.

The Government, on the other hand, argued that time was of the essence given the express contractual provision and that even if time was not of the essence, having regard to the circumstances in the case, rescission was not unreasonable or unjustified given the contractual breach.

The decision of the court forms the leitmotif of this paper and is worth summarising exhaustively on the subject:

- The question of whether time was of the essence of the contract was one of the intentions of the parties which had to be gathered from the terms of the contract.
- July 5, 1955 was the date of commencement of the work and was not a nominal date.
- The (then) latest 4th edition of Halsbury's Laws of England regarding building and engineering contracts stated:

> - 1179. *Where time is of the essence of the contract*. The expression time is of the essence means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract. Exceptionally, the completion of the work by a specified date may be a condition precedent to the contractor's right to claim payment. The parties may expressly provide that time is of the essence of the contract and where there is power to determine the contract on a failure to complete by the specified date, the stipulation as to time will be fundamental. Other provisions of the contract may, on the construction of the contract, exclude an inference that the completion of the works by a particular date is fundamental, time is not of the essence where a sum is payable for each week that the work remains incomplete

> after the date fixed, nor where the parties contemplate a postponement of completion.
> - Where time has not been made of the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer may by notice fix a reasonable time for the completion of the work and dismiss the contractor on a failure to complete by the date so fixed.

- The italicised portions in the above quote are based on *Lamprell v. Billericay Union*,[7] *Webb v. Hughes*,[8] and *Charles Rickards Ltd. v. Oppenheim*.[9]
- Even if parties had expressly provided that time was of the essence, such stipulation would have to be read with other contractual provisions in order to find out whether time was of the essence. If those other provisions are construed to exclude inference that the completion of fate was intended to be fundamental, time would not be of the essence.
- An example of such construction would be where the contract included provisions for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract. Such clauses would render an expression time-as-essence provision "ineffective".[10]
- Clause 2 of the contract provided that time was of the essence, that liquidated damages would be levied for the delay, and also stated the

[7] Lamprell v. Billericay Union, (1849) 154 ER 850: [1849] 3 Ex 283.
[8] Webb v. Hughes, [1870] L.R. 10 Eq. 281.
[9] Charles Rickards Ltd. v. Oppenheim [1950] 1 KB 616.
[10] *Hind Construction*, ¶ 8.

manner in which the contractor is to complete the remaining work. Clause 6 conferred the power on the executive engineer of the Government to grant an extension of time.

- The provision of conferring the power on the executive engineer to grant an extension of time and providing "for levying and recovering penalty/compensation" if the work remained incomplete are inconsistent with the provision that time is of the essence.
- The correspondence exchanged between the parties shows that the 12-month duration was waived as the contractor was allowed to perform at his risk by making rescission effective from August 16, 1956.
- The question in the case is not whether rescission was reasonable. If time was not of the essence or if such a stipulation ceased to be of the essence, the government could have made time as the essence and could have rescinded the contract in case of failure by the contractor to perform within the extended time.
- Some reasonable time-making time as essence should have been granted by the Superintending Engineer. Time was not of the essence and the Government did not fix further periods making time as essence and instead it rescinded the contract directly, which was wrongful and illegal.

Thus, the court ruled in favour of the contractor and against the government.

C. Subsequent Decisions

Hind Construction is a decision by a three-judge Bench. There are several ways the courts have dealt with *Hind Construction*.[11] The first strand of decisions has relied on *Hind Construction* and applied it straight away to the facts.[12] Another strand of decisions distinguished facts before it from *Hind Construction* and held it to be inapplicable.[13] These categories[14] are discussed below:

Most decisions that came after *Hind Construction* followed the precedent. Many decisions held that where there was a liquidated damages ("LD") clause or an extension of time ("EOT") clause, time would not be of essence even though the contract might have so stated.[15] *Hind Construction* has also been cited by a five-judge Bench of the Supreme Court in *Chand Rani*

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[11] This paper does not address those cases where *Hind Construction* was cited although the underlying transaction did not pertain to construction contracts.

[12] *See* Citadel Fine Pharmaceuticals v. Ramaniyam Real Estates P. Ltd. MANU/SC/0939/2011; McDermott International Inc. v. Burn Standard Co. Ltd., MANU/SC/8177/2006: (2006) 11 SCC 181; Citi Bank v. Standard Chartered Bank (2004) 1 SCC 12; S Brahmanand v. KR Muthugopal (2005) 12 SCC 764; Arosan Enterprises v. Union of India (1999) 9 SCC 449; Amal Peterson v. The Authorized Officer, Tamilnadu Mercantile Bank Ltd. (18.08.2020 - MADHC): MANU/TN/4351/2020, ¶7.8-7.11; Pondicherry University v. B.E. Billimoria & Company Limited, O.M.P. (COMM) 186/2019, I.A. 8723/2019, (Del HC: 26.05.2020); Star India v Kaleidoscope 2015(5) Arb LR 282 (Bom).

[13] *See* Amal Peterson v. The Authorized Officer, Tamilnadu Mercantile Bank Ltd. (18.08.2020 - MADHC): MANU/TN/4351/2020, ¶ 7.9; Rail Land Development Authority v. Yantti Buildcon 2018(3) Arb LR 356 (Del.).

