

## Law Disorder in Indian Construction industry

Mohd Umair                      Tanveer Ahmad Wani

Ph.D.Civil                              Associate Professor

Department of Civil Engineering                      Department of Engineering

NIU, Greater Noida, UP.      NIU, Greater Noida, UP.

---

**Abstract:** India by nature is a developing country, where migrations from rural to urban area are quite natural, due to this kind of transit, the construction activities are evolving rapid pace. In India, Every Civic body, Development Control body and its Rules for any construction or Building Bye laws are framed as per Indian Contract Act, 1872 the "Act"). It is largely based on English Common Law. It is indispensable on the part of every distinct, who needs to construct a structure to obtain essential permission from the local authority before proceeding for construction. In spite of rules and regulations framed for good reasons, instances of violation of development control rules are observed. As a result, the development of town experiences arbitrary and unforeseen urbanization. This paper presents the critical analysis of development control rules, which are being violated at large in contemporary time. We also tried to discuss the overview of construction sector in Indian Law in order to pave the road towards construction rules & regulations.

It is projected that commendation, statistics and control mechanism, violation reducing mechanism offered. It would encourage innovative initiatives and emerge debate on it, which is often neglected area of construction control rules & regulations on ground zero. It's not barely a matter of construction although it's a matter of millions lives.

**Keywords:** Transit, Development, Law, Violated, Regulations etc.

---

Date of Submission: 29-01-2022

Date of Acceptance: 10-02-2022

---

### I. Introduction

The construction industry is one that has an exceptional role in our country's (better yet, in every developing country's) quest for development. We can say that there is no development sector into which construction does not enter. The construction industry plays a key role in building economic infrastructure like roads, railways etc.; in expanding social infrastructure like schools, hospitals, etc.; and in expanding factories. As one facet of improving people's lives is the building and renovation of residences, construction plays a great role in this regard as well. To bring about fast growth in any economic sector, a strong and efficient construction industry is called for.

Indian construction sectors generally operate with severe limitations, and are unable to meet local demands. Several complex activities, agencies and inputs have to interact before deriving any products or outputs of this sector. Building materials and a multitude of things such as, contractors, equipment, machinery, skills etc. have to be assembled to produce an output. Thus, the construction industry is characterized by complex relationships between various parties which call for law. Construction is a process that consists of the building or assembling of infrastructure and thus involves a certain property on which the construction is to be undertaken. A construction project must fit into the legal framework governing the property, which include governmental regulations on the use of property, and obligations that are created in the process of construction. However there are no well coherent and codified laws or pertinent reading materials, particularly in our country, on the ebullient matter of the construction law.

### II. Law By Definition

Construction Law deals primarily with contract law and encompasses all aspects of the legal process, from the initial bidding on the project, to the negotiation and the formation of the agreements and contracts.

Construction law also governs disputes between the parties involved in the construction process (i.e. builder and homeowner). There are many laws that govern the construction process, and that apply to the various businesses and professions that are a part of and serve the construction industry.

Government contract law is a specific area of construction law. These projects involve the Federal, State and Local Governments, and are governed by very precise government laws, legal principles and legal procedures.

When injuries occur, workers' compensation law is also a subset of construction law.

In construction law, both the owner and the contractor are required by law to act in good faith in the performance of their contractual obligations. Courts have held that the construction contractor owes the owner a duty to perform services in an appropriate workmanlike manner. This duty requires the contractor to warn the owner if the design or construction specifications may have damaging results. Likewise, courts have held that an owner has a duty to cooperate with contractors. The owner's duty to cooperate also requires that the owner not interfere with or purposefully delay the contractor's performance.

Although specialized, construction law can touch on many legal practice areas. If you have issues with your contractor, you might want to speak with an attorney who has expertise in this complex field.

### **III. Law Behind Construction Projects**

#### *Standard types of construction contract in Indian jurisdiction*

The construction industry in India barely subscribe to any standard form of construction contract, which make easy to the professionals. However, some of the commonly used forms include the suite of contracts published by FIDIC (International Federation of Consulting Engineers), ICE (Institution of Civil Engineers) and the model published by the IIA (Indian Institute of Architects). Governmental construction authorities, such as the National Highways Authority of India ("NHAI"), employ their own standard form contract as per their departmental requirements, particularly for Public and Private Partnership projects. One standard FIDIC form extensively used in the Indian construction industry is the Plant and Design/Build Contract. Designonly contracts prevalent in India are majorly inspired by the FIDIC Conditions of Contract for Plant and Design/ Build (the FIDIC Yellow Book).

