

Arbitration tribunal granting right to a non-participating party to match the lowest bidder in the tender process is violation of Public Policy – Supreme Court

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In a recent Judgment of Supreme Court of India, dated 13th July 2018 in a case between National High Ways Authority of India Vs Gwalior Jhansi Express Way Limited (2018 Online SC 688), the court set aside an Arbitrators order on the ground of “Fundamental Policy of Indian law” holding that the order passed under S.17 of the Act, allowing the Respondent to match the Lowest tenderer without participating in the tender process.

Facts and contentions: The parties entered a concession agreement dated 17th December 2006, for works of widening the existing two lane portion of K.16 to Km 96.127 on National High Way No.75 to four lanes in the States of Uttar Pradesh and Madhya Pradesh. The Appellant asserts that the Respondent could not complete the work in the required pace due to inadequate deployment of machinery, plant material and manpower. The appellant alleged that the Respondent abandoned the project and merely achieved 62% progress. Therefore, the appellant issued a cure notice dated 19th October 2013 and the respondent approached the High Court of Delhi and got an interim protection which continued till the Arbitration tribunal was constituted.

On 08th April 2016 the appellant moved an application under S.17 of the Act before the tribunal asking permission to complete the balance works. The respondent also filed an application under S.17 of the Act, seeking direction from the tribunal directing 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. After that the tender process was started by the Appellant, the Respondent did not participate in the process. But the Respondent approached the arbitral tribunal and sought for permission to match the lowest bidder which was allowed by the tribunal. The said order came to be challenged and the High Court upheld the order of the tribunal and hence an appealed to the Supreme Court.

Decision of the Court: The Supreme Court of India held that there was no express permission given by the tribunal to the Respondent, to keep themselves away from the tender process. In such a situation, the Respondent ought to have participated in the Tender Process. The Arbitrator allowing the Respondent to match the Lowest tenderer by way of an order under S.17 is not sustainable in law. It further held that permitting a company, which did not participate in the tender process, to match the L-1 is violative of fundamental principles of Indian law. While arriving at that decision, the Supreme Court followed its earlier Judgment in VHCPL-ADCC Pingalal Infrastructure Pvt Limited Vs union of India (2010) SCC Online Del 2687 & Raj West Power Limited Vs Rajasthan Electricity Regulatory Commission 2013 SCC Online APTEL 46.

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