

(2012) 02 DEL CK 0217
In the Delhi High Court
Case No : O.M.P. No. 300 of 2005

National Highways Authority of India	APPELLANT
Vs	
R.S.B. Projects Ltd.	RESPONDENT

Date of Decision : 15-02-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 15(1), 34, 7
Constitution of India, 1950 — Article 226
National Highways Authority of India Act, 1988 — Section 11, 15, 3, 4

Citation : (2012) 2 AD 550 : (2012) 1 ARBLR 516

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Ravi Gupta, with Ms. Meenakshi Sood and Mr. Mukesh Kumar, for the Appellant; Arvind Minocha, for the Respondent

Final Decision : Dismissed

Judgement

Justice S. Muralidhar

1. National Highways Authority of India ("NHA") in this petition u/s 34 of the Arbitration and Conciliation Act, 1996 ("Act") challenges an award dated 9th May 2005 passed by the Arbitral Tribunal holding that NHA will pay to the Respondent, RSB Projects Limited, a sum of Rs.1,14,11,468/- against all its claims. It was further directed that in the event NHA fails to make the payment within 90 days, the Respondent would be entitled to interest at 12% per annum from the date of the award till the date of payment.

Background Facts

2. NHA has been constituted u/s 3 of the National Highways Authority of India Act, 1988 ("NHA Act") for development, maintenance and management of national highways. u/s 4 of the NHA Act, all national highways vest in the Central Government. In exercise of its powers u/s 11 of the NHA Act, the Central Government has entrusted the National Highway-1, from Delhi to

Amritsar, to NHAH for the purpose of development, maintenance and management.

3. NHAH invited bids for Contract Package No. NS/3 (DL) for the project titled "4/6 Laning of KM 8.200 to KM 16.20 of Delhi Karnal Section of NH-1 in the State of Delhi". The Respondent's bid was accepted by letter of acceptance dated 8th July 1999 for the contract price of Rs.29,57,77,777/-. In terms of the said letter, the Respondent was to furnish to the NHAH performance security equal to 5% of the contract price within ten days of the receipt of the letter of acceptance in accordance with Clause 34.1 of "Instructions to Bidders" (Section -1) valid up to 28 days from the date of the expiry of the defects liability period and also sign the contract, failing which action in terms of Clause 34.3 of the "Instructions to Bidders" would be taken.

4. By a letter dated 10th July 1999, the Respondent conveyed its acceptance and furnished a bank guarantee dated 13th July 1999 in the sum of Rs.1,47,88,889/-.

5. One of the bidders M/s. B.R. Arora and Associates Private Limited ("BRAAPL") filed Civil Writ Petition No.4140 of 1999 in this Court challenging the award of the above contract to the Respondent. It was contended by BRAAPL that its bid at a price of Rs.26.90 was the lowest, whereas the bid of the Respondent was the third lowest. On 15th July 1999, this Court passed an order directing that "the award of contract, if any, in favour of Respondent No.3 (the Respondent herein) shall be subject to further orders passed by this Hon'ble Court."

6. On 23rd July 1999, the Government of India in the Ministry of Surface Transport ("MOST") issued a letter to the Chairman, NHAH regarding award of contract for various packages in "North-South and East-West corridors." MOST advised NHAH that for Packages NS-2, NS-4, NS-5 and EW-3 contracts could be awarded to the party offering the lowest bid price as indicated in the said letter. In respect of Package EW-6, the party to whom the contract was awarded should be asked to match its bid price with the lowest bid price, failing which fresh bids were to be invited. MOST noted in its letter that in respect of NS-3 where BRAAPL was the lowest bidder the Court had ordered that the contract could be awarded subject to further orders passed by it. MOST advised that "the decision of the Court may be awaited."

7. By its letter dated 26th July 1999, the NHAH informed the Respondent that in view of the order dated 15th July 1999 passed by this Court "the award of work as notified vide letter dated 08.07.1999, may be treated to be held in abeyance. No further action may please be taken in respect of this project until further instructions." However, the aforementioned letter was, by a subsequent letter dated 11th October 1999 from NHAH to the Respondent, treated as withdrawn.

8. On 2nd December 1999, NHAH wrote to the Respondent informing, inter alia, as under:-

... It has now been decided to award this contract to you at the lowest quoted

bid price for the package viz. Rupees Twenty six crores ninety lakh forty six thousand six hundred only (Rs.26,90,46,600/-). You are requested to communicate your concurrence to the above, failing which fresh bids may have to be invited.

