

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3288 OF 2018

NATIONAL HIGHWAYS AUTHORITY OF INDIAAppellant(s)

:Versus:

GWALIOR JHANSI EXPRESSWAY LIMITEDRespondent(s)

J U D G M E N T**A.M. Khanwilkar, J.**

1. This appeal emanates from the decision of the High Court of Delhi at New Delhi dated 21st August, 2017 in Appeal ARB.A (Comm.) No.20 of 2017 whereby the appeal filed by the appellant under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) seeking to quash the order dated 24th May, 2017 passed by the Arbitral Tribunal under Section 17 of the Act came to be dismissed. The Arbitral Tribunal vide order dated 24th May, 2017 allowed the

application preferred by the respondent (claimant) under Section 17 of the Act seeking a direction to the appellant to allow the respondent to exercise an option to match the lowest bid in terms of the order dated 23rd July, 2016 passed by the Arbitral Tribunal and including to exercise Right of First Refusal (“ROFR”) and for other consequential reliefs.

2. Shorn of unnecessary details, some of the relevant facts are that the appellant (a body corporate, constituted under the National Highways Authority of India Act, 1988) entered into a Concession Agreement dated 17th December, 2006 with the respondent (a consortium comprising of Apollo Enterprises Limited and D.S. Construction Limited) for works 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 Uttar Pradesh and Madhya Pradesh on the terms and conditions specified therein. The appellant asserts that the respondent failed to undertake the project work at the requisite pace, inter alia, due to inadequate deployment of machinery, plant, material and manpower. The respondent had merely achieved

62% progress and eventually abandoned the project site in March, 2012. The appellant, therefore, had to issue a Cure Period Notice dated 19th October, 2013 requiring the respondent to cure the breaches within 30 days from receipt of the notice, failing which the appellant may be forced to initiate further action to terminate the contract in terms of the Concession Agreement. The respondent denied the correctness of the stated notice by a written reply. The appellant then issued letters dated 27th February, 2014 and 7th March, 2014 expressing its intention to issue termination notice of the Concession Agreement. The respondent immediately rushed to the court by filing a petition under Section 9 of the Act seeking stay of the Cure Period Notice dated 19th October, 2013 as well as the notice expressing the intention to issue termination notice. The High Court of Delhi passed an interim stay on 12th March, 2014 restraining the appellant from taking any coercive action. The petition under Section 9 of the Act was finally disposed of on 22nd April, 2015 with a direction to the Arbitral Tribunal, which was already constituted in the meantime, that the interim order dated 12th March, 2014

would continue during the pendency of the arbitral proceedings with liberty to the parties to seek its modification or revocation before the Arbitral Tribunal.

3. The appellant accordingly moved an application dated 8th April, 2016 under Section 17 of the Act before the Arbitral Tribunal seeking permission to complete the balance works of the project as it was causing huge distress due to traffic congestion, unsafe highway, increase in expenditures, higher wear and tear of the vehicles and, in particular, national loss to the public at large. The respondent also filed an application under Section 17 of the Act on 17th May, 2016 seeking interim directions against the appellant to pay Rs.400 crores to the respondent at the risk and costs of the respondent for completing the balance works of the project. The reliefs claimed in the application filed by the respondent read thus:

“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 the alternative and strictly without prejudice to the prayer (a), as an interim measure permit the Respondent to invite tender/bid for executing the**

balance work under the Concession Agreement on Engineering Procurement and Construction basis subject to Claimant being granted the right of First Refusal for matching the lowest bid and in 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 strictly without prejudice to the prayer (a) & (b), direct the Respondent to act in terms of their letter dated 19.01.2016 and the Circular dated 09.06.2015 in the event prior to the award of contract of the balance work on Engineering Procurement and Construction basis the Project Lenders of the Claimant agree to provide first charge to the Respondent;

d) Pass such further order and other relief(s) as this Hon'ble Tribunal may be deem fit, just, necessary and appropriate in the facts and circumstances of the case."

(emphasis supplied)

4. During the pendency of the aforementioned proceedings before the Arbitral Tribunal, a meeting was held on 19th April, 2016 in the Chamber of Member (P) at NHAI – HQ to discuss and conclude the issues of Gwalior-Jhansi project pursuant to Ministers' meeting dated 15th March, 2016 in order to get the work restarted without further delay. Another meeting was convened on 27th April, 2016 before the said Authority, as a result of which the hearing of the matter was deferred till 18th

May, 2016. On the adjourned date, the advocate appearing for the appellant placed reliance on the minutes of the meetings held on 19th April, 2016 and 27th April, 2016. The hearing of the applications was then deferred till 29th May, 2016, as the respondent submitted a construction-linked financial plan for completing the balance work within a maximum period of 24 months from the date of receipt of advance payment from the appellant. The appellant filed its response on 28th May, 2016 to the proposal submitted by the respondent. The appellant asserted that the financial plan submitted by the respondent was not in accord with the NHAI Circular dated 19th June, 2015. In the meantime, on 25th May, 2016, the respondent filed its reply to the application filed by the appellant under Section 17 of the Act. The appellant had stated that it was agreeable to infuse funds for completion of the project as per the policy with condition of first charge of NHAI, considering the larger public interest. The respondent accepted the offer given by the appellant including the conditions specified by the appellant.

