

Rachana Infrastructure Limited vs National Highways Authority Of India & ... on 26 March, 2025

Author: Subramonium Prasad

Bench: Subramonium Prasad

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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 26th MARCH,

IN THE MATTER OF:

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FA0(OS) (COMM) 44/2025, CM APPL. 17762/2025, CM APPL.

17764/2025, CM APPL. 17763/2025

RACHANA INFRASTRUCTURE LIMITED

....

Through: Mr. Malak Bhatt, Ms. Neeha Nag

Ms. Nitya Prabhakar, Advocates

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA & ANR.

.....Respondents

Through: Mr. Santosh Kumar, Standing

Counsel and Ms. Nidhi Rani,

Advocate

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

HON'BLE MR. JUSTICE HARISH VAIDYANATHAN

SHANKAR

JUDGMENT (ORAL)

SUBRAMONIUM PRASAD, J.

1. The challenge in the instant Appeal is to the Judgment and Order dated 30.01.2025 passed by the learned Single Judge in O.M.P. (I) (COMM.) 25/2025 whereby the learned Single Judge has dismissed the petition filed by the Appellant herein under Section 9 of the Arbitration and Conciliation Act, 1996 on the ground of locus.

2. Shorn of unnecessary details, the facts leading to the instant appeal are that the Appellant and Respondent No.2 constituted a Joint Venture, namely, Wagad-Rachna JV and entered into a Joint Bidding Agreement dated 23.11.2021. It is stated that the Joint Venture was to participate and bid for the Engineering, Procurement and Construction Agreement ("EPC Contract") for the Project floated by Respondent No.1 through a Notice Inviting Tender bearing No. NHAI/Guj/Patan-Gojaria/2021. It is stated that the Appellant executed a Power of Attorney in favour of Respondent No.2 on 23.11.2021. It is stated that on 02.09.2022, the EPC Contract was signed between the Respondent Authority and the Joint Venture, outlining the scope of work which included the construction and maintenance of the Project Highway, as per the detailed specifications and schedules. It is stated that the Appellant held 5% share in the Joint Venture and

Respondent No.2 was the lead member. It is also stated that pursuant to the Joint Bidding Agreement being entered into, Respondent No.2 has the control over the financial matter of the Joint Venture and has misused the Power of Attorney executed by the Appellant by opening various bank accounts without the consent of the Appellant.

3. It is the grievance of the Appellant that Respondent No.1 has released all the payments to Respondent No.2, ignoring the objections raised by the Appellant herein. The Appellant, thereafter, approached this Court by filing a petition under Section 9 of the Arbitration and Conciliation Act, 1996 being O.M.P. (I) (COMM) No.25/2025 with the following reliefs:

"a) Pass an order directing the Respondent No. 1 to refrain from making direct payments to Respondent No.2 and deposit all future payments made under the Engineering, Procurement, and Construction Contract dated 02.09.2022 into a fresh Joint Escrow Account, jointly operated by the Petitioner and Respondent No.2, in accordance with the terms of the APPENDIX-

V, Joint Bidding Agreement dated 23.11.2021;

AND/OR

b) Pass an order directing Respondent No. 1 to provide a detailed rendition of all payments made directly to Respondent No. 2 under the Engineering, Procurement, and Construction Contract dated 02.09.2022 to date, along with a clear and comprehensive account of the corresponding work executed by the parties, as per the terms of the APPENDIX-V, Joint Bidding Agreement dated 23.11.2021; AND/OR

c) Pass an order directing Respondent No. 1 and 2 to keep the Petitioner duly informed about all communications related to the work of the Joint Venture, including but not limited to notices, correspondence, and instructions addressed to the JV, and to provide the Petitioner with timely and complete updates regarding any work-related decisions or developments; AND/OR

d) Pass such other order or direction as may be considered appropriate and deem fit in the present facts and circumstances of the case."

4. It is stated that the aforesaid objection raised by the Appellant has been rejected by the learned Single Judge holding that the Appellant being only a minor constituent of the Joint Venture, is not individually entitled to approach this Court by filing the petition under Section 9 of the Arbitration and Conciliation Act, 1996 since it is not an individual signatory to the Arbitration Clause which forms part of the EPC Contract entered into between the Joint Venture and Respondent No.1. It is this order which is under challenge in the instant appeal.

5. It is the contention of the learned Counsel for the Appellant that the Appellant being a party to the Joint Venture is entitled to raise disputes by invoking the Arbitration Clause under the EPC Contract. It is further contended that the learned Single Judge has failed to appreciate that the

reliefs sought by the Appellant are primarily against Respondent No.1 and the Appellant being bound by the EPC Contract and the Joint Bidding Agreement in its individual capacity, continues to be a party to the Arbitration Agreement which can seek relief under Section 9 of the Arbitration and Conciliation Act, 1996. It is the case of the Appellant that in view of the Arbitration Agreement between the parties, the only effective remedy available to the Appellant is to seek urgent protection under Section 9 of the Arbitration and Conciliation Act, 1996 before commencement of the arbitral proceedings. It is also stated that the conduct of Respondent No.1 in unilaterally disbursing payments solely to Respondent No.2 despite the explicit objections of the Appellant is in the teeth of its contractual obligations.

