



2025:DHC:5521-DB



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

Date of decision: 07th JULY, 2025

IN THE MATTER OF:

+ **FAO(OS) (COMM) 268/2019 & CM APPL. 43706/2019**

IRCON INTERNATIONAL LTDAppellant

Through: Mr. Chandan Kumar and Mr. Vikram
Sharma, Advocates

versus

M/S PCL BRAHMAPUTRA CONSORTIUM LTD (JV)

.....Respondents

Through: Mr. Udit Seth and Mr Roshan Roy,
Advocates

+ **FAO(OS) (COMM) 265/2019 & CM APPL. 43440/2019**

IRCON INTERNATIONAL LTDAppellant

Through: Mr. Chandan Kumar and Mr. Vikram
Sharma, Advocates

versus

M/S PCL BRAHMAPUTRA CONSORTIUM LTD (JV)

.....Respondents

Through: Mr. Udit Seth and Mr Roshan Roy,
Advocates

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

HON'BLE MR. JUSTICE HARISH VAIDYANATHAN

SHANKAR

JUDGMENT

SUBRAMONIUM PRASAD, J.



1. The present appeals have been filed by the Appellant under Section 37 of the Arbitration and Conciliation Act, 1996 ("**the Act**") challenging the judgment dated 17.07.2019 ("**Impugned Judgment**") passed by the learned Single Judge in OMP (COMM) No. 82 of 2017 and OMP (COMM) No. 83 of 2017 whereby the learned Single Judge has upheld the Awards as passed by the Sole Arbitrator.
2. The facts in brief as stated in the appeal - FAO(OS) (COMM) 268/2019 are as follows:
 - a) The Appellant herein invited bids for road works till WMM stage (excluding Asphalt works) for the expressway between Noida & Greater Noida package - VIA (Km 10+100 to Km 12+500) ("**Works**")
 - b) The Respondent vide Offer letter dated 22.12.2000 sent its offer and the bid of the Respondent was accepted by the Appellant.
 - c) The Appellant vide letter dated 17.01.2001 bearing No. IRCON/1007/Noida/Pkg-VIA/51 issued a Letter of Intent ("**LOI**") accepting the Respondent's offer for the abovementioned Works for a total value of Rs. 9,52,70,876/-. The works had to be completed within 16 months from the date of the issuance of the LOI.
 - d) An Agreement dated 31.05.2001 bearing No. IRCON/1007/NOIDA/AGREEMENT/09 was entered into between the Appellant and Respondent whereby all the details i.e., description and scope of work, extension of time and settlement of disputes etc were stamped upon.



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- e) A letter dated 01.06.2002 bearing No. PCL-BCL/NGNEWP/IRCON/139 was sent by the Respondent to the Appellant asking the Appellant to enhance the rates as vide an Order of the Apex Court all mining activities within 5 km periphery of the National Capital Territory of Delhi were banned due to which there was a shortage of the mining materials and the rates of various raw materials were hiked by the mine lease holders. Another letter was sent by the Respondent to Appellant in the same regard showing the current and previous market rates and requesting the Appellant to increase the rates accordingly. Several other letters were also sent by the Respondents for enhancement of rates.
- f) The Appellant, vide letter dated 31.12.2002 bearing No. IRCON/1007/Noida/Pkg.VI-A/13 rejected the request made by the Respondents by stating that according to the terms of the contract, the Respondents are not entitled for any revision of rates.
- g) The works were completed and the final bill was submitted by the Respondent on 24.1.2004.
- h) Thereafter, the Respondent received full and final payment of Rs. 29,56,886/- and issued a No Claim Certificate dated 30.04.2004 subject to 6 claims/issues that are as follows:
- i. Rate difference on account of lead due to the Apex Court ban.
 - ii. Compaction cost of extra layers due to difference in thickness of layers in embankment fill i.e., difference of thickness as specified in contract and actual work done at



site upon instructions of the Site-in-Charge/Engineer-in-Charge.

- iii. Item No. 5.03 drain excavation quantity 9467.865 cubic meter.
- iv. Escalation bill for the period up to extension of time. (RBI indices to be calculated and frozen up to the date of time extension granted by the department).
- v. Escalation bill to be calculated from the date of start of the contract and not after 1 year of start of the contract
- vi. Interest payable for delayed payment
- i) Arbitration was invoked by the Respondent vide letter dated 11.09.2007. Subsequently, a Sole Arbitrator was appointed by the Chief Executive Officer, NOIDA.
- j) The Arbitrator, after considering the pleadings, documents placed on record and oral submissions made by both the parties, passed an Award dated 29.04.2011. Vide this aforementioned Award the Sole Arbitrator partially allowed claim no. 1, 2 & 5 and also awarded interest @ 15% per annum qua the amounts awarded in claim no. 1, 2 & 5 from 01.05.2004 and also awarded interest @ 15% per annum from the date of the Award till the date of payment of the awarded amount.
- k) The Sole Arbitrator was of the opinion that the objection of the Appellant regarding delay in execution of the work by the Respondent is not correct. The Sole Arbitrator held that the delay occurred due to an abnormal situation of ban on mining by the Apex Court during the course of the execution of work and due to



