

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 458 OF 2018

NATIONAL HIGHWAY AUTHORITY OF
INDIA

.....APPELLANT(S)

VERSUS

M/S. PROGRESSIVEMVR (JV)

.....RESPONDENT(S)

WITH

CIVIL APPEAL NO. 459 OF 2018

AND

CIVIL APPEAL NO. 460 OF 2018

J U D G M E N T

A.K. SIKRI, J.

All these appeals involve the *lis* of an identical nature. National Highway Authority of India (NHAI) is the appellant in these appeals. Respondents in different appeals are the contractors who were awarded the contracts by the appellant/NHAI for construction of roads etc. The terms and conditions on which the contracts were to be executed are

identical in all these cases, as the standard form contract was signed by the parties. Dispute had arisen about the interpretation that is to be given to sub-clause 70.3 of Conditions of Particular Application (COPA) of the contract which contains 'Price Adjustment Formula'. The tender document of the NHAI, modeled upon generic FIDIC construction contracts, envisage that since the estimation of work including the rates, prices and costs of various items of work is done on the basis of prices/costs of materials, labour and other inputs prevailing on and around the date of the submission of bid, 'Price Adjustment' (also generally known as Price Escalation/Variation) is needed so as to protect both the parties in cases of rise or fall of prices/costs of various components of work during the period when the work is being executed. In the NHAI contracts, as opposed to one lump financial quote, the entire work to be executed under the Contract is divided into various estimated quantities of work unit wise in the BOQ (Bills of Quantities) document which is part of tender document. Each bidder is required to quote rates/prices for each estimated quantities or items of work. These rates are also referred to as 'Base Unit Rates and Prices' or 'BOQ Rates/Prices'.

Sub clause 70.3 provides for the 'adjustment formulae' for

calculating the price adjustment amount. In this sub clause, the work is divided into seven components of work and price adjustment, in each interim payment made month-wise, is given for these components only, which is made clear in sub-clause 70.2 which provides that price adjustment on any account other than the seven components enumerated in 70.3, is deemed to have been included in the price bid amount. These seven components of works are Labour, Plant & Machinery and Spares, Petrol, Oil and Lubricants (POL), Bitumen, Cement, Steel and Other Components/materials. Since the BOQ rate or base unit rate/prices are the composite rate for a particular item of work in the Bills of Quantity (BOQ) submitted by the claimants and does not specifically give the base rates/prices of the seven components of works given in sub-clause 70.3 (xi).

- 2) The dispute concerns interpretation of sub-clause 70.3 (xi) which is quoted hereinbelow:

“

a)	Labour- P_l	20%
b)	Plant and Machinery and Spares - P_p	20%
c)	POL- P_f	10%
d)	Bitumen- P_b	x%
e)	Cement- P_c	y%
f)	Steel- P_s	z%
g)	Other materials- P_m	50 – (x+y+z)%
	Total :	100%

(Note: x, y, z are the actual percentage of cost of material of bitumen, cement and steel respectively used for execution of work as per the Interim Payment Certificate for the month)”

- 3)** The entire controversy is with regard to the ‘Note’ after sub-para (xi) of sub-clause 70.3 of the conditions, which has been extracted above. This note mentions that x, y, z are the actual percentage of the cost of material of bitumen, cement and steel respectively which are used for execution of the work as per the Interim Payment Certificate (IPC). The issue is, while calculating the actual percentage of cost of material of bitumen, cement and steel respectively, it is the base rate (i.e. the rate prevailing 28 days prior to the submission of the bid) of these materials which is to be taken into consideration while working out the price adjustment as per the formula provided or it is the current cost of the material in that particular month.
- 4)** The respondents (hereinafter referred to as the ‘contractors’) contend that it is the prevailing rate in that particular month which would be the determining factor, whereas the NHAI insists on taking base rate while applying the formula.
- 5)** Before proceeding further, at this juncture, we would like to state the historical background giving rise to the dispute in question. For the sake of convenience, the facts are taken note of from Civil

Appeal No. 458 of 2018 in which M/s. ProgressiveMVR (JV) is the contractor.

The NHAI is a statutory body constituted under Section 3 of the NHAI Act, 1988. The functions assigned to NHAI under Section 16 of the NHAI Act, 1988 are to develop, maintain and manage the National Highways entrusted to it by the Central Government. In the year 2005, the NHAI issued an invitation for bid for four laning from Km. 402.00 to Km 440.00 of Gopalganj – Muzaffarpur section of NH-28 in Bihar in contract package No. LMNHP-EW-II- (WB-10). The contractor was found successful bidder and accordingly the letter of acceptance was issued to it where it is clearly stated that your bid is accepted by NHAI for the contract price of Rs.263,97,29,718/- (Two Hundred Sixty Three Crore Ninety Seven Lac Twenty Nine Thousand Seven Hundred Eighteen Rupees Only). According to the NHAI, the Engineer was paying the price adjustment as per the base rate and the contractor had not raised any dispute in this regard. The contractor first time raised a dispute about price adjustment by applying current cost while arriving XYZ percentage as per sub-clause 70.3 (viii) of COPA. The contractor vide letter dated April 13, 2008 raised objection with the Engineer at the time of submission of IPA 9. The team leader rejected the dispute raised

by the contractor by stating that the essence of price adjustment cannot be maintained by considering the current rates of the materials and the claim cannot be accepted. This resulted in a dispute between the parties and on September 2, 2008, the contractor invoked the provision of sub-clause 67.1 of COPA and referred the matter for recommendation from the DRB (Dispute Resolution Board).