[14] There is another category of cases where *Hind Construction* was cited but the court did not deal with it at all. This paper does not deal with those cases.

[15] NTPC Limited v. Sri Avantika Contractors (I) Limited, (08.06.2020 - DELHC) : MANU/DE/1237/2020; Pondicherry University v. B.E. Billimoria and Co. Ltd., (26.05.2020 - DELHC): MANU/DE/1099/2020; The Chief Executive Officer, Kolkata Metropolitan Development Authority v. Pragati 47 Development Limited, (30.10.2019 - CALHC): MANU/WB/2639/2019; National Highways Authority of India v. Progressive Constructions Ltd., (10.04.2019 - DELHC) : MANU/DE/1310/2019; Union of India (UOI) v. Gujrat Co-Operative Grain Growers Federation Ltd., (07.12.2009 - DELHC): MANU/DE/4669/2009; Panipat Food Limited v. Union of India, MANU/DE/0555/1995 : 1995 (60) DLT 258.

(Dead) by Lrs. v. Kamal Rani (Dead) by Lrs.,[16] albeit in the context of immovable property transactions.

Several courts have distinguished *Hind Construction* on various grounds. Some courts have held that *Hind Construction* did not apply in the context of commercial contracts. For instance, in the recent decision of *Amal Peterson v. The Authorized Officer, Tamil Nadu Mercantile Bank Ltd.*,[17] the Madras High Court held that *Hind Construction* did not apply to commercial contracts.[18] The conclusion of the court is surprising considering that in both cases the promisee was a government entity. In *Hind Construction*, the contract was a construction contract while in this case, the contract was for auction of immovable property. In both types of transactions, time is traditionally not regarded as of essence.[19]

Certain courts have distinguished *Hind Construction* on the basis of the nature of the clause on the extension of time. For instance, in *Devender Kumar v. Parsvnath Realcon Pvt. Ltd.*,[20] the Real Estate Regulatory Authority held time to be of the essence of the contract (even though *Hind Construction* was cited) on the ground that the period of extension as per the flat buyer agreement was only six months. It is to be noted that this case arose out of an agreement to purchase a flat by a consumer. However, it is of interest to note

[16] Chand Rani (Dead) by Lrs. v. Kamal Rani (Dead) by Lrs, MANU/SC/0285/1993, ¶ 46.
[17] Amal Peterson v. The Authorized Officer, Tamil Nadu Mercantile Bank Ltd., MANU/TN/4351/2020 (18.08.2020 - MADHC).
[18] *Id*. ¶ 7.9.
[19] *See* Chand Rani v. Kamal Rani, MANU/SC/0285/1993.
[20] Devender Kumar v. Parsvnath Realcon Pvt. Ltd., MANU/RR/0012/2020: (16.01.2020 - RERA Delhi).

that *Hind Construction* was not distinguished on the ground that the underlying transaction was different from the one which arose in that said case.

Another such case where *Hind Construction* was not followed although the transaction was a joint development agreement is the case of *K.K. Krishnan Kutty v. Green Tree Homes and Ventures Pvt. Ltd.*[21] Here too, *Hind Construction* was not followed, not because the underlying transaction was illegal but for different reasons. In this case, the owner was an individual owning a few acres of land. A joint development agreement was entered into between the owner and a builder for a house construction project. The builder collected a large sum of money from buyers but completed only a part of the project, leaving buyers in the lurch. An arbitrator was appointed to adjudicate the disputes between the buyers' association, the owner and the builder. The arbitrator ruled in favour of the buyers' association and cancelled the joint development agreement owing to the default committed by the builder. The arbitrator also directed the owner to return the money paid by the builder. Cross-petitions were filed challenging the said award.

The builder contended before the High Court that time was not of the essence of the contract. Relying on *Hind Construction,* the builder argued that a mere delay in completion of the project cannot be a ground for termination. The court rejected the said contention and held that "When a person enters a contract and lure the public and collect huge amount in several crores cannot contend that time is not essence of contract."[22]

[21] K.K. Krishnan Kutty v. Green Tree Homes and Ventures Pvt. Ltd., MANU/TN/4722/2019: (12.06.2019 - MADHC).

[22] It is interesting to note that the High Court relied on the proposition in McDermott International Inc. v. Burn Standard Co. Ltd., MANU/SC/8177/2006: (2006) 11 SCC 181

Haryana State Industrial Development Corporation Ltd. v. Shushil Kumar Rout,[23] is another example where the court did not apply *Hind Construction*, although the decision is not clear on whether the contract contained clauses on LD or EOT. In this case, the government entity-owner granted several extensions to the contractor and therefore the arbitral tribunal held that the time was not of the essence in view of the repeated extensions granted by the owner. In the proceedings challenging the award, the contractor contended that the owner only asked the contractor to commence the work within seven days but no outer limit was fixed and that therefore time was not of the essence of the contract.