2. It is requested that your reply may be furnished to NHAI by 10.12.99 positively.

9. In reply, the Respondent by letter dated 8th December 1999 reiterated that its bid was the lowest responsive bid and once their tender had been accepted, they could not concur with the proposal of the NHAI.

10. BRAAPL's Writ Petition No. 4140 of 1999 was dismissed by this Court by order dated 12th December 2000 which reads as under:

Present: None for the petitioner.

Mr. Gopal Subramaniam, Sr. Advocate with Mr. K.K. Lahiri, Ms. Shejali Shukla for respondent No.1.

CW 4140/1999 & CMs 8064/99, 1015/2000

Dismissed in view of the facts that no one is present on behalf of the petitioner and Mr. Subramaniam contends that fresh tenders are being called.

11. By letter dated 21st December 2000, NHAI informed the Respondent that it had decided to cancel the award of the work of Package No. NS/3 (DL) and invite fresh bids. The said letter reads as under:-

Dear Sir,

This has reference to your letter No.RSB/NHAI/99/9142 DATED 08.12.1999 and earlier correspondence regarding the above subject.

2. As you have not agreed to match your bid price with that of lowest bidder and as the Hon'ble High Court of Delhi has dismissed the Civil Writ Petition No.4140 of 1999 (M/s. B.R. Arora & Associates Pvt. Ltd. v/s. NHAI and Others, wherein you were also one of the Respondents) regarding this package on 12.12.2000, it has been decided to cancel the award of work of Package No. NS/3 (DL) made to you and to invite fresh bids for the package. Accordingly, the letter of acceptance for this package issued to you vide this office letter No. NHAI/20030/3/NS-3/99-Tech. and dated 08.07.1999 is hereby withdrawn.

3. The bank guarantee submitted by you for performance security may please be got collected from this office.

4. Please acknowledge receipt of this letter.

12. Aggrieved by the aforementioned decision of the NHAI, the Respondent filed Civil Writ Petition No.1215 of 2001 which was dismissed by this Court by order dated 3rd March 2001 which reads as under:

03-03-2001

Present: Mr. Nidesh Gupta with Mr. Naveen Singh for the Petitioner.

C.W. 1215 & CM 2137/2001

Aggrieved by the cancellation of the award of work of package No.NS-3(DL) and action of the respondent in inviting fresh bids for the said package, the petitioner has filed the present writ petition under Article 226 of the Constitution of India.

Learned counsel for the petitioner has contended that the petitioner was the third lowest bidder and the first lowest bidder's bid was not entertained and the bid of the second lowest bidder was also not proper but petitioner's offer was not considered by the respondent. The first lowest bidder filed a writ petition in this court which was dismissed. Counsel for the petitioner has contended that the respondent National Highway Authority of India has filed an application defending the award of work in favour of the petitioner in the said writ petition filed by the lowest bidder and for that purpose a separate application was filed by the respondent authority before the Court.

It is contended by counsel for the petitioner that in the terms of bid documents under the heading "Award of Contract" it is clear that there was no provision for cancelling of the award of contract and the same was strictly barred and prohibited.

I have carefully analysed the arguments advanced by counsel for the petitioner.

Filing of the writ petition by B.R. Arora and Associates Private Limited, the lowest bidder and the stand taken in that writ petition by National Highway Authority of India defending their stand of award of contract in favour of the petitioner would not give a right to the petitioner in view of petitioner contending that a lawful concluded contract came into existence by award of contract by the respondent in favour of the petitioner. In case of breach of any legal obligation under the said concluded contract, the petitioner has got an equally efficacious remedy for the recovery of damages. This writ petition is mis-conceived and not maintainable.

No ground to interfere.

Dismissed.

13. Thereafter, by letter dated 5th April 2001, the Respondent informed the NHAI that it was invoking the arbitration clause and nominating its arbitrator with a request to the NHAI to appoint an arbitrator from its side in terms of Clauses 24 and 25 of the General Conditions of Contract ("GCC").

14. By its letter dated 15th May 2001, the NHAI informed the Respondent that "since no concluded contract came into existence, the question of your invoking clause 24 & 25 of the Conditions of Contract or any other clause of the bid documents does not arise." NHAI, therefore, took no cognizance of the

appointment of the Arbitrator by the Respondent and maintained that it was not liable to nominate an arbitrator from its side.