which the prices increased abnormally as the material was to be procured from a huge distance beyond the ban area. The Sole Arbitrator held that the abnormal situation which arose due to a ban on mining by the Apex Court could not have been countenanced at the time of the acceptance of contract. The Respondent had informed the Appellant and requested it to revise the rates which had never been denied nor refuted by the Appellant. On the basis of this, an amount of Rs.67,86,655/- has been awarded towards claim no.1 in favour of the Respondent. As far as claim no.2 is concerned, the Sole Arbitrator held that the Appellant has not disputed the rate analysis. The Arbitrator held that the Appellant herein had admitted the Certificate dated 27.08.2004 where the Respondent has done embankment fill with fly ash of 2,28,836 cubic meters and an amount of Rs.36,61,376/- was awarded in favour of the Claimant. As far as claim no.3 and 4 are concerned, the same were rejected. As far as claim no.5 is concerned, a sum of Rs.6,16,122/- was awarded to the Respondent as compensation due to delay in payment of security deposit. Resultantly, the summary of the Award of claims reads as under:

<i>Claim No.</i>	<i>Amount claimed</i>	<i>Awarded</i>
1.	81,17,355.65	67,86,655.00
2.	43,32,410.00	36,61,376.00
3.	6,20,600.00	NIL
4.	3,62,850.00	NIL
5.	7,39,350.00	6,16,122.00
6.	2,80,800.00	NIL
7.	39,00,000.00	Interest @15% pa. w.e.f. 1.5.2004 on



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		<i>Claims No.1, 2 & 5.</i>
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3. The facts in brief as stated in the appeal - FAO(OS) (COMM) 265/2019 are as follows:

- a) The Appellant herein, vide letter dated 18.05.2002 bearing No. IRCON/1007 asked the Respondent as to whether they are interested to take up works out of Package - VIB between Km 13+250 to Km 4+500, which was already earlier entrusted to M/s Gangotri Enterprises Ltd., and get it executed on their risk and cost on “as is where is basis”, on the same rates, terms and conditions of contract which was earlier entered into between the Appellant and M/s Gangotri Enterprises Ltd. The approximate value of works was set to be Rs. 7 Crores.
- b) The Respondent vide their letter dated 25.05.2002 bearing No. PCL-BCL/IRCON/NGNEWP/134 addressed to the Appellant, agreed to execute the works as offered by the Appellant subject to the following conditions:
 - i. Price escalation from the commencement of the work with the base month as mentioned in the earlier contract since the rates, as quoted by the company which was earlier engaged for the execution of the works, were based on the prevailing market rates at that time.
 - ii. Increased rates for GSB and WMM is to be paid accordingly as the Apex Court had banned all mining operations within 5 km periphery of Delhi NCR and the



Respondent will have to procure material from different sources involving an additional lead of around 80 km and, the Government of Haryana/Lease Holder has also increased the royalty.

- c) Vide letter dated 26.06.2002 bearing No. IRCON/1007/NOIDA/PKG-VIB/689, the Appellant accepted the offer of the Respondent for a total contract value of Rs. 7,46,76,313.73/- at the BoQ rates, with the following conditions as accepted/modified:
- i. Respondent shall be paid price adjustment from commencement of contract of balance works between Km 13+250 to Km 14+500 treating base date as January 2001 and;
 - ii. Respondent shall be paid the price difference, if any, for the extra lead involved in procurement of material due to the Apex Court's restrictions based on the method adopted for similar works in other contracts with regard to the instant project/works.
- d) The scheduled date of completion for the left main carriage way was set to be 30.09.2002 and completion date for total work was 31.12.2002.
- e) Thereafter, the Appellant and the Respondent signed a formal Agreement dated 07.09.2002 with respect to the abovementioned works wherein Clause 4 contained the conditions regarding the



rates and price escalation, to which the above said parties agreed to earlier.