Besides the NHAI, several government departments such as the Public Works Department, Delhi Metro Rail Corporation, Indian Oil Corporation, National Building Construction Corporation, Central Public Works Department, etc. have their own standard form contracts.

Management contracts are executed in the form of Engineering, Procurement and Construction Management Contracts. As the name suggests, such contracts are executed between employers and contractors, wherein contractors are hired to holistically manage the completion of a construction project while overseeing developments regarding engineering, procurement and construction of a project.

Legally binding contract and specific requirements which need to be included in a construction contract

The Indian law of contracts is codified (Indian Contract Act, 1872 the "Act"). It is largely based on English Common Law. For any binding contract to come into existence, there should be an agreement between two or more parties who are competent to contract, and the parties must have entered into the agreement with their free consent, for a lawful consideration and a lawful object. These requirements are mandated by the Act (Section 10 thereof). As all other contracts, construction contracts must also satisfy the aforesaid requirements to be legally enforceable. Further, rudimentary requirements of a valid offer, followed by an acceptance of an offer, with the intention of entering into a legally enforceable agreement not void in law, are other essentials of a valid contract under the Act. As the Act provides, contracts need not be evidenced in writing, which similarly applies to all construction contracts.

### **IV. Letter Of Intent Either A Legally Binding Or Non Legally**

Letter of intent either a legally binding or non-legally

The legal position in India as regards a "Letter of Intent" ("LOI") is well settled and can be understood while referring to the contract law principle to the effect that an agreement to enter into an agreement does not create any legal relation between the addressor and its addressee, nor is it legally enforceable before a court of law.

A letter of intent merely indicates a party's intention to enter into a contract with the other party in future. Normally, it is an agreement to 'enter into an agreement' which is neither enforceable nor does it confer any rights upon the parties. However, some aspects of a LOI may contain binding obligations, if so specifically provided therein.

Such aspects may include clauses concerning confidentiality and exclusivity of dealings, amongst others. In certain circumstances it may be construed as a letter of acceptance of the offer resulting in a concluded contract between the parties. It largely depends on the intention of the parties to be drawn from the terms of the Letter of Intent, the nature of the transaction and other relevant circumstances. If parties have acted on a Letter of Intent (as if there is a binding obligation), it is likely to be held as a binding contract between them. In India, a binding contract can result from conduct alone.

## **V. Insurance While Carrying Out Construction Work**

The standard type of insurance policy opted by the employer, contractor or a sub-contractor separately or jointly is the Contractor's All Risk Policy ("CAR Policy"). All major construction contract projects expressly provide for putting in place a CAR policy during the construction stage. Federal legislation requires any business including construction projects employing more than 10 people to procure registration under the Employees State Insurance Act, 1948 ("ESI Act").

The ESI Act mandates every employer to provide for its worker's insurance. The said Act covers both workers employed directly under an employer and through a contractor. The insurance procured by an employer/contractor under the mandate of the ESI Act covers for contingencies such as maternity leave, sickness, temporary or permanent physical disablement, or death owing to the hazards of employment which may lead to loss of wages and earning capacity of an employee.

Standard requirements in relation to construction contracts in terms of:

- (a) General requirements
- (b) Labor
- (c) Tax
- (d) Health and safety

The following are some of the statutory requirements which must be complied with:

(a) General requirements: As stated above, all construction contracts must satisfy the requirements of the Indian Contract Act, 1872 to be legally enforceable. There are no statutory requirements specifically in relation to construction contracts.

(b) Labor: All employers and contractors are required to comply with the relevant labor legislations in force in India or in the state/city concerned. The onus of complying with such labor laws falls upon an employer or a contractor depending on the legislation. Laborers get their legal recognition from the definition of the word "workman" under the Industrial Disputes Act, 1947 (a Federal legislation) which entitles them to various statutory benefits and fair treatment at the hands of their employer/contractor. Further, the Contract Labor (Regulation and Abolition) Act, 1970 must be complied with by any principal employer/contractor who hires 20 or more contract laborers for an "establishment". The said Act requires the principal employer to register its establishment in accordance with the Act, whereas all such contractors must obtain a license from the authorized licensing authority specified in the Act. In order to regulate the condition of service of inter-state laborers, the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, requires all contractors who employ five or more inter-state migrant workmen to register themselves. It is aimed to protect and/or provide a migrant worker's right to equal wages, displacement allowance, home journey allowance, medical facilities, etc. The Workmen's Compensation Act, 1923 require that compensation be paid to workers if injured in the course of employment. Under the Minimum Wages Act, 1948, the employer is required to pay the minimum wage rates as may be fixed by the relevant government. Further, the Payment of Wages Act, 1936 ensures that the employees receive wages on time and without any unauthorized deductions.