15. The Respondent filed Arbitration Application No.143 of 2001 in this Court u/s 11 of the Act seeking the appointment of an Arbitrator. On 6th March 2002, the said application was allowed by the following order:

AA No.143/2001

This is a petition u/s 11 of the Arbitration and Conciliation Act, 1996 as disputes arose between the parties and there being an arbitration agreement, the petitioner invoked the provision of Clause of Special Conditions of Contract Act and appointed Sh. S.K. Kogekar as Arbitrator from their side and requested the respondent to appoint another arbitrator from their side so that the disputes could be referred to arbitration as provided for in the relevant conditions of the contract. Respondent failed to appoint an arbitrator from their side within the stipulated period. Hence the present petition. Learned counsel for the Respondent states that without prejudice to the rights and contentions of the respondent, an arbitrator from their side be appointed by the Court. I, accordingly, appoint Justice Dr. A.S. Anand, former Chief Justice of India as Arbitrator from the side of the Respondent.

As the arbitration agreement provides that the Arbitral Tribunal would consist of three arbitrators, both the arbitrators i.e. Shri S.K. Kogekar, appointed by the petitioner and Justice Dr. A.S. Anand, appointed for the respondent shall nominate a third arbitrator, who shall act as the presiding arbitrator.

Petition stands disposed of.

16. The matter was then taken to the Division Bench by the NHAH by filing an application CM No. 5472 of 2002 in CW No. 3003 of 2002. The application was dismissed by the Division Bench by an order dated 20th May 2002 in which inter alia it was noted that "the contention of the petitioner that the consent was given without prejudice has no relevance because the Arbitral Tribunal having been appointed with the consent of the parties then the remedy available to the petitioner is to agitate his pleas, if any, before the Arbitral Tribunal."

Impugned Award of the Arbitral Tribunal

17. The Respondent filed its statement of claims before the Arbitral Tribunal under six heads. The Tribunal framed the following preliminary issues on 23rd December 2002:

(a) Whether there is no concluded, legal and binding contract between the parties.

(b) Whether this Tribunal has been legally constituted.

(c) Whether Union of India is a necessary and proper party.

18. The impugned award came to be passed on 9th May 2005. The summary of

the impugned Award is as under:

(i) Issue (a) was decided against the NHAI with the Arbitral Tribunal holding that there was a concluded contract that came into existence and that no prior approval of the Central Government for the NHAI to enter into the said contract was required u/s 15 of the NHAI Act since the Central Government had not prescribed any value exceeding which such approval was necessary. Further, the arbitration clause in the Special Conditions of Contract which fell within the definition of the arbitration agreement u/s 7 of the Act was binding on the parties.

(ii) Issue (b) was answered against the NHAI by holding that the Arbitral Tribunal had been appointed with the consent of NHAI and, therefore, was legally constituted.

(iii) Issue (c) was decided against the NHAI by holding that there was no need for the Respondent to have impleaded the Union of India as a party to the arbitral proceedings.

19. The Arbitral Tribunal then examined the question as to which party committed a breach of the contract. It was held that the decision of the NHAI to cancel the award of work to the Respondent was made on the ground that the Respondent had not agreed to match its price with that of the lowest bidder, which was in breach of contract on the part of the NHAI. The Arbitral Tribunal then proceeded to decide each of the claims. Against Claim No.1 for a sum of Rs.23,74,946/-for commission/bank charges and losses towards margin money and expenses incurred for enhancing the bank guarantee limit, the Arbitral Tribunal awarded the Respondent a sum of Rs.8,31,975/-. Against claim of Rs.43,08,425/-, under Claim No. 2 on account of idling of staff, the Arbitral Tribunal allowed a sum of Rs.3,28,200/-. Claim No. 3 for a sum of Rs.92,12,400/- on account of idling of machinery, tools and plant was rejected. As against a sum of Rs.4,43,55,000/-claimed by the Respondent as loss of profit in Claim No. 4, the Respondent was held entitled to recover from NHAI Rs.88,73,333/-. As against Claim No. 5, the Respondent was held entitled to interest at 8% per annum on the amounts awarded under Claim Nos.1 and 2 with effect from 5th April 2001 till the date of the Award, which worked out to Rs.3,77,960/-. The Respondent was held entitled to interest at 12% from the date of the award till the date of payment in event of the NHAI failing to pay the awarded amount to the Respondent within 90 days of the award. The Arbitral Tribunal also allowed Claim No. 6 for a sum of Rs.10 lakhs in favour of the Respondent towards the cost of the arbitration proceedings.

Was there a valid award of work and a concluded contract?

