

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment pronounced on: 17th June, 2016**

+ **O.M.P. No.1003/2013**

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through Mr.Mukesh Kumar, Adv. with
Ms.Gunjan Sinha Jain, Adv.

versus

M/S PROGRESSIVE-MVR (JV)

..... Respondent

Through Dr.Amit George, Adv. with
Mr.Swaroop George & Ms.Rajsree
Ajay, Adv.

+ **O.M.P. No.54/2015**

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through Mr.Rajiv Kapoor, Adv. with
Mr.Kumar Ravishankar, Adv.

versus

M/S BSCPL INFRASTRUCTURE LTD.

..... Respondent

Through Mr.Ajay Kumar Jha, Adv.

CORAM:

HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

O.M.P. No.1003/2013

1. By way of this common judgment, I propose to decide the two sets of objections filed by the same petitioner against different respondents. The facts and legal points in both the matters are common, therefore, both the petitions are being decided together.
2. OMP No.1003/2013 has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “Act”) challenging the Award dated 1st June, 2013 (though pronounced on 9th May, 2013) passed by the Arbitral Tribunal with respect to dispute arising out of payment of price adjustment in accordance with the Note prescribed under sub-Clause 70.3 (c)(xi) of the Conditions of Particular Application (hereinafter referred to as the “COPA”).
3. Brief facts of the case as per pleadings of the parties are that:-
 - (i) The tenders were called for the work of "Four Laning from KM. 480.000 to KM. 520.000 of Gopalganj - Muzaffarpur section of NH-28 in Bihar" (hereinafter referred to as the 'work').
 - (ii) The respondent/Contractor submitted its bid to the petitioner/ Employer on 23rd May, 2005. After scrutiny of the bids of all the competing contractors, the bid of the respondent was found to be the most competitive and accordingly, a letter of acceptance was issued by the petitioner to the respondent on 8th July, 2005.
 - (iii) In view of the same, a contract agreement being Contract Package No.LMNHP-EW-II-(WB)-12 was formally executed between the

petitioner and the respondent for execution of the work for a contract price of Rs.311,13,26,068/-.

- (iv) The work was to be carried out as per the Bill of Quantities (hereinafter referred to as the 'BOQ') read in conjunction with conditions of contract, specifications, drawings and other documents forming part of the contract.
- (v) As per the respondent, it had initiated execution of the work entrusted to it. During the execution of the work, a certain dispute arose between the parties which was subsequently referred to arbitration, in terms of the provisions of the contract, to a three-member Arbitral Tribunal constituted by the parties for the said purpose.
- (vi) The resulting Award of the Arbitral Tribunal dated 1st June, 2013 is the subject matter of challenge in the present petition filed by the petitioner under Section 34 of the Act.

4. Learned counsel for the respondent has relied upon the judgment of the learned Single Judge in *NHAI v. BSCPL*, reported as 2015(1) Arb. LR 129 and the judgment dated 10th March, 2015 of the Division Bench of this Court in *NHAI v M/s. NCC-VEE (JV)*, FAO(OS) No.93/2015 stating the issue and interpretation of the clause required in the present case is *pari materia* and, therefore, there is no requirement of adjudication in the present petition. It is a covered matter. The judgment of the Single Bench has attained finality.

5. Learned counsel for the petitioner, on the other hand, submitted that the said contention is not correct which is against the terms of the contract. The Court has to examine the conduct of the parties for more than 9 interim

payment certificates (IPC) which was at ad idem with regard to the payment of the price escalation in terms of Sub Clause 70.3 (c)(xi). Furthermore, the clause in **BSCPL** (supra) was entirely different and distinct from the clause in the present case, and the Note in BSCPL has been reproduced herein below:-

“Note: X, Y, Z are the actual percentage of cost of materials of bitumen, cement and steel respectively used for execution of work as per the Interim Payment certificate for the month.”

6. In order to distinguish the present case with the case of **BSCPL** (supra), the Note was interpreted on the basis of the term “cost” which has been defined in Clause 1.1 (g) (i) of the General Conditions of Contract. In fact, the learned Single Judge in para 21 clearly records that the Arbitral Tribunal rejected the contention with regard to engagement of base cost prevailing 28 days prior to the bid due date on the basis of definition of the cost expressly defined in the contract. (The said aspect that in the Award, interpretation of Note was only done on the basis of cost, is also reflective from paras 8 & 9 of the judgment dated 10th March, 2015 passed by the Division Bench in FAO(OS) No.93/2015.)

7. In **BSCPL** (supra), the NHAI till 18 IPCs was also making payment on the basis of current cost as against the stand put forth before the Arbitral Tribunal therein that the price escalation has to be paid on the basis of base cost prevailing 28 days prior to the date of the bid. Only the basis of the conduct of the NHAI in making payment of price escalation on the basis of the current cost, the Arbitral Award after applying the findings of the Supreme Court in **Godhra Electricity Co. Ltd. & Anr. v. State of Gujarat**,

reported as (1975) 1 SCC 199 and *Abdulla Ahmed v Animendra Kissen Mitter*, reported as AIR 1950 SC 15, has passed the Award in the said matter, which has attained the finality between the parties.