- 6) The DRB vide its majority gave its recommendation dated January 4, 2009 to the effect that 'the contractor's interpretation is not in accordance with contract and should be rejected.' Being aggrieved by the order passed by the DRB, the contractor issued a notice to invoke arbitration in terms of provisions of clause 67 of COPA against the order passed by the DRB. Arbitral Tribunal was constituted. The respondent filed the statement of claim before the Arbitral Tribunal for the following claim:

Claim No. 1 – Reimbursement of escalation amount paid less Rs.24,93,52,493/-

Claim No. 2 – Interest- past interest, pendente lite and future.

Claim No. 3 – Cost of Arbitration.

- 7) After conclusion of the proceedings, the Arbitral Tribunal in their majority award dated August 7, 2013 (with one member

dissenting) decided the issue in favour of the contractor, *inter alia*

holding that:

“Arbitral Tribunal finds that the whole dispute is hinging on the word ‘cost’ as appearing in sub-clause 70.3 (xi). Contractor says that cost should be read as actual expenditure incurred by him in procurement of these materials as per current invoices while the respondent says that this word “cost” should be read as the cost of these materials to be worked out on base rates. In this way an element of ambiguity has crept in the contract. So in spite of analyzing the dispute from different angles as discussed in the foregoing para, even if we apply the thumb rule i.e. Rule of Contra Proferentem, the word cost will have to be construed against the employer who has prepared the draft.”

It, thus, allowed the claim raised by the respondent.

8) In dissenting note, the dissenting arbitrator held in para 11 that:

“In my opinion Pb or Pc or Ps in the price variation formula do not take into account the actual expenditure at the time of IPC and the definition of cost as given in para 1.1 (g)(1) of the GCC is not pertinent to the case.”

He further held that the contractor is very much aware about the interpretation on the NHA1 more than five months before the contractor submitted their bid and even after knowing the method of applicability they had not raised any doubt or clarification with regard to the method of calculation of XYZ nor seek any clarification to the note appended below 70.3 (viii) which shows that they are fully aware about the method of calculation of XYZ and afterwards signing of contract construed the acceptance of

the contractor to the NHAI's method and interpretation related to "Notes".

- 9)** Against the said majority award allowing the claim of the contractor, the NHAI filed objections in the form of Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') before the High Court of Delhi. It was numbered as OMP (Comm.) No. 1211 of 2013.
- 10)** We may also mention at this stage that in other dispute between the NHAI and M/s. NCC-VEE (JV), where also the award had gone in favour of the said contractor, similar objections filed by the NHAI had been dismissed by the learned Single Judge on December 17, 2014 and appeal thereagainst was also dismissed by the Division Bench of the High Court on March 10, 2015. So much so, the Special Leave Petition (SLP) filed by the NHAI was also dismissed by this Court on March 10, 2015. When the things rested at that, another significant and interesting development took place. In another identical dispute raised by one M/s. Ssangyong Engineering and Construction Co. Ltd., the Arbitral Tribunal constituted in that case gave its award dated December 14, 2015 whereby it accepted the interpretation being urged by the NHAI and dismissed the claim of the said contractor.

11) Be that as it may, insofar as petition of the NHAI under Section 34 filed in the High Court against the award given in M/s. ProgressiveMVR (JV) is concerned, the learned Single Judge dismissed the same vide its order dated August 23, 2016 holding that the matter was covered by the decision of the Division Bench in M/s. NCC-VEE (JV) matter. Against that order of the learned Single Judge, NHAI filed intra-court appeal which has also been dismissed by the High Court vide impugned judgment dated September 16, 2016, following its earlier judgment dated March 10, 2015. This is how the appeal of the NHAI against M/s. ProgressiveMVR(JV) had come up for consideration. Likewise, in other cases also, the judgments of the High Court have gone in favour of the contractors in somewhat similar circumstances.

12) Another pertinent observation needs a mention at this juncture. In para 11 above, we have noted that in the case of M/s. NCC-VEE (JV) identical award interpreting the same clause which was in favour of the contractor and against the NHAI was upheld and the objection petition filed by the NHAI was dismissed. That order was upheld by the Division Bench of the High Court on March 10, 2015 and SLP thereagainst was also dismissed. Pertinently, while dismissing the appeal, Division Bench of the

High Court in its order dated March 10, 2015 noted as under:

“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.

11. It is well settled that the interpretation of a term of contract is within the domain of the Arbitral Tribunal and if the Arbitral Tribunal interprets a particular clause in a particular manner, which is a possible interpretation, then the court ought not to interfere in its jurisdiction under Section 34 of the said Act. The only exception being where the interpretation results in a perversity and shocks the conscious of the Court, the latter eventuality has not happened in the present case.”