The High Court gave a finding that the contractor was deliberately avoiding execution of the balance work in the contract and held that the contract could be terminated as per clause 2.2(a) of the general conditions of the contract if due diligence was not shown by the contractor.[24] The court also found that the tribunal's finding that time was not of the essence of the contract was "contrary to the record" and was "not sustainable."[25]

III. CRITIQUE

Academic critique, unlike law practice, is not bound by the doctrine of precedents. A court or tribunal is bound to decide within the four corners of the precedent system. There is leeway to distinguish precedents based on facts.

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regarding the ratio that there should be minimum supervisory jurisdiction of courts hearing set aside applications against awards while the same precedent also followed *Hind Construction* on the issue as to time not being of essence notwithstanding an express stipulation to that effect.

[23] Haryana State Industrial Development Corporation Ltd. v. Shushil Kumar Rout, MANU/DE/0925/2019: (26.02.2019 - DELHC).

[24] *Id.* ¶ 16.

[25] *Id.* ¶ 17.

Academic critique is critical for the evolution of the legal system mainly because it gives considerable scope to question even the "well-established" precedents and propositions. This paper critiques the decision unbound by the precedential strength of *Hind Construction*.

A. Error of Contract Construction

On the issue of construing clauses providing for time as essence, the Supreme Court held in *Hind Construction*:

> 8. It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental…[26]

The basis of this proposition as well as the quote from the 4th edition of the Halsbury's Laws of England appears to be based on a nineteenth-century decision in *Lamprell v. The Guardians of the Poor of the Billericay Union*.[27]

In the first place, if parties provide expressly that time is the essence of the contract, it is perplexing why a court should go beyond the express terms of the contract. It is a fundamental rule of contractual construction that the express words of a contract are to be given their meaning and importance unless the context otherwise requires or if there is ambiguity. For instance, a

[26] *Hind Construction*, ¶ 8.
[27] Lamprell v. The Guardians of the Poor of the Billericay Union 3 Ex. 283 (1849).

five-judge bench of the Supreme Court held in *Abdulla Ahmed v. Animendra Kissen Mitter*:

> As pointed out by Viscount Simon, Lord Chancellor, in Luxor (Eastbourne), Ltd. v. Cooper [1941] A.C. 108, contracts with commission agents do not follow a single pattern and the primary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under discussion.[28]

Similarly, in *Central Bank of India Ltd. v. Hartford Fire Insurance Co. Ltd.*,[29] another three-judge bench of the Supreme Court unequivocally stated that the court's duty is to give effect to the bargain of the parties and that where the bargain was in writing the court must give effect to the plain meaning of the words. The pertinent portion of the decision is worth quoting here:

> Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words; however, it may dislike the result.[30]

The plaining-meaning rule in construing documents is reflected in Section 94 of the Indian Evidence Act, 1872. The said provision states that evidence need not be given to show that the language used in a document applies to existing facts if two conditions are satisfied: (a) the language used

[28] Abdulla Ahmed v. Animendra Kissen Mitter (14.03.1950 - SC) : MANU/SC/0013/1950.
[29] Central Bank of India Ltd. v. Hartford Fire Insurance Co. Ltd., MANU/SC/0318/1964.
[30] Central Bank of India Ltd. v. Hartford Fire Insurance Co. Ltd., MANU/SC/0318/1964, ¶ 8.

in the document is plain, and (b) the language used applies accurately to the existing facts.

Where parties expressly agree that time would be of the essence, there is no *ex-ante* justification why the court should go beyond the literal meaning of the term and see if other provisions of a contract conveyed a meaning otherwise.

This error in contract construction in *Hind Construction* is apparent in the mutually destructive reasoning that the court gave. Having found that the parties never intended time to be of the essence, the court in equal breath held that since the termination letter provided for termination which was beyond the initial period of twelve months, the said period was "waived".[31] The conclusions are mutually destructive because a waiver of a right can take place only when there exists one in the first place. If there existed a right, then how is that the court held that there was no such right, that is, time was "never"[32] intended to be of the essence?

B. Artificial Construction of Liquidated Damages & Extension Clauses

After holding that the contract could exclude the inference that time was not of the essence, the Supreme Court in *Hind Construction* went on to give an example of such exclusion:

> [F]or instance, if the contract were to include causes providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the

[31] *Hind Construction*, ¶ 9. The court subsequently held that once "*either of the aforesaid conclusions is reached*", the High Court's conclusion could not have been proper. But the question is: which of these conclusions was correct?
[32] *Id.*

> work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of the contract.[33]

Thus, according to the court, if the contract contained provisions dealing with EOT or LD,[34] such clauses would be construed as rendering ineffective an express provision that time is of the essence.

Why should it be so? An agreement stating time as the essence could very well provide that in certain circumstances, the promisee would be empowered to extend the time and the promisor would be liable for damages or liquidated damages if there is a breach. In fact, an LD clause would reiterate the party intent that time should be of the essence. An EOT clause could govern how the contract can be extended in exceptional circumstances and the procedure for the extension.

Parties negotiating a construction contract would want to provide for the duration within which the contractor has to complete the project, the circumstances when an extension of time would be given and liquidated damages in case of delay. But to hold that the last two clauses would override an agreement regarding time as being critical to the contract is beyond business sense. In fact, EOT and LD clauses are near-universal terms in

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[33] *Id*. ¶ 8.