8. The contractual clauses in the present case as well as the facts are entirely distinguishable as there is no reference of cost in the Note concerning the present matter. But, the Arbitral Tribunal suo moto read “cost” in the Note of which interpretation was sought to arrive at the conclusion that for calculating the actual percentage of material, the current cost is required to be engaged and it is settled law that interpretation of the terms of the contract fall within the jurisdiction of the Arbitrator and any error while so interpreting is not amenable to correction under Section 34 of the Act.

9. The question which arises in the present case as submitted by the counsel for the petitioner is that while interpreting the terms of the contract, which in itself are unequivocal and unambiguous, is the Arbitral Tribunal permitted to introduce words which are conspicuously missing. The Arbitral Tribunal is bound to interpret the terms of the contract as it is and not what it should have been.

10. It is canvassed by the learned counsel for the petitioner that once the Arbitral Tribunal arrived at a conclusion that the contract did not indicate the adoption of the fixed base rates, and at the same time, the contract also did not indicate adoption of the current rates, the only course available to the Arbitral Tribunal was bound to resort the salutary principle of deciphering the intention of the parties from the conduct adopted by them shortly after the date of instrument and during the performance of the contract.

11. In the present case, it is submitted by the petitioner that the Arbitral Tribunal did not even address the preliminary objection by the petitioner that the claim was not maintainable being barred by the principle of estoppel as it was an admitted fact that for the first nine IPCs, the contractor itself was raising its bill as per the correct interpretation of the relevant terms and conditions of the contract, and it was only after much water had flown down the bridge that the contractor for the first time changed its stand and started demanding payment of price escalation on current rates, rather than the BOQ rates or the rates prevailing 28 days prior to the bid. There is no adjudication on the aspect of the conduct of the Contractor submitting IPCs after calculating the variables on rates prevailing 28 days prior to the bid. Even otherwise, the Note refers to the actual percentages of material of bitumen, cement and steel respectively used for execution of work as per the IPC for the month. For calculating the percentage, the denominator in the equation insofar as the value of the work done in particular IPC is on the BOQ rates and therefore, as per the settled mathematical principles, the numerator would also be based upon the BOQ rates. In case the numerator is derived from the current rates, whilst the denominator is worked out at BOQ rates, it would lead to absurd consequences.

12. It is submitted that as the Arbitral Tribunal failed to appreciate that the price adjustment formula was devised to capture escalation, and once the current cost of material is taken into account, there was no requirement of any further escalation, and escalation over and above the current cost would amount to unjust enrichment. Therefore, the interpretation arrived at by the

Arbitral Tribunal is, on the face of it, unreasonable and unfair and the Award is liable to be set aside.

13. Lastly, it is alleged with regard to reliance placed by the counsel for the petitioner on the judgment dated 22nd October, 2013 in O.M.P. No.1043/2013 titled as **NHAI v. M/s KMC-RK-SD (JV)** which has application to the facts of the present case, as in the present case is not one of misinterpretation of the terms of the contract, but where by introduction of the term of cost in the Note, the Arbitral Tribunal has in a way rewritten the contractual arrangement, which is not permissible in law. Furthermore, here is not the case where an objection was to be raised by the Contractor on an opinion/calculation by the Engineer. Rather, in the present case, the contractor itself was calculating the variables X, Y, Z on the basis of cost prevailing 28 days prior to the bid and submitting its IPCs, which was accepted by the Engineer.

14. The petitioner has also filed the objections by way of OMP No.54/2015 under Section 34 read with Section 16(6) of the Act for setting aside the Arbitral Award dated 28th August, 2014 as received by the petitioner on 1st September, 2014 and modification in the Award dated 29th August, 2014.

The petitioner has deposited an amount of Rs.20,88,52,283/- before this Court in view of order passed on 21st December, 2015 as part of the Claim No.1 raised in another matter which was challenged by the petitioner has been dismissed in the Supreme Court in Special Leave Petition filed by the petitioner.

With regard to the facts and challenge to the Award dated 28th August, 2014 as the legal points are similar to another matter which is the subject matter of OMP.No.1003/2013, similar contentions were raised by both the parties in this matter also pertaining to Claim No.1.

