

Construction Arbitration Newsletter

Construction Arbitration Law Firm

- **Possession of site in parts - site free from hindrances was not handed over on time - Employer was under a mandate to make the site available as soon as possible free of encumbrance, after the award of the contract - the Contractor was prohibited from entering upon the site or taking possession, until so instructed in writing by the Engineer-in-Charge - Employer does not have unfettered right to hand over the Site, any time it wished.**
- **Wrongful termination - Employer having delayed the handing over the site up to the date of termination of the contract, could not have raised a counter-claim towards risk and cost.**
- **Consequence of wrongful termination of contract - awarding damages and compensation for loss of profit of the unexecuted value of the work is just and reasonable.**
- **Determination of quantity of excavation based on Simpson's Rule as against Auto Plotter Software method - cannot be interfered by the Court.**
- **Document recording Original Ground Level (OGL) - admissibility - Employer's record with self-certification by its officials without obtaining the signature of the Contractor's authorised representative - the contract required the recording of the pre-levels to be signed jointly by the Employer and the Contractor - when two different set of documents are produced, the set of documents signed by an unauthorised representative has no weight and cannot be relied upon.**
- **Determination of compensation for loss of overheads - overheads at 6% of the contract value considering the nature of the work was held reasonable.**
- **Loss of profit - Contractor claiming loss of profit must establish that he had the opportunity to deploy his resources in other ventures and those ventures would have yielded profit - award taking loss of profit as 10% of the value of the balance work, in the absence of proof of loss, is not maintainable.**

[NTPC Ltd. v. Sri Avantika Contractors Ltd. - Delhi High Court - Decided on 8.6.2020]



- **Delay in handing over of the site - if delay is caused for failure on the part of the Employer to give possession, Engineer can grant extension of time for completion of the work and / or certify such sum to cover extra cost incurred and such sum shall be paid by the Employer to the Contractor.**

- **Delay caused due to utility shifting – Employer had undertaken the identification of utility in advance and diversion of all charted utilities was to be done prior to handing over of site.**
- **Delays attributable to the Employer - no fault could be attributed to the Contractor for the failure to mobilize resources and achieving the key dates in the extended time.**
- **Failure by the Contractor to utilize the work front made available progressively – since there was delay in handing over of site by the Employer, the plea of the Employer is untenable - work fronts were not made available to the Contractor in time and also the Employer had failed to provide sufficient work fronts.**
- **Rescission of contract – Employer must issue a notice prior to rescinding the contract in compliance with the mandatory provisions of the contract – if rescission is found to be illegal, the Employer cannot claim risk and cost.**
- **Encashment of Bank Guarantee - is permissible only for the purpose for which it was issued and after recovering of entire amount of advance, there was no occasion for the Employer to invoke the bank guarantee and recover the same, as the purpose of the bank guarantee was already served.**
- **Financing charges claimed on principal claim amount – interest paid on loans - in the name of finance charges, interest cannot be awarded if there is a specific bar in the contract to award interest.**

*[Bengaluru Metro Rail Corporation Ltd. v. Navayuga Engineering Company,
Bangalore District Court - Decided on 28.1.2022]*



**NTPC Ltd. v. Sri Avantika Contractors Ltd. - Delhi High Court -
Decided on 8.6.2020**

The Employer awarded the work of "Site Levelling and Infrastructure Works Package" for its Kudgi Super Thermal Power Project Stage-I (3x800 MW), Karnataka to the Contractor. The scheduled period for completion was 30 months. The Employer had the reciprocal obligation to handover the land for construction work. The scope of civil work to be executed by the Contractor, included site levelling for the plant; construction of phase roads and drains in plant area; sewerage in plant area; diversion of existing drains; raw water reservoirs; plant boundary wall; watch towers and approach road from State Highway. Subsequently, two amendments were carried out and the scope of work increased and consequently, the value of work. Disputes between the parties were referred to Dispute Resolution Board (DRB), but the decision was not acceptable to both the parties. The Contractor invoked the arbitration clause. The arbitral tribunal held that the start of work was delayed, resulting in initial delay of six months, and this was on account of the delay in handing over the areas. The tribunal was of the view that reasonable extension to the Contractor should have been granted by the Employer and the six months extension granted was not reasonable, as even on the date of termination, large areas were not handed over to the Contractor. The Employer's contention of delay in mobilisation, was also rejected by the tribunal on the ground that unless the land was handed over as per the schedule, the Contractor could not be faulted. The tribunal held that the Employer was liable for the delay due to handing over of hindrance free site for execution of the work and further there was a continuing delay in the handing over of land. The arbitral tribunal held that the delay due to obstructions, agitations by land owners or locals was concurrent with the delay in handing over of site. The tribunal held that the dispute pertaining to the initial levels called the Original Ground Levels (OGLs), as there was no dispute regarding the final levels, could be resolved by considering documents which is signed by the authorised representative of both the parties. The Court upheld the award on the ground that it cannot enter into the findings of facts or calculations or re-appreciate the evidence before the tribunal. The Court upheld the award of claim for overheads by taking 6% of the contract value but rejected the award of loss of profit at 10% of the amount of the balance executed work because of absence of proof of loss. The Court held that the issue of grant of extension of time cannot be re-examined by the court.



The Contractor was awarded the contract for construction of elevated structure between, excluding station portions, Byappanahalli to Cricket Stadium. The Employer rescinded part of the work covered by the contract. The Contractor challenged the rescissions before the arbitral tribunal. The arbitral tribunal held that the Contractor has proved that various delays in completion of the project was caused by the Employer. The arbitral tribunal noted that work could not be completed within 27 months and extension of time for completion of work in accordance with revised programme was submitted by the Contractor and accordingly the extension of time was given. The tribunal held that all the five rescissions took place before completion of revised extended period of completion. It was held that the Employer had the responsibility to give land and other input for achieving the milestones. Further, since the Employer failed to fulfil its obligations which led to delay, it could not have levied penalty. The arbitral tribunal awarded finance charges due to various delays attributable to the Employer and as a consequence of contract being extended, the tribunal held that finance charges were payable on the claims till the date of award. The tribunal held that though interest cannot be awarded in view of specific bar in the contract, for the finance charges incurred, Contractor was entitled to finance charges. The Court held that the arbitral tribunal is the final judge of the quality, as well as the quantity of evidence before it. The Court held that if the award is for payment of money no interest shall be payable on whole or any part of the money. However, retention money which was forfeited, bank guarantee given for mobilisation and plant and machinery advance and bank guarantee given for performance guarantee which was encashed, were not adjudicated amounts but were amounts which were taken by the Employer and to be refunded later. Therefore, the amounts of retention money and Bank guarantees cannot be considered as part of award for payment of money. The Employer was thus, liable to return these principal amounts to the Contractor with interest and the bar in the contract to award interest did not apply.



Dharmendra Rautray

Barrister (Lincoln's Inn, London)

Rautray & Co.

B3/18 Vasant Vihar,

Paschimi Marg,

New Delhi – 110057

Tel: +91.11.46552244 / 46113964

M: 9899988878

E: dharmendra@rautray.com

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Author of the book “Principles of Law of Arbitration in India”

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