- 13)** Thus, the main reason because of which the NHAI lost in those proceedings was that two possible interpretations could be given to the clause in question and, therefore, the recourse taken by the Arbitral Tribunal by adopting one particular interpretation was not required to be interfered with. SLP against that was dismissed. In a situation like this, this Court would not have undertaken further exercise in the matter. However, another Arbitral Tribunal in the case of M/s. Ssangyong Engineering and Construction Co. Ltd. has accepted the other view, which goes in favour of the NHAI. It leads to an anomalous situation. The NHAI has entered into multiple contracts with different parties containing the same

clauses of price variation. Once we find that Arbitral Tribunals are taking different views, and the view taken in favour of the NHAI is also one of the possible interpretations, the effect thereof would be to uphold both kinds of awards even when they are conflicting in nature in respect of the same contractual provision. It may not be appropriate to countenance such a situation which needs to be remedied. Therefore, under this peculiar situation, we deem it proper to go into the exercise of interpreting the said clause so that there is a uniformity in the approach of the Arbitral Tribunals dealing with this particular dispute and a sense of certainty is attached in the outcomes.

- 14)** As mentioned above, clause 70 is the relevant clause which pertains to price adjustment, with which we are concerned.

Accordingly, we reproduce hereunder the relevant portions:

“Clause 70: Changes in Cost and Legislation

Delete clause 70 in its entirety, and substitute:

Sub-Clause 70.1: Price Adjustment

The amount payable to the Contractor in various currencies pursuant to Sub-Clause 60.1 shall be adjusted in respect of the rise or fall in the cost of labour, Contractor’s equipment, Plant materials and other inputs to the Work, by applying to such amounts the formulae prescribed in this Clause.

Sub-Clause 70.2: Other Changes in Cost

To the extent that full compensation for any rise or fall in the costs to the Contractor is not covered by the provisions of this or other Clauses in the Contract, the unit rates and, prices included in the Contract shall be

deemed to include amounts to cover the contingency of such other rise or fall in cost.

Sub-Clause 70.3 :Adjustment Formulae

Contact price shall be adjusted for increase or decrease in rates and price of labour, materials, Plant, machinery, equipment, spares, fuels and lubricants in accordance with the following principles and procedures as per formulae given below. The amount certified in each payment certificate shall be adjusted by applying, the respective price adjustment factor to the payment amounts due in each currency.

a) Price adjustment shall apply for work carried out within the stipulated time or extensions granted by the Employer and shall not apply for work carried out beyond the stipulated time. Price adjustment for reasons attributable to the Contractor, shall be paid in accordance with Sub-Clause 70.6;

b) Price adjustment shall be calculated for the local and foreign components of the payment for work done as per formulae given below; and

c) Following expressions and meanings are assigned to the value of the work done during the period under consideration:

R= Total value of work done during the period under consideration and payable in Indian Rupee currency, it would include the value of materials on which secured advance has been granted, if any, during the period, less the value of materials in respect of which the secured advance has been recovered , if any, during the period. This will exclude cost of work an items for which rates were fixed under variation Clauses (51 and 52) for which the escalation will be regulated as mutually agreed at the time of fixation of rate.

R_i = Portion of 'R' as payable in Indian Rupees

R_f = Portion of 'R' as payable in foreign currency (at first exchange rates)

$R = R_i + R_f$

To the extent that full compensation for any rise or fall in indexed costs to the Contractor is not covered by the

provisions of this or other Clauses in the Contract, the unit rates and prices included in the Contract shall be deemed to include amount to cover the contingency of such other rise or fall in costs.

i) Adjustment for Labour Component

xxx xxx xxx

ii) Adjustment for Cement Component

xxx xxx xxx

iii) Adjustment for steel component

xxx xxx xxx

iv) Adjustment for plant and machinery and spares component

xxx xxx xxx

v) Adjustment for Bitumen Component

Price adjustment for increase or decrease in the cost of bitumen shall be paid in accordance with the following formula:

$$V_b = 0.85 \times P_b / 100 \times R_1 \times (B_i - B_o) / B_o$$

V_b = Increase or decrease in the cost of work during the month under consideration due to changes in the rate of bitumen.

B_o = The average official retail price of bitumen at IOC depot at Barauni/Haldia on the day 28 days prior to the date of submission of bids.

B_i = The average official retail price of bitumen at IOC depot at Barauni/Haldia on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related.

P_b = Percentage of bitumen component of the work.

vi) Adjustment for fuel and lubricants

xxx xxx xxx

vii) Adjustment for other Local Materials

xxx xxx xxx

viii) Adjustment for Foreign Currency Component

xxx xxx xxx

xi) The following percentages will govern the price adjustment for the local currency portion (RI) of the contract:

1. Labour – P ₁	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	100%

(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)

Sub-Clause 70.4 : Sources of Indices

xxx xxx xxx

Sub-Clause 70.5: Base, Current and Provisional Indices

The base cost indices or prices shall be those prevailing on the day 28 days prior to the closing date for submission of bids. Current indices or prices shall be those prevailing on the day 28 days prior to the last day of the period to which a particular Interim Payment Certificate is related. If at any time the current indices are not available, provision indices as determined by the Engineer will be used, subject to subsequent correction of the amounts paid to the Contractor when the current indices become available.”