- f) Various extensions were sought by the Respondent to complete the works. The last extension was given upto 31.03.2003. The works were completed in all respect on 02.12.2003 and the final bill was submitted by the Respondent to the Appellant on 12.01.2004
- g) Subsequently, the Respondent received a full and final payment of Rs. 3,99,803/- and issued a No Claim Certificate subject to the settlement of the following claims:
 - i. Rate difference on account of lead due to the Apex Court Ban;
 - ii. Compaction cost of extra layers due to difference in thickness of layers in embankment fill i.e. difference of thickness as specified in contract and the actual work done at site upon instructions of your site-in-charge/ engineer-in-charge;
 - iii. Item No. 5.03 drain excavation quantity 1982.702 cubic meter which had been denied by the Appellant;
 - iv. Escalation bill for the period up to extension of time (RBI indices to be calculated and to be frozen up to the date of time extension granted by the department).

4. The Arbitral Tribunal, after going through the facts and analysing the material on record, partially allowed the claim no.1, 2 and 5 i.e., (claim no.1: Price difference due to extra cost incurred for procurement of material involving extra lead on account of ban imposed by the Apex Court, claim



no.2: Extra compaction cost due to increase in number of layers for compaction of embankment fill and claim no.5: Compensation due to delay in payment of security deposit)

5. The Awards dated 28.05.2010 and 28.04.2011 were challenged by the Appellant by filing O.M.P. (COMM.) 82/2017. and O.M.P. (COMM.) 83/2017 respectively before this Court. The learned Single Judge disposed of these petitions vide a common judgment dated 17.07.2019 as the nature of contracts and the issues involved in the petitions were similar.

6. The learned Single Judge dealt with the challenge to the two awards and decided the same by passing the impugned common judgment dated 17.07.2019. The challenge was made before the learned Single Judge in the manner as if claim no.1, 2 and 5 have been awarded. The learned Single Judge after going through the award rejected the contentions of the Appellant herein (Petitioner therein). The learned Single Judge held that the findings of the Sole Arbitrator in Paragraph No.(III)(c) and (d) of the first award i.e., the award passed in FAO(OS) (COMM) 268/2019, does not warrant any interference. The learned Single Judge was of the opinion that the Arbitrator has correctly repelled the objections raised by Appellant herein after considering the stand of Respondent herein that execution of work beyond the scheduled date of completion was accepted without levy of liquidated damages and without making time the essence of the contract on the ground that the ban imposed by the Apex Court on mining led to an abnormal increase in prices of raw materials which was not envisaged by the parties and, consequently, led to the Respondent herein procuring the raw material from locations which were much beyond the area where the work was executed. The learned Single Judge further held that the Arbitrator



being the master of the evidence placed before him both with regard to the quantity and quality has appreciated the evidence. The learned Single Judge repelled the arguments of the Appellant herein by stating that certain arguments have gone beyond the scope of the Act and an attempt has been made by the Appellant herein to argue on questions not urged before the Sole Arbitrator.

7. It is this common judgment dated 17.07.2019 that is being challenged by the Appellant.

8. The learned Counsel for the Appellant states that in view of Clauses 17.1 and 13.1 of the Joint Venture Agreement dated 22.03.2000, the Arbitration proceedings could never have been initiated by the Respondent. It is stated that in the guise of partnership, the Respondent without being in a partnership, nor being authorized to represent the other party, invoked arbitration and allegedly also represented the other party in the arbitration, therefore, making it a case of improper reference to arbitration.

9. It is further stated that the Award is directly hit by Section 34(2)(v) as here, the invocation of the arbitration is patently illegal which is manifest on the face of the Arbitral Award in as much as it is in favour of a partnership, whereas, as per the Joint Venture Agreement, neither of the parties could have represented each other.

10. *Per contra*, the learned Counsel for the Respondent states that the aforementioned argument is barred by waiver. It is stated that the Appellant has raised this argument for the first time only at this stage. It is further stated that the supra-arguments were neither raised before the Court exercising jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996 or the Sole Arbitrator and therefore, neither the Impugned



Judgment nor the impugned award contains any observation regarding this argument.

11. It is further contended by the learned Counsel for the Respondent that the Respondent had preferred an Enforcement Petition bearing No. O.M.P. (Enf.)(Comm.) 156/2019 against the Appellant wherein they had raised the same objection before the Executing Court. It is stated that the Executing Court vide Order dated 19.01.2021 had dismissed the said objection of the Appellant. It is further stated that against the aforesaid Order, the Appellant preferred an Appeal bearing No. EFA (OS)(COMM) 7/2022 which was later dismissed as withdrawn vide Order dated 15.02.2024.

12. Heard both the parties and perused the material on record.

13. Clauses 13 and 17 of the Joint Venture Agreement reads as under:-

“13. TAXATION

13.1 As the parties have expressly agreed that the agreement shall not in any event constitute an association or partnership agreement and that the association of person (s) is expressly excluded, the parties hereby for purpose of income tax returns and be assessed and be liable to pay tax separately on their respective profits or gains arising to them from execution of the said work.

