

# Construction Arbitration Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Failure to handover hindrance free site for construction - fundamental or repudiatory breach of contract - reciprocal obligations - Contractor was obliged to commence the pre-construction activities including the survey of the work site, investigation, soil testing etc. before the commencement of the construction works - Employer was obliged to deliver and handover hindrance-free land at the proposed work site to the Contractor to enable smooth progress of construction activities and completion of the same within the period stipulated in the agreement - to determine a fundamental breach of contract or repudiatory breach of contract, one has to look at the situation as to whether the party in breach has produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made and the scope of inquiry would be to ask not only what had already happened but also what was likely to happen in future and the fact that the breach was deliberate may be of great importance.**
- **No damage clause - contract providing no claim for delay in giving the possession of the work site to the Contractor for execution of the work or delay in obtaining necessary permissions - contract provided that no claim for compensation for loss suffered by the Contractor inter alia, on account of delay by or on behalf of the Government in the possession of the worksite will be allowed where such failure is due to legal formalities or circumstances beyond the control of the State Government - award of damages by the arbitral tribunal on account of delay is not tenable in law - arbitral tribunal cannot act contrary to the stipulation in the contract.**
- **Claim for loss of profit - there can be no material application of Hudson's formula in the matter of award on account of loss of profit without the aggrieved party leading any evidence as a condition precedent for application of the said formula.**

*[Executive Engineer, Water Ways Division v. Modi Project Ltd. - Jharkhand High Court - Decided on 8.1.2024]*



- **Claim for escalation due to prolongation of work - Extension of Time (EOT) approved with a condition that extension was without price escalation and without compensation - post facto EOT granted by the Employer i.e. after the completion of work - Contractor was not aware of the condition that he would not be entitled to price escalation before completion of work, which included execution of extra and additional work - all conditions of EOT ought to have been brought to the notice of the Contractor before the completion of the work so as to afford to him an opportunity to choose as to whether he would avail any benefit out of the contract.**
- **Price Adjustment - increase and decrease in the rate of labour and materials except those materials supplied by the Employer - clause in the contract provided that price adjustment clause shall be applicable only for the work that is carried out within the stipulated time or extension thereof as are not attributable to the Contractor and that no claims for price adjustment other than those provided shall be entertained - extra time of three months for blasting of rocks occurred due to non-supply of stock materials - Contractor entitled to price escalation.**

*[Dhiren Kumar Singh v. State of Odisha - Orissa High Court - Decided on 10.11.2023]*

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The Contractor was awarded the work for the construction of the Jharjhara Reservoir Project in the district of West Singhbhum on turnkey basis. The work awarded to the Contractor comprised of three main components namely, construction of an Earthen Dam effecting creation of a Reservoir, construction of two new canal systems, namely the left Main Canal system and the Link Canal system and renovation of the old Brahmani Canal system. The Contractor contended that the land that was required for the execution of the work was either not acquired or not possessed by the Employer. It could not construct its site office at the head work site, nor could do a separate survey of its work (Dam and appurtenant works of the main canal) on account of heavy public objections and resistance by the land owners/occupiers in the reservoir area. The Contractor could not execute more than 10% of the work in the next six months period. The Employer asked the Contractor to return the total amount of mobilization advance. The Employer took the stand that the tender was invited after acquiring more than two-third of land required for the work and as per the Notice Inviting Tender (NIT), the tenderers were advised to visit the work site of the scheme to study the details and conditions of work, examine the project details etc. The Contractor was aware that some portion of the project work was under acquisition and therefore, the Contractor was not justified in demanding the entire work site. The Contractor referred the disputes to arbitration. The arbitral tribunal held that Employer was responsible for handing over hindrance free land at the sites as a condition precedent, which it failed to. The Court observed that the finding of the arbitral tribunal that the Employer had committed a fundamental breach of contract is perverse on account of non-consideration of material clauses of the contract. The arbitral tribunal while allowing the claims of the Contractor had ignored the clauses of the Notice Inviting Tender (NIT) which expressly provided that survey / investigation was to be made by the tenderer; no claim for idle labour, men and machinery would be entertained for any reason whatsoever; required facilities were to be established at the work site before execution of work and the tenderer was to plan his construction work programme in accordance with the departmental programme for the transfer of land through acquisition or inter departmental land transfer. Accordingly, the Court set aside the arbitral award.



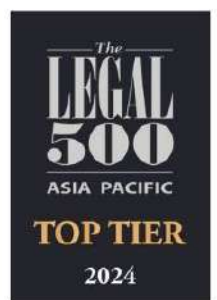
The Contractor was awarded the work for "Restoration and completion of balance work of T.M.C. from RD 68.040 km to 79.815 km under Potteru Irrigation Project, Package No-6". But, due to certain hindrances and departmental laches, the work could not be completed within the stipulated time. The completion of work took 46 months instead of 10 months. The final deviation was approved on the basis of measurement against the works executed by the Contractor after 8 years. The disputes between the parties were referred to arbitration. Both parties challenged the arbitral award since both were aggrieved. The arbitral tribunal held that due to requirement of execution of extra and additional work, excess deviation of more than 71% was approved. Extension of time as well as approval of final deviation was both after completion of the work. No penalty or damages was imposed. Therefore, the Contractor was entitled to price escalation. The Court upheld the Contractor's claim for price escalation.



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