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

+ **EFA(OS) (COMM) No. 5/2017**

Date of decision: 18<sup>th</sup> April, 2017

M/S NCC-VEE (JV)

..... Appellant

Through Mr. Krishna Vijay Singh & Mr.  
Nachiketa Goyal, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA.... Respondent  
Through Ms. Gunjan Sinha, Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE SANJIV KHANNA**

**HON'BLE MR. JUSTICE ANIL KUMAR CHAWLA**

**SANJIV KHANNA, J. (ORAL):**

Having heard counsel for the appellant, we are not inclined to interfere with the impugned order dated 21<sup>st</sup> February, 2017, whereby, OMP (Enf.) (Comm) No. 71/2016 has been disposed of.

2. Disputes with regard to computation of the base price became subject matter of Arbitration Award dated 30<sup>th</sup> September, 2012. The majority award accepting the plea of the appellant had ultimately issued the following directions:-

“93. We now proceed to deal with the Claims and Counter-Claims as enumerated in the submissions made by the parties and pronounce our findings-

- 1) The Respondent/Engineer is not authorised to recover payments made by it earlier on account of the price adjustment.
- 2) The Respondent/Engineer is not justified in applying the new altered price adjustment procedure proposed by the Respondent.
- 3) The Respondent shall continue to follow the same

procedure in finalizing the bills which was being followed in issuing the IPCs till IPC 18.

4) The Respondent shall return the Bank Guarantees of Rs.25.46 crore to the Claimant.

5) Respondent's Counter-Claim of Rs.12,81,94,646.00 against the Claimant is disallowed along with any interest on the said amount.

6) Cost of arbitration to the extent provided for in the Contract shall be borne by each party itself. All the balance cost of Arbitration shall be shared equally by the parties.

94. The Tribunal having carefully considered the documentary evidence, the oral evidence and the submissions of the Parties and giving due weight thereto and rejecting all submissions to the contrary, hereby makes this majority Award and for the reasons set out above FINDS, AWARDS, ORDERS and DIRECTS as follows:-

1) That the Respondent shall interpret the Sub-Clause 70.3 (xi) of the Contract in the same manner it has been interpreting the sub-clause while paying IPC 1 to IPC 18 to the Claimant. No recovery of the payment already made shall be affected.

2) That the Respondent shall continue to interpret Sub-Clause 70.3 (xi) in the same manner it has been interpreting the sub-clause while paying IPC 1 to IPC 18 from IPC 19 onwards till completion of the Work and pay the Claimant accordingly.

3) The Respondent shall return the Bank Guarantees of Rs. 25.46 crores to the Claimant immediately.

4) The costs of Arbitration over and above the costs covered under Sub-Clause 67.3 (vii) of COPA shall be shared equally by the parties.

5) All other claims and requests are rejected.”

The said award has attained finality and the challenge made by the respondent has been dismissed.

3. The aforesaid Award decides the question relating to interpretation of sub-clause (xi) to clause 70.3 and upholds the appellant's contention that

the actual/current cost of bitumen, cement and steel should be used for calculation and rejects the respondent's contention that the cost/rate prevailing 28 days prior to the closing of the submission of the bids should be used for calculation.

4. The appellant had filed the aforesaid OMP for execution of the Award in view of circulars dated 29<sup>th</sup> May, 2012 and 15<sup>th</sup> February, 2013 issued by the respondent-National Highways Authority of India. For the sake of convenience, we would like to reproduce the two circulars, which are as under:-

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29<sup>th</sup> May, 2012

**POLICY MATTERS-TECHNICAL (103/2012)**  
**[Decision taken on File No. 11014/12/2001/Tech/GM**  
**(WB)]**

**Sub: Payment of Escalation on Material Advance.**

Reference has been received regarding payment of Escalation on Material Advance whether to be made on value material in escalation formulae “R” for which material advance paid to be considered 75% (actual advance paid to the Contractor) or 100% of material value.

2. Generally Clause 70.3 (C) of the contracts deals with price adjustment formulae. Typically as an illustration the “R” is defined as under:-

“R= Total value of work done during the month. It would include the value of materials on which secured advance has been granted, if any, during the month, less the value of materials in respect of which the secured advance has been recovered if any, during the month. This will exclude cost of work on items for which rates were fixed under variations clause (51 and 52) for which the escalation will be regulated as mutually agreed at the time of fixation of rate.”

3. The issue has been deliberated and it is found that for calculation of the value of R prescribes the value of materials (and not value of secured advance against the material) on which secured advance has been granted/recovered, if any, for that month should be included/deducted for that month.
4. Also all PIUs/Field Units should ensure that, while calculating the payment on account of price adjustment, correct indices (i.e. the source of publication of such indices) as mentioned in the Civil Works Contracts should be used. Any other indices (i.e. published from a different source) not mentioned in the Civil Works Contracts should not be used.
5. The above may also be brought to the notice of all the 'Engineers' under various contracts with such provision.
6. This applies for all contracts where such provision exists and will supersede the Policy Circular no. 66/2003 dated 15/12/2003 or any such interpretation.
7. All Divisions/Field Units are required to comply with this and payment in contracts with such provision should be made accordingly.
8. This issues with the approval of Chairman.”

