

Construction Arbitration Newsletter

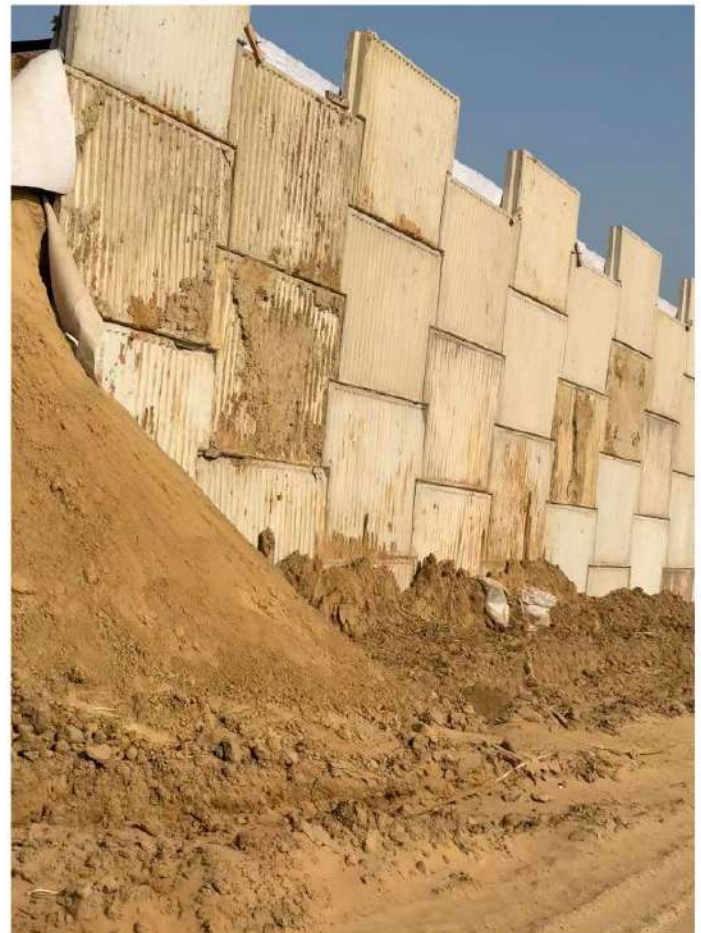
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Construction Arbitration Law Firm

- **Quantification of loss of profit - foreclosure of contract - possession of site not handed over to the Contractor - Contractor has to prove that there was other work available that he could have secured if not for the delay - same has to be proved with reference to invitations to tender in which the Contractor could not participate due to insufficient capacity to undertake other work; or by books of accounts to demonstrate a drop in turnover.**
- **Stay of operation of the arbitral award - liability to deposit the awarded amount with the Court as a condition for stay against execution - Court does not have scope to go into the examination of the challenges to the arbitral award while adjudicating an application seeking deposit of the awarded amount with the Court.**

*[Executive Engineer v. S. Bose - Calcutta High Court
- Decided on 20.1.2025]*

- **Applicability of principles of Code of Civil Procedure - principles of the Code are applicable mainly because public corporations are involved and because the Government Corporations have to pay large amounts under the arbitral awards.**



- **Meaning of constructive possession** - means necessary for construction, operation and maintenance - it means actual physical possession and access to vacant unencumbered land without hindrances and interruptions - contractual obligation was not to give paper possession but actual physical possession - contract has to be interpreted in a commercial fashion - words “grant” and “vacant access” in a commercial contract for construction could only be construed as envisaging actual physical possession or actual physical access to an unencumbered and unhindered site.

*[National Highways Authority of India v. Yedeshi Aurangabad Tollway Ltd. -
Delhi High Court - Decided on 16.1.2025]*



Executive Engineer v. S. Bose - Calcutta High Court - Decided on 20.1.2025

The scope of the work under the tender was construction of Sea Dykes with Hume Pipe Sluice at New Manglutan in South Andaman under Watershed Development Project. The work was not started even till the stipulated date of completion. The Employer invoked the clause of the General Conditions of Contract (GCC) to close the contract. After the foreclosure of the contract, the Contractor invoked arbitration. The arbitral tribunal, amongst other claims, allowed the claim for loss of profit by the Contractor. The Court noted that the tender amount included 15% being percentage on cost of materials and labour to cover all overheads and profits. The Court upheld the finding of the arbitral tribunal quantifying the amount of loss of profit and limited the amount of loss of profit to 1/3rd of this 15%. Further, the Court upheld the finding of the arbitral tribunal and concluded that the site had never been handed over and work never commenced, the damages or loss claimed on account of idling of man power, machinery or expenses incurred on them without any evidence, was not sustainable.

**National Highways Authority of India v. Yedeshi Aurangabad Tollway Ltd. -
Delhi High Court - Decided on 16.1.2025**

The Concessionaire was granted concession for four-laning of the project highway on design, build, finance, operate and transfer basis (DBFOT). There was delay in completion due to delayed land procurement, utility shifting, tree cutting, pandemic etc. The Employer insisted that the Concessionaire should submit undertaking that it would not raise any claim on the Project cost due to shifting of Project Milestone. However, the Concessionaire did not sign a supplementary agreement. The disputes between the parties were referred to arbitration. The arbitral tribunal concluded that the obligation of the Employer was to grant actual vacant access, and not mere notification of the land for acquisition. The term 'constructive possession' meant actual physical possession and access to vacant unencumbered land without hindrances and interruptions. The arbitral tribunal agreed with Concessionaire's contention that the Independent Engineer (IE) was the sole authority to determine and grant EOT. Further, the arbitral tribunal found that the Employer delayed in approving the cost of shifting and in depositing supervision charges and approving plans for shifting of the utilities. Once it was established that the Commercial Operation Date (COD) was delayed on account of material breach or default of the Employer, or for that reason, toll revenues were suspended or reduced, the Employer was liable to extend the concession period. The liability of the Employer to extend the concession period did not stand absolved merely because there was contributory material breach or default on the Concessionaire's part in delaying the COD. The waiver of damages for delay in fulfilment of conditions precedent did not absolve the Employer of its liability under the CA forever. The waiver was for the limited purpose of declaration of the Appointed Date. The damages envisaged by clause 10.3.4, it was held, were contemplated only in the event of failure of the Employer to grant vacant access to any part of the said 20% of balance land, de hors the obligation to make 80% of the land available by the Appointed Date. The Concessionaire was entitled to compensation as well as extension of the concession period. The statutory auditor's certificate was supported by back up documents including the statements of plant and machinery deployed, extracts of Monthly Progress Reports, salary statements, wage slips, pay slips, bills and invoices of contractors, attendance logs of workers, details of tax deducted at source, leave and license agreements, vehicle logs, lease agreements for plants, vehicle hire invoices, bank statements, loan account statements and extracts from the IE reports on the status of progress of work etc. The statutory auditor also confirmed, in evidence, that these documents were taken into account by it while certifying the Concessionaire's claim under clause 35.2 of the CA. The statutory auditor had deposed and confirmed the contents of his certificate. The Court concluded that the Concessionaire could not be expected to carry out construction on land which had hindrances or obstruction, even though the Employer sought to advance the argument based on the definition of "encumbrance". The Employer had failed to make out a case for waiver of the requirement to deposit the awarded amount.



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