

(2022) 10 DEL CK 0009

In the Delhi High Court

Case No : Original Miscellaneous Petition (I) (COMM.) No. 244 Of 2022, I.A. No. 12741 Of 2022

Consulting Engineers Group Limited

APPELLANT

Vs

National Highways Authority Of India (NHAI)

RESPONDENT

Date of Decision : 06-10-2022

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 2(1)(h), 9

Citation : (2022) 10 DEL CK 0009

Hon'ble Judges : Mini Pushkarna, J

Bench : Single Bench

Advocate : Arvind Nayar, Nandadevi Deka, Sudhir Yadav, Savyasachi Rawat, Akshay Joshi, Gunjan Sinha Jain

Final Decision : Dismissed

Judgement

Mini Pushkarna, J

1. By way of the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter called "The Act"), petitioner is seeking prayer for staying operation of debarment order dated 02.08.2022 issued by the respondent by which petitioner has been debarred from participating in all the tenders floated by respondent and other executing agencies of Ministry of Road Transport and Highways of India, for a period of three months with levy of penalty of Rs. 20 lakhs. The petitioner further prays for restraining respondent from giving effect to or acting in terms of or in furtherance of the said debarment order, and for restraining respondent from rejecting the bills submitted by petitioner prior to the order dated 02.08.2022 as non responsive.

2. Facts in brief are that, notice inviting tender dated 15.03.2018 was issued by respondent for the project: consultancy services for Authority's Engineer (hereinafter referred to as 'AE') for supervision of construction of 8 Lane Dwarka Expressway from Delhi-Haryana Border to start of rail over bridge, Gurugram,

Haryana. As per the tender document, bidders could apply either as a sole firm or by forming joint venture with other consultants.

3. In order to participate in the aforesaid tender process and to provide consultancy services, M/s Aecom Asia Company Ltd (hereinafter referred as "M/s Aecom") and M/s Consulting Engineering Group Ltd. (hereinafter referred as 'petitioner') agreed to form a consortium wherein M/s Aecom was the lead partner and petitioner was the associate partner. Memorandum of Understanding (MOU) dated 14.05.2018 was entered between petitioner and M/s Aecom for this purpose. Petitioner entered into the bidding process as joint venture with M/s Aecom pursuant to the aforesaid MOU. Technical and financial bids were submitted by M/s Aecom for participation in the tender process.

4. Subsequently, Letter of Award ("LOA") dated 22.10.2018 was issued to the consortium of petitioner and M/s Aecom. LOA was specifically addressed to M/s Aecom being the lead partner and authorized representative of the consultants.

5. Consultancy Agreement dated 05.12.2018 was entered between the consortium of petitioner and M/s Aecom as joint venture on the one hand and respondent on the other hand. Clause 8 of the said Consultancy Agreement under the General Conditions of Contract provides for amicable settlement of disputes between the parties, as follows:

" 8. Settlement of Disputes

8.1 Amicable Settlement

The Parties shall use their best efforts to settle amicably all disputes arising out of or in connection with this Contract or the interpretation thereof.

8.2 Dispute Settlement

Any dispute between the Parties as to matters arising pursuant to this Contract which cannot be settled amicably within thirty (30) days after receipt by one Party of the other Party's request for such amicable settlement may be submitted by either Party for settlement in accordance with the provisions specified in the SC."

6. The contract for construction of 8 lane Dwarka Expressway was awarded to Larsen and Toubro Ltd. (hereinafter referred as EPC Contractor). The consortium of petitioner and M/s Aecom was engaged as consultant to act on behalf of respondent herein as Authority's Engineer for supervision of the said construction work.

7. It is the case of the petitioner that as per the design of contractual work, 219 numbers of spans of approximately 40 meters each, were to be erected by the EPC contractor, of which 55% physical progress of contractual work was achieved without any glitch by the EPC contractor and petitioner. However, while erecting P 107-108, some cracks in the bottom of RS3 – RS4 segments and hogging of spans were observed by the EPC contractor on the night of 24.03.2021. The

same was intimated telephonically to the petitioner on the morning of 25.03.2021 by the EPC contractors. Thus, it is submitted on behalf of the petitioner that considering the exigency of the situation, the petitioner instructed the EPC contractor to secure the site between P107-109 by following the safety norms and to close the sides with hard barricades.