As far as Claim No.2 pertaining to the payment of additional costs/ losses suffered due to being prevented from executing the work as planned is concerned, learned counsel for the respondent submits that the objections raised against this claim are also liable to be dismissed in view of dismissal of OMP No.633/2012, **NHAI v. HCC Ltd.**, decided on 8th July, 2014 wherein the similar objection was raised. In support of his submission, counsel has placed reliance on the order dated 6th July, 2012 passed in OMP 582/2012 in **NHAI v. Oriental Structural Engineers Pvt. Ltd.–Gammon India Ltd. (JV)**, where this Court had declined to interfere with the Award and dismissed the petition relating to objection with regard to compensation on account of delays in completion of the work and Arbitral Tribunal had Awarded pendent-lite and future interest @ 12% p.a. on Claim No.2 till the date of payment. This judgment was affirmed in **National Highways of India v. Oriental Structural Engineers Pvt. Ltd.-Gammon India Ltd. (JV)**, 2013(2) Arb.LR 264 (DEL) (DB) in an appeal being FAO(OS) No.461/2012 passed by the Division Bench. The Special Leave Petition being SLP(C) No.19536/2013 against order dated 31st January, 2013 has been dismissed by the Supreme Court on 8th July, 2013. Counsel submits that the present case is covered under these cases which were decided on merit.

Pertaining to Claim No.5 of interest, it is submitted, neither any challenge in the petition nor any ground raised, except in the prayer portion.

The interest awarded by the Arbitral Tribunal is duly as per the provisions of the contract. The issue of interest is also covered by this Court's judgment dated 8th July, 2014 in OMP No.633/2012. There is no merit in the submissions of the petitioner.

15. It is mentioned that there was no arguments addressed by the counsel for the petitioner on Claims No.2 during the hearing. The Claim No.1 of the Concessionaire is regarding adjustment of Contract Price in terms of sub-Clause 70.3 of COPA for variation in rates/prices of Cement, Steel, Bitumen and other materials over the rates/prices of these commodities prevailing in the previous month prior to the closing date for submission of bids for the project. In support of objections filed, learned counsel for the petitioner has referred an order of the Arbitral Tribunal in another matter comprising of Sh.O.P.Goel, Sh.S.P.Singh and Sh.P.C.Sharma in the matter of M/s. Ssangyong Engineering & Construction Co. Ltd. (claimant) and NHAI (respondent) for the project of 'Construction of Sagar Bypass between Km. 187 to Km.211 of NH-26 in the State of Madhya Pradesh (Contract Package – ADB-II/C-5)'. The award on the dispute regarding price adjustment was passed by the Arbitral Tribunal on 14th December, 2015 after the award passed in this present case as submitted by the counsel for the petitioner who submits that the present case is also not covered with the judgments passed in earlier matters which were upheld by the Supreme Court.

16. Learned counsel for the petitioner has addressed the similar submissions as argued by the counsel for the petitioner in O.M.P. No.1003/2013. It is an issue of interpretation of clause 70.3 of the contract which is the same issue in the connected matter. The facts and details of

evidence and documents are referred in the impugned Award. Since the issue in the present case is identical as involved in OMP No.1003/2013, both the matters are decided by single judgment. The facts are taken from OMP No.1003/2013.

17. The issue in hand is mainly pertaining to interpretation of a contractual clause by the Arbitral Tribunal, as the dispute arose between the parties regarding the true meaning and interpretation of the price adjustment formula contained in the contract, namely Clause 70.3 of the COPA.

The extract of relevant part of the Clause, which fell for interpretation by the Arbitral Tribunal, is sub-Clause 70.3(xi) and the Note appended below the said sub-Clause has been reproduced here as under:

"xi. The following percentages will govern the price adjustment for the local currency portion (R1) of the contract.

1.	Labour- Pl	20%
2.	Plant and Machinery and spares- Pp	20%
3.	POL –Pf	10%
4.	Bitumen-Pb	X%
5.	Cement –Pc	Y%
6.	Steel-Ps	Z%
7.	Other materials-Pm	$\frac{50-(X+Y+Z)}{100}\%$
	Total	<u>100%</u>

(Note: X, Y, Z are the actual percentage of bitumen, cement and steel respectively used for execution of work as per the interim payment Certificate for the month.)"

18. The stand of the petitioner, on the other hand is that while computing the percentage of the components of X, Y and Z, the percentage has to be calculated by multiplying the quantities of these items in a bill with their 'base cost' i.e. the cost prevailing at the time of submitting the bid.

The stand of the respondent is that while computing the percentage of the components of X, Y and Z i.e. bitumen, cement and steel respectively, the percentage has to be calculated by multiplying the quantities of these items in a bill for that particular month, with the 'current cost' or landed cost of these items in the market.

19. The Arbitral Tribunal in its Award has accepted the stand of the respondent that while computing the percentage of the components of X, Y and Z i.e. bitumen, cement and steel respectively, the percentage has to be calculated by multiplying the quantities of these items in a Bill with their current cost in the market and while rejecting the plea of the petitioner *inter-alia* categorically held that had the contract intended only the quantity to be the variable and contemplated a fixed predefined 'base rate' then the 'Note' below clause 70.3(xi) could have been worded accordingly.