20. Mr. Ravi Gupta, learned Senior counsel appearing on behalf of NHAI, submitted that there was a concluded contract between the parties. It is submitted that under Clause 33 of the bid documents, there were two essential stages to be completed before a concluded contract could come into existence. One was the notification of the contract and the other the signing of the

agreement. Under Clause 33.2, the notification of the award of the work would constitute the formation of the contract subject only to the furnishing of a performance security in accordance with the provisions of Clause 34. However, the failure of the bidder to comply with the requirements of Clause 34.1, i.e., to deliver to the employer a performance security in the form of a bank guarantee in the form given u/s 7 would constitute sufficient ground for cancellation of the award or forfeiture of the bid security. He submitted that the form of agreement was never signed. After NHAH withdrew the letter dated 28th July 1999 whereby it had placed the award of the contract in abeyance, the Respondent on 12th July 1999 prayed for return of the Earnest Money Deposit ("EMD") in the form of bank guarantee and it was accordingly returned. It is accordingly submitted that in the above circumstances, there was no concluded contract entered into with the Respondent. Consequently, the question of the invocation by the Respondent of the arbitration clause in the Special Conditions of Contract ("SCC") did not arise.

21. In order to appreciate the above submissions, it is necessary to refer to the relevant clauses of the bid document which read as under:

31. Award Criteria

31.1 Subject to Clause 32, the Employer will award the Contract to the Bidder whose Bid has been determined to be substantially responsive to the Bidding documents and who has offered the lowest evaluated Bid Price, provided that such Bidder has been determined to be (a) eligible in accordance with the provisions of clause 3, and (b) qualified in accordance with the provisions of Clause 4. No Bidder will be awarded more than three contract packages under this programme, in which 13 other tenders are being invited, subject to their eligibility and bid capacity and on the basis of least cost to the Employer. In case of a bidder who has been awarded any work on North South & East West corridor, his eligibility for award of work will be limited to two Contract packages only, subject to eligibility and bid capacity.

22. The key in Clause 31.1 is "responsive". The principal criteria was not that the bid should be the lowest but it necessarily had to be "substantially responsive to the bidding documents". As rightly observed by the Arbitral Tribunal, the NHAH in its counter affidavit filed in reply to the BRAAPL's writ petition, categorically stated that BRAAPL's bid was rejected "as being non-responsive" and, therefore, could not be considered along with that of other tenderers. This was mentioned in paras 13 and 18 (f) of the counter affidavit. It was specifically denied by the NHAH in the said affidavit that the award of the contract to the Respondent herein was not against the interests of public at large and in fact was "in consonance with the law and within the four corners of the terms and conditions of the tender documents."

23. The interpretation now sought to be placed by learned Senior counsel for NHAH on the above clauses of the bid documents by the NHAH is not in

consonance with the spirit of the said clauses. The requirement of the above clause was satisfied except that the formal signing of the form of agreement in terms of Clause 33.4 did not take place. This situation was brought upon by the NHAI wrongly interpreting this Court's interim order dated 15th July 1999 in the writ petition filed by BRAAPL and placing the award of work in favour of the Respondent by its letter dated 8th July 1999 under abeyance by its letter dated 26th July 1999. Otherwise, the letter dated 8th July 1999 clearly constituted an award of work with the NHAI unambiguously informing the Respondent by the said letter that its bid dated 21st June 1999 "is hereby accepted by NHAI" and requesting the Respondent to furnish performance security in accordance with Clause 34.1 of the "Instructions to Bidders". NHAI perhaps realized that it had erred and, therefore, issued a subsequent letter on 11th October 1999 treating the letter dated 26th July 1999 as withdrawn.

24. The request by the Respondent for release of EMD bank guarantee had been made by its letter dated 14th July 1999 and this was reiterated on 12th November 1999. This was consistent with the terms and conditions of the contract. The letter dated 2nd December 1999 written by the NHAI deciding all of a sudden to award NS/3 (DL) contract again to the Respondent "at the lowest quoted bid price" was wholly unwarranted. The explanation given by the NHAI that it was only acting on the instructions contained in the letter dated 23rd July 1999 of the MOST is unacceptable. As already noted, that letter gave no such instructions to NHAI as regards Contract Package No. NS/3 (DL). This action of the NHAI was rightly rebuffed by the Respondent by its letter dated 8th December 1999. It conveyed its inability to accept the said proposal as it stated: "our rates are already very competitive and cannot brook any more pruning."

