

# Pcl-Brahmaputra Consortium Ltd.(Jv) vs Ircan International Ltd on 19 January, 2021

**Author: Vibhu Bakhru**

**Bench: Vibhu Bakhru**

\$~21

\*

+

IN THE HIGH COURT OF DELHI AT NEW DELHI

OMP (ENF.) (COMM.) 156/2019 and EA No. 38/2020

PCL-BRAHMAPUTRA CONSORTIUM

LTD. (JV)

Through:

..... Decr  
Mr Udit Seth and Mr  
Guruprasad, Advocates.

versus

IRCON INTERNATIONAL LTD

..... Judgement Debtor

Through: Mr Chandan Kumar, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% 19.01.2021

1. Exemption is allowed, subject to all just exceptions.

2. The application is disposed of.

3. The applicant has filed the present application, inter alia, praying that a sum of 4,77,46,950.69/- deposited by the Judgment Debtor (hereafter „IRCON ) with the Registry of this Court be released against an unconditional bank guarantee of the aforesaid amount.

4. The petitioner has filed the above-captioned petition under Section 36 of the Arbitration and Conciliation Act, 1996 (hereafter „the A&C Act ) seeking enforcement of an arbitral award dated 28.05.2010.

5. Admittedly, IRCON s application [O.M.P. (Comm.) 82/2017] under Section 34 of A&C Act to set aside the award was rejected on 17.07.2019 and thus, there can be no dispute that the Decree Holder is entitled to enforce the arbitral award in terms of Section 36 of the A&C Act.

6. The learned counsel appearing for IRCON opposed the present application. He contended that the identity of the Decree Holder is not the same as the identity of the party in whose favour the award is made. He referred to the Joint Venture Agreement dated 22.03.2000 entered into between Brahmaputra Consortium Ltd. (JV) and M/s. Progressive Construction Ltd. and drew the attention

of this Court to Clause 13 and 17.1 of the said Agreement. He submitted that since the parties to the said agreement had specifically agreed that nothing stated in the agreement would constitute an association or a partnership between them, the Decree Holder cannot be construed as an independent entity. He further reasoned since the petitioner cannot be considered as a separate entity therefore, the question that the petitioner enforcing the arbitral award does not arise.

7. Clause 13 and sub-clause 17.1 of the Joint Venture Agreement entered into between M/s Brahmaputra Consortium Ltd. (JV) and M/s. Progressive Construction Ltd. (members of the petitioner consortium) are set out below:-

"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 persons (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.

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 other party."

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.

16. In view of the above, this Court is unable to accept that the arbitral award cannot be enforced by the Decree Holder.

17. This Court also finds no ground to disallow the application for release of the money deposited by IRCON against an unconditional bank guarantee. Although IRCON has filed an appeal under Section 37 of the Act, it is not disputed that there is no order interdicting the Decree Holder from enforcing the arbitral award.

18. In view of the above, the Registry of this Court is directed to release the amount deposited by the Judgment Debtor (IRCON) to the Decree Holder against an unconditional Bank Guarantee for a sum of 5 crores from a Scheduled Bank in favour of the Registrar General of this Court and to his satisfaction. The Bank Guarantee amount is higher than the amount directed to be released to give room for any interest that may be required to be paid by the Decree Holder in case IRCON prevails in its appeal under Section 37 of the A&C Act against an order dated 17.07.2019 dismissing its application for setting aside the Arbitral Award in question.

19. The term of the Bank Guarantee shall be for a period of one year. In the event IRCON's appeal under Section 37 of the A&C Act is rejected, the bank Guarantee shall be released to the Decree Holder notwithstanding that the term of the guarantee has not expired. The term of the Bank Guarantee shall not be extended unless specifically directed by the Division Bench considering IRCON's appeal under Section 37 of the A&C Act.

20. The application is allowed in the aforesaid terms.

VIBHU BAKHRU, J JANUARY 19, 2021 RK