20. It is not in dispute that the contract does not stipulate specifically, however, the Arbitral Tribunal held that a plain reading of the 'Note' below sub-Clause 70.3(xi) does not by any means indicate or even imply that the cost of a material on a date 28 days prior to the submission of bids is intended to be taken into account for calculating the X, Y, Z percentages.

21. In earlier orders passed by the predecessor Bench on 10th March, 2015 and 15th April, 2015, it has been recorded that a similar issue concerning the petitioner had been adjudicated upon by a Single Judge of this Court in the case titled *NHAI v. BSCPL* (supra) and the same has been upheld by a Division Bench of this Court by order dated 10th March, 2015 in FAO (OS) No.93/2015 (supra).

22. One of the main arguments of the petitioner is that it is the base cost that is to be utilized for calculating the X, Y, Z, percentages in the price adjustment formula which had been rejected by this Court in the aforesaid decisions, however, it is not in dispute by the learned counsel for the petitioner that the order of the Division Bench has attained finality as *in-limine* the petitioner's challenge has been rejected by the Supreme Court in Special Leave Petition Nos.19526/2015 & 19645/2015 filed by the petitioner on 31st August, 2015.

23. No doubt, during hearing, the learned counsel for the petitioner has tried to distinguish the facts of the present case with the case of **BSCPL** (supra), mainly, on the reason that there is a slight difference in the relevant price adjustment clause that was in issue before the Court in the **BSCPL** (supra) case and the price adjustment clause that has been interpreted by the Arbitral Tribunal in the present case. It is also contended that in fact, the judgment of the Single Judge in the **BSCPL** (supra) case supports the case of the petitioner in the present case, as the respondent in the present case had initially raised certain IPC as per the interpretation of the petitioner/NHAI and later resiled from the same in subsequent bills, therefore, the said factor had persuaded the Single Judge to uphold the claim of the contractor in the **BSCPL** case (supra) was on account of the petitioner having itself sanctioned bills for a long period of time as per the contractor's interpretation, whereas the position in the present case is just the opposite, in view of such difference in the price adjustment clause considered by this Court in the **BSCPL** case (supra) as compared to the price adjustment clause in the present case.

24. The price adjustment clause in the **BSCPL** case (supra) is as under:

"xi. The following percentages will govern the price adjustment of the contract.

1.	Labour- P_l	20%
2.	Plant and Machinery and spares- P_p	20%
3.	POL – P_f	10%
4.	Bitumen- P_b	X%
5.	Cement – P_c	Y%
6.	Steel- P_s	Z%
7.	Other materials- P_m	$50-(X+Y+Z)\%$
	Total	<u>100%</u>

(Note: X, Y, Z are the actual percentage of cost of bitumen, cement and steel respectively used for execution of work as per the interim payment Certificate for the month.)"

25. The price adjustment clause in the present case is as under:

"xi. The following percentages will govern the price adjustment for the local currency portion (R1) of the contract.

1.	Labour- P_l	20%
2.	Plant and Machinery and spares- P_p	20%
3.	POL – P_f	10%
4.	Bitumen- P_b	X%
5.	Cement – P_c	Y%
6.	Steel- P_s	Z%
7.	Other materials- P_m	$50-(X+Y+Z)\%$
	Total	<u>100%</u>

(Note: X, Y, Z are the actual percentage of bitumen, cement and steel respectively used for execution of work as per the interim payment Certificate for the month.)"

26. The Division Bench, while upholding the findings of the Arbitral Tribunal in the **BSCPL** case analyzed the clause as under :

"4. From the above sub para (xi) it is evident that percentages ascribed to labor, plant, machinery and spares and POL are constant (fixed). Insofar as bitumen, cement and steel

are concerned, the percentages are variable and have been depicted as X %, Y % and Z %. Insofar as other materials are concerned, the formula prescribed is $50 - (X+Y+Z)\%$. The total of all components is 100%. It is evident that the percentage of other materials is a balancing item. Therefore, it may be positive and it can also be negative. This is so, because the total must always be 100%.

5. Insofar as 'X', 'Y' and 'Z' are concerned the Note appended to sub-para (xi) stipulates that they are the actual percentages of cost of bitumen, cement and steel respectively, used for execution of work, as per the interim payment certificate for the month.

6. The entire controversy in the present case relates to the meaning of the expression 'cost' of bitumen, cement and steel. According to the learned counsel for the appellant the expression 'cost' denotes the quantity of bitumen, cement and steel used in a particular month multiplied by the base rate (i.e. the rate prevailing 28 days prior to the submission of the bid).

7. On the other hand, the contention raised by the respondent is that the expression 'cost' refers to the quantity of the bitumen, cement and steel used during a particular month multiplied by the prevailing rate in that month. This is the limited scope of the controversy in this case.