25. In its letter dated 8th July 1999, the Respondent also informed the NHAI that it had already paid Rs.8,31,975/- to the bank as bank charges and was already incurring heavy losses of business by desisting from tendering for other works elsewhere in anticipation of starting the work immediately since July 1999. The NHAI does not appear to have responded to the said letter. Even the subsequent letter dated 6th July 2000 by the Respondent to NHAI asking it to make available the site for work to be commenced was not replied to. Ultimately, on 21st December 2000 the NHAI decided to cancel the award of work of Contract Package No. NS/3 (DL) and to invite fresh bids for the package.

26. The letter dated 21st December 2000 itself is an acknowledgment by NHAI that there was in fact an award of work to the Respondent. Otherwise, there was no need to cancel such award of work in the first place. Even otherwise, there could be no manner of doubt that a concluded contract did come into existence. The absence of the signing of formal agreement in terms of Clause 34.1 of the bid document would make no difference to that position. In coming to the above conclusion in the impugned Award, the Arbitral Tribunal placed reliance on the decision of the Supreme Court in Seth Banarsi Das Vs. The Cane Commissioner and Another, and the decision of this Court in Progressive Constructions Limited

v. Bharat Hydro Power Corporation Limited AIR 1996 Del 1992. This Court finds no error having been committed by the Arbitral Tribunal in this regard.

Was NHAI legally authorised to enter into the contract?

27. The next submission is that in terms of the NHAI Act there had to be a specific authorization permitting it to enter into a contract. The signing of such contract had to be under the seal of the NHAI. The further contention is that in terms of Section 15 of the NHAI Act, the prior approval of the Central Government was a mandatory requirement. Reliance was placed on the decisions in Orissa State (Prevention and Control of Pollution) Board Vs. Orient Paper Mills and Another, and Dr HS Rekhi v. the New Delhi Municipal Committee AIR 1962 SC 544.

28. Section 15 of the NHAI Act reads as under:

15. Mode of executing contracts on behalf of the Authority.

(1) Every contract shall, on behalf of the Authority, be made by the Chairman or such other member or such officer of the Authority as may be generally or specially empowered in this behalf by the Authority and such contracts or classes of contracts as may be specified in the regulations shall be sealed with the common seal of the Authority:

Provided that no contract exceeding such value or amount as the Central Government may prescribe in this behalf shall be made unless it has been previously approved by that Government: Provided further that no contract for the acquisition or sale of immovable property or for the lease of any such property for a term exceeding thirty days and no other contract exceeding such value or amount as the Central Government may prescribe in this behalf shall be made unless it has been previously approved by that Government.

(2) Subject to the provisions of sub-section (1), the form and manner in which any contract shall be made under this Act shall be such as may be provided by regulations.

(3) No contract which is not in accordance with the provisions of this Act and the regulations shall be binding on the Authority.

29. In terms of the proviso to Section 15(1) of the Act, the approval of the Central Government becomes necessary only in respect of a contract exceeding value or amount that the Central Government may prescribe. There has been no such prescription by the Central Government as to the value of a contract exceeding which such approval was required. The letter dated 23rd July 1999 was not such a letter. In the above provision, the words "such contracts" and the words "classes of contracts" though separated by the word "or" refer to the species of contracts that may be specified in the regulations as requiring to be mandatorily "sealed with the common seal" are indicative of this legal position. Admittedly, the contracts or classes of contracts which require to be sealed with

the common seal of the NHAI have yet to be specified by way of regulations. Consequently, there was no necessity for the contract in the instant case to have been sealed with the common seal of the NHAI. The conclusion to this effect of the Arbitral Tribunal and the further conclusion that the disputes between the parties were rightly referred to arbitration is in consonance with the provisions of the NHAI Act and the clauses of the contract. The question is therefore answered in the affirmative.

Appointment of the Arbitral Tribunal

30. It was next contended that the agreed procedure for appointment of the Arbitral Tribunal was that the Arbitrator of the NHAI could be appointed only by the Indian Road Congress ("IRC"). As rightly pointed out by Mr. Minocha, learned counsel for the Respondent, the appointment of an arbitrator on behalf of the NHAI was with the consent of the NHAI itself. Clause 32(b) of the SCC did not specify as to who had to approach the IRC when there was a failure of the NHAI to nominate its arbitrator. Further, in terms of Clause 32(a) only when there is a failure of the two arbitrators to reach a consensus within a period of 30 days that the Presiding Arbitrator is to be appointed by the IRC. However, NHAI waived this condition when it agreed to this Court appointing the Arbitrator on its behalf. That the constitution of the Arbitral Tribunal was by consent is evident from the order dated 6th March 2002 of the learned Single Judge in AA No. 143 of 2001 as affirmed by the Division Bench by order dated 20th May 2002, both of which have been referred to earlier. No plea was advanced by NHAI in its reply to the petition u/s 11 of the Act that the Respondent ought to have approached the IRC for appointment of an arbitrator on behalf of the NHAI. This ground has been rightly rejected by the Arbitral Tribunal.