The conditions suggested by the appellant have been noted by the Arbitral Tribunal as under:

“(i) As the Respondent is a public body, in the event of the lowest bidder being denied the work, it will require to be compensated. For this purpose Claimant/Concessionaire shall pay to the authority a sum of Rs.2% of the bid amount, out of which 75% shall be paid to the lowest bidder. This is on the lines agreed by the parties and provided in the Concession Agreement based on Model Concession Agreement (MCA).

(ii) The Respondent shall not pay any ‘Mobilization Advance’ without Bank Guarantee being furnished for the equivalent amount. The advance shall be at the interest at the rate of 2% more than the prevailing bank interest.

(iii) The work shall be completed by the Claimant in a period of 24 months from the date of LOA for the Construction Contract.

(iv) The terms and conditions of the Construction Agreement shall be in addition to and not in substitution of any terms and condition of the Concession Agreement. In the event of any disparity the terms of the Concession Contract shall prevail.

(v) The specifications and quality of construction shall not be lower than stipulated in the Concession Agreement.

(vi) The Respondent shall be free to bring forward consequential additional claims for the expenses incurred and damages suffered.”

The respondent, through counsel, informed the Arbitral Tribunal that the respondent would accept the aforementioned conditions except condition No.(ii).

5. The arguments were heard by the Arbitral Tribunal on 28th May, 2016. Before the application filed by the parties under Section 17 of the Act could proceed further, the appellant filed an application under Section 23 of the Act for amendment of its reply dated 25th May, 2016 so as to withdraw its acceptance of prayer (b) for modification of procedure order No.9 dated 28th May, 2016, for the reasons mentioned therein. Finally, the Arbitral Tribunal disposed of the applications by a common order dated 23rd July, 2016. It accepted the relief claimed by the respondent in terms of prayer clause (b) of its application, reproduced in paragraph 3 above.

6. The Arbitral Tribunal rejected the plea of the appellant to withdraw from its earlier offer noted in the reply affidavit. The Arbitral Tribunal *inter alia* observed thus:

“

NHAI had taken a specific stand before us that it would not agree to prayer (a) made by the Claimant. Tribunal therefore granted time to NHAI to examine and come out with concrete proposals in respect of prayer (b) and on the unilateral conditions suggested by NHAI itself, an order to that effect

was passed by the Tribunal on May 18, 2016. Conditions stipulated by NHAI, it is seen, are more stringent than what were suggested by CCEA in its meeting held on May 13, 2015, particularly in the CCEA decision made on October 14, 2015, where in CCEA stated that after the constructions, loans can be recovered bi-annually through execution of a tripartite agreement between NHAI, lender and concessionaire. Policy endorsed by CCEA takes note of the comfort level of not only that of NHAI, citizens and travellers, but also of the concessionaire. We have to take it, that it was after taking into consideration all those aspects including the policy decisions taken by CCEA and the Claimant's eligibility for one time fund infusion in terms of the Circular dated June 9, 2015, the NHAI suggested various conditions and all those conditions were accepted by the Claimant including the furnishing, of Bank Guarantee for the mobilization advance to be made by NHAI. We are of the view that by furnishing the unconditional Bank Guarantee, the interest of NHAI is also protected.

We find that NHAI has no case that the Claimant has been blacklisted or that it is incapable of completing the balance work. In our view, it would not be in public interest if the remaining work is allotted to a third party and in the facts and circumstances, one cannot rule out the possibility of passing the same order, even if NHAI is allowed to withdraw the unilateral conditions suggested by it.

The Tribunal in its order dated May 25, 2016, also made it clear that only if the Claimant would agree to all the conditions stipulated by NHAI, the Claimant would be granted permission to complete the balance work. The Claimant has now filed an affidavit before the Tribunal that all the conditions stipulated by NHAI are acceptable to it, that being the factual position, we find no reason to entertain the application preferred by NHAI under Section 23 of the Act seeking amendment in its reply dated May 25, 2016, to the Claimant's Sec 17 application, so as to withdraw the conditions unilaterally suggested by it.

We are also of the view that the reasons stated for modification of Procedural Order No.9 dated May 28, 2016, cannot be sustained in the facts and circumstances of the case and we find it difficult to accept the contention that the specific conditions stipulated by NHAI to the alternative prayer (b) made by the Claimant in Sec 17 Application have been made without application of mind or that the so called 'higher management' was unaware of the pendency of this arbitration proceedings as well as the pendency of the Sec 17

applications filed by the parties and the various meetings held in respect of this matter at HQ of NHAI and the participation of Lead Bank, the Claimant and the officials of NHAI and the meaning and content of the policy laid down by CCEA. Sec 17 Application preferred by NHAI would therefore stand dismissed and prayer (b) made by the Claimant in its Sec 17 Application stands allowed subject to the conditions stipulated by NHAI.