XXXXXX

“Dated: 15.02.2013

CIRCULAR

Sub: Price adjustment due to change of base year of WPI from 1993-94 to 2004-05-Procedure for payment-reg.

Due to change of base year of Wholesale Price Index (WPI) from year 1993-94 to 2004-05 references have been received from various field units of NHAI (from ROs & PIUs) for mechanism for adoption of WPI series 2004-05 for payment of price escalation in the contacts with base year of WPI as 1993-94 because the old series is not published since August, 2010. Some of the items of the old

series have been dropped and some new items have been included in the new series. List of items dropped or revised from WPI Series (1993-94) and list of items added or revised in WPI Series (2004-05) are available on the website <http://caindustry.nic.in> of the Ministry of Commerce & Industry, Govt. of India. In fact, nomenclatures of many items of old series have changed in the new series and need to be correlated. In view of this, field units are required to follow following guidelines/instructions for payment of price adjustment which are based on WPI.

- (i) The items in the new series should be chosen based on its technical analogy and practical use. As such, replacement of items in new series corresponding to items in old series should be Grey Cement for Cement, Rebars for Bars & Rods and Construction Machinery for Heavy Machinery & Parts. In case of any other item, field units may recommend similar replacement to headquarter in consultation with Engineer of the project.
- (ii) There is no problem in price adjustment for contracts based on 1993-94 series up to August, 2010; so, payment of price adjustment for them up to August, 2010 should be made as per the contractual provisions.
- (iii) For payment of price adjustment after August, 2010 for contracts based on 1993-94 series, average linking factor for individual items may be derived instead of using linking factor for broad groups provided on the website. This average linking factor for an individual item may be derived by taking average of the month-wise linking factor of the item obtained by dividing its index of old series of a month by index of its new series for that month for the year 2009-10 (April, 2009 to March, 2010), when both the series are available. The method of derivation of this average linking factor for 3 sample items is annexed at Annexure-I and average linking factors so obtained for them are tabulated below:

S. No.	Item in 2004-05	Item in 1993-94	Average linking factor (derived over

			12 momnths)
1.	Grey Cement	Cement	<b><u>1506?</u></b>
2.	Rebars	Bars & rods	<b><u>2210?</u></b>
3.	Construction Machinery	Heavy Machinery & Parts	<b><u>?</u></b>

The index for any item for any month in 1993-94 series beyond August, 2010 (when 1993-94 series is not available) may be worked out on the basis of available index of the item for the month in 2004-05 series by multiplying the same by the average linking factor for the item so obtained. Thus, payment on account of price adjustment may be made by adopting the above process subject to the condition that the contractors furnish undertaking affirming that this price adjustment is acceptable to them and they will not make any claim, whatsoever, on this account in future after this payment.

This issue with the approval of the Competent Authority.”

5. We do not think the appellant could have filed an execution application on the basis of the said circulars. The single Judge in the impugned order has noticed that the second circular dated 15<sup>th</sup> February, 2013 was issued after the Award dated 30<sup>th</sup> September, 2012, was pronounced. The second circular issued by the respondent pertains to price adjustment due to change of the base year of the Wholesale Price Index from 1993-94 and 2004-05. The subject matter of the Award and the dispute raised, which was adjudicated in the Award, was different, as it related to the question of base price of bitumen, cement and steel and decided whether the same should be based upon indices or price prevailing on the day 28 days prior to the closing of subject matter of bids or as per interim payment certificate for the month.

6. In these circumstances, the findings of the single Judge that the

Award does not make any reference to the circulars and, therefore, the circulars themselves was not the subject matter of the Award, is correct.

7. Learned counsel for the appellant has submitted that ultimately the payment quantified and also the manner in which it has to be calculated was examined and decided. We have already noticed the dispute, which was subject matter of the Arbitration Award dated 30<sup>th</sup> September, 2012. It is open to the appellant to rely upon the majority Award in support of his submissions, and it is equally open to the respondent to justify the adjustments and submit that the dispute subject matter of the arbitration Award dated 30<sup>th</sup> September, 2012 was relating to a restricted element of computation i.e. cost of bitumen, cement and steel and not the aspects and issues covered by the circulars and adjustments now made.

8. This dispute or question cannot be raised by filing an execution petition in the factual matrix, but appropriately in separate and distinct proceedings.

9. For the aforesaid reasoning, we are not inclined to interfere with the impugned order. Counsel for the respondent has raised preliminary objection as to the maintainability of the appeal, but has not pressed for the same in view of the fact that the appeal has been dismissed on merits.

**SANJIV KHANNA, J.**

**ANIL KUMAR CHAWLA, J.**

**APRIL 18, 2017**  
**VKR/NA**