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

% ***Date of decision:* 21.08.2017**

+ **ARB. A. (COMM.) 20/2017 & I.A.Nos.9348-49/2017**

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Petitioner

**Through Mr.Ramesh Kumar & Mr.Siddharth
Pandey, Advocates**

versus

GWALIOR JHANSI EXPRESSWAYS LIMITED Respondent

**Through Mr.Arvind Nigam, Sr.Advocate with
Mr.Abhishek Bansal, Advocate**

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

ORDER

% **21.08.2017**

JAYANT NATH, J.(ORAL)

I.A.No.9348/2018(exemption)

Allowed subject to all just exceptions.

ARB. A. (COMM.) 20/2017 & I.A.No.9349/2017

1. This appeal is filed under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'the Act'*) seeking to quash the order dated 24.05.2017 passed by the learned arbitral tribunal under Section 17 of the Act.

2. Some of the relevant facts are that the parties entered into a concession agreement on 17.12.2006 for the work of widening the existing two-lane portion of Km 16.000 to Km 96.127 on National Highway No.75 to four lanes in the States of U.P. and Madya Pardesh. It is the case of the appellant that the respondent failed to comply with the terms and conditions

of the agreement and abandoned the work. On 19.10.2013, a cure period notice was issued to the respondent. On 27.02.2014 and 07.03.2014 the appellant issued its Intention to issue Termination Notice to the respondent. On a petition being filed under Section 9 of the Act before this court by the respondent, this court on 12.03.2014 passed an interim order restraining the proposed issue of the Termination Notice. On 22.04.2015, the interim order was continued with liberty to the parties to seek modification or revocation of the order before the learned arbitral tribunal.

3. The appellants thereafter are said to have filed an application under Section 17 of the Act before the learned Arbitral Tribunal seeking permission to complete the balance work by issuing fresh tender at the risk and cost of the respondent and by reserving their right to make additional claims against the respondent.

The respondent also filed an application under Section 17 of the Act wherein it was pleaded by the respondent that the respondent had completed more than 78 per cent of the work. Further, the lenders/bankers of the respondent had invested Rs.504 crores in the project whereas the respondent had invested Rs.211 crores. Hence, a total of Rs.721 crores out of a project cost of Rs.715 crores had been invested by the respondent. It was pleaded that delay in handing over the land as per concession agreement is an admitted fact which was the major cause of the delay. The appellant had on 01.12.2012 completed the handing over of the land which was otherwise to be completed by 04.06.2008 i.e. a delay of over four years. Hence, it was urged that the completion of the project within the scheduled time as per the concession agreement was not possible. Based on the above averments, the respondent sought the following relief from the learned arbitral tribunal.

“a. Allow the present application and as an interim measure direct the Respondent to pay a sum of rs.400 crores to the Claimant at the risk and cost of the claimant so as to complete balance/ remnant works of the project.

b. In alternative and strictly without prejudice to the prayer (a) as an interim measure permit the Respondent to invite tender/ bid for executing concession agreement on construction basis subject to claimant being granted the right of first refusal for matching the lowest bid and in the balance work under the engineering procurement and the event the claimant matches the said lowest bid permit the claimant to complete the said balance/ remnant works on the terms and conditions of the tender / bid invited on engineering procurement and construction basis except for the provision, if any, for furnishing bank guarantees;

c. In alternative and without prejudice to the prayer (a) & dated 19.01.2016 and the circular dated 09.06.2015 in the event prior to the award of contract of the balance works on engineering procurement and construction basis the project lenders of the claimant agree to provide first charge to the respondent.”

4. The learned Arbitral Tribunal vide its order dated 23.07.2016 noted that it would not be in public interest that the remaining work is allotted to a third party. The Arbitral Tribunal dismissed the application of the appellant and granted Prayer B of the application of the respondent subject to the conditions stipulated by NHAI. The appellant was directed to take follow-up action on the basis of the order.

5. Subsequently, the respondent filed a fresh application under Section 17 of the Act before the learned Arbitral Tribunal for directions to the appellant to grant first right of refusal to the respondent by matching the lowest bid in terms of the earlier order of the Arbitral Tribunal dated 23.07.2016.