13.2 With the exception of Income Tax liable as per Indian Laws and Rules (As applicable for the parties), all other taxes, levies etc. resulting from the performance of the contract shall be treated as Joint Venture costs.

xxx

17. GENERAL



17.1 Nothing contained in this agreement, not in the supplementary agreement, if any, is intended to create, nor shall be construed as creating a partnership or association of partnership firm or any other type of firm between the parties. Neither of the parties shall have authority or power (and shall not represent itself as having such authority power) to contract in the name of or to undertake any liability or obligation on behalf of the other party.

17.2 This agreement including its amendments and supplements duly made thereunder shall be binding on the respective legal successors permitted assignees and permitted nominees as the case maybe of the parties hereto.

17.3 Nothing in this agreement or in the contract shall authorize either party to pledge the credit of the other party except in so far as this may have been expressly authorized in writing.

17.4 Neither party shall have the right to assign any of its rights benefits or liabilities under this agreement to any third party without obtaining the prior written consent of the other party.

17.5 The parties hereby irrevocably and unconditionally acknowledge and agree that all previous agreements in relation to those matters to which they are patties shall be superseded by this agreement and accordingly shall be of no further force and effects as of the date hereof including without limitation all rights assuring to each of them therein.”

14. The issue raised by the Appellant herein before this Court under Section 37 of the Act regarding maintainability of the arbitration has been



raised for the very first time. Such an argument can never be countenanced under Section 37 of the Act.

15. It is stated by the Appellant that, in the reply, the Respondent has itself admitted that the Appellant had awarded the work to the Joint Venture (JV) and, therefore, the JV had the right to sue. It is stated that the Respondent has admitted that the JV is a legal entity in the name of partnership between the two entities and thus, it can enter into a contract and sue in its own name. It is stated by the Appellant that this assertion is against the JV Agreement which is evident from Clauses 17.1 and 13.1 of the Joint Venture Agreement. It is stated that the Appellant had not awarded the work to a Joint Venture rather it awarded the work to an entity which did not call itself either a partnership nor did it authorize either of the two sub-entities to represent each other.

16. In the opinion of this Court, the entire argument of the Appellant is unfounded. This issue requires leading of evidence and cannot be raised for the first time under Section 37 of the Act. The work was awarded to the Respondent herein and it is the Respondent which has raised its claim because the Respondent is a separate legal entity acting on its own behalf. In any event, the very same contention was also raised by the Appellant before this Court in a petition being OMP (ENF.) (COMM.) 156/2019 and the learned Single Judge of this Court vide Order dated 19.01.2021 had rejected the said contention. The learned Single Judge in the said decision has analysed the Clauses 17.1 and 13.1 of the Joint Venture Agreement and observed as under:

"13. A plain reading of Clause 13 indicates that the concerned parties had agreed that each of the members



of the consortium would be assessed to income tax separately. The said parties had further agreed that the inter se agreement would not be construed as creating a partnership. However, the same does not mean that the Decree Holder herein (which is a consortium of two entities) is not a party that had executed the contract or is not the party in whose favour the award has been passed.

14. Admittedly, the Joint Venture Agreement dated 22.03.2000 was for the specific purpose for executing IRCON's Project of Noida, Greater Noida Expressway for Packages VI and VII. The said Joint Venture Agreement was available on record of IRCON. IRCON had not only awarded the contract to the Consortium but had also made certain payments for the same.

15. Undisputedly, the said Consortium (Decree Holder herein) is the beneficiary of the arbitral award, which is sought to be enforced in the present case."

17. This Court is in agreement with the aforesaid finding of the learned Single Judge of this Court. Reliance placed by the Appellant on the Judgment passed by the Apex Court in MSEDC vs. Godrej and Boyce Manufacturing Co. Ltd, **2019 SCC Online Bom 3920** is not applicable in the facts of the present case.

18. It is a trite law that individual members of a JV cannot raise disputes on their own. In any case, the said issue is of no consequence, as the JV which is a separate legal entity to whom the work was allotted chose to raise the dispute. No arguments have been raised by the Appellant on the correctness or otherwise of the learned Single Judge on the merits of the case. Despite the fact that there was no ground of challenge, this Court once again has gone through the Award and the Order of the learned Single Judge



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and this Court does not find any reason to interfere with the well considered judgment of the learned Single Judge.

19. Resultantly, the appeals are dismissed, along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

HARISH VAIDYANATHANSHANKAR, J

JULY 07, 2025

S. Zakir/YC