[34] The fourth edition of Halsbury's Laws of England quoted in *Hind Construction* employs the phrase "*where a sum is payable for each week that the work remains incomplete after the date fixed*" while *Hind Construction* employs the phrases "*for payment of fine or penalty*" (Para 8), "*penalty/compensation*" (Para 8) and "*penalty*" (Para 9). But the clause concerned in *Hind Construction* was in the nature of a LD clause. Subsequent decisions also apply *Hind Construction* to LD clauses. See, for instance, National Buildings Construction Corporation Limited vs. Indian Railways Construction Company Ltd. (14.09.2015 - DELHC): MANU/DE/2728/2015.

standard form contracts.[35] For instance, in a commentary on the FIDIC[36] Contracts,[37] the authors state that "The parties to a contract may make time of the essence. They do this when they fix time for completion or a fixed day of completion. If they have done so, they usually also agree to liquidated damages (LAD) for failure to comply with time for completion."[38]

Contractual mechanisms for extension of time are regarded as best practices.[39] There is no legitimate commercial reason why those two clauses should undercut a clause providing for time as essence.[40] As a matter of fact, in *S. Daya Singh v. Som Datt Builders Pvt. Ltd.*,[41] the Delhi High Court considered the existence of a penalty (liquidated damages) clause in the contract to be a factor in holding that time was of the essence of that contract.[42] Therefore, the example provided by the Supreme Court in *Hind Construction* as undercutting the time of the essence clause is conceptually flawed and outmoded.

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[35] See, for instance, DAVID CHAPPELL, VINCENT POWELL-SMITH & JOHN SIMS, BUILDING CONTRACT CLAIMS 19, 43 (2005); DOUGLAS F. COPPI, JOHN D. CARTER, PAUL J. GORMAN & ROBERT FRANK CUSHMAN (ED.), PROVING AND PRICING CONSTRUCTION CLAIMS 99 (2000).

[36] Fédération Internationale des Ingénieurs Conseils, known in English as the International Federation of Consulting Engineers.

[37] FIDIC Contracts can be accessed from https://fidic.org/bookshop (accessed 12.03.2021).

[38] THE CONSTRUCTION SPECIFICATIONS INSTITUTE, CONSTRUCTION CONTRACT ADMINISTRATION PRACTICE GUIDE 65 (2011); AXEL-VOLKMAR JAEGER & GOTZ-SEBASTIAN HOK, FIDIC-A GUIDE FOR PRACTITIONERS 74 (2010). Also see, ELLIS BAKER, BEN MELLORS, SCOTT CHALMERS & ANTHONY LAVERS, FIDIC CONTRACTS: LAW & PRACTICE 239 (2009); WILLIAM F. COBB, CONSTRUCTION CONTRACT TIME IS OF THE ESSENCE CLAUSES (01.10.2020), https://www.cobbgonzalez.com/construction-contract-time-is-of-the-essence-clauses/ (accessed 06.12.2020)l; Bricker & Eckler LLP, *"Time is of the essence" – finishing the work on time and what happens if the work is not finished on time*, LEXOLOGY (31.03.2008), https://www.lexology.com/library/detail.aspx?g=d56ea6ce-2130-49d9-98c3-f613c1cd912b (accessed 06.12.2020).

[39] LUKAS KLEE, INTERNATIONAL CONSTRUCTION CONTRACT LAW 146 (2015).

[40] *Id.* p. 128.

[41] MANU/DE/2261/2019: (16.07.2019 - DELHC)

[42] *Id.* ¶ 37.

Where an agreement expressly stipulates time as essence and the contractor fails to complete the project, the owner is not only entitled to terminate the contract but is also entitled to damages for the contractor's failure to complete it, where the breach is by the contractor. The damages that may be caused to the owner may be difficult to compute and hence the parties may agree on the quantum of loss that the owner is likely to incur, which is nothing but an LD clause or an agreed damages clause. Liquidated damages may be calculated on the basis of a percentage of contract value for every week of delay. This is fairly standard commercial practice. But to hold that such a clause will militate against the stipulation that time is of the essence is artificial and is wholly contrary to commercial practice.

Hind Construction would be completely flawed where there is an express time-as-the-essence stipulation and a clause entitling the owner to terminate the contract in case of failure to complete the project within the time agreed upon, notwithstanding the LD and the EOT clauses. A contractual provision recognising the right of the owner to terminate due to failure by the contractor to complete the project within the time prescribed produces the same effect as a time-is-of-essence clause. This applies even in respect of a termination clause allowing termination for failure by the contractor to complete the contract by the extended time agreed.

C. Incentives to Litigate & Delay Completion

When *Hind Construction* holds that LD and EOT clauses will render nugatory time as essence clause, it, theoretically, forces the parties to either choose between time being of essence or to have clarity on the extension of time and liability in case of delay but not both. In other words, it penalises

contracting parties for wanting better clarity in their contracts in various situations. Consequent to the lack of contractual clarity, parties are forced to litigate if such situations arise. This acts in favour of errant contractors who intend to delay the completion of projects.

