

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

% **Order reserved on: 24 February 2023**
Order pronounced on: 07 March 2023

+ OMP (ENF.) (COMM.) 188/2021, CCP(O) 46/2022,
EX.APPL.(OS) 1316/2021, EX.APPL.(OS) 1318/2021 (Stay),
EX.APPL.(OS) 1319/2021 (Necessary Direction),
EX.APPL.(OS) 2822/2022, EX.APPL.(OS) 3243/2022,
EX.APPL.(OS) 3311/2022

ITD CEMENTATION INDIA LIMITED Decree Holder

Through: Dr. Amit George, Mr. Piyo
Horold, Mr. Amol Acharya,
Mr. Rayadurgam Bharat and
Mr. Arkaneik Bhaumik, Advs.

versus

SSJV-ZVS JOINT VENTURE & ORS. Judgement Debtors

Through: Ms. Nupoor Maharaj, Adv. for
Judgement Debtor No. 1 & 2
Mr. Garnishee, Adv. with Mr.
Puneet Taneja, Adv. for NTPC.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

ORDER

EX.APPL.(OS) 3311/2022

1. The instant application has been moved for Respondent No. 2 being struck off from the array of parties in the present petition. The execution proceedings emanate from an Award rendered on 09 March 2019 in terms of which the Enforcement Petitioner became entitled to realize an amount of Rs. 6,65,55,228/- along with interest @ 12%

from 07 November 2013 till the realization of the amount along with costs.

2. The first respondent is a joint venture which was constituted between M/s SSJV Projects Private Limited and M/s Zarubezhvodstroy. The aforesaid joint venture as per the Applicant's own admissions was formed for the purposes of execution of the contract relating to the construction of a Barrage and a De-silting Chamber for Tapovan- Vishnugad Hydroelectric Power Project. As is evident from the records produced in these proceedings, the Respondent had entered into a contract on 06 February 2009 for construction of an upstream cut-off wall. Consequent to disputes having arisen, the matter came to be referred to arbitration. Those proceedings ultimately culminated in the pronouncement of an Award of which execution is sought in the present petition.

3. Undisputedly, SSJV Projects, the second Respondent, was a constituent of the joint venture. It is the joint venture which was arrayed as a Respondent before the Arbitral Tribunal.

4. The Applicant Respondent No. 2 however contends that since it was not individually placed on notice by the Arbitral Tribunal, the execution proceedings as drawn against it are not maintainable. Learned counsel appearing for the Applicant would contend that since the second respondent is an entity duly incorporated and thus having a separate and distinct identity in law, no proceedings for execution can be taken against it.

5. Learned counsel had also placed reliance upon a judgment rendered by the Court in **Consulting Engineers Group Limited v.**

National