15) Clause 70.3(v) deals with ‘Adjustment for Bitumen Component’.

As per this clause, the price adjustment for increase or decrease in the cost of bitumen is to be paid in accordance with the following formula:

$$V_b = 0.85 \times P_b / 100 \times R_1 \times (B_i - B_o) / B_o$$

- 16)** P_b denotes percentage of bitumen component of the work and R_1 is the total value of the work. B_i denotes current rate/cost as it is the average official retail price of bitumen at IOC Depot at Barauni/Haldia on the day 28 days prior to the submission of bids, which makes it clear that it is equivalent to the base rate. Thus, when this formula is considered of its own, B_o clearly refers to the base rate. However, little confusion is generated because of the note which is appended to Clause 70.3(xi). A perusal of sub-clause (xi) shows that insofar as labour, plant and machinery and spares and POL (Petrol, Labour and Lubricant) are concerned, specific percentages are given that were to govern the price adjustment and these are 20%, 20% and 10% respectively. However, insofar bitumen, cement and steel components are concerned, percentages are to be worked out which are denoted as X%, Y% and Z% respectively. X, Y, Z are the actual percentage of cost of bitumen, cement and steel respectively, used for execution of work as per the IPC for the month.

17) According to the Contractors, the word 'cost' mentioned therein is to be assigned as per the definition thereof contained in the contract which is 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”.

However, according to the NHAI, 'actual percentage of cost' refers to the percentage which is to be assigned to particular component, namely, bitumen in this case and it does not refer to the actual cost. No doubt, there is no mention of 'base rate' in this note. However, submission of the NHAI is that since it is the cost which is used for execution of work as per the Interim Payment Certificate. Insofar as IPC is concerned, the same is worked out on base rate and, therefore, it refers to base rate. In order to support its contention, the NHAI has given the following illustration for calculating the bitumen (X%) as follows:

$$Vb = 0.85 \times Pb/100 \times Ri \times (Bi - Bo)/Bo$$

(0.85 which is 85% as 15% is profit on which there cannot be any adjustment)

Vb = Increase or decrease in the cost of work during the month under consideration due to changes in the rate of bitumen.

Bo = The average official retail price of bitumen at IOC depot at Barauni/Haldia on the day 28 days prior to the date of submission of bids.

Bi = The average official retail price of bitumen at IOC depot at Barauni/Haldia on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related.

Pb = X% = Percentage of bitumen component of the work.

- 18)** Pb = X% is calculated by NHAI by following mathematical formula:

$$\text{Pb} = \frac{\text{Quantity of Bitumen consumed during the month} \times \text{base rate of bitumen} \times 100}{\text{Total Work done during the month of} \times \text{BOQ rates.}}$$

- 19)** R₁ in the aforesaid formula denotes the value of work as per IPC which according to the NHAI is calculated at the base rate. It is further stated that in the aforesaid mathematical formula, base rate of bitumen is taken having regard to the effect that the denominator clearly mentions the base rate and, therefore, it cannot be actual rate in the numerator. Further, as noted above, according to the NHAI, it is not price adjustment formula but only to arrive at percentage of X. It is argued that in order to arrive at the correct percentage of X (bitumen) component, it is mathematically required that rates in numerator and denominator has to be same otherwise correct percentage cannot be achieved.

- 20)** Commenting upon the definition of 'cost' which is relied upon by the Contractors, it is the submission of the NHAI that it is totally

misconceived because the definition of cost does not provide that wherever the word 'cost' is used in the contract, it is to be always construed as current or actual cost. Further, the definition of 'cost' *per se* is not an issue but 'cost occurring on what date and on what rate' is the real question. It was argued that the word 'cost' is in fact used in various sub-clauses of Clause 70 which clearly demonstrate that it would mean 'the base cost'. Sub-clauses 70.1, 70.2 and 70.7 are relied upon in support of this contention.

- 21)** Mr. Patwalia, learned senior counsel appearing for the NHAI, after highlighting the aforesaid aspects, made a passionate plea to the effect that the interpretation given to the 'Note' in sub-clause 70.3(xi) by the Arbitral Tribunal would lead to disastrous and unrealistic price adjustment amounts in favour of the contractors. To demonstrate the same, it is pointed out that in the case of M/s. ProgressiveMVR (JV), the total amount paid to the contractor upto 41 IPC is about Rs.210 crores. The price adjustment amount upto 41 IPC calculated and paid by taking into account the base rates, is Rs.77.70 crores. The contractor on the other hand is claiming an amount of Rs.127 crore as the price adjustment amount which is around more than 60% of the entire

contract amount and, therefore, clearly exaggerated and unjustified. It was, thus, argued that Court could interfere with the award when it was clearly contrary to the terms of the contract. Mr. Patwalia went to the extent of arguing that no reasonable person would come to such a conclusion as arrived at by the Arbitral Tribunal and, therefore, this Court could interdict such an award. Reliance was placed on the following judgments: (i) ***Hindustan Zinc Ltd v. Friends Coal Carbonisation***¹, (ii) ***Associate Builders v. Delhi Development Authority***² and (iii) ***Bhakra Beas Management Board v. Krishan Kumar Vij & Anr.***³