8. The Arbitral Tribunal has examined this aspect of the matter in detail in paragraphs 57 to 85 of the Award. The Arbitral Tribunal concluded that a plain reading of the Note below sub clause 70.3(xi) does not suggest that the cost of bitumen, cement and steel mentioned therein, has to be considered as the cost of these materials prevailing 28 days prior to the last date of submission of the bid. It was further concluded that on a joint reading of the relevant clauses and sub clauses, it was clear that the cost of bitumen, cement and steel to be considered in the said Note was the actual/current cost and

that contract does not mention that the definition of cost of this particular sub clause had to be understood differently.

9. We may also point out that in the general conditions of contract, Clause 1.1 (g) (i) defines 'The cost' to mean expenditure properly incurred or to be incurred, whether on or off the site including over and above charges properly allocated thereto and does not include any allowance of profit. The said definition does not refer to any base cost as the appellant wants us to interpret the said Note.

10. We have also examined the judgment of the learned Single Judge. We find that the interpretation given by the Arbitral Tribunal is not an impossible view. Although, there may be some substance, in what the learned counsel for the appellant submits by way of interpretation of the said Note, but that would only be one of the possible interpretations. Another possible interpretation is the one adopted by the Arbitral Tribunal."

27. Counsel for the respondents in both the matters submits that from the earlier decisions passed by this court which have attained finality by the Supreme Court, it is evident that the dispute in the **BSCPL** case (supra) was as to whether the 'base cost' was required to be used or the 'current cost'. The difference in the 'Note' in the price adjustment clause before the Division Bench in the **BSCPL** case (supra) and the 'Note' in the price adjustment clause that was considered by the Arbitral Tribunal in the present case i.e. 'actual percentage of cost' as compared to 'actual percentage' would not amount to a material difference for the reason that the parties are *ad-idem* in the present case as well as that the 'actual percentage' is to be arrived at by the usage of the correct 'cost' or 'rate' of the elements of X, Y and Z respectively.

28. The stand of the respondent is that while computing the percentage of the components of X, Y and Z i.e. bitumen, cement and steel respectively, the percentage has to be calculated by multiplying the quantities of these items in a bill for that particular month, with the 'current cost' or landed cost of these items in the market. The stand of the petitioner on the other hand is that while computing the percentage of the components of X, Y and Z the percentage has to be calculated by multiplying the quantities of these items in a bill with their 'base cost' i.e. the cost prevailing at the time of submitting the bid.

29. The submissions of both the parties have been recorded in the Arbitral Award at various places. The details are given as under:

"6.11. As already stated in para 6.05.1 the Claimants representative brought out that definition of cost when read in conjunction with sub Clause 70.3 (c) (ii) and (iii) of COPA in the Note given below sub Clause 70.3(xi) this Note would read as X,Y,Z are the actual percentage of all expenditure properly incurred on the site including overheads and other charges and excluding any allowance for profit for material of bitumen, cement and steel respectively used for execution of work as per IPC for the month. The Claimants representative further contended that it is actual current/ invoices cost of these materials during a particular month that needs to be taken into account for calculating these percentages variable X,Y,Z. It is further elaborated by definition of 'R' in the formula which relates to adjustment for secured advance at the current rate for a particular IPC and therefore the concept of current rate is already there in the formula of price adjustment.

6.12. Thus the actual current/ invoice cost of these materials during a particular month that needs to be taken into account in calculating percentage variables of X,Y,Z.

7.4.1. According to Respondents, the true intent and spirit as well as the purpose of clause 70.3(xi) is that for calculating the percentages of X, Y, Z the price of the respective materials i.e. bitumen, cement and steel that were prevailing at the time of the BOQ are to be taken and shall remain constant throughout the contract and the current market prices of these materials, which can change frequently, cannot be taken for calculating these percentages.

8.10. The contention of the Respondents is that the entire price adjustment formulae are based on the underlying principle of 'cost' as it existed in the month previous to the date of submission of the Bids and the current indices/prices to work out the price adjustment and that the price prevailing in the month previous to the date of submission of the Bids needs to be taken into account even for working out these percentage X,Y,Z Based on this interpretation of the Note below Sub clause 70.3(xi) and implications of Sub Clause 1.1(e)(i). Clause 6 of Preamble to BOQ, Clause-14 of Instructions to Bidders. Sub clauses 701 to 70.3 Clause 60.1/60.9 in the Contract it contends that working out these percentages X,Y,Z by using the current invoice cost is not the intent in the contract."

30. The contract contains a similar definition of the word 'cost' in Clause 1.1 (g) (i) which has been reproduced by the Arbitral Tribunal in paragraph 4.02.1 of the Arbitral Award as under:

"Cost means all expenditure properly incurred or to be incurred whether on or off the site including overhead and other charges properly allocated thereto but does not include any allowance for profit."

31. Therefore, it is to be examined in the present case as to whether the price adjustment clause contemplates the usage of the 'current cost' or 'base cost' of the items of the work that correspond to the elements of X, Y and Z and as to whether the findings of the Arbitral Tribunal are liable to be

interfered with in exercise of the jurisdiction of the Court under Section 34 of the Act.