NHAI is directed to take up follow up action on the basis of this order, within two weeks from today and submit a report to that effect within a month. Claimant is directed to scrupulously follow the conditions imposed by NHAI for accepting prayer (b). Claimant is further directed to submit quarterly reports before the Tribunal of the progress of the balance work undertaken by it on the basis of the order of this Tribunal. The Claimant is directed to furnish Bank Guarantee from a nationalised bank on the mobilization advance to be made by NHAI within the time stipulated. Both sec 17 Applications and the Application made by NHAI under Sec 23 of the Act are disposed of as above, reserving all the contentions raised by the parties in the main matter.

This order as well as the observations and findings recorded will have no bearing on the ultimate disposal of the main matter.”

7. The appellant acquiesced to the aforementioned interim order passed by the Arbitral Tribunal and allowed it to attain finality. For, the subject project was on Build Operate and Transfer (“BOT”) basis, any amount incurred by the Authority with regard to the project or in relation to the completion of the balance work was liable to be reimbursed by the Concessionaire (respondent).

8. The appellant accordingly issued a tender for the balance work vide Notice dated 28th November, 2016 which fact was brought to the notice of the Arbitral Tribunal during the hearing on 10th December, 2016. The tender notice was placed in the public domain, as is done in the case of other tender process. Some of the pertinent clauses of the tender documents may be appositely reproduced for considering the matter in issue before us. In the bidding document, Volume I, regarding Invitation for Bids (“IFB”), it was noted that sealed bids were invited (technical and financial) from eligible bidders for the construction and completion of the balance work detailed in the table given in the said document. Clause (1) postulated that eligibility of bidders would be assessed on post qualification basis, amongst others. The financial bid in the second part would be opened of only those bidders whose technical bids were responsive to eligibility and qualification requirements as per the Request for Proposal (“RFP”). Further, clause (7) of the IFB reads thus:

“7. The Bidders may take notice of the following:

Notwithstanding anything to the contrary contained in this RFP, as per the direction of Hon’ble Arbitral Tribunal, **if the**

BOT-Annuity concessionaire (M/s Gwalior Jhansi Expressway Ltd.) of Four lane project (Gwalior-Jhansi section of NH-75, is also a responsive bidder, the Concessionaire shall have the option of matching the lowest bid in terms of the selection criteria, subject to payment of 2% (two per cent) of the bid amount to the Authority and thereupon becomes the selected Bidder.
.....”

(emphasis supplied)

In Section I of the bid document providing for procedure for tender document of the Instructions to Bidders, the eligibility of bidders has been specified in clause (3) thereof which reads thus:

“3. Eligible Bidders

3.1 Eligibility of bidders is based on bidder meeting the pass/fail criteria regarding their general and particular experience, financial position, personnel and equipment capabilities and other relevant information as demonstrated by the applicant’s responses on the forms attached.

3.2. This invitation for bids is open to bidders meeting the following requirements:-

- a) xxx xxx xxx
- b) xxx xxx xxx
- c) xxx xxx xxx
- d) xxx xxx xxx

“(e) Notwithstanding anything to the contrary contained in this REP, as per the direction of Hon’ble Arbitral Tribunal, **if the BOT-Annuity concessionaire (M/s Gwalior Jhansi Expressway Ltd.) of Four lane project (Gwalior-Jhansi section of NH-75, is also a responsive bidder, the Concessionaire shall have the option of matching the lowest bid** in terms of the selection criteria, subject to payment of 2% (two per cent) of the bid amount to the Authority and thereupon becomes the selected Bidder. Out of the amount so received by the Authority (ILLEGIBLE) 5%

of the amount shall be paid by the Authority to the lowest bidder. For the avoidance of doubt, it is clarified that no claim for compensation, damages, loss of profits etc. by the lowest bidder for unbecoming selected bidder, shall be admissible from the Authority.

(f) Notwithstanding anything to the contrary contained in this RFP, for the purposes of eligibility and qualification of the BOT-Annuity concessionaire **(M/s Gwalior Jhansi Expressway Ltd.)**, if it has participated in the bidding process, it shall be deemed to fulfill all the requirements of Clauses 3 to 6 of the RFP, being the existing concessionaire of the Four lane project (Gwalior-Jhansi section of NH-75.”

(emphasis supplied)

Again in clause 26, it is stated thus:

“26. Examination of Technical Bids and Determination of Responsiveness of Technical Bids

x x x x x x x x x x x x

26.8 Notwithstanding anything to the contrary contained in this RFP, as per the direction of Hon’ble Arbitral Tribunal, **if the BOT-Annuity concessionaire (M/s Gwalior Jhansi Expressway Ltd.) of Four Lane project (Gwalior-Jhansi section of NH-75, is also a responsive bidder, the Concessionaire shall have the option of matching the lowest bid** in terms of the selection criteria, subject to payment of 2% (two per cent) of the bid amount to the Authority and thereupon becomes the selected bidder, Out of the amount so received by the Authority, 75% of the amount shall be paid by the Authority to the lowest bidder. For the avoidance of doubt, it is clarified that no claim for compensation, damages, loss of profits etc. by the lowest bidder for unbecoming selected bidder, shall be admissible from the Authority.