- 22) Senior Advocates Mr. Neeraj Kishan Kaul, Mr. S. Gurukrishna Kumar and Mr. Dhruv Mehta argued the case on behalf of different respondents. It was submitted that when two views are possible, a particular view taken by the Arbitral Tribunal which was also reasonable should not be interfered with, as rightly done by the High Court. It was stressed that the contract in question was item rate contract and the only way Pb (i.e. percentage of bitumen component of the work) in the formula provided for adjustment for bitumen component was to calculate said Pb at

1 (2006) 4 SCC 445

2 (2015) 3 SCC 49

3 (2010) 8 SCC 701

current rate. Otherwise, there would not be a realistic figure of work done. Reading from the majority opinion of the Arbitral Tribunal, it was submitted that the view taken was correct view wherein the Tribunal has observed as under:

“A plain reading of the words ‘actual percentage of cost of bitumen’ conveys these to the mind that actual percentage based on cost of bitumen, cement or steel used for carrying out a work in particular month shall be accounted for. These words, even from remote consideration, do not carry the mind of the reader to the cost of bitumen as prevailing at the time of submission of Bid. If the intention of the contract would have been to account for the base rates of cement, steel and bitumen or the rates as prevailing at the time of submission of bid, this would have been specifically mentioned so. Not only it would have been so mentioned, also these rates would have been clearly laid down in the tender, as these could not be left to be determined by the parties after finalization of the contract.”

It was also submitted that the Tribunal, while giving the aforesaid interpretation to this clause in the contract, had not only gone by the words used but also by the intention of the parties behind such a clause, as discussed in detail in the Award.

- 23)** Mr. Gurukrishna extensively read out from the order of the learned Single Judge in the case in which he is representing (Civil Appeal No. 459 of 2018) and is reported as (2015) 1 Arbitral Law Reporter 129, which was upheld by the Division Bench in the impugned judgment. He also relied upon para 27 of the judgment in the case of **Associate Builders** which reads as under:

“27. Coming to each of the heads contained in *Saw Pipes* [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head “fundamental policy of Indian law”. It has already been seen from *Renusagar* [*Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.”

24) Mr. Dhruv Mehta who appeared in Civil Appeal No. 460 of 2018 submitted that as far as case of his client is concerned viz. M/s. NCC-VEE (JV), in the earlier round, SLP has been specifically dismissed and as per the award, payment was made to the contractors. Therefore, there was no reason to deny the payment for subsequent period where again, the Award had gone in its favour and the principle of issue estoppel clearly applies in his case. He also submitted that there was only one possible interpretation and the interpretation given by the NHAI was clearly unacceptable. In any case, submitted the learned senior counsel, even in case of doubt, benefit should go to the contractors. It was further submitted that in case of his client, 21 interim payments were made as per the current costs. He also referred to few judgments in support of his contentions which are as under:

(i) *Bhanu Kumar Jain v. Archana Kumar & Anr.*⁴

4 (2005) 1 SCC 787

“29. There is a distinction between “issue estoppel” and “res judicata”. (See *Thoday v. Thoday* [(1964) 1 All ER 341 : (1964) 2 WLR 371 : 1964 P 181 (CA)] .)

30. Res judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of res judicata creates a different kind of estoppel viz. estoppel by accord.

31. In a case of this nature, however, the doctrine of “issue estoppel” as also “cause of action estoppel” may arise. In *Thoday* [(1964) 1 All ER 341 : (1964) 2 WLR 371 : 1964 P 181 (CA)] Lord Diplock held: (All ER p. 352 B-D)

“cause of action estoppel’, is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist i.e. judgment was given on it, it is said to be merged in the judgment. ... If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam.” [Ed.: The rest of the extract from *Thoday* [(1964) 1 All ER 341 : (1964) 2 WLR 371 : 1964 P 181 (CA)] may usefully be referred to (All ER p. 352, B-F)“Estoppel per rem judicatam is a generic term which in modern law includes two species. The first species, ‘cause of action estoppel’, is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment

was given on it, it is said to be merged in the judgment, or for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule of public policy expressed in the Latin maxim, 'nemo debet bis vexari pro una at eadem causa'. In this application of the maxim, causa bears its literal Latin meaning. The second species, 'issue estoppel', is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation on one such cause of action any of such separate issues whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."]

32. The said dicta was followed in *Barber v. Staffordshire County Council* [(1996) 2 All ER 748 (CA)] . A cause of action estoppel arises where in two different proceedings identical issues are raised, in which event, the latter proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings. In such an event the bar is absolute in relation to all points decided save and except allegation of fraud and collusion. [See *C. (A Minor) v. Hackney London Borough Council* [(1996) 1

All ER 973 : (1996) 1 WLR 789 (CA)] .]"