8. It is the case of the petitioner that without seeking its permission, the EPC contractor began de-stressing of the span to release the tension at the earliest and avoid further damage to the segments. Petitioner had instructed the EPC contractor to submit methodology for de-stressing and lowering of segments of the spans for its approval, however, before the methodology could be submitted, an accident occurred on 28.03.2021.

9. It is submitted by Id. Senior Counsel for petitioner that in the morning of 28.03.2021 at around 7:30 A.M., after night shift of workers was over at 7:00 A.M., an accident occurred on the site wherein span P108-109 collapsed bringing down the contiguous span P107-108 along with it. Pursuant to the occurrence of accident, respondent constituted an Expert Committee to carry out detailed technical analysis and further analyze the reasons of failure leading to accident.

10. The Expert Committee constituted by respondent and the Ministry of Road Transport and Highways of India (MoRTH), submitted its report in September, 2021. The Expert Committee inter alia concluded that there was laxity in monitoring of quality control measures by the contractor and the Authority's Engineer; lack in coordination and formal communication amongst the contractor, Authority's Engineer and designer and proof check consultants relating to deviations in construction related activities, etc.

11. Subsequently, respondent sent a show cause notice dated 16.09.2021 to petitioner and the EPC contractor citing the findings and observations of the Expert Committee. Petitioner submitted its representation against the said show cause notice on 06.10.2021. Petitioner was called for personal hearing on 01.12.2021 by respondent vide letter dated 26.11.2021.

12. Respondent issued an order against the EPC Contractor levying penalty to the tune of Rs. 6.67 crores along with self imposed disciplinary measure from participating in bids of NHAI/MoRTH for three months. Afterwards, petitioner received order of debarment dated 02.08.2022, which has been impugned by way of the present petition.

13. It is contended on behalf of petitioner that petitioner was responsible for reviewing only 20% of the contractual work by conducting test and inspections. Whereas, the EPC contractor was responsible for the entire 100% of the contractual work. It is submitted that debarment order is manifestly illegal and arbitrary for the fact that petitioner has been made a scapegoat in the entire incident, despite the fact that the entire responsibility of maintaining the quality of construction was upon the contractor. The accident occurred entirely due to laxity of workmanship by the contractor. It is, thus, prayed that petitioner is

entitled to reliefs as prayed in the present petition.

14. In support of his submissions, Id. Senior Counsel for petitioner has relied upon the following judgments:

- * Denis Chem Lab Limited v. State of MP & Ors., ILR [2020] MP 196.
- * Kulja Industries Limited v. Chief General Manager, (2014) 14 SCC 731.
- * Royal Infra Engineering Private Limited v. Surat Municipal Corporation & Ors., 2022 GLH (1) 483.
- * Sarku Engineering Services v. Union of India, 2016 SCC OnLine Bom 523.
- * Coastal Marine Construction and Engineering Limited v. Indian Oil Corporation Limited, 2019 SCC OnLine Del 6542.
- * Sai Consulting Engineers Private Limited v. National Highways Authority of India, in OMP (I) (COMM.) 330/2020.

15. On the other hand, Id. Counsel appearing for respondent submits that the present petition is not maintainable and is liable to be dismissed, as there is no valid and existing arbitration clause between the petitioner in its individual capacity and respondent. The consultancy agreement dated 05.12.2018 was executed between respondent and Joint Venture of M/s Aecom in association with petitioner. In the consultancy agreement, the Joint Venture/Consortium is referred to as "the consultants". Admittedly, the present petition has not been filed by M/s Aecom and/or with the specific authorization/consent of M/s Aecom. Thus, it is contended that the terms of the MoU do not confer any express or implied authority on petitioner to pursue the contractual matters, which include invocation of dispute resolution clause for raising any dispute in individual capacity, without participation/approval/authorization/consent from the lead member/partner, i.e., M/s Aecom.