26.9 Notwithstanding anything to the contrary contained in this RFP, for the purposes of eligibility and qualification of the BOT-Annuity concessionaire **(M/s Gwalior Jhansi Expressway Ltd.)**, if it has participated in the bidding

process, it shall be deemed to fulfill all the requirements of Clauses 3 to 6 of the RFP, being the existing concessionaire of the Four lane project (Gwalior -Jhansi section of NH-75).

27. Opening of Financial Bids.

xxx xxx xxx xxx

27.5 Notwithstanding anything to the contrary contained in this RFP, as per the direction of Hon'ble Arbitral Tribunal, **if the BOT-Annuity concessionaire (M/s Gwalior Jhansi Expressway Ltd.) of Four lane project (Gwalior-Jhansi section of NH-75, is also a responsive bidder, the Concessionaire shall have the option of matching the lowest bid** in terms of the selection criteria, subject to payment of 2% (two per cent) of the bid amount to the Authority and thereupon becomes the selected Bidder. Out of the amount so received by the Authority, 75% of the amount shall be paid by the Authority to the lowest bidder. For the avoidance of doubt, it is clarified that no claim for compensation, damages, loss of profits etc. by the lowest bidder for unbecoming selected bidder admissible from the Authority.

27.6 Notwithstanding anything to the contrary contained in this RFP, for the purposes of eligibility and qualification of the BOT-Annuity concessionaire (M/s Gwalior Jhansi Expressway Ltd.), **if it has participated in the bidding process**, it shall be deemed to fulfill all the requirements of Clauses 3 to 6 of the RFP, being the existing concessionaire of the Four lane project (Gwalior-Jhansi section of NH-75).”

(emphasis supplied)

In clause 30, it is observed thus:

“30. Examination of Financial Bids and Determination of Responsiveness of Financial Bids

xxx xxx xxx xxx

30.4 Notwithstanding anything to the contrary contained in this RFP, as per the direction of Hon'ble Arbitral Tribunal, **if the BOT-Annuity concessionaire (M/s Gwalior Jhansi Expressway Ltd.)** of Four lane project (Gwalior Jhansi section of NH-75, is also a responsive bidder, the Concessionaire shall have the option of matching the lowest bid in terms of the selection criteria, subject to payment of 2% (two per cent) of the bid amount to the Authority and thereupon becomes the selected Bidder. Out of the amount so received by the Authority, 75% of the amount shall be paid by the Authority to the lowest bidder. For the avoidance of doubt, it is clarified that no claim for compensation, damages, loss of profits etc. by the lowest bidder for unbecoming selected bidder, shall be admissible from the Authority.

30.5 Notwithstanding anything to the contrary contained in this RFP, for the purposes of eligibility and qualification of the BOT-Annuity concessionaire **(M/s Gwalior Jhansi Expressway Ltd.)**, **if it has participated in the bidding process, it shall be deemed to fulfill all the requirements of Clauses 3 to 6 of the RFP**, being the existing concessionaire of the Four lane project (Gwalior-Jhansi section of NH-75).”

(emphasis supplied)

9. In consonance with the tender documents as uploaded on E-Tender Portal 2016, technical bids were opened on 5th January, 2017 and financial bids were opened on 29th March, 2017. It is only thereafter on 25th April, 2017, the respondent moved an application before the Arbitral Tribunal under Section 17 of the Act, seeking, *inter alia*, permission of the Arbitral Tribunal to complete the balance work at its risk and

cost. In the said application, it was asserted that the respondent verily believed that it would get an opportunity to exercise the option of ROFR and match the lowest bid, in terms of the order dated 23rd July, 2016. However, to its utter shock, surprise and dismay, it was reliably learnt on the previous day (to the filing of the application) that the appellant was proceeding to conclude the tender process by issuing LOI/LOA in favour of the L-1 bid behind the back of the respondent and in a highly surreptitious and opaque manner. On the basis of the said assertions, the respondent in its application filed under Section 17 of the Act prayed thus:

- “a) Allow the present application and direct the respondent to grant first right of refusal to the claimant for matching the lowest bid, in terms of the order dated 23.07.2016 passed by this Hon’ble Tribunal;
- b) Pending hearing and disposal of the present Application, pass an ex-parte ad-interim Order, directing the Respondent to not issue LoI/LoA or award the works or take any further steps, in any manner, directly or indirectly, in favour of any party, pursuant to the Notice Inviting Tender published by the Respondent on 28.11.2016;
- c) Confirm prayer (b) upon issuance of notice;
- d) Pass such further order and other relief(s) as this Hon’ble Tribunal may be deemed fit, just, necessary and appropriate in the facts and circumstances of the case.”

10. This application was resisted by the appellant by filing a reply affidavit. The appellant asserted that the respondent chose to remain silent during the entire period and only at the belated stage when the tender process was nearing completion, it has chosen to file the application with the intention of stalling the entire process. This approach cannot be countenanced. The appellant also asserted that it was unfathomable that the respondent would get the right to match the lowest bid without participating in the bidding process. Further, an application such as this would delay the progress of the main arbitration proceedings which was required to be completed within one year. It was thus asserted by the appellant that the ROFR could be invoked by the respondent only if it had participated in the bidding process. The appellant adverted to the terms and conditions of the tender documents which unambiguously mandated the respondent to participate in the tender process, coupled with the fact that there was no express direction given by the Arbitral Tribunal so as to give any right or cause of action to the respondent to contend to the contrary. The appellant

beseached the Arbitral Tribunal to allow it to take the tender process to its logical end.