(ii) *Godhra Electricity Co. Ltd. & Anr. v. State of Gujarat & Anr.*⁵

"11. In the process of interpretation of the terms of a contract, the court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performances under it. Parties can, by mutual agreement, make their own contracts; they can also by mutual agreement remake them. The process of practical interpretation and application, however, is not regarded by the parties as a remaking of the contract; nor do the courts so regard it. Instead, it is merely a further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the courts should not give great weight to these further expressions by the parties, in view of the fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent actings as admissible guides in interpretation. It is true that one party cannot build up his case by making an interpretation in his own favour. It is the concurrence therein that such a party can use against the other party. This concurrence may be evidence by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when he knows that the first party is acting on reliance upon the interpretation (see *Corbin on Contracts*, Vol. 3, pp.249 & 254-56).

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18. In these circumstances, we do not think we will be justified in not following the decision of this Court in *Abdulla Ahmed v. Animendra Kissen Mitter* [AIR 1950 SC 15 : 1950 SCR 30, 46] where this Court said that extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning and that evidence of the acts done under it is a guide to the intention of the parties,

5 (1975) 1 SCC 199

particularly, when acts are done shortly after the date of the instrument.”

(iii) Bank of India & Anr. v. K. Mohandas & Ors.⁶

“32. The fundamental position is that it is the banks who were responsible for formulation of the terms in the contractual Scheme that the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension Regulations, 1995, and, therefore, they bear the risk of lack of clarity, if any. It is a well-known principle of construction of a contract that if the terms applied by one party are unclear, an interpretation against that party is preferred (*verba chartarum fortius accipiuntur contra proferentem*).”

25) We have given our serious consideration to the respective submissions of the counsel for the parties. First and foremost aspect which is to be kept in mind is that the issue relates to price adjustment and such an adjustment can be made in respect of various components which are used in the contract. The contractual provisions specifically deal with adjustment for labour component, cement, steel etc. These components are seven in numbers which may undergo price adjustment during the period when the contract is in progress, depending upon the market conditions, namely, increase or decrease in market prices of these components from time to time. The very nature of this price adjustment suggests that such variation would have relevance with the price which was indicated in respect of these components at the time of submitting the tender by the successful

6 (2009) 5 SCC 313

contractor and, in that sense, it can have reference only to the base price. The formula which is provided for working out the price adjustment has to be examined in this hue.

- 26)** In the aforesaid circumstances, there appears to be some force in the submission of NHA that formula indicates the base price which has to be taken for the purposes of working out the price adjustment. After all, what is the purpose of giving price adjustment? The clause relating to price adjustment indicates that certain components which go into the execution of the projects like labour component, cement component, steel component, plant and machinery and spares component, bitumen component etc. may not remain static insofar as their price is concerned. There is a possibility that from the date when the price of these components was quoted by the contractor in his bid, there may be increase or decrease in the said price from time to time during the execution of the contract. It is for this reason, clause relating to price adjustment is provided so as to give effect to the rise or fall in the costs to the contractor. To this adjustment formula for working out the cost, at the time of execution of the contract, is provided. This adjustment which has to be arrived at, naturally, has to be in comparison with the base price that was

stated by the contractor. Thus, even from the commonsense point of view, it is the base price which has to be kept in mind while working the price adjustment. However, we are not resting our decision on this common sense approach as the final outcome has to depend on the formula provided in the contract; being a contractual term.

- 27)** In the present case, we find that the intention in the formula as well is to keep in mind the base cost while arriving at the price adjustment. There are few reasons which drive us to take this opinion.
- 28)** Clause 70.3 (xi) deals with percentages on various components that will govern the price adjustment. Insofar as labour, plant and machinery and spares, and POL (Petrol, Oil and Lubricants) are concerned, there is a fixed percentage prescribed, i.e., 20%, 20% and 10% respectively. However, with regard to the other three components, namely, bitumen, cement and steel variable percentage is mentioned which has to be calculated. Seventh component is 'Other Material'. Insofar as this component is concerned, it is the balance percentage, after percentage of bitumen, cement and steel is arrived at, as it mentions "50 – (x+y+z)" percentage. From this, one can infer that normally the

combined percentages of x, y and z has to be less than 50%. However, when the current cost is taken into consideration while working the formula, the percentages of x, y and z far exceed 50% which would make the percentage of other materials in the negative. Such a negative aspect has to be avoided. Mr. Patwalia, learned senior counsel for the NHAI was able to successfully demonstrate it by giving various live examples.

- 29)** We may point out that submission of the learned counsel for respondents was that when such an eventuality happens, the adjustment of “other materials” can be in the negative, i.e., by reducing the price of the other material in giving the adjustment so that total remains 100%. It is difficult to accept this suggested mode. What is important is that insofar as other materials are concerned, the inputs thereof would be negligible as compared to bitumen, cement and steel and, therefore, even if their price is reduced to offset the negative elements, that would be substantially less than the gain which would accrue to the contractors by giving higher cost adjustment for the aforesaid three components. Moreover, such a result cannot be countenanced by giving negative adjustment in the price of “other material” even when, as a matter of fact, prices of other material

had also gone up. That could not have been the intention while laying down the formulae. As mentioned above, the word “actual” in the note under sub-clause 703(xi) of COPA relates to the percentage and not to the cost. The percentage x, y, z are mentioned to ensure that the contractor is compensated realistically on the actual material used each IPC. Therefore, it seems more logical and proper to adopt the base cost of material while working out the price adjustment.