Claim Nos. 1 to 6

31. As regards Claim No. 1 of bank guarantee charges, the Arbitral Tribunal has correctly appreciated the facts as well as the law and, in fact, awarded a sum of Rs.8,31,975/- as against Rs.23,74,946/-. As regards Claim No. 2 for Rs.43,08,425/- for idling of staff, the Arbitral Tribunal has partly allowed the claim to the extent of the salary of six persons for the period July to December 1999. The said finding does not call for any interference. As regards the question of loss of profit under Claim No. 4, the Arbitral Tribunal followed the dictum of the Supreme Court in A.T. Brij Paul Singh and Others Vs. State of Gujarat, and Dwaraka Das Vs. State of Madhya Pradesh and Another, . The Arbitral Tribunal examined the profit and loss accounts and the balance sheet of the Respondent for the years 1993-94 upto 1997-98. The income percentage on the basis of these figures, which were, in fact, provided to the Arbitral Tribunal by the NHAI. The Arbitral Tribunal also referred to the profit and loss account for the above years even while it held the accounts for the year 2000-01 as not relevant. The Arbitral Tribunal gave its reasoning as follows:

From the facts mentioned here-in-above, the annual average percentage income

comes to 3.45%. In the above chart we have worked out the annual percentage income on the basis of the income before depreciation. Even if, we exclude the amount of depreciation, the income after excluding the depreciation for the years 1993-94, 1994-95, 1995-96, 1996-97 & 1997-98, comes to Rs.10,12,167/-, Rs.56,74,789/-, Rs.39,57,809/-, Rs. 70,17,649/-& Rs. 61,32,377/- respectively and on the as is of the said income the percentage of income comes to 1.67%, 3.69%, 2.35%, 3.48% & 3.03%. The annual average percentage income will come to 2.84% if the amount of depreciation is also excluded though normally, for the purpose of calculating the annual percentage income, the same should not be excluded. It may be relevant to note here that the above mentioned percentages have been worked out on the basis of the figures of the financial years 1993-94 to 1997-98 which were furnished by the claimant to the respondent along with the bid documents. the percentage of the profit relied upon by the respondent in the written submissions, which include only 2 financial years mentioned above is based on the assessed income which is worked out after giving benefits of various deductions which are permissible to the assessee against the capital and machinery etc., under the Income Tax Act and as such the figures relied upon by the respondent are not relevant to ascertain the claim on account of loss of profit.

Keeping in view the aforesaid facts, we are of the opinion that it would meet the ends of justice, if the claimant is allowed 3% amount of the total contract value on account of loss of profit. The amount 3% of the total value of the contract comes to Rs.88,73,333/-. Accordingly, we hold that the claimant is entitled to recover from the respondent a sum of Rs.88,3,333/- against claim No.4.

32. Mr. Gupta assailed the above finding and submitted that the Respondent could not have claimed loss of profit unless it had, in fact, deployed its personnel. Since the site itself was not handed over, there was no question of deploying any personnel or locking up its working capital. It was pointed out that in all instances, where loss of profit had been awarded, the work had commenced.

33. On the other hand, it was pointed out by Mr. Minocha, learned counsel for the Respondent, that even the bid documents permit bidding at a profit of 15% to the bidder. It is pointed out that in Dwarka Dass, in similar circumstances, the Supreme Court emphasized that a broad analysis of figures for arriving at the profit percentage was sufficient. Here the Arbitral Tribunal awarded only 3% profit.

34. It appears to the Court that the view taken by the Arbitral Tribunal in this regard was a plausible one and cannot be said to be "patently illegal". It is also based on the figures of the audited balance sheets and profit and loss accounts of the Respondent. This Court also finds no ground having been made out for interference with the Award with regard to Claim No. 5 (interest) and Claim No. 6 (costs).

Conclusion

35. For all the aforementioned reasons, this Court finds no reason to interfere with the impugned Award of the Arbitral Tribunal. The petition is dismissed with costs of Rs.20,000 which shall be paid by the NHAI to the Respondent within four weeks.