11. Admittedly, no rejoinder was filed by the respondent to the specific plea taken by the appellant in the reply affidavit that despite having knowledge of the condition in the tender documents requiring the respondent to participate in the tender process, it failed to do so for reasons best known to the respondent.

12. The Arbitral Tribunal vide order dated 24th May, 2017 allowed the application preferred by the respondent by *inter alia* observing as follows:

“The Tribunal while examining both the 17 Applications preferred by the parties specifically noticed that the Claimant had completed more than 65% of the work though, NHAI took the stand that the physical progress was only 62.13%. Claimant took the stand that it had completed more than 73% work. Considering the fact that so much of money and labour had been invested by the Claimant, and at the same time safeguarding the interest of NHAI, the Tribunal passed the order dated 23.7.2016 directing the Respondent to grant the Claimant the right of first refusal for matching the lowest bid. The Tribunal also felt that involvement of third parties would also create more problems. The Tribunal, therefore, ordered in the event Claimant matches the lowest bid, Claimant be permitted to complete the balance work that too by periodically submitting reports before the Tribunal so that the Tribunal can examine whether the

Claimant is successfully completing the balance work to the satisfaction of NHAI. In our view, the stand taken by the Respondent that the first right of refusal can be granted to the Claimant only if it had participated in the bidding process cannot be sustained. Accordingly, reliefs sought for by the Claimant in the Application dated 25.4.2017 are granted”.

13. Against this decision, the appellant filed an appeal under Section 37(2)(b) of the Act before the High Court of Delhi at New Delhi. The same was dismissed on 21st August, 2017. The High Court upheld the view taken by the Arbitral Tribunal by *inter alia* observing thus:

“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 non 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.”

14. The appellant has assailed the decision of the Arbitral Tribunal dated 24th May, 2017 and of the High Court dated 21st August, 2017 on the argument that the respondent cannot be permitted to exercise ROFR *sans* participating in the bidding process and in the teeth of the terms and conditions of the tender documents. According to the appellant, the Court cannot interfere with the tender process and in particular with the modalities adopted for re-tendering of the balance work of the project. The process of evaluation of tender and awarding the contract are essentially commercial functions for which reason the Courts should refrain from exercising judicial review, especially when the decision taken by the statutory authority is *bona fide* and taken in public interest. Further, the order of the Arbitral Tribunal dated 23rd

July, 2016 in no way, much less expressly, exempts the respondent from participating in the bidding process nor has any stipulation been placed on the appellant to refrain from incorporating a condition requiring the respondent to participate in the tender process along with others. In that case, all concerned including the respondent, were bound by the terms and conditions specified in the tender documents. The fact that the respondent was deemed to possess technical qualifications would not and does not do away with the essentiality of participating in the subject bidding process, the purpose whereof is to ensure a fair competition amongst the participants and, more particularly, to get a fair offer and the best value for money in a scientific and transparent manner, encouraging competition between the participants and also to give them equal opportunity. It is contended that the order of the Arbitral Tribunal, be it dated 23rd July, 2016 or dated 24th May, 2017, is in excess of jurisdiction as it transcends beyond the purport of Section 17 of the Act. For, it was not open to the Arbitral Tribunal to pass an interim order concerning a separate contract albeit facilitating completion of the

unfinished and incomplete works of the project. It is contended that it is well settled position that the prerogative to formulate the terms and conditions of the tender document is that of the employer and the Court cannot sit in appeal over such conditions. Nor can the same be re-written or modified much less when it has not been challenged by the respondent. It is contended that the fact that the respondent qualified the technical bids in 2006, will not by itself qualify it for re-tendering bid process in 2016. Having failed to participate in the bid process in 2016, it was not possible to examine the eligibility and qualification of the respondent in the context of tender documents of 2016. Further, a person or entity who stands out of the tender process or fails to comply with the terms and conditions of the tender documents cannot acquire any right or interest much less actionable claim in respect of such tender process. According to the appellant, the respondent must take the consequences of non-participation in the subject tender process and cannot be allowed to interdict the same in absence of an express exemption granted by the competent forum/Authority to the respondent not to

participate in the tender process and yet exercise ROFR. To buttress the aforesaid submission, reliance has been placed on the decision of the Delhi High Court in ***VHCPL-ADCC Pingalai Infrastructure Pvt. Ltd. & Anr. Vs. Union of India & Ors.***¹ and on the decision of the Appellate Tribunal for Electricity in ***M/s. Raj West Power Limited & Anr. Vs. Rajasthan Electricity Regulatory Commission & Ors.***²

15. The respondent on the other hand, would contend that no interference in this appeal is warranted in view of the concurrent view taken by the Arbitral Tribunal as well as the High Court that it was not necessary for the respondent to participate in the tender process to exercise ROFR. For, the order dated 23rd July, 2016 does not prescribe such a pre-condition nor does it prohibit the respondent from exercising the ROFR without participation in the bidding process. It is contended that the order dated 23rd July, 2016 is based on consent of the parties and has never been challenged by the appellant and as such, the appellant was obliged to comply