(c) Tax: A person responsible for paying any sum to a contractor for carrying out any work (including supply of labor for carrying out any work) is required to, at the time of payment; deduct tax commonly known as Tax Deducted at Source ("TDS") under Section 194M and 194N of the Income Tax Act. The Works Contract Tax is applicable to contracts for labor, work or service. Other taxes include VAT and Service Tax. The Building and other Construction Workers Welfare Cess Act, 1996 which applies to 10 or more building workers or other construction work, has been enacted for the welfare of construction workers including regulating the workers safety, health, and other service conditions. A cess of 1% is collected from the employer on the cost of construction incurred. Moreover GST is also introduced on 16 September 2017; amendment in taxation system.

(d) Health and Safety: Social security legislations such as the Employee's Compensation Act, 2009, Employees' State Insurance Act, 1948, Maternity Benefit Act, 1961, Payment of Gratuity Act, 1972, and the Employees' Provident Fund Act, 1952 mandatorily apply to all employers and contractors hiring laborers or workmen in the construction industry.

## **VI. Way Of Retention**

Yes, in construction contracts, provision for retaining part of the purchase price for the given situations is fairly common. Parties may also agree to deposit the purchase price in an escrow account to ensure a level playing field for both the employer and the contractor. The contract may provide that the employer, prior to completion of the works, releases the retention money provided the contractor furnishes an unconditional bank guarantee equivalent to the retention money.

## **VII. Guarantee And Performance**

Yes, performance bonds/performance guarantees are commonly provided for in construction contracts in India to provide security against failure of a contractor to perform its contractual obligations. Similarly, an

employer may require company guarantees from parent companies against the duties and obligations of a subsidiary company involved in a construction contract.

The nature of restrictions that may apply to a performance guarantee will depend upon the wording of the terms of guarantee. A performance guarantee, in nature, is a contract between an employer and a guarantor, independent of the contract between an employer and a contractor. Therefore, unless otherwise provided, a guarantor shall be obliged to unconditionally honor a guarantee as and when called upon by the employer.

Normally, construction contracts require the contractor to furnish an unconditional performance bank guarantee to ensure timely and satisfactory performance by the contractor. The employer normally requires the contractor to keep the performance bank guarantee valid until the defect liability period is over or the completion certificate is issued. The beneficiary of the bank guarantee, i.e. the employer, must make a demand for payment under the bank guarantee, should a need so arise, before the expiry of validity period stipulated in the bank guarantee. A demand made by the employer for payment after the validity period will not be honored by the bank.

Retention of title rights in relation to goods and supplies used in the works through contractor.

Yes it is possible. Right to lien over goods arises from the contractor's right to be duly paid for the goods supplied to an employer. The existence of right of lien over goods, and the scope of such right, is determined by a contractual clause to that effect. Lien over goods whose ownership passes over to an employer on delivery to, or affixation on, a construction site may exist if contractually so provided for. However, most construction contracts do not provide for the contractor's title rights to the goods and supplies made for the work

### **VIII. Foot Print Of Contracts Handling**

Construction contracts are commonly supervised by third parties in India, who may be appointed by an employer in the role of either an architect or an engineer. The scope of their functions and duties are contractually defined.

Whilst the engineer or architect usually has a contractual duty to act impartially between the contractor and employer, in practice it is usually in government contracts especially that the engineer often tows the line of the employer.

#### **Collective Issues on Construction Contracts:**

#### **1. Is the employer entitled to vary the works to be done under the contract? Is there any limit on that right?**

1A. Variations in the works to be performed under a construction contract may be made by an employer or an engineer employed for such works. If such variations are made, a contractor is entitled to seek additional payments for the same so far as such variations have been duly authorized by the employer/engineer-in-charge. However, such variations must not be of such a nature so as to substantially alter the character of the contract in question and must be within the ability of the contractor to execute.

