

Construction Arbitration Newsletter

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Construction Arbitration Law Firm

- Ignorance of vital correspondence by the arbitral tribunal - award liable to be set aside if the arbitral tribunal ignored the vital correspondence where the party had admitted its liability.
- Claim for payment of price variation on the labour component beyond the express cap in the contract - award liable to be set aside where the claim for payment of price variation on the labour component beyond the express cap of 45% stipulated in the contract.
- Interpretation of contract by the arbitral tribunal - finality - the interpretation and construction of a contract are solely within the domain of the arbitral tribunal, and a plausible view rendered by the arbitral tribunal should not be interfered with - if the arbitral tribunal ignores express contractual terms, the award is liable to be set aside.
- Binding effect of accepted rates by the Contractor - the contract provided that accepted rates were good for all excavation irrespective of the type of rock or soil encountered - award allowing the claim of the Contractor by ignoring the express provisions of the contract is liable to be set aside - the rates were quoted by the Contractor after inspection of the site and after familiarizing all contractual features such as accessibility, working condition, geological feasibility / terrain conditions.

[Gammon India Limited v. Konkan Railway Corporation Ltd. - Bombay High Court - Decided on 22.7.2025]



- **Absence of reasons for awarding liquidated damages - arbitral award liable to be set aside for manifest arbitrariness if the conclusion on a major claim e.g., Liquidated Damages, is devoid of analysis and reasons, fails to discuss express contractual provisions or the case law relied upon by the party - absence of articulated reasons on contentious legal facets (like waiver or necessity to prove actual loss) is not saved by giving benefit to a non-legal expert arbitrator.**
- **Admissibility of evidence - expert report - arbitral tribunal is not expected to follow strict rules of procedure or evidence - taking into consideration a fact-finding expert report (like a report commissioned by the challenging party, even if introduced by the Contractor) to arrive at the truth is not an error that attracts the standard of perversity or patent illegality - arbitral tribunal cannot get bogged down by procedure and manner of introducing evidence.**
- **Arbitrability of Excepted Matters - clause in the contract precluding arbitration for amounts withheld upon the recommendation of "Government agencies of Government of India" does not apply to retentions made based on the view of the internal vigilance department of the Employer - Employer's vigilance department is merely an internal department and not an "inspection agency of the Government of India" for the purpose of excluding a dispute from the scope of arbitration.**
- **Civil Works Compliance - use of M30 Grade cement - where two expert reports (from IIT Mumbai), including one commissioned by the Employer, find that the Contractor used the stipulated grade of concrete (M30), the arbitral tribunal's finding to release the withheld amount on the premise of non-compliant work is logical and rational and does not warrant interference - the fact that the structure was used for years without repair and was certified as safe by regulators further supported the finding.**
- **Proof of loss for claim of liquidated damages - even though liquidated damages are a pre-estimate of damages, an arbitral tribunal that denies the entire liquidated damages claim based on the Employer's failure to prove actual loss in a concrete fashion must provide reasoned analysis as to why the liquidated damages clause itself (which implies difficulty in proof) was disregarded - absence of such reasoning renders the denial of liquidated damages manifestly arbitrary.**
- **Service Tax - new law - the contract provided that should there be any variation in applicable taxes and duties on materials in the works or services performed by the Contractor or imposition of new levies due to subsequent legislation, the financial implications of such variation shall be reimbursed by the Employer at actuals - contract between the parties was not a divisible contract and the new provision covered indivisible contracts.**

*[Hindustan Petroleum Corporation Limited v. G.R. Engineering Private Limited -
Bombay High Court - Decided on 18.6.2025]*



**Gammon India Limited v. Konkan Railway Corporation Ltd. -
Bombay High Court - Decided on 22.7.2025**

The Contractor was awarded a works contract for the construction of a B.G. Single Line Tunnel (Tunnel No. 20 - Karbude Tunnel) in Ratnagiri. The work was completed after grant of several extensions. Following the submission of the final bill, the Contractor alleged short payments by the Employer and invoked the arbitration clause. The Employer accepted the award in respect of most of the claims but challenged it only for three specific claims for refund of recoveries towards electricity charges, reimbursement of difference between price variation on account of increase in minimum wages and extra cost in excavation of soft strata of the tunnel. The Contractor argued that while excavating the tunnel, it came across soft strata contrary to the geo-technical appraisal given in the bid document indicating that the excavation was likely to go across amygdule basalt. According to the Contractor, the strata encountered was not rock/dense basalt, but laterite and soft material throughout in 400 mtrs from Bhoke side. The Contractor was forced to resort to drift method of tunnelling with heavy seepage issues not permitting proper drilling cycle and meeting of unexpected expenditure. The Court set aside the award allowing claim for refund of recoveries towards electricity charges on the ground that the arbitral tribunal had ignored vital correspondence where the Contractor had clearly admitted its liability to bear the electricity consumption charges, only raising a complaint about the rate increase. Further, the award of claim for reimbursement of difference between price variation on account of increase in minimum wages was also set aside since the claim sought payment for price variation on the labour component beyond the express cap of 45% stipulated in the contract. The award of claim for extra cost in excavation of soft strata of the tunnel was also set aside since the arbitral tribunal had ignored contractual provisions for tunnelling, which expressly stipulated that the accepted rates were good for all excavation irrespective of the type of rock or soil encountered. The rates were quoted by the Contractor after inspection of the site and after familiarizing all contractual features such as accessibility, working condition, geological feasibility/terrain conditions.



Hindustan Petroleum Corporation Limited v. G.R. Engineering Private Limited - Bombay High Court - Decided on 18.6.2025

The Employer awarded to the Contractor the contract to construct twelve “mounded bullets” to store liquified petroleum gas at Employer’s refinery at Mahul. The mounded bullets civil works were specifically required to conform to “M30 grade” reinforced cement concrete (RCC). There was delay in completion of the works. Disputes between the parties arose out of Employer computing liquidated damages in the payments due on invoices raised. The Employer computed liquidated damages due to the delay and withheld various other amounts from the Contractor’s payments. The arbitral tribunal allowed the claims of the Contractor and concluded that amount withheld by the Employer on account of civil works, under-insurance, customs duty variation, service tax, and liquidated damages should not have been withheld. Both parties relied on expert reports during the course of arbitration. The Court concluded that the arbitral tribunal was not wrong in rejecting the contention that the dispute on account of withholding of amount on the premise of non-compliant civil works was not arbitrable. The draft expert report prepared at the behest of the Employer which was accessible to both the parties could not be ignored since it was carrying out a fact-finding exercise. The structure was held to be safe and stable with ability to withstand the design load. The arbitral proceedings cannot be bogged down by procedural processes. If the Employer had reason to disagree with the draft report, it was open to the Employer to seek issuance of summons to the expert and to confront his findings by putting questions to him. The arbitral tribunal had observed that if there is a delay, “there will be some loss of investment”. Further the arbitral tribunal asserted that “liquidated damages can only be awarded to the extent of the loss which he proves” and concluded that losses caused to the Employer has not been adequately proved. The Court observed that liquidated damages are meant to be a reasonable pre-estimate of damages and losses, arrived at by the contracting parties exercising their autonomy, for application when it is difficult to prove actual loss. It was necessary for the arbitral tribunal to return a finding on whether it was difficult to prove the damages, particularly, when the arbitral tribunal had stated at the threshold that there would always be some loss of investment, owing to a delay. The arbitral tribunal should have dealt with the issue whether it is difficult or impossible to prove the loss in the instant case. The award rejecting the claim of the Employer for liquidated damages was set aside.



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