30) We may mention here that when the dispute was raised, as per the provisions contained in the contract, in the first instance, it was referred to the Dispute Review Board (DRB) which went into the issue in detail and discussed the issue, inter alia, in the following manner:

“...d) The present dispute is what rate for the material i.e. bitumen, cement and steel is to be considered in arriving at the actual percentage of cost of the respective material used in the work in the IPC of that month. The Contractor’s plea is that it should be current material cost of the material consumed in that month while the Employer’s view is that it should be the base price.

e) In support of his arguments, the Contractor says that base price is not specified in the Contract. The Contractor plea that the base rates are not specified in the tender is not correct as sub-clause 70.5 of COPA clearly states that ‘the base cost indices or prices shall be those prevailing in the previous month prior to the closing date for submission of Bids.’

Further, sub-clause 70.3(v) for price adjustment of

bitumen component of the work reads as under:

$$V_b = 0.85 \times \frac{P_b}{100} \times R_i \times \frac{(B_1 - B_0)}{B_0}$$

In this formula to work out V_b i.e. increase or decrease in the cost of work during the month under consideration, due to change in the rates for bitumen, B_0 has been defined as 'the average official retail price of bitumen at the IOC refinery Mathura on the day 28 days prior to the date of submission of bids. Obviously, this is the initial price or base price of bitumen. In all the relevant IPCs value of B_0 has been taken by the contractor as the retail price of bitumen on the day 28 days prior to the date of submission of bid which is base price only.

f) The Contract specified for calculation x, y and z factors every month. The intention is to permit price adjustment based on actual consumption of respective materials issued in execution of work in the particular month if they are fixed at tender stage only just like labour and POL etc., the price adjustment is to be allowed irrespective of whether the item is executed or not which is not realistic. Hence in this Contract, the price adjustment is linked to the actual usage of material viz. cement, steel and bitumen.

g) BOQ rates have been quoted based on the cost of materials at the time of bidding. Therefore, in working out the actual percentage of cost of any specific material in the BOQ cost, rates of material applicable to the same datum period for BOQ costs i.e. base period is only logical and justified.

h) The weightage factor x, y and z for these materials have two basic parameters namely their cost and cost of work done. In order to ascertain the actual percentage of cost of these materials in an IPC, cost of material has to be on the same basis as adopted in cost of work done. As the cost of work done is based on base cost of materials, it is therefore natural that the cost of these materials incorporated in the work should be calculated on the base cost only. Calculating the cost of these materials on actual procurement price is not justified and would go against the terms and conditions of the Contract word 'actual' in the note

under sub-clause 70.3(xi) 8 COPA relates to percentage and not to the cost.”

31) The DAB thereafter worked out the formula in the following manner:

“x, y, z percentages are to be worked out as per provisions note below sub-clause 70.3(ix).

Thus, p (x,y,z) percentages

$$= \frac{\text{Cost of material consumed during the month}}{\text{Work done in that month as per IPC}} \times 100$$

$$= \frac{\text{Quantity of material consumed during the month} \times \text{Rate of material}}{\text{Work done}} \times 100$$

The Contractor has quoted rates in the tender based on base rates of material and IPC is based on BOQ rates quoted by the contractor on base rates of material. Therefore for working out actual percentage of cost of material of bitumen, cement and steel used in execution of work as per the IPC for the month, base rate of material can only be used as per the provisions of contract in order to arrive at actual percentage, numerator and denominator is based on BOQ rates determined on base rates. The numerator should also be based on base rates. This is why rate of material in numerator should be rate of material at the time of bid. This is a fixed rate and not variable as claimed by the contractor. The contract provision is quite clear in this regard and there is no ambiguity.”

32) It also pointed out that if the current cost of material is adopted, instead of base cost as claimed by the contractor, price adjustment will be paid twice. One due to increase in percentage factor (x, y and z) due to use of current rate instead of base rates and second due to application of price adjustment factor $b_1-b_0/$

bo. It also demonstrated, by giving examples, that when the base rate is adopted, the price adjustment was quite proximate with the prevailing price which compensated the contractor realistically. On the other hand, on adoption of current rate, the calculation of price adjustment was almost three times the amount of increase in cost of bitumen incurred by the contractor.

- 33)** We are quite in agreement with the aforesaid analysis carried out by the DRB.
- 34)** As mentioned above, the majority Award has held that even the intention of the parties was to take into consideration the current cost. For this purpose it had taken into consideration the manner in which IPC payments were made. However, we find here, though unfortunately, that there was no consistent practice. Sometimes the payments were made on the basis of current cost and sometimes on the basis of base cost. May be different officers understood the formula in a different manner which resulted in the aforesaid varied approach. However, when it came to the knowledge of the Authorities at appropriate level, directions were given to pass the IPC keeping in view only the base rate. Therefore, no such intention of the parties can be discerned, which became the basis of the majority award. On the

other hand, as far as dissenting award is concerned it has pointed out the lacunae which would arise if the contention of the contractors is accepted, in the following manner:

“13. We now proceed to scrutinise IPC-12 for the months of November and December, 2008 to highlight lacunae in the argument/rational, as given by the claimant. The table below given original details of percentage of cement, steel, bitumen and other material which have been accepted by with parties and certified by the Engineer percentages are based on base prices 28 days before the last date of submission of bid.