Take the case of an EOT clause in the agreement laying down the procedure for extension of time and consequences in case of force majeure circumstances. Without such a clause, there would not be any clarity on how the parties would have to proceed. Although Section 56 of the Indian Contract Act, 1872 would govern a situation where there is no agreement between the parties, the provision is not detailed enough to govern how parties should proceed.

Hind Construction and the state of the law on the issue result in serious injustice. This is exemplified in the case of *S. Daya Singh v. Som Datt Builders Pvt. Ltd.*[43] The builder had to construct a housing complex in the owner's property as per an MOU entered into between them. The builder agreed to obtain permission from the authorities for the construction. A development agreement was signed in 1989, and an amount of Rs. 1 crore was paid by the builder to the owner. Statutory clearances were not forthcoming as it was found out that the premises could only be used for institutional purposes Therefore, the owner's legal heir terminated the contract (since the owner had expired) in 2004, that is, after a lapse of about fifteen years. Disputes arose, an arbitral tribunal was appointed, and the tribunal held in favour of the builder.

[43] S. Daya Singh v. Som Datt Builders Pvt. Ltd., MANU/DE/2261/2019: (16.07.2019 - DELHC).

One of the primary reasons in the arbitral award was that termination was illegal since time was not of the essence. This finding was set aside by a Single Bench of the Delhi High Court holding thus:

> The prescribing of a period of four years for completing the construction, the conduct of the parties in making the requisite applications for permission to L & DO and for sanction of plans even prior to the execution of the development agreement and as a pre-condition for entering into the agreement as also the prescribing of a penalty per month for any delay by the builder - all go to show that the parties contemplated time to be of the essence in the contract.[44]

The decision is interesting because there was not even an express stipulation in the agreement that time was of the essence. Further, the agreement provided that the construction had to be complete within thirty-six months from the date when the site was available. Even though more than a decade had elapsed, the court still went on to hold that time was of the essence. It is pertinent to note that not a single brick had been built; even so, the arbitral tribunal found it in favour of the builder. It is not clear from the record as to whether the tribunal relied on *Hind Construction*. However, it is clear that the counsel for the builder did so before the High Court but the same was rightly rejected and the award was set aside.

Thus, owing to the lack of clarity/certainty as regards the law on time as essence, the owner had to suffer non-completion for sixteen years as well as an arbitral award against him, and that too, by a three-member arbitral tribunal.

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[44] *Id*, ¶ 37.

Another example of perpetration of injustice is the case of *Haryana State Industrial Development Corporation Ltd. v. Shushil Kumar Rout*.[45] Here, the owner kept on insisting that the contractor should re-commence the work but the contractor never did so. Therefore, the contract was terminated. However, it was challenged that time was never the essence and *Hind Construction* was cited in support of it. The arbitral tribunal found in favour of the inefficient contractor. It took a challenge to the High Court to reverse this unfair result.[46]

But an unjust or unreasonable behaviour by the contractor cannot be determinative of the construction of the time-as-essence clause in a contract. The question as to the construction of such express stipulations has to be looked at independent of any non-interpretative conduct[47] of the contracting parties.

D. Need for a Re-Look at Traditional Notions in Construction Law

It would seem that *Hind Construction* was persuaded by the passage in the 4th edition of the Halsbury's Laws of England.[48] The proposition is still good law in many jurisdictions.[49] Nevertheless, why should contract law tend to override an express condition in contract and interfere with a private bargain between the parties, unless public policy reasons require otherwise. In the Indian context where a substantial number of owners are Government entities,

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[45] Haryana State Industrial Development Corporation Ltd. v. Shushil Kumar Rout, MANU/DE/0925/2019.
[46] *Id*. ¶ 17.
[47] *See* The Godhra Electricity Co. Ltd. v. The State of Gujarat, MANU/SC/0282/1974: (1975) 1 SCC 199.
[48] *See* Part II of the paper containing the quote.
[49] *See* Fitzpatrick v. Sarcon, (No 177) Ltd. [2012] NICA 58.

this question is more pertinent. Agreements are concluded pursuant to tendering processes where the condition that time is of essence is known at the time of bidding itself. Undercutting that condition during performance undermines the tendering process.

Interestingly, according to amendments in 2018, the Specific Relief Act, 1963 allows the victim of a breach to get the contract performed through a third party and recover expenses from the original contractor.[50] But that provision is without prejudice to the general provisions of the Contract Act, including Section 55 of the Contract Act in relation to which *Hind Construction* was decided. Given the above, the intent behind enacting the Specific Relief (Amendment) Act, 2018[51] on this aspect may not get furthered, if *Hind Construction* continues to be good law.

The applicability of English legal position on the concepts time and completion in construction law[52] in the Indian context needs a re-look given India's need for rapid infrastructural development.

Indian courts have long ignored a term providing for termination in case of delay in performance. A stipulation as to time-as-essence kicks in the consequences of Para 1 of Section 55- it entitles the owner to treat the

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[50] *See* Section 20 of the Specific Relief Act, 1963 (as amended).