¹ 2010 SCC Online Del 2687

² 2013 SCC Online APTEL 46

with the same in its letter and spirit. According to the respondent, having completed 78% work of the Project (which according to the appellant, is only around 62%) and having invested Rs.715 crores on the Project, by no stretch of imagination can the respondent be termed as a non-serious contender. According to the respondent, the appellant cannot be heard to challenge the order dated 23rd July, 2016, which confers ROFR, as it was based on consent of the parties and also attained finality. Further, the purpose of participating in the bidding process was only to ascertain as to whether the offer given by the bidder was a responsive offer. The respondent having already completed substantial work of the Project, by no stretch of imagination, can be said to be incapable of completing the balance work. This aspect had commended to the Arbitral Tribunal, as can be discerned from the order dated 23rd July, 2016. The Arbitral Tribunal in that order also unambiguously recorded that it was not the case of the appellant herein that the respondent had been black listed or was incapable of completing the balance work. Not only that, the Arbitral Tribunal went on to observe that it would not

be in the public interest to allow a third party to take over the balance work of the project. On that basis, direction was given to the appellant to allow the respondent to exercise ROFR, subject to certain conditions. The order passed by the Arbitral Tribunal, in essence, was on the basis of consent of the respondent with unilateral conditions imposed by the appellant, which the appellant should not be allowed to resile. According to the respondent, it was impermissible for the appellant to incorporate conditions such as clauses 3, 26, 27 and 30 in the tender documents, as the same are in the teeth of order dated 23rd July, 2016 passed by the Arbitral Tribunal and, more so, without seeking liberty from the Arbitral Tribunal in that behalf. It is contended that the purpose of the tender process is only to evoke responsive offers. There would be no logic or rationale for participation of the respondent in the backdrop of clause 3.2(f) which is a deeming provision virtually declaring the respondent as eligible and qualified for the work. The capability of the respondent to complete the balance work was never in doubt as has been recorded by the Arbitral Tribunal. In any case, in the absence of liberty given

by the Arbitral Tribunal, it was not open to the appellant to incorporate such a pre-condition in the tender document. It is contended that such pre-condition would require the respondent to furnish bid security amount in which case it would be a *fait accompli* situation for the respondent if it were to refuse or fail to match the lowest bid. For, it would result in forfeiture of its bid security and also entail in black listing. The order dated 23rd July, 2016, is one of ROFR and not for right to participate in the bidding process as such. Further, the submission of financial bid by the respondent was not to find out whether it is L-1. In that, all the bidders participating in the subject tender process pursuant to tender notice, were made fully aware in the bid document itself that the respondent had ROFR and L-1 would be compensated by the respondent as provided in the order dated 23rd July, 2016. Therefore, the respondent was not expected to bid with itself by submitting a financial bid and then matching the same. The respondent would contend that the appellant has wrongly asserted that the respondent was aware of the conditions prescribed in the tender documents and yet did not choose to

participate in the bidding process. For, the bid documents were neither furnished to the respondent nor placed on record before the Arbitral Tribunal. Thus, the conditions on which reliance has now been placed by the appellant were never pointed out to the respondent or to the Arbitral Tribunal at any point of time. In any case, the appellant had completely failed to show as to what prejudice would be caused by allowing the respondent to exercise ROFR without participating in the tender process. The learned Single Judge of the High Court repeatedly made queries in that behalf which was not explained by the appellant, as is noted in the impugned judgment. Resultantly, the High Court rejected the plea of the appellant and held that it was not necessary for the respondent to participate in the bidding process in terms of order dated 23rd July, 2016, to exercise ROFR. The respondent has distinguished the two decisions relied upon by the appellant and would contend that the same do not lay down any legal principle that participation in the bidding process is a condition precedent for exercise of ROFR. It is contended, in the present case, the ROFR, without condition of participation

in the bid, was granted by the Arbitral Tribunal on the basis of consent of the parties. It is contended that in view of the concurrent view taken by the Arbitral Tribunal as also the High Court, this Court should be slow in entertaining this appeal.

16. We have heard Mr. K.K. Venugopal, learned Attorney General for India and Mr. Mukul Rohatgi, learned senior counsel appearing for the respondent.

17. The issue involved in the present appeal ostensibly concerns the justness of the order passed by the Arbitral Tribunal and affirmed by the High Court on an application moved by the respondent (claimant) under Section 17 of the Act in the pending arbitral proceedings. However, in essence, the subject matter of the application under consideration relates to the rights and liabilities of the parties in respect of a tender process for awarding of a contract in relation to the unfinished and balance work of the Highway Project.