32. The findings of the Arbitral Tribunal in the present case are as under:

"9.4. The AT Noted that the cost of these materials is a function of quantity and rate. Since the quantity is a variable in every IPC, the intention of the contract was to make these percentage components as dynamic variables to try to make the price adjustment formulae as rational and realistic as possible.

9.5. AT further Noted that the dispute is regarding the rate to be taken into account in working out the cost viz. the rate too is to be variable current rate from time to time or a fixed rate. Had the contract intended only the quantity to be the variable and a fixed predefined rate, the Note below Clause 70.3(xi) could have been worded accordingly. However the AT is to interpret the contract as it exists in terms of Supreme Court judgment (2009) 5 SCC 313. It is observed that the certain percentage of the current cost of materials brought to site goes into the valuation of IPC as secured materials advance. A reference to Sub-Clause 60.3 of COPA is relevant:

Sub-Clause 60.3: Materials for Permanent Works.

With respect to materials brought by the Contractor to the site for incorporation in the permanent works the contractor shall (i) receive a credit in the month in which these materials are brought to the site and (ii) be charged a debit in the month in which they are incorporated in to the Permanent works both such credit and debit to be determined by the Engineer in accordance with the following provisions:

(a) no credit shall be given unless the following conditions shall have been met to the Engineers satisfaction.

(i) the materials and Plant are in accordance with the specifications for the Works:

(ii) the materials and Plant have been delivered to the site and are properly stored and protected against loss damage or deterioration.

(iii) the Contractors records of requirement, orders, receipts and use of materials are kept in a form approved by the Engineer, and such records are available for inspection by the Engineer:

(iv) the Contractor has submitted a statement of his cost of acquiring and delivering the materials to the Site, together with such documents as may be required for the purpose of evidencing such cost; and

(v) the origin of the materials and currencies of payment there for are those indicated in the Appendix to Bid.

(vi) The materials and plant shall be incorporated or used within 90 days period.

(b) the amount to be credited to the contractor shall be equivalent of 75 percent of the Contractor's reasonable cost of materials delivered to the site after review of the documents listed in sub paragraph (a) (v) above as determined by the Engineer. Provided further the advance shall not exceed 75 per cent of the corresponding value of materials determined on the basis of the BOQ rates.

9.6. The stipulation in the formulae for apportioning a part of the IPC amount to different materials is not to be confused with the price adjustment as such. This cost or any other cost taken into account in working out the percentage factors X, Y, Z could affect only the weight age given to a particular material in apportioning a percentage of the IPC cost to that material and parties could agree to any mode for working out such apportioning of IPC valuation. A plain reading of the Note below sub Clause 70.3(xi) does not by any means indicate or even imply that the cost of a material on a date 28 days prior to the submission of bids is intended to be taken into account for calculating the X,Y,Z percentages. The parties could have agreed and stipulated so in the agreement but

they have not done so. The contract as it was executed and entered into, does not say so.

9.09. Sub Clause 70.(xi) indicate the cost of material to be incorporated a particular IPC is to be calculated as per IPC period and it does not imply that the cost of a material on a date 28 days prior to the submission of bids is intended to be taken into account for calculating the X,Y,Z percentages. If that is so the parties could have agreed and stipulated so in the agreement but they have not done so. The contract, as it was executed and entered into, does not say so."

33. It appears from the above that the Arbitral Tribunal has come to a conclusion that since the 'actual percentage' was to be calculated in reference to the 'work done' for a 'particular month', it is the usage of the current cost that is contemplated by the price adjustment formula in as much as it is the current cost that would be representative of the work done in a particular month rather than an alleged base cost of several months or years prior.

34. The Arbitral Tribunal has also observed that the 'Note' appended below the price adjustment clause nowhere stipulates the usage of the base cost, though the petitioner, being the drafter of the contract, could have explicitly provided for the same when it drafted the Note. It appears to the Court that the Arbitral Tribunal has taken a plausible view; it is to be considered as to whether this can be interfered with in exercise of the limited jurisdiction under Section 34 of the Act.

35. In the present case, the petitioner is not able to show any explicit stipulation in the 'Note' appended about the price adjustment clause that it is the base rate which is to be utilized. Therefore, it cannot be concluded that the Arbitral Tribunal has construed the contract in unfair manner; it could be interpreted totally in a different way by a reasonable person. Therefore, the

challenge under Section 34 of the Act is without any valid basis (Reference was made on behalf of the respondent to the judgment of the Supreme Court in the case of *National Highways Authority of India v. ITD Cementation India Limited*, 2015(5) SCALE 554).