[51] The Statement of Objects and Reasons to the Specific Relief (Amendment) Bill, 2018 *inter alia* reads: *"Further, it is proposed to provide for substituted performance of contracts, where a contract is broken, the party who suffers would be entitled to get the contract performed by a third party or by his own agency and to recover expenses and costs, including compensation from the party who failed to perform his part of contract."*

[52] A commentary remarks on the concept of completion in UK construction contracts: "*In UK construction contracts, completion is a vague concept. The fact that building projects can be handed over in a less than perfect state is to the advantage of both parties. This is clear when the legal meaning of completion is considered*." JOHN MURDOCH & WILL HUGHES, CONSTRUCTION CONTRACTS: LAW & MANAGEMENT 181 (2000).

unperformed portion of the contract as voidable. But the question, in that case, would be whether time was actually of essence or was waived. As we have seen in this paper, courts generally hold that time is not of the essence in the contract. A contractual provision on termination for the failure of the contractor to complete the contractual milestones or complete the contract as per schedule operates differently. It is enforceable as it is. This conceptual difference between the manner in which these two clauses operate is to be borne in mind. The decision of the Delhi High Court in *Rail Land Development Authority v. Yantti Buildcon Pvt. Ltd.*,[53] brings out this distinction.[54] So does a rarely cited decision of a two-judge Bench of the Supreme Court in *State of Gujarat v. Dahyabhai Zaverbhai*, where the Supreme Court held that since the contractor abandoned the work by exiting the site and failed to make much progress in the work.,[55] *Hind Construction* did not apply.[56]

Another aspect that has been ignored by Indian Courts is a point noted in the previous heading of this part of the paper. A contractual provision on termination for the failure of the contractor to progress as per schedule or complete the contract would support the construction that time is of the essence notwithstanding the existence of LD/EOT clauses because it would

[53] Rail Land Development Authority v. Yantti Buildcon Pvt. Ltd., MANU/DE/1751/2018.
[54] *See also* Lee Chau Mou v. Kin Seng Engineering, HCCT3/2006, Court of First Instance, Hong Kong (27.02.2007), https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=56179&QS=%2B&TP=JU (accessed 06.12.2020).
[55] State of Gujarat v. Dahyabhai Zaverbhai, MANU/SC/0729/1997. Since 1997, this decision has been cited in about four case and out of these four, two pertain to construction/ infrastructure contracts. See, Moni Traders v. Govt. of NCT of Delhi, MANU/DE/2411/2017 and Gatta Rattaiah v. Food Corporation of India, MANU/AP/0031/2011.
[56] State of Gujarat v. Dahyabhai Zaverbhai, MANU/SC/0729/1997, ¶ 6.

reiterate the right of the owner to terminate in case of lack of progress or failure to complete and not the other way around.

Courts often ignore a provision in LD clauses which state that imposition of LD would be without prejudice to other right or remedy of the owner on account of the breach. If there is such a provision, a question arises as to whether the LD clause would undercut the time-as-essence clause. It is submitted that it would not.

Indian courts need to revisit the traditional manner in which construction contracts and time as essence clauses are viewed. Termination gives an exit option to the owner who is not satisfied with the performance of the contractor. Due to precedents such as *Hind Construction* the owner is forced to deal only with an inefficient contractor. Examples of such cases have been discussed in Part II of this paper.[57] Given this, where there is a termination-for-convenience clause in a contract, it should be examined whether the courts could hold illegal termination for breach as a termination for convenience. This would be a win-win proposition for both the owner and the contractor: the contractor would get compensation for the work done and the security deposit would be returned, and on the other hand, the employer will also be able to find an efficient contractor to complete the project.

[57] *See* S. Daya Singh v. Som Datt Builders Pvt. Ltd., MANU/DE/2261/2019: (16.07.2019 - DELHC); Haryana State Industrial Development Corporation Ltd. v. Shushil Kumar Rout MANU/DE/0925/2019: (26.02.2019 - DELHC).

For all these reasons, *Hind Construction* needs to be reconsidered by a larger Bench of the Supreme Court.[58]

E. Appropriate Change in Contracting Language Making Time as Essence

Altering rules are those rules that lay down how a default rule can be altered.[59] The altering rules theory holds that if the contractual terms did not produce the intended legal effect that the parties or one of them sought to achieve, the court should state how the contracting practice should be changed to produce the intended effect.[60] In this context, it is mystifying why parties do not change their contracting practices to produce the intended effect that time is of the essence. *Hind Construction* was decided in 1979. Even after more than three decades, we find that parties have been using similar clauses and making the same arguments as they did in 1979, without substantial change in contracting practices.

This is not to suggest that courts failed in performing their duty of guiding future contracting parties. Even in *Hind Construction*, the Supreme Court provided such guidance, *albeit*, in a limited way:

> If time was not of the essence of the contract or if the stipulation as to the time fixed for completion had, by reason of waiver, ceased to be applicable then the only course open to the respondent-defendant was to fix some time making it the essence and if within the time so fixed

[58] *Hind Construction* has been unfortunately cited as a precedent even in contract for sale of goods. *See* Associated Business Corporation v. State of J. and K. MANU/JK/0133/2014, ¶¶12-16.
[59] Ian Ayres, *Regulating Opt-Out; An Economic Theory of Altering Rules*, 121 YALE L.J. 2032 (2012) [hereinafter. *Regulating Opt-Out*]
[60] *Regulating Opt-Out,* 2054.