18. While considering the relief claimed by the respondent (claimant), the same should have been tested on the touchstone of the principle governing the tender process, especially when the validity of the tender document has not been put in issue or challenged before any competent forum. Going by the terms and conditions in the tender documents, as already alluded to in paragraph 8 above, there is no tittle of doubt that the right of the claimant (respondent) to match the bid of L-1 or to exercise ROFR would come into play only if the respondent was to participate in the tender process pursuant to the notice inviting tenders from the interested parties. The objective of tender process is not only to adhere to a transparent mechanism but to encourage competition and give equal opportunity to all tenderers with the end result of getting a fair offer or value for money. The plain wording of the eligibility clause in the tender documents and the incidental stipulations make it explicit that the respondent was required to participate in the tender process by submitting its sealed bid (technical and financial). The fact that a deeming clause has been provided in the tender document that if the

respondent was to participate in the bidding process, it shall be deemed to fulfill all the requirements of the tender clauses 3 to 6 of the RFP, being the existing concessionaire of the Project, does not exempt the respondent from participating in the tender process; rather the tenor of the terms of the documents made it obligatory for the respondent to participate in the tender process to be considered as a responsive bidder, along with others. Having failed to participate in the tender process and, more so, despite the express terms in the tender documents, validity whereof has not been challenged, the respondent cannot be heard to contend that it had acquired any right whatsoever. Only the entities who participate in the tender process pursuant to a tender notice can be allowed to make grievances about the non-fulfillment or breach of any of the terms and conditions of the concerned tender documents. The respondent who chose to stay away from the tender process, cannot be heard to whittle down, in any manner, the rights of the eligible bidders who had participated in the tender process on the basis of the written and express terms and conditions. At the culmination of the tender process, if

the respondent had not participated, in law, the offer submitted by the eligible bidders is required to be considered on the basis of the stated terms and conditions. Thus, if the claim of the respondent was to be strictly adjudged on the basis of the terms and conditions specified in the subject tender document, the respondent has no case whatsoever.

19. The gravamen of the plea taken by the respondent is on the assumption that the interim order passed by the Arbitral Tribunal on 23rd July, 2016 bestows unconditional right on the respondent to exercise ROFR, in the event tender process in respect of the balance work is resorted to. For that, we may straightway advert to the order dated 23rd July, 2016. That is an order granting prayer clause (b) in the application preferred by the respondent under Section 17 of the Act. The same has been reproduced in paragraph 3 above. Notably, there is nothing in the entire application (filed by the respondent under Section 17 of the Act) to even remotely suggest that the respondent had prayed in clause (b) that it be exempted from participating in the proposed tender process as such, and

could yet exercise ROFR before the letter of intent was to be issued to the lowest bidder. The exemption in this regard cannot be inferred. It has to be an express exemption sought and so granted and disclosed in the tender documents. The respondent may be right in contending that the interim order passed by the Arbitral Tribunal dated 23rd July, 2016 neither prescribes that the respondent must participate in the bidding process as a condition precedent for exercise of ROFR nor does it prohibit the respondent from exercising ROFR without participation in the bidding process. The order is, indeed, silent in that behalf. But, that will be of no avail to the respondent. For, such exemption ought to have been prayed and expressly granted by the Court. In absence of such express exemption, the respondent was obliged to comply with the terms and conditions of the tender documents publicly notified by the appellant as per its understanding of the order of the High Court. Having failed to participate in the bidding process in consonance with such notified terms and conditions, the respondent lost the opportunity granted under the order dated 23rd July, 2016 to match the lowest bid or to

exercise ROFR. Any other view would fall foul of the fundamental policy of the Indian law and cannot be countenanced.

20. It is not the case of the respondent that an express exemption has been granted to the respondent, from participating in the bidding process. In the matter of tender process, there can be no tacit or implied exemption from participating. In the first place, whether such direction can be issued by the Arbitral Tribunal under Section 17 of the Act itself is debatable. However, since the order dated 23rd July, 2016 has remained unchallenged, we do not wish to dilate on that aspect. Indeed, the appellant accepted the order with a sanguine hope that a proper tender process can be resorted to, wherein the respondent would also participate, for awarding the contract of unfinished and balance works of the subject Project. For effectuating that order, tender documents were issued by the appellant on 28th November, 2016 which, as aforesaid, explicitly stipulated that the respondent was expected to submit its bid within the specified time.

Admittedly, the fact that tender notice was issued, came to be disclosed before the Arbitral Tribunal on 10th December, 2016. Surprisingly, the respondent neither took any clue nor bothered to follow up the tender documents which were placed in public domain (as is done in respect of any other tender process). Further, the respondent waited till the opening of technical bids on 5th January, 2017 and financial bids on 29th March, 2017 and rushed to the Arbitral Tribunal by way of an application under Section 17 of the Act, only on 25th April, 2017 stating that on the previous day, it had come to its notice that the appellant was likely to issue letter of intent to the lowest bidder, without giving opportunity to the respondent to match the lowest bid or exercise ROFR. To oppose the said application, the appellant in the reply affidavit had asserted that the respondent was fully aware about the terms and conditions of the tender documents and yet chose not to participate in the bidding process. The respondent did not think it necessary to counter the said assertion by filing any rejoinder thereto. Notwithstanding that, the Arbitral Tribunal was impressed by the plea taken by the respondent

and allowed the application of the respondent vide order dated 24th May, 2017. The relevant extract of the said order has been reproduced in paragraph 12 above. The Arbitral Tribunal was more impressed by the fact that the respondent had completed substantial works of the Project and it would be just and proper to allow the respondent to complete the balance work. The Arbitral Tribunal made no effort to ascertain as to whether the order dated 23rd July, 2016 was a blanket and unconditional order entitling the respondent to straightaway exercise ROFR without participating in the bidding process. The Arbitral Tribunal merely adverted to the objection of the appellant and rejected the same on the finding that involvement of a third party in the Project would create serious problems. It took the view that giving option to the respondent to match the lowest bid and to complete the balance work, with a condition to periodically submit the progress report to the Arbitral Tribunal for monitoring whether the balance work was successfully completed to the satisfaction of the NHAI, would be a proper and equitable arrangement. This approach

is not in conformity with the fundamental policy of Indian law.