36. It is also a matter of fact and it has come on record that when the *BSCPL* case came up before a Single Bench of this Court on 15th April, 2014, it was in fact the submission of the petitioner itself that the issue involved in the *BSCPL* case is the same as the one in the present case, i.e. O.M.P. No.1003/2013. The averment to this effect made by the petitioner before this Court on 15th April, 2014 in the *BSCPL* case is as under:

"Learned senior counsel for the petitioner states that the issue involved in the present petitions has not been decided by this Court. He further submits that in another petition, i.e. O.M.P. No.1003/2013 titled NHAI Vs Progressive MVR the same issue is pending consideration before this Court and is listed on 14.07.2014.

List along with O.M.P. No.1003/2013 on 14.07.2014."

But now the petitioner is trying to distinguish the applicability of the ratio in the *BSCPL* case with the present case.

37. The second submission of the learned counsel for the petitioner is also covered from the few findings of the Single Judge of this Court in the *BSCPL* case and the Arbitral Tribunal therein. Apart from the fact that the Arbitral Tribunal and the Single Judge in the *BSCPL* case, on an interpretation of the price adjustment clause, rejected the contention of the petitioner that it was the base rate/cost that was to be utilized in computing the elements of X, Y and Z, and it was further observed that after giving a

particular interpretation to the terms of contract for considerable period, a party to a contract cannot unilaterally change it to the disadvantage of the other party. This observation was in the context of the facts that the petitioner had, for the majority of the contract period in the **BSCPL** case i.e. for 19 bills, adopted the current rate/cost and subsequently unilaterally sought to change the methodology and adopt the alleged base rate/cost. The submission of the petitioner is that since in the present case, the respondent had raised bills as per the petitioner's interpretation/methodology for 9 bills, and subsequently sought to claim the current rate/cost from the 10th bill onwards, the award in the present case is liable to be set aside in light of this conduct of the respondent.

38. The submissions have no force, as the finding of the Division Bench in the **BSCPL** case, into which the order of the Single Judge merged, was purely on the question of interpretation of the contractual terms and which having been found to be in favour of the respondent.

39. Learned counsel for the respondents submits that as a matter of fact, a similar argument of the petitioner, pertaining to a set of disputes between it and certain contractors, was rejected by a Single Judge of this Court i.e. Hon'ble Mr. Justice Rajiv Shaktiher in the case of **National Highways Authority of India v. KMC-RK-SD (JV)**, being O.M.P. No.1043/2013 decided on 22nd October, 2013 wherein the similar clause was involved. The said factual position has not been denied by the learned counsel for the petitioner. In the said case, this Court was faced with similar situation in the sense that an award was sought to be challenged by the petitioner, though there were already judicial pronouncements of this Court on the same issue

against it, on the ground that in the previous judicial pronouncements it had been noted that the petitioner has itself made payment of certain bills as per the interpretation of the contract whereas in the subject case the contractor had claimed initial bills as per contrary interpretation i.e. the interpretation of the petitioner. The said Bench recorded the relevant facts and the arguments of the petitioner on this score in the following words:

"3.6 During the course of the execution of the works in issue, the respondent submitted five (5) Interim Payment Certificates (IPCs). Amounts against the said five (5) IPCs were collected. It is when the respondent sought to file the sixth (6th) IPC, that it submitted its price escalation not only for the previous five (5) IPCs, but also for the sixth (6th) IPC. This submission was made by the respondent with the engineer on 21.01.2008. The engineer, vide his order dated 22.01.2008, rejected the respondent's claim for price adjustment, on the ground that, there was no provision for payment towards price adjustment in the contract. In this behalf reference was made to clause 70 of the COPA. 3.7 In terms of the contract obtaining between the parties, the respondent escalated the issue by making a grievance with the Dispute Resolution Board (in short DRB). The DRB, by a majority of 2:1 decided in favour of the petitioner.

5. Mr.Kapur, who argued in support of the petition, assailed the Award on the following grounds:

"...(iv) The respondent had accepted payments against five (5) IPCs without seeking price adjustment. In other words, respondent was all along aware that it will not be allowed price adjustments on all items of the BOQ, as demanded. For this purpose, reliance was also placed on the averments made in the statement of claims. It was sought to be demonstrated that the respondent chose the route of going through the engineer in the first instance, then the DRB, and finally, the arbitral route as it was

aware that the petitioner would not concede to its demand."

40. In paras 8 to 11 of the judgment, Hon'ble Mr. Justice Rajiv Shakdher, then proceeded to reject the submission of the petitioner in the following words:

"8. ...Interpretation of the provisions of the contract, which is a plausible interpretation, is clearly within the remit of the arbitrator. Error, if any, which is relatable to the interpretation of a contract, is not an error which is amenable to correction by courts as these are not errors apparent on the face of the record. [See Steel Authority of India Ltd. vs Gupta Brothers Steel Tubes Ltd. (2009) 10 SCC 63 in paragraph 18(ii) at page 79; Judgment dated 23.12.2011 passed in FAO(OS) No.294/2001 titled Indian Farmers Fertiliser Cooperative Ltd. vs Duggal Construction (India) Ltd. at paragraph 28 and judgment dated 05.09.2013 passed in OMP No.855/2013 titled M/s JSC Centrostroy vs National Highways Authority of India].