> the appellant-plaintiff had failed to complete the work the respondent-defendant could have rescinded the contract.[61]

Thus, according to the court, even if time is not of the essence or a stipulation that time is of the essence is waived, the owner could fix some time making it the essence, and that if the contractor failed to complete the work within such time, the owner can rescind the contract. But this guidance is only partial. The Supreme Court did not provide any guidance as to how parties could validly state in their contract that time is of the essence. The reason for a change in contracting behaviour of the parties could be the lack of guidance by courts on this aspect.

The concluding part of this paper suggests certain changes in contracting practices that could produce the intended effect.

IV. CONCLUSION

There has been a shift in practice as owners have been consistently making time as essence in the contracts.[62] While noting that time-as-essence clauses carry lesser weight than similar clauses in other types of contracts, a commentator remarks:

> In commercial construction, it is indeed well understood that the owner needs to be able to make certain financial commitments based on the expected completion date of the project. Even in residential construction, failure to complete the project by the agreed-upon date can result in considerable expense for the owner.[63]

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[61] *Hind Construction*, ¶ 10.
[62] GAIL S. KELLEY, CONSTRUCTION LAW: AN INTRODUCTION FOR ENGINEERS, ARCHITECTS, AND CONTRACTORS 113 (2013);
[63] *Id.* p. 114.

A number of construction projects are financed through project financing. Financing a construction project being a high-risk activity is based on the financial evaluation of the sustainability of the project,[64] and other factors relating to recoup of investment.[65] The faster the construction is completed, the less interest the owner will have to pay to its funders.[66] A commentator observes:

> Time is money. This adage is especially true in the construction industry. Time is essential for almost all construction projects due to the monetary effects associated with a project's completion date. The project owner has an interest in completing the project within the prescribed time because the owner relies on the anticipated completion date for the project's use, financing, revenue projects, and other purposes.[67]

In India, many of the construction projects are undertaken or financed by the government. Each time there is a delay in construction, the public bears the brunt. This is recognised even in the context of proof of liquidated damages, where the government is not liable to prove the extent of loss suffered considering that the loss to the public owing to delay in project completion is inherent.[68] On the other hand, the difficulties that construction

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[64] Roman Gorshkov & Viktor Epifanov, *The Mechanism of the Project Financing in the Construction of Underground Structures, 15th International scientific conference "Underground Urbanisation as a Prerequisite for Sustainable Development",* 165 PROCEDIA ENGINEERING 1211 – 1215 (2016), https://www.sciencedirect.com/science/article/pii/S1877705816342023.

[65] DOUGLAS F. COPPI, JOHN D. CARTER, PAUL J. GORMAN & ROBERT FRANK CUSHMAN (ED.), PROVING AND PRICING CONSTRUCTION CLAIMS 99 (2000)

[66] *Financing Your Construction Project*, KORTE (Dec. 6, 2020), https://www.korteco.com/pdf/construction-finance.pdf.

[67] DOUGLAS F. COPPI, JOHN D. CARTER, PAUL J. GORMAN & ROBERT FRANK CUSHMAN (ED.), PROVING AND PRICING CONSTRUCTION CLAIMS 99 (2000).

[68] See, for instance, Construction and Design Services v. Delhi Development Authority (04.02.2015 - SC): MANU/SC/0313/2015, ¶¶13-15.

contractors face in project completion is also not a minor issue. Even so, it is prudent to address those problems directly than by diluting the contractual provisions using artificial doctrines. In a country where the government is often criticised for delays, it is important that construction contract law is attuned to nudge the contractors to complete projects on time.

Notwithstanding the above prescription, precedents are well-entrenched in this field. Part III of this paper noted the surprising absence of any marked change in contracting behaviour by the parties given the existing state of affairs addressed in this paper. Parties to contracts can change their contracting behaviour and contract management strategies to ensure that time is treated as essential. Following are some of the strategies:

- Parties can agree that notwithstanding the LD and the EOT clauses, time for completion of the construction contract would be of the essence. At the end of the day, *Hind Construction* construes a contract. If the contract conveys an unequivocal intent that time would be of the essence, courts cannot undercut such an agreement. An illustration of such a clause is given below:

  "Notwithstanding anything to the contrary, including, but not limited to, provisions relating to the extension of time and compensation for delay, time for completion of the contract as per the schedule provided Clause ___ of this Agreement shall be the essence of the Contract." By drafting the time-as-essence clause as a non-obstante clause, parties' intent that such a clause overrides any other clause conveying an alternative interpretation is clarified.
- The purpose of a time-as-essence clause is to provide that completion within time is fundamental and that failure thereof by the contractor

will entitle termination. If the contractor does not complete the contractual milestones as agreed, specific termination rights may be provided, with notice, of course, to the contractor to proceed as per milestones.[69]

