

Construction Arbitration Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Apportionment of delay - proportion of delay attributable to each of the parties was not ascertainable - delay in handing over of drawings - Contractor delayed in executing the work, and had not deployed sufficient resources - Employer entitled to terminate the contract - retention of the bank guarantee amount, security deposit, and levy of liquidated damages by the Employer on the Contractor - Employer not able to prove loss - Contractor entitled to refund of the bank guarantee, and security deposit - although the extent of loss or damage is not required to be proven, the fact that loss or damage has been suffered must be established, even to claim liquidated damages or penalty.**
- **Liquidated damages - is no different from unliquidated damages - it cannot be granted if there is no loss or injury.**
- **Claims barred by limitation - continuing breach - rejection of a demand of damages does not constitute a continuing breach of the contract on the part of the Contractor after it has been terminated - if the contract has been terminated there is no continuing wrong and the period of limitation would commence from the date of the breach - once a tender is issued by the Employer at the risk and cost of the Contractor, then, the amount which is to be claimed from the person who is guilty of breach, becomes crystalized when the risk purchase tender at a higher cost is awarded - engagement of a new contractor for completing the contract cannot extend the limitation period.**

[Gillanders Arbuthnot and Co. Ltd. v. Steel Authority of India Limited - Delhi High Court - Decided on 20.11.2024]

[Union of India v. Krishna Constructions Company - Delhi High Court - Decided on 21.10.2024]



**Union of India v. Krishna Constructions Company - Delhi High Court -
Decided on 21.10.2024**

The disputes between the parties could not be settled by the Dispute Resolution Committee. The parties referred the dispute to arbitration. The arbitral tribunal concluded that both the parties were responsible for the delay in completion of the contractual work. The Employer had delayed in handing over of the drawings to the Contractor; in particular, the foundational drawings had not been handed over for the first seven months, out of a total contract execution period of twelve months. The arbitral tribunal also found that the Contractor had delayed in executing the work, and had not deployed sufficient resources to the contract. The proportion of delay attributable to each of the parties was not ascertainable. The Court upheld the finding of the arbitral tribunal that the Employer had not placed any material to show that it spent more money to get the left over job completed through a third agency. There was no evidence to prove that the breach of contract by the Contractor had resulted in a legal injury to the Employer. The Employer had wrongly withheld the amounts recovered by way of performance bank guarantee, security deposit and the final bill of the Contractor.



The disputes between the parties arose out of a contract for installation of a Top Pressure Recovery Turbine (TRT) (PKG-18) under 2.5 MT New Stream Expansion at SAIL's IISCO Steel Plant, Burnpur, India. The contract was for execution of work on a divisible turnkey basis for an aggregate consideration. The works under the contract were to be completed within a period of twenty-four months from the effective date of the contract. The execution of the works under the contract was delayed. According to the Employer, the contract was delayed on account of reasons attributable to the Contractor. The Employer terminated the contract and informed the Contractor that the balance works would be completed at their risk and cost by engaging another contractor. The Employer invited fresh tenders for completion of the balance work. The Employer raised a claim for damages. The Employer made a request to the ICC for arbitration, but did not deposit the necessary costs. The Employer initiated the arbitration proceedings by sending a fresh request to the ICC Secretariat. Thereafter, the arbitral tribunal was constituted. The arbitral tribunal rejected the Employer's claim as being barred by limitation. The arbitral tribunal concluded that the cause of action accrued when the contract was terminated and since the arbitration proceeding was commenced after more than 9 years, the Employer's claims were barred by limitation. Further, it observed that the clause 44.2.6 of the General Conditions of Contract (GCC) concerns the quantification of damages and not the cause of action for claiming the same. The single judge in the challenge proceeding, concluded that the arbitral tribunal had committed an error by not recognising the right of the Employer under clause 44.2.6 of the GCC and for deciding the issue of limitation without conducting a trial. The Employer had contended that although the breach of the contract occurred on the date when the contract was terminated on 29.11.2012; however, the same could not be considered as the date from which the period of limitation was required to be reckoned. The Employer relied on clause 44.2.6 of the GCC and contended that the breach was a continuing one and therefore, the limitation would begin to run from the date on which the breach ceases. The Employer took the plea that the amount due to it, could only be determined after the completion of facilities, that is, after the risk purchase contract was completed. Alternative, the limitation would begin to run from 'the breaking point' of negotiations between the parties. The Court upheld the finding of the arbitral tribunal and concluded that the Employer's claims were barred by limitation.



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Successfully handled construction arbitrations relating to DBFOT projects, EPC Contracts and FIDIC based contracts in infrastructure projects.