16. In support of its submissions, respondent has relied upon the following judgments:

- * Geo Miller & Co. Pvt. Ltd. Vs. Bihar Urban Infrastructure Development Corporation Limited and Anr., 2016 SCC OnLine Del 6248
- * Maharashtra State Electricity Distribution Company Limited (MSEDCL) Vs. Godrej and Boyce Manufacturing Company Limited, 2019 SCC Online Bom 3920

17. On merits, it is contended on behalf of respondent that the petitioner along with its consortium partner was engaged as Authority's Engineer, whose role was extremely vital as the Authority's Engineer is to act as eyes and ears of the respondent. Petitioner along with its consortium partner had to thoroughly scrutinize every activity undertaken during the construction at project site to avoid any lapses on the part of the contractor, particularly safety aspects. Thus, AE was required to supervise and monitor execution of the EPC contract agreement with the contractor. Respondent also relied upon report of the Expert

Committee to bring out the gross dereliction of duties/responsibilities by the AE, which contributed to the accident.

18. I have considered the submissions made on behalf of both the parties and have perused the documents.

19. In terms of the NIT/Request for proposal (RFP) issued by respondent, bidders had the option to apply either as a sole firm or by forming joint venture. Relevant clause of the RFP is as follows:

"9. Consultants may apply either as a sole firm or forming joint Venture with other consultants. In case of Joint Venture, the maximum number of Joint Venture partners is limited to 2 (i.e. one lead + 1 JV partners). Formulation of more than one JV/association with different partners for the same work is not allowed and all such proposal involving the firms shall be treated as non-responsive. If the consultant submits bids as sole applicant and also in JV/ Association with another consultant, both bids shall be summarily rejected. No consultant shall submit more than one bid.

10. (A) The Applicant whether a sole applicant or lead member with joint venture may include any number of Associate to provide technology in assignment (refer para 10 (iii) of data sheet). The associate firm can provide equipment based road inspection services for any of the 4 equipment viz., (i) Network Survey Vehicle including all modules required as per technical specifications, (ii) Falling Weight Deflectometer, (iii) Mobile Bridge Inspection Unit and (iv) Retro Reflectometer. However, the associate(s) cannot be common for 2 or more bidders. If any associate is common with 2 or more bidders, all those bids shall be declared non-responsive. Hence, the bidder may ensure on his own that the associate proposed by him is not proposed by any other bidder participating in the same assignment and the bidder is solely responsible in this regard.

(B) In addition, the applicant whether a sole applicant or lead member with joint venture may also include an Associate for providing key personnel. In such case, the applicant should submit an MOU with associate regarding role and responsibility of Associate Company. However the maximum no. of key personnel from Associate firm during RFP proposal and implementation of contract should be limited to two (2).

11. Consulting firms meeting the following criteria are only eligible for applying for this assignment. Firms not meeting these criteria, need not apply.

The construction period to be indicated in the RFP by concerned Technical Division inviting the RFP.

A). Eligibility criteria for sole applicant firm.

S. No.

Experience of the firm in last 7 years

Annual Turnover***

Preparation of DPR (NH/SH/Equivalent)

Project Supervision/IC (NH/SH/Equivalent)

The firm should have minimum experience of preparation of detailed Project Report/ Feasibility Study cum Preliminary Design Report which has 4** lane or more Bridge/Underpass/ Flyover of aggregate length equal to 20 Km or more.

The firm should have minimum experience of Project Supervision/Independent Engineer/Authority's Engineer of project which has 4** lane or more Bridge/Underpass/ Flyover of aggregate length equal to 30 Km or more.

Annual turnover (updated average of last 3 years) of the firm from consultancy business should be equal to or more than 2% of Estimated Project Cost.

1(b)

Firm should also have experience of Project Supervision/Independent Engineer/Authority's Engineer of at least one project of similar category of 4** or more lane bridge / Underpass/ Flyover project of length equal to 4 Km or more. For this purpose the metro projects (Viaducts) shall be considered.

** Similar project means 4 lane or more as applicable for the project for which RFP is invited. Experience of 4/6 lane shall be considered interchangeably for 4/6 laning projects.

B) Eligibility Criteria for partners in case of JV (not more than 1 JV partners shall be allowed) shall be as under:

The lead partner must fulfill at least 50% of requirements at 1(a) of table in para (A) above and other JV partner should fulfill at least 30% of eligibility criteria as indicated at 1(a) of table in para (A) above. Also the lead partner and JV partner jointly should meet the eligibility criteria as mentioned at 1 (a) of table in para (A) above. Lead partner should meet the criteria 1(b) of table in para (A) above.