#### **2. Can work be omitted from the contract? If it is omitted, can the employer do it himself or get a third party to do it?**

2A. Works may be omitted from a construction contract by an employer or an engineer if there is an express term in the contract permitting omission. However, such omissions must not be made to deliberately deprive a contractor from its entitled share of works. The employer cannot omit the work on non bona fide grounds (and have it carried out by someone else without the contractor's consent).

#### **3. Are there terms which will/can be implied into a construction contract?**

3A. Indian law recognizes use of both express and implied terms in a construction contract. While express terms are easily identifiable, implied terms must be read into a contract while examining the intention of the contracting parties. However, such terms must not offend the intended commercial purpose of the contract as understood between the parties. While there are no agreed set of terms which can be implied in a construction contract, certain obligations are understood as impliedly binding both the employer and the contractor. For example, a contractor is expected to perform its tasks while exercising a standard of care, and must provide such materials which are fit to be used for the stipulated works. Who usually owns the intellectual property in relation to the design and operation of the property?

#### **4. Generally, a contract for service contains clauses so as to empower an employer to claim ownership over all intellectual property as may be created by an employee in the course of his employment.**

4A. Indian law also provides for employment as an exception to author's ownership over his intellectual property. Therefore, in the case of construction contracts, ownership of intellectual property in the form of design of concerned works should vest with the employer.

#### **5. Is the contractor ever entitled to suspend works?**

5A. A contractor may suspend performance of its obligations under a construction contract on grounds provided for in the contract in accordance with its statutory right to do so under the Indian Contract Act, 1872. Some occasions when a contractor may suspend performance include non-performance of the obligations or

considerable delay by an employer, non-payment of dues for works performed, non-fulfillment of conditions upon which the performance is contingent, force majeure, etc.

**6. On what grounds can a contract be terminated? Are there any grounds which automatically or usually entitle the innocent party to terminate the contract? Do those termination rights need to be set out expressly?**

6A. The Indian Contract Act, 1872 ("Act") allows a party to rescind/terminate a contract in the event of breach by the other party, including refusal to perform or disabling himself from performing (Section 39 of the Act). Over and beyond the statutory grounds of breach recognized in the Act, parties may choose to provide contractual stipulations recognizing events which would amount to breach of the contract to entitle the injured party to terminate the contract. A statutory or common law ground of breach need not be expressly provided in a contract; however, other instances of breach should be specified in the contract. Performance is contingent, force majeure, etc.

**7. Is the concept of force majeure or obstruction known in your jurisdiction? What remedy does this give the injured party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for force majeure?**

7A. The concept of a force majeure event is well recognized in the Indian legal system. The doctrine of hindrance of contract is imbibed in Section 56 of the Indian Contract Act, 1872 ("Act"). In accordance thereof, a contract stands unsatisfied if the performance of an agreed set of obligations becomes impossible or unlawful, either before or after the conclusion of a contract. Section 56 of the Act thus recognizes force majeure (or act of God) events as a ground for obstruction of contracts. Hindrance of a contract under Section 56 of the Act results in such a contract becoming void in law, and thus cannot be enforced. Therefore, a frustrated contract stands discharged and relieves the parties from performance of all underlying obligations. However, an exception to Section 56 states that if obstruction was within the reasonable contemplation of the promisor, or if the contract is unsatisfied due to acts attributable to the promisor, the promisee shall be entitled to compensation for any loss it suffers due to non-performance of promisor's obligations under the contract.

However, Section 56 does not apply to instances of mere inconvenience, economic unfeasibility, or if performance of the contract has become more burdensome, but without impossibility.

**8. Are parties which are not parties to the contract entitled to claim the benefit of any contract right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the original contracts in relation to defects in the building?**

8A. Third parties cannot bring claims or enforce terms of a contract against a party to a contract. This principle emanates from the doctrine of "private of contract" which confers rights and obligations arising out of a contract only upon parties to a contract. Therefore, in the landscape of construction law, a contractor cannot be subjected to claims from third parties to a construction contract. However, third parties are entitled to a remedy under tort law for injury suffered due to negligent acts of a contractor. Therefore, a contractor may be subjected to claims under tort law for negligence.

**9. Can one party (P1) to a construction contract which owes money to the other (P2) set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set off?**

9A. Yes, parties in a construction contract can set off their claims and dues against each other. This can be done either by way of mutual negotiations and agreement, or through a proceeding before a court of law or in an arbitration proceeding. An instance for the latter would arise where parties disagree upon the amount due to either party. In such cases, a cross-claim is filed by the party who wishes to set off its claims against the amount it owes to the other party. Such cross claims must be for a recognized sum and must be based on a legitimate claim against the other party.