21. The approach of the High Court in the appeal preferred by the appellant was no different. The relevant extract of the High Court decision has been reproduced in paragraph 13 above. The High Court did not find any error, much less manifest error, in the view taken by the Arbitral Tribunal. Further, it can be gleaned from the observations of the High Court in the impugned judgment that the High Court was more eager to know as to what prejudice would be caused to the appellant if the respondent had not participated in the bidding process. This query of the High Court is begging the question. For, that cannot be the primary basis to answer the relief claimed by the respondent in the application under Section 17 of the Act. An entity who stays away from the bidding process and fails to comply with the express terms and conditions of the tender documents cannot claim any right to match the lowest bid or exercise ROFR. Only a responsive bidder could do so. The High Court has overlooked

the fact that the appellant is a body corporate under the 1988 Act. It has to act in a just and fair manner in the matter of allocation of contract albeit the balance and unfinished work of the Project. No express exemption has been granted to the respondent vide order of the Arbitral Tribunal dated 23rd July, 2016 – to exercise ROFR or match the lowest bid without participating in the bidding process. The respondent had the option to participate in the bidding process which was not availed of for reasons best known to the respondent. The High Court also overlooked the fact that the tender process was not an empty formality and with the initiation of the same, third parties, who participated in the bidding process, were likely to be prejudiced by allowing the respondent to match the lowest bid or exercise ROFR, without participating in the bidding process despite the express stipulation in that behalf in the tender documents. Suffice it to observe that the High Court committed the same error as committed by the Arbitral Tribunal in not examining the core issues for grant or non-grant of the relief to the respondent, in conformity with the fundamental policy of Indian law.

22. The argument of the respondent that the order dated 23rd July, 2016 passed by the Arbitral Tribunal was based on consent of the parties and was never challenged by the appellant, does not take the matter any further. The respondent on the one hand, contends that the said order was based on consent of the parties and also in the same breath contends that the respondent consented to the unilateral conditions stipulated by the appellant, which the appellant should not be allowed to resile as prayed by it. Be that as it may, on a fair reading of the order dated 23rd July, 2016, it is noticed that the same is the outcome of a contest and not founded on any concession. In any case, the order makes no express mention about granting of exemption to the respondent from participating in the proposed bidding process. The fact that the respondent has already invested a substantial amount in the subject Project and has also completed substantial work can be no basis to overlook the fundamental policy of Indian law regarding the subject of tender process and the rights and obligations of the parties

involved. We are also not impressed by the argument of the respondent that the respondent was not expected to refuse to match its own bid or that if it had participated in the bidding process and exercised ROFR, then it would have resulted in consequence of black listing and forfeiture of bid security amount. The fact that the respondent would exercise ROFR would mean that the bid given by the respondent was not L-1. If it was not L-1, exercising ROFR would obviously neither entail in forfeiture of the bid security nor would visit the consequence of black listing. This plea is obviously an argument of desperation and belated one to justify the failure to participate in the bidding process.

23. The appellant invited our attention to the dictum in ***VHCPL-ADCC Pingalai Infrastructure Pvt. Ltd.***, (supra). In that case, the Court considered the question whether the petitioner had preferential right to match the lowest bid without pre-qualifying or participating in the bidding process. In that case, Article 14.1(c) of the concession agreement stipulated that the respondent No.1 could invite proposals

from eligible persons for capacity augmentation of the project which required the petitioner to give an option to submit its proposal. The Court after noticing the precedents on the relevant aspects, went on to observe that if the concessionaire chose not to submit its proposal, it did not have the right to match the preferred offer as would be the case of the respondent herein, in view of the express stipulation in the tender documents requiring the respondent to participate in the bidding process. The appellant has also placed reliance on the decision in ***M/s. Raj West Power Limited***, (supra). We agree with the respondent that this decision does not lay down any principle which may have any bearing on the case in hand.

24. In view of the above, we have no hesitation in concluding that the decision of the Arbitral Tribunal as confirmed by the High Court, falls foul of the fundamental policy of Indian law and cannot be countenanced.

25. Accordingly, the order passed by the Arbitral Tribunal dated 24th May, 2017 as also the order dated 21st August,

2017 passed by the learned Single Judge of the High Court, deserve to be quashed and set aside and resultantly, the application preferred by the respondent under Section 17 of the Act dated 25th April, 2017 ought to be dismissed. We order accordingly.

26. The appeal is allowed in the above terms with no order as to costs.

.....CJI.
(Dipak Misra)

.....J.
(A.M. Khanwilkar)

.....J.
(Dr. D.Y. Chandrachud)

**New Delhi;
July 13, 2018.**