Note: The weightage given for experience of a firm would depend on the role of the firm in the respective assignments. The firm's experience would get full credit if it was the sole firm in the respective assignment. If the applicant firm has completed projects as JV with some other firms, weightage shall be given as per the JV share***. However if the applicant firm has executed the project as associate with some other firms, 25% weightage shall be given to the applicant firm for the projects completed under such association.

*** For weightage of experience in any past Consultancy assignment, experience certificate from the client shall be submitted. In absence of clear demarcation of JV share in client certificate, the weightage will be treated as 60% for lead partner and 40% for minor partner. Annual turnover duly certified by Chartered Accountant shall be accepted. In case of non-availability of such documents no weightage of turnover/experience will be considered."

20. For participating in the present tender process in order to provide consultancy services to respondent, petitioner entered into MoU dated 14.05.2018 with M/s Aecom. As per the said MoU, petitioner formed a consortium with M/s Aecom in order to provide services to the respondent as Authority's Engineer. As per the MoU, M/s Aecom is the lead partner while the petitioner herein is the associate partner. The relevant terms of the MoU are reproduced as under:

"(i) M/s AECOM Asia Company Limited will be the lead partner and M/s Consulting Engineers Group Ltd. (Associate Partner) will be the Associate Partner.

(ii) M/s AECOM Asia Company Limited (Lead Partner) shall be the Incharge of overall administration of contract and shall be authorized representative of all the Consortium partners for conducting all business for and on behalf of the Consortium during the bidding process and subsequently, represent the Consortium for and on behalf of the Consortium for all contractual matters for dealing with the Employer/ EPC Contractor if Consultancy work is awarded to Consortium.

(iii) The Consortium Partner do hereby undertake to be jointly and severely responsible for all the obligation and liabilities relating to the consultancy work and in accordance with the Terms of Reference of the Request for Proposal for the Consultancy Services.

(iv) Subsequently, if the Consortium is selected to provide the desired consultancy services, a detailed MOU indicating the specific project inputs and role of each partner/s along with percentage sharing of cost of services shall be submitted to the Employer (Consultant may submit the detailed MOU along with percentage sharing of cost at the time of bidding also)"

21. Thus, the petitioner participated in the tender process as joint venture, after entering into MoU with M/s Aecom, by which a consortium was formed between petitioner and M/s Aecom.

22. Subsequently a consultancy agreement dated 05.12.2018 was executed between the respondent and the joint venture of M/s Aecom and petitioner. In the consultancy agreement, the joint venture/consortium is referred to as the consultants. Consultant is defined in Clause 1.1(h) - General Conditions of Contract (GCC) to mean the Authority Engineer, which in the present case is not the petitioner in individual capacity, but the consortium of petitioner and M/s Aecom, who participated in the tender process as Joint Venture.

23. Perusal of the GCC shows that petitioner was not a member-in-charge/ lead member or authorized representative of the consortium in terms of clauses 1.6, 1.8 & 1.9 of the GCC, read with Clauses of Special Conditions of Contract (SCC).

24. Relevant clauses of GCC are reproduced as below:-

"1.6 Notices

1.6.1 Any notice, request or consent required or permitted to be given or made pursuant to this Contract shall be in writing. Any such notice, request or consent shall be deemed to have been given or made when delivered in person to an authorized representative of the Party to whom the communication is addressed, or when sent by registered mail, telegram or facsimile to such Party at the address specified in the SC.

1.6.2 Notice will be deemed to be effective as specified in the SC.

1.6.3 A Party may change its address for notice hereunder by giving the other Party notice of such change pursuant to the provisions listed in the SC with respect to Clause GC 1.6.2.

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1.8 Authority of Member in Charge

In case the Consultants consist of a joint venture of more than one entity, the Members hereby authorize the entity specified in the SC to act on their behalf in exercising all the Consultants' rights and obligations towards the Client under this Contract, including without limitation the receiving of instructions and payments from the Client.

1.9 Authorized Representatives

Any action required or permitted to be taken, and any document required or permitted to be executed, under this Contract by the Client or the Consultants may be taken or executed by the officials specified in the SC."

25. Perusal of the clauses of Special Conditions of Contract ("SCC") clearly reflect that the member-in-charge was M/s Aecom Asia Company Limited. The address of Joint Venture is shown as situated in DLF Cyber City, which is that of M/s Aecom. Similarly, Authorized Representative of consultants is shown as Mr. Manmohan Singh Rawat, who is again Vice-President with M/s Aecom.