Are there any terms in a construction contract which are unenforceable?

The following terms or clauses shall be unenforceable in a construction contract:

- (a) Clauses empowering an employer to unilaterally terminate a contract without any remedy to a contractor;
- (b) Unilateral and substantial alteration of the character of a contract by adding/omitting obligations of a contractor;
- (c) Clause for payment of an unreasonable sum in the form of liquidated damages;
- (d) Clause absolutely restricting a party from enforcing his rights under or in respect of any contract;
- (e) Clause which limits the time within which a party may enforce his rights; and
- (f) Any other clause which falls foul of the provisions of the Indian Contract Act, 1872.

## **IX. Violation In Plan Permission And In Execution Stage:**

Study from the surveyed reveals that more than 70% cases, certificate of architect / engineer who shall undertake supervision of the construction was not attached in spite of specific condition but plans has been approved by the municipal council. Study also points out that, the inspection by the planning authority at various stages during the construction has never been carried out as mentioned in rules or on ground zero.

Nevertheless on complaint either by the neighbor or by any citizen this practice is found to be adopted. Some statistic says routine inspection has been done by the authorities for public organization. However such evidence are too less in private sector even though every related organization is directly dealing with lives.

### SETBACK

A major problem of blueprint violation has been found in the residential construction in overfilled and non-overfilled areas, especially in all kind of urban development. The Land owners/developer may take the building permission from the municipal council by submitting the building plan as per prevailing development control bye laws and rules and get approval of their plan from the municipal council afterwards their employers are unable to maintain other laws, which been described above Para by virtue of they intend to do their own defined so called guide line.

### X. Conclusion

In this paper the impact of strong inclusions on construction law is considered. We can conclude that stable inclusions can influence law stability in the construction industry, their shape and their distribution in the construction which starts with planning, design, and financing and continues until the structure is ready for occupancy. In India the construction industry is a vital indicator of the growth as it creates investment opportunities across various related sectors. The industry is fragmented, with a handful of major companies involved in the construction activities across all segments; medium sized companies specializing in niche activities; and small and medium contractors who work on the subcontractor basis and carry out the work in the field. All in all, we would suggest every concerned either agency or individual get attention abide the law or their quality of law in the construction industry in order to maintain the accurate guideline and kickoff debate on it, it would create a sign of international quality in construction work.

### Aknowledgements

I might want to express my earnest gratitude to my scholarly supervisor Dr. Tanveer Ahmad Wani for his ceaseless direction, backing and support all through the term of this venture. I need to give my genuine gratitude to our Hod. for their help. Last much gratitude goes to my family, companions and individual scientists. Last however not the least; I owe my cherishing because of my grandfather, for his persistent consolation and backing.

### References

- [1]. Barrie, S., Donald, and Boyd C. Paulson, Professional Construction Management: including CM, Design-Construct, and General Contracting, (3rd edition, New York: McGraw-Hill, 1992).
- [2]. Bockrath, T., Joseph, Dunham and Young's Contracts, (Specifications, and Law for Engineers, 4th edition, New York: McGraw-Hill, 1986).
- [3]. Clough, H., Richard, Construction Contracting, (New York: John Wiley & Sons, 1986).
- [4]. T.N.Boob, Dr. Y.R.M. Rao, Dr.N.P.Hirani Polytechnic, Pusa Dist. Yavatmal (M.S.), 2Principal, Dr. Pauls Engineering College
- [5]. Hinze, W., Jimmie, Construction Planning and Scheduling, (2nd edition, Upper Saddle River, New Jersey: Pearson Prentice Hall, 2004).
- [6]. S. Chockalingam, and T. Sornakumar, "An Effective Total Construction Safety Management in India", 2011.
- [7]. Nishka Kamath, a student at Nalanda Law College, University of Mumbai
- [8]. Pratibha Joshi, Promila Sharma, T.C. Thakur, and Amit Khatter, "Safety in Construction Line: Important issue for Risk Identification", International Journal of Advanced Engineering Research and Studies, IJAERS/Vol. I/ Issue III/April-June, 2012/30-34.
- [9]. The International Comparative Legal Guides are published by global legal group.

Mohd Umair, et. al. "Law Disorder in Indian Construction industry." *IOSR Journal of Mechanical and Civil Engineering (IOSR-JMCE)*, 19(1), 2022, pp. 30-35.