IPC-12

Month	Cement	Steel	Bitumen	Other Material	Total
(a) Nov 2008	5.14%	5.22%	15.81%	23.83%	50%
(b) Dec2008	2.06%	2.44%	14.53%	30.96%	50%

In the method now adopted by the claimant, as part of their claim, the above details get changed as under.

IPC-12

Month	Cement	Steel	Bitumen	Other Material	Total
(c) Nov 2008	9.52%	10.21%	50.82%	(-) 20.55%	50%
(d) Dec2008	3.71%	4.78%	55.35%	(-) 13.84%	50%

The above details are based on modified claim which were submitted by the claimant when the proceeding were in progress. These were accepted by the AT as per section 23(3) of the Arbitration and Conciliation Act, 1996. In their original claim submitted by the claimant, the percentage of bitumen was adjusted to ensure that total of Pb, Pc, Ps do not exceed 50% and other material was made zero. This made the percentage of bitumen hypothetical and factually incorrect. In their revised submissions, the percentage of bitumen is as per their calculations and consequently the percentage of “other material” has been made negative.

Now, if we consider the aim of price escalation formula as compensation to either party for rise/fall in prices of various components, all material used in a particular IPC must be subjected to the formula, Negative figure implies that this material has been extracted from works completed earlier. This is physically not possible unless works are ordered to be demolished at the cost of the contractor and payments made earlier are to be recovered. This is certainly not the present case. That apart, if flexible pavement work (which is the case of IPC-12 as bitumen percentage is high) bitumen consumption varies from 4 to 5% by weight and the balance is other material like aggregate etc. how can we consider the material as negative and what would happen of price if this material goes down. Would we give additional benefit to the contractor as the percentage has become negative and the contractor would get increase in price variation as the quantity is negative and price has gone down. This makes the price variation formulate unrealistic as the contractor would get credit instead of debit when the price goes down. This would be an absurd situation.

Yet another way to look at the formula is that component like Labour, POL, plant/machinery, cement, steel, bitumen and other material are each a percentage or part of R which is based on BOQ rates which in turn are based on base costs 28 days prior to the last date of submission of bid. Obviously, the percentage of various component must also be based on values pertinent to BOQ rates.

It must also be noted that the claimant is getting price adjustment for current rates in the third portion of the formula $(B_1 - B_0)$ where B_1 is the price 28 days before the IPC and B_0 is the price 28 days before submission of bid. Therefore, the claimant is getting compensated for procuring items at higher rates when the price is rising.”

- 35) We find due rationale in the aforesaid approach. As a result, we hold that while applying price adjustment formula for calculating the price adjustment of bitumen, it is the base rate which is to be

applied and not the current rate.

- 36)** Having arrived at the aforesaid finding, now we need to determine the outcome of these cases.
- 37)** Once we interpret the formula in the manner indicated above, the necessary consequences would be to hold that the Arbitral Tribunal(s) did not decide the cases with the correct application of the formula and further that the claim for price adjustment in respect of bitumen laid by the contractors was not correct. Therefore, it can be held that the Award(s) are contrary to the contractual terms. At the same time, this outcome poses a dilemma inasmuch as in these cases, the Arbitral Tribunal has taken a particular view and when this was a plausible view, keeping in mind the parameters of judicial review of the Court in exercise of powers under Section 34 of the Act, normally the Court would not interfere with such Awards. However, as already indicated above, such a situation has arisen because of conflicting Awards given by the Arbitral Tribunals themselves, which has provoked this Court to take a final view in the matter, necessitated by the aforesaid reason. If one takes into consideration the theory that one applies the principle mechanically i.e. that a plausible view is not to be interfered with,

then it may lead to very anomalous situation. In such an eventuality, view taken by a particular Arbitral Tribunal in favour of the Contractor would be upheld as plausible view. Likewise, the Court will have to uphold the view taken by a particular Arbitral Tribunal in favour of NHAI as well, as a plausible view. Therefore, the purpose is to avoid such a situation which cannot be permitted as it would result in upholding both kinds of arbitral awards interpreting the same clause, whether they go in favour of the employer or they go in favour of the contractor. When the exercise is done keeping in view these considerations and outcome thereof is not determined, interest of justice would also demand that this result has to be applied to the pending cases, which have not attained finality. Therefore, in these peculiar circumstances, we hold that the principle of issue estoppel will apply only in those cases where matters have attained finality and no judicial proceedings are pending. In all those cases, including the present one, where awards are challenged on this particular aspect, this judgment will govern the outcome.

- 38)** As a consequence, all these appeals are allowed thereby setting aside the impugned judgment and also the award given by the Arbitral Tribunal on the claim pertaining to price adjustment of

bitumen. There shall, however, be no order as to cost.

.....J.
(A.K. SIKRI)

.....J.
(ASHOK BHUSHAN)

**NEW DELHI;
FEBRUARY 23, 2018**