26. Relevant clauses of SCC are reproduced as below:-

"1.6.1 The addresses are:

Shri Dinesh Yadav

General Manager (Tech)- Delhi Division

National Highways Authority of India

G5&6 Sector 10 Dwarka

New Delhi-110075

(Tel: 011-25074100/4200 Ext: 1232)

(Email: dineshyadav@nhai.org)

Shri Manmohan Singh Rawat
Vice President-Transportation
19th Floor Tower C Building 5 Cyber Terraces
DLF Cyber City, phase-II, Gurgaon-122002, Haryana India
(Tel: +911244871400 Ext:645)
(Email: infoaecom@gmail.com)

.....

1.8 The Member in Charge is: M/s AECOM Asia Company Ltd.

1.9 The Authorised

Representatives are:

Client: Shri Dinesh Yadav

General Manager (Tech)-Delhi Division.

National Highways Authority of India

G-5&G-6, Sector-10, Dwarka

New Delhi 110075

(Tel:-011-25074100/4200 Ext 1232)

(E-mail-dineshyadav@nhai.org)

Consultants: Shri Manmohan Singh Rawat

Vice President-Transportation

19th Floor Tower C Building 5 Cyber Terraces

DLF Cyber City, phase-II, Gurgaon-122002, Haryana India

(Tel: +911244871400 Ext:645

(Email: infoaecom@gmail.com)“

27. The consultancy agreement was signed by the lead partner, i.e., M/s Aecom and not by petitioner. Show cause notice dated 16.09.2021 was issued by respondent to the consortium through authorized representatives of M/s Aecom. Reply dated 06.10.2021 to the show cause notice was issued by the lead member, i.e., M/s Aecom. Further, representation dated 04.08.2022 after passing of the impugned order was submitted by the lead member, M/s Aecom.

28. Similarly after perusal of the terms of the MoU between petitioner and M/s Aecom, it transpires that the terms of MoU do not confer any express and/or implied authority on the petitioner to pursue the contractual matters, which

include invocation of dispute resolution clause, in individual capacity without the participation or approval or authorization or consent from the lead member, M/s Aecom.

29. It is pertinent to note here that pursuant to the MoU, technical and financial bid in the present tender process was submitted by M/s Aecom, and not the petitioner herein. The Letter of Award dated 22.10.2018 was issued to the consortium and specifically addressed to M/s Aecom being the lead partner and authorized representative of the consultant.

30. Reference to the terms of the Consultancy Agreement, NIT/Request for Proposal and MoU, discloses that petitioner is not party to the Consultancy Agreement in its individual capacity. Clause 8 of the GCC relating to settlement of disputes refers to parties, which includes the consultants i.e. Consortium of petitioner and M/s Aecom and the respondent, and not the petitioner alone. Clause 8.2 of the GCC further provides that any disputes between the parties which cannot be amicably settled, would be referred to a settlement in accordance with the terms of the special conditions of contract, which envisages resolution by process of arbitration by sole arbitrator

31. Thus, in view of the aforesaid it is seen that only the consultants, i.e., M/s Aecom in association with the petitioner can invoke the disputes resolution clause. It is the consultants and not the petitioner in his individual capacity who are referred to as "parties" in the arbitration agreement as contained in the Consultancy Agreement. Petitioner not being a party to the arbitration agreement in its individual capacity, cannot take recourse to the arbitration clause in its individual capacity, or approach this Court in individual capacity.

32. This court in the case of Geo Miller and Company Limited (Supra) 2016 SCC OnLine Del 6248 has held as follows:

"25. Clearly, therefore, the arbitration clause refers to and envisages dispute only "between parties." Under Section 2(1)(h) of the Act, party is defined as "party to an arbitration agreement." The parties to the arbitration agreement in the present case are clearly the consortium and BUIDCO.

26. It was then contended that the agreement has been signed not only by Gammon India but also by Geo Miller and therefore Geo Miller could its own capacity seek to invoke the arbitration clause. The Court is unable to agree with the above submission. The wording of the agreement is clear that the consortium would be represented through M/s. Gammon India Limited, lead member of the consortium through its authorised signatory. The parties never intended that one of the members of the consortium separately invoked the arbitration agreement. Unlike the decision Automation Technologies (I) Pvt. Ltd. (supra) where there was no contrary intention expressed in the agreement in the present case the agreement in question clearly envisages the consortium acting through the lead member Gammon India.