6. Heard the learned Counsel for the Appellant and perused the material on record.

7. Before this Court proceeds further, it is necessary to extract the Clauses of the EPC Agreement. Clause 1.1(ii) of the EPC Agreement defines the "Lead Member" which reads as under:-

"Lead Member" shall, in the case of a joint venture, mean the member of such joint venture who shall have the authority to bind the contractor and each member of the Joint venture; and shall be deemed to be the Contractor for the purposes of this Agreement; the Lead Member shall itself undertake and perform at least 51% (fifty one per cent) of the total length of the Project Highway;"

8. Clause 1.5(ii) of the EPC Agreement reads as under:-

"(ii) Without prejudice to the joint and several liability of all the members of the Joint Venture, the Lead Member shall represent all the members of the Joint Venture and shall always be liable and responsible for discharging the functions and obligations of the Contractor. The Contractor shall ensure that each member of the Joint Venture shall be bound by any decision, communication, notice, action or inaction of the Lead Member on any matter related to this Agreement and the Authority shall be entitled to rely upon any such action, decision or communication of the Lead Member. The Authority shall have the right to release payments solely to the Lead Member and shall not in any manner be responsible or be held liable for the inter se allocation of payments among members of the Joint venture."

9. Clause 4.1(xi) of the EPC Agreement reads as under:-

"(ix) The Contractor shall obtain and maintain a project related bank account operational at site where all transactions related to the payment of work will be done. The Contractor shall submit a monthly account statement and a detailed report on utilization of funds transferred to this project related bank account to Authority's Engineer. Notwithstanding anything contrary to this agreement, the authority, in the interest and to ensure timely completion of the work, reserves the right to audit such bank accounts to ensure that there is no diversion of funds from this project specific account to any other project being implemented by the Contractor."

10. Clause 1.5(ii) of the EPC Agreement on which reliance has been placed by the learned Single Judge, specifies that Respondent No.1 has the discretion to release payments solely to the Lead Member i.e., Respondent No.2 and shall not in any manner be responsible or be held liable for the inter se allocation of payments among members of the Joint Venture.

11. It has been held time and again that Joint Venture is a separate legal entity and action by one of the parties to the Joint Venture cannot be construed as an action of the Joint Venture.

12. The Apex Court in *New Horizons Limited and Another v. Union of India and Others*, 1995 1 SCC 478 has observed as under:-

"24. The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (Black's Law Dictionary, 6th Edn., p. 839) According to Words and Phrases, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p. 117, Vol. 23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields. (Black's Law Dictionary, 6th Edn., p. 342) Joint venture companies are now being increasingly formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia, viz., Japan, South Korea, Taiwan, China, etc. [See Jacques Buhart : Joint Ventures in East Asia -- Legal Issues (1991).] There has been similar growth of joint ventures in our country wherein foreign companies join with Indian counterparts and contribute towards capital and technical know-how for the success of the venture. The High Court has taken note of this connotation of the expression "joint venture". But the High Court has held that NHL is not a joint venture and that there is only a certain amount of equity participation by a foreign company in it. We are unable to agree with the said view of the High Court."

(emphasis supplied)

13. The Apex Court has therefore held that the Joint Venture is a legal entity in the nature of a partnership, engaged in the joint undertaking of a particular transaction for mutual profit or an association as a whole.

14. The Apex Court in *Gammon India Limited v. Commissioner of Customs, Mumbai*, 2011 12 SCC 499 after placing reliance on *New Horizons Limited* and *Another* (supra) has observed as under:-

"28. In short, *New Horizons* [(1995) 1 SCC 478] recognises a joint venture to be a legal entity in the nature of a partnership of the constituent companies. Thus, the necessary corollary flowing from the decision in *New Horizons* [(1995) 1 SCC 478] , wherein the partnership concept in relation to a joint venture has been accepted, would be that M/s Gammon-Atlanta JV, the joint venture could be treated as a "legal entity", with the character of a partnership in which Gammon was one of the constituents. In that view of the matter, the next question for consideration is: whether being a legal entity i.e. a juridical person, the joint venture is also a "person" for the purpose of Condition 38 of the exemption notification, stipulating that the goods should be imported by "a person" who had been awarded a contract for construction of goods in India by NHAI?"

15. Applying the aforementioned judgments to the facts of the instant case, the Appellant is only a 5% stakeholder in the Joint Venture between the Appellant and Respondent No.2. Clause 26.3 of the EPC Agreement contains an Arbitration Clause. The Arbitration Clause only binds the Authority i.e. Respondent No.1 and the Contractor which is the Joint Venture. The Arbitration Clause does not postulate that any of the constituents of the Joint Venture is also individually entitled to invoke the Arbitration Clause. The Arbitration Agreement, which is a separate Agreement in itself, can therefore be invoked only by the party to the Arbitration Agreement namely, the Joint Venture or the Respondent No.1. The view taken by the learned Single Judge that the Appellant, not being a party to the EPC Agreement, would not be entitled to take aid of Section 9 of the Arbitration and Conciliation Act, 1996 and get interim reliefs thereunder against the Authority i.e., Respondent No.1 or the partner of the Joint Venture, does not warrant any interference. The Appellant has not even chosen to make the Joint Venture a party to the present appeal.

16. Needless to state, the scope of interference of the Appellate Court under Section 37 of the Arbitration & Conciliation Act is narrow. In view of the same, this Court is not inclined to substitute its own findings in place of those of the learned Single Judge, which, in the opinion of this Court are well reasoned. Resultantly, the view taken by the learned Single Judge does not warrant any interference.

17. It is made clear that the observations made in this judgment are only confined to the questions raised in this appeal as to whether the Appellant, not being a signatory to the contract, is entitled to maintain a petition under Section 9 of the Arbitration & Conciliation Act.

18. With these observations, the instant appeal is dismissed. Pending applications, if any, stand disposed of.

SUBRAMONIUM PRASAD, J.

HARISH VAIDYANATHAN SHANKAR, J.

MARCH 26, 2025 RJ