- It may be noted that although the Supreme Court in *State of Gujarat v. Dahyabhai Zaverbhai*[70] also held similarly, the decision is not as unequivocal as that of the Delhi High Court in *Rail Land Development Authority v. Yantti Buildcon Pvt. Ltd.*[71] The case before the Supreme Court noted here was concerned mainly with the question of whether the contractor abandoned the work or not, bringing into play Section 39 of the Contract Act. The Delhi High Court's decision, however, is consistent with international practice, where an effect was given to termination clauses, so long as the situation in question fell within such termination clause and due notice is given. For instance, in the oft-cited case of *Lee Chau Mou v. Kin Seng Engineering*,[72] the question was whether termination made after notice as per the contractual clause entitling the owner to terminate due to failure by the contractor to perform as per the contractual schedule was legal. The Hong Kong court held that it was, in view of the contractual termination clause.
- Contract management practices have a significant bearing where questions of extension of time arise. It is important that the contract

[69] State of Gujarat v. Dahyabhai Zaverbhai, MANU/SC/0729/1997; Rail Land Development Authority v. Yantti Buildcon Pvt. Ltd., MANU/DE/1751/2018.
[70] *Id.*
[71] Rail Land Development Authority v. Yantti Buildcon Pvt. Ltd., MANU/DE/1751/2018.
[72] Lee Chau Mou v. Kin Seng Engineering, HCCT3/2006, Court of First Instance, Hong Kong (27.02.2007), https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=56179&QS=%2B&TP=JU (accessed 06.12.2020).

manager of the owner is conscious of the clause regarding time as essence. Whenever communication is made to the contractor regarding the progress of work, the owner should bring the clause to the attention of the contractor.

- When the duration of the contract is about to be over but work is yet to be complete, the contractor manager has to issue a letter to the contractor as per the contract giving notice that if the contractor is unable to make sufficient progress/ cure the delay/ breach, the contract would be terminated as per the contractual provisions. While doing so, the contract manager has to bring to the contractor's attention the clause regarding time as essence and the consequences of failure to comply with the contractual timetable.
- Reasonable time has to be granted to the contractor to cure the delay/ breach. This is usually the time when the contractor will seek an extension either for reasons of delay by the owner or due to reasons beyond the control of the contractor. In such cases, the owner has to expeditiously determine the correctness of such contentions and take a stance either accepting or rejecting the same.

  In case the owner is of the view that the contractor's stance is not correct, the contract manager can terminate the contract after ensuring due notice and in compliance with the contractual provisions. However, this may prove risky in the light of the state of Indian law on the issue.
- The alternative and a more prudent course of action is to inform the contractor unequivocally that he had to complete the contract within the fixed time, that it was of the essence, that the contractor was unable to complete the contract within that time, and, importantly, that the

contractor has no right to remain on-site beyond the contractual duration. It is important that the owner reserves its rights under the contract. The paramount consideration for the owner is the completion of the project and if the contractor delays the work, it is better to let the contractor know much in advance that no extension would be given, let the contractor exit the site, and engage another contractor to complete the work. Blame, liability and other issues can be determined subsequently if such a course of action is worth pursuing.

- However, if the time remaining is relatively substantial but work completed is abysmally less, the owner may exercise the provision on termination for convenience.
- Wherever contract extension is given, the extension letters should clearly provide the following:
    a. The date when the project was supposed to be completed and the progress achieved as on the date of the extension letter.
    b. The extension is granted without prejudice to the remaining provisions of the contract, including the right to levy LD for the delay.
    c. The extension is granted without any escalation or any increase in the contract price.
    d. In respect of the extended period, time is of the essence, and the contract could be terminated in case the contractor did not achieve progress as per the milestones agreed for the extension.[73]

[73] If extension is granted without any mention regarding time as being of essence, the owner is deemed to have waived its right. See, HALSBURY'S LAW OF INDIA: Vol. 9: Contract (2015),

- Where the contractor suspends the work and does not re-commence it, contract managers should specify not only the date within the contract when the work has to be recommenced but also the date of completion. *Haryana State Industrial Development Corporation Ltd. v. Shushil Kumar Rout*[1] is an example where the contract manager did not mention the completion date, thus allowing the contention that time ceased to be of the essence and this invited an adverse award from the arbitral tribunal. The contract manager should specify that both the re-commencement and the completion dates are of the essence and would lead to termination as per contractual provisions.
- It may be noted that even if the contract does not specify that time is of the essence, the owner can serve a reasonable notice and make time as essence.[2] In such a case, the following conditions may apply:[3]
    a. The owner has to be ready and willing to perform his part of the bargain;
    b. The contractor has unreasonably delayed project completion; and
    c. The contractor should be given a reasonable period to cure the delay.

Section 95.128. See also, Koyana Suryanarayana Reddy v. C Chellayyamma, AIR 1989 AP 276: (1989) 1 LS (AP) 35 (SB).

[1] Haryana State Industrial Development Corporation Ltd. v. Shushil Kumar Rout, MANU/DE/0925/2019: (26.02.2019 - DELHC)

[2] *Hind Construction*, ¶ 10.

[3] British and Commonwealth Holdings Plc. v. Quadrex Holdings Inc., [1989] 3 WLR 723, 737 [English Court of Appeal].

These suggestions could go a long way in protecting the rights of the owner and ensuring project completion. All said and done, it is submitted that *Hind Construction* is no more good law and requires reconsideration.