6. The learned Arbitral Tribunal has now vide its impugned order, granted reliefs to the respondent on the application dated 25.04.2017 namely, to allow the respondent the first right of refusal by matching the lowest bid received in the tender for the balance work.

7. I have heard the learned counsel for the parties.

8. Learned counsel for the petitioner has vehemently argued that the respondent failed to participate in the bid that took place pursuant to the order of the Arbitral Tribunal dated 23.07.2016 and consequently, lost its right to be considered. It is urged that there is no assessment as to whether the respondent was qualified to bid or could fulfil the other terms and conditions of the bid and hence, the impugned order is entirely erroneous.

9. The learned senior counsel for the respondent has reiterated that the Arbitral Tribunal has merely reiterated the directions passed on 23.07.2016 when the application of the Appellant was allowed in terms of Prayer(b). The appellants were needlessly trying to deviate from the said directions and hence, the impugned order has merely reiterated the earlier directions. It is urged that the appellants, having accepted the order dated 23.07.2017 in as much as there was no challenge to the same. They cannot now turn around and seek to impugn the order dated 13.05.2017.

10. A perusal of the first order of the learned Arbitral Tribunal dated 23.07.2016 would show that the relief as prayed for by the respondent in Prayer b of their application under Section 17, subject to fulfilment of the conditions stipulated by NHAI was allowed. Prayer 'b' of the application reads as follows:

“b. In alternative and strictly without prejudice to the prayer (a) as an interim measure permit the Respondent to invite tender/ bid for

executing concession agreement on construction basis subject to claimant being granted the right of first refusal for matching the lowest bid and in the balance work under the engineering procurement and the event the claimant matches the said lowest bid permit the claimant to complete the said balance/ remnant works on the terms and conditions of the tender / bid invited on engineering procurement and construction basis except for the provision, if any, for furnishing bank guarantees;”

11. The Arbitral Tribunal by the impugned order notes that the appellant had initially before the tribunal agreed to accept Prayer ‘b’ subject to certain conditions. These conditions were accepted by the respondent except the condition with regard to furnishing of a bank guarantee for the mobilisation advance. The learned Arbitral Tribunal safeguarded the right of the appellant by directing the respondent to furnish a bank guarantee for the amount to be advanced by NHAI. The order also notes that as per the appellant, 62.13 % of the work is complete whereas as per the respondent 73 per cent of the work is complete. Considering the amount of money and labour invested by the respondent and also safeguarding the interest of the appellant, the order notes that the tribunal on 23.07.2016 had directed the appellant to grant to the respondent the first right of refusal by matching the lowest bid. The reasons as to why the directions were given were as the involvement of a third party would create more problems. In the light of the above, the tribunal took the view that the contentions of the appellant that the respondent has not participated in the bidding process cannot be now considered is without merits and accordingly, allowed the relief to the respondent.

12. It is quite clear from a perusal of the earlier order dated 23.07.2016 that the respondent was granted right of first refusal by matching the lowest

bid, and if it matched the bid the respondent was to be permitted to complete the balance work as stated. There was no directions that the respondent was obliged to participate in the bid. They had been given the right to match the lowest bidder, subject to terms and conditions and in that eventuality of their matching the lowest bid, they were to be given the right to carry out the balance work. The insistence of the appellant that the respondent ought to have participated in the bid floated pursuant to the order of the learned Arbitral Tribunal dated 23.07.2017 is misplaced.

13. Learned counsel for the appellant was, several times asked as to what prejudice is caused by the respondent by not participating in the bid. The only reply made by the learned counsel for the appellant was that in the absence of participation in the bid by the respondent, the appellant is unable to ascertain whether the respondent was eligible to be a bidder or not. In my opinion in the light of the orders of the Learned Arbitral Tribunal dated 23.07.2016 the appellant was not to participate in the bid. The apprehension of the appellant are entirely misplaced.

14. No prejudice is caused to the appellant. It is manifest that other than insistence on compliance by the respondent of a procedural requirement, there is no prejudice caused to the appellant by none participation of the respondent in the bidding process. Further the impugned directions are passed in accordance with the earlier orders of the Learned Arbitral Tribunal dated 23.07.2016 which has not been challenged and attained finality. There is no merit in the present appeal and the same is dismissed.

JAYANT NATH, J.

August 21, 2017/raj/r