9. Apart from the above, in respect of the provisions of the very same contract, a Single Judge of this court in the case of National Highways Authority of India v. Unitech-NCC Joint Venture has repelled this very contention advanced by the petitioner. Pertinently, the matter was carried in appeal to the Division Bench. The Division Bench vide judgment dated 30.08.2010 passed in FAO(OS) No.338/2010 has sustained the view taken by the Single Judge.

10. The submission of Mr Kapur that the present case on facts was distinguishable from facts which arose in the case referred to above, is according to me untenable, for the following reasons:

...

11. The other contention of Mr Kapur that the respondent did not raise an issue with regard to price adjustment till it filed the sixth (6th) IPC, is also misconceived, in my opinion, for the

reason that the respondent was entitled, under the terms of the contract, to raise the issue with the engineer, which it did, and thereafter, if necessary, escalate the issue with the DRB and, if not satisfied, by invoking the arbitration agreement obtaining between the parties. As a matter of fact, as Noted by the arbitral tribunal as well, the respondent was entitled to, as a matter of fact, wait till the conclusion of the contract to raise the issue of price adjustment vis-à-vis all items of the BOQ.”

41. The aforesaid judgment of the Single Judge was carried in appeal by the petitioner before a Division Bench of this Court in F.A.O.(OS) No.139/2014. The Division Bench rejected the appeal of the petitioner by order dated 1st April, 2014 in the following words:

"This appeal is directed against the decision of a learned single Judge delivered on 22.10.2013 in O.M.P No.1043/2013. The appellant had filed the said O.M.P under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the Award passed by a three Member Arbitral Tribunal on 11.06.2013. The learned single Judge while rejecting the petition had Noted in paragraph 9 that the very contentions which were raised by the learned counsel for the appellant before him had been considered in earlier cases including the case of National Highways Authority of India vs Unitech-NCC Joint Venture and those contentions had been rejected by the learned single Judge. The matter went in appeal to the Division Bench which by a decision dated 30.08.2010 in FAO(OS) No.338/2010 reported in 178 (2011) DLT 496 (DB) upheld the view taken by the learned single Judge. There are several other decisions of this court also interpreting clause 70.3 of Conditions of Particular Application (COPA). All those decisions have interpreted the said clause in a manner contrary to what is being urged by the learned counsel for the appellant. Following those said decisions and in particular the decision in the case of Unitech-NCC Joint Venture (supra), the present appeal is also dismissed."

42. The Special Leave Petition No.21055/2014 filed by the petitioner against the aforesaid order of the Division Bench was dismissed by the Supreme Court by its order dated 17th November, 2015. The reliance of Mr.Kapoor on the subsequent Award passed by the other Arbitral Tribunal is of not much relevance, once the view taken by two Benches has been confirmed by the Supreme Court.

43. Upon reading of the aforesaid decisions which are binding upon this Court and examination of the facts of the present case, it appears that once the Arbitral Tribunal after discussion has come to the conclusion that the contract contemplated the utilization of the current cost in the price adjustment clause, and when the similar findings in connected cases have been given, this Court should not take the different view, as the said judgments were upheld up to the Supreme Court. Raising of few bills to the contrary in the initial part of the contract by the respondent would not make any difference. Admittedly, there were a total of 36 bills raised by the respondent during the execution of the subject work; the respondent raised 9 bills in terms of the interpretation propounded by the petitioner. From the 10th bill onwards and all the way up to the 36th bill i.e. till the conclusion of the subject work, the respondent adopted the interpretation by abandoning the earlier methodology of preparation of bills, at a relatively early stage in the work which is upheld by the Arbitral Tribunal, the respondent, in fact, has not changed the settled interpretation or methodology at the stage of the contract. Even, as informed by the respondent, the petitioner was itself making payments.

44. In the present case also, as has been noted to be a relevant factor by the Single Judge in the **KMC-RK-SD (JV)** case (supra), the respondent had referred the matter for adjudication as per the dispute resolution clause in the contract, i.e. by escalating the matter to the Engineer, then to the Dispute Review Board, and finally to the Arbitral Tribunal, as the similar issues have already been adjudicated against the petitioner by this Court and which decisions have attained finality up to the Supreme Court.

45. In view of the aforesaid reasons and circumstances, the objections filed by the petitioner in both the matters, i.e. O.M.P. Nos.1003/2013 & 54/2015 are dismissed, as there is no infirmity in the awards. The amount deposited by the petitioner in OMP No.54/2015 in view of orders passed on 21st December, 2015, 27th January, 2016 and 9th February, 2016 shall be released to the respondent by the Registry along with interest accordingly, if any, forthwith.

46. No costs.

(MANMOHAN SINGH)
JUDGE

JUNE 17, 2016