27. It was then contended that Geo Miller is aggrieved by the SCN issued to it and the subsequent order black listing it and that since this arose out of the contract in question Geo Miller has a remedy of seeking arbitration for adjudication of the said disputes.

28. The Court is unable to agree with the above submission either. While it is true that SCN issued by BUIDCO, which led to its black listing, the remedy of Geo Miller for such action is not under the TPA between BUIDCO, Consortium and PNN, but other remedies that may be available to it in accordance with law."

33. In the aforesaid case, this Court has categorically held that when the agreement is with a consortium, it is never the intention that one of the members of the consortium separately invokes the arbitration agreement. In the present case also the consultancy agreement of the respondent is with the consortium between the petitioner and M/s Aecom. There is no contrary intention which has been expressed in the agreement that only one of the members of the consortium could separately invoke the arbitration agreement.

34. This Court in the case of Municipal Corporation of Delhi Vs M/s Asian-Techs-Progressive Constructions Joint Venture and Ors., 2017 SCC OnLine Del 6455, held as follows:-

"15. In this regard reference may be made to the decision in Gammon India Limited v. Commissioner of Customs, Mumbai (2011) 12 SCC 499 whereby the Supreme Court held that a joint venture itself was a legal entity and, therefore, action by only one of the parties to the JV could not be construed as action on part of the JV. Reference in the said decision was also made to the earlier decision of the Supreme Court in New Horizons Limited v. Union of India (1995) 1 SCC 478."

35. Hon'ble Supreme Court in the case of Gammon India Ltd. Vs Commissioner of Customs, Mumbai, (2011) 12 SCC 499 recognized that Joint Venture is a legal entity. Thus, action by only one of the constituents of the joint Venture was not held acceptable and legally tenable. Hon'ble Supreme Court held as follows:-

"25. In New Horizons [(1995) 1 SCC 478] , a joint venture company, consisting of a few Indian companies (with 60% share capital) and a Singapore-based company (with 40% share capital), had participated in tender proceedings floated by the Department of Telecommunications for printing and binding of the telephone directories of Delhi and Bombay. The tender submitted by New Horizons Ltd. (for short "NHL") was not accepted by the Tender Evaluation Committee, apparently, on the basis of the fact that the successful party had more technical experience than any one of the constituent companies of NHL. Aggrieved by the said decision, NHL filed a writ petition in the Delhi High Court against the decision of the Department of Telecommunications. The said writ petition was dismissed rejecting the plea of NHL that the technical experience of the constituents of the joint venture was liable to be treated as that of the joint venture. NHL brought the matter to this Court.

26. Explaining the concept of joint venture in detail, it was held in New Horizons case [(1995) 1 SCC 478] that a 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 of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It was observed that a joint venture could take the form of a corporation wherein two or more persons or companies might join together. Accordingly, the appeal of NHL was allowed and it was held that it was a joint venture company in the nature of a partnership between the Indian group of companies and Singapore-based company which had jointly undertaken the commercial venture by contributing assets and sharing risks.

27. Applying the principle of "lifting the corporate veil", it was held in New Horizons case [(1995) 1 SCC 478] that the joint venture companies' technical experience could only be the experience of the partnering companies and the technical experience of all constituents of NHL was liable to be cumulatively reckoned in the tender proceedings and any one of the constituents was competent to act on behalf of the joint venture company. Highlighting the concept of joint venture, the Court observed thus: (New Horizons case [(1995) 1 SCC 478] , SCC pp. 493-94, para 24)

"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.)"

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?

29. In support of his submission that the joint venture is a "person" as contemplated in the exemption notification, the learned counsel for Gammon had relied on the definition of the word "person" as given in Para 3.37 of the Export and Import Policy for the year 1997-2002. It reads thus:

"3.37. 'Person' includes an individual, firm, society, company, corporation or any other legal person."

30. The argument was that since a joint venture has been declared to be a legal entity in *New Horizons* [(1995)1 SCC 478], it squarely falls within the ambit of the said definition of the word "person". We are of the opinion that even if the stated stand on behalf of the appellant is accepted, mercifully, on stark facts at hand, it does not carry their case any further. Neither was it the case of the appellant either before the adjudicating authority or before the appellate authority or before us, nor is it suggested by the documents viz. the supply order or the bill of entry, that the import of the machine was by or on behalf of the joint venture. On the contrary, the Tribunal has recorded in its order that when questioned, the learned counsel for the appellant clarified that the correspondence with the supplier of goods and placement of order had been done by Gammon and not by the joint venture or on their behalf. He also admitted that payment for the machine had not been made from the joint venture account, which had been provided for the contract but from the funds of Gammon.

31. Thus, the inevitable conclusion is that import of "concrete batching plant 56 cum/hr" by Gammon cannot be considered as an import by M/s Gammon-Atlanta JV, "a person" who had been awarded contract for construction of the roads in India and therefore, neither Gammon-Atlanta JV nor Gammon fulfil the requisite requirement stipulated in Condition 38 of Exemption Notification No. 17/2001/Cus dated 1-3-2001."

36. Similarly, Bombay High Court in the case of Maharashtra State Electricity Distribution Company Limited (*Supra*) 2019 SCC Online Bom 3920 held as follows:

"63. It is thus clear that the bids invited by the petitioner could be either by individuals or by joint venture. There was a separate criteria prescribed under the bid document for individuals and the joint venture. A separate joint venture was required to be entered into between the partners of the joint venture which was to be accompanied to the agreement to be entered into between the petitioner and the joint venture in the prescribed format. The contractor defined under the contract in reference to the joint venture reference was whose tender has been accepted by the employer. It is also clear that if the contract was joint venture of two persons, all such persons shall be jointly and severally liable to

the petitioner for fulfillment of the terms of the contract.

64. The petitioner and the said joint venture of the respondent with the Electropath Services (India) Private Limited had entered into the contract agreement on 8th June, 2009. A perusal of the said Form of Contract Agreement clearly indicates that the respondent as well as Electropath Services (India) Private Limited jointly were described as the contractor in the said agreement entered into between the petitioner and the joint venture. No separate agreements between the petitioner on one hand with the respondent herein and the petitioner on the other hand with the said Electropath Services (India) Private Limited were entered into. Clause 9.1 of the said contract provided the terms of the payment required to be made on the basis of the progress of the work specifically set out in the said provision. Clause 9.2 provided that the rates payable by the contractor shall be calculated on the basis of post data given in bid document and quoted percentage 13.47 for estimated tender cost.

65. Clause 14 of the said contract provided for any dispute or claim arising of the said agreement shall be dealt with as per clause 20 of Volume - of the bidding document. Clause 17 of the said contract provided that all the disputes and differences between the parties under or in connection with the said contract or any breach thereof shall be sought to be referred to the Chief Engineer (Infrastructure Plan). If any such differences and disputes as between the parties cannot be settled through the Chief Engineer (Infrastructure Plan) within 180 days from such disputes, they shall be settled by arbitration which shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act, 1996 and any statutory modification thereof from time to time. It is thus clear beyond reasonable doubt that the parties who could refer the dispute under such contract were the petitioner herein as the employer of one part and the respondent herein and Electropath Services (India) Private Limited jointly as the contractor of the other part. Letter of award issued by the petitioner indicates that the same was addressed to the respondent (lead partner) of JV with Electropath Services (India) Private Limited as joint partner.

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68. It is thus clear that in the said joint venture agreement also a member and the member in-charge i.e. the said Electropath Services (India) Private Limited and the member in-charge i.e. the respondent herein were fully responsible for the quality of all the equipments/components/manufactured/supplied and erected etc. to the petitioner. The said joint venture agreement does not provide that the respondent alone was entitled to invoke arbitration agreement on behalf of the joint venture or to make any other claim on behalf of the joint venture upon the petitioner in any Court of law."

37. Considering the aforesaid law laid down in a catena of judgments, it is clear that the present petition filed on behalf of petitioner is not maintainable and the same is liable to be dismissed. The Consultancy Agreement dated 05.12.2018

was executed between respondent and joint venture of M/s Aecom and petitioner herein. Thus, in the present case the joint venture consisting of M/s Aecom and petitioner herein alone has the authority to invoke the dispute resolution clause. Petitioner in his individual capacity cannot solely and independently approach this Court by taking recourse to the Dispute Settlement Clause.

38. In view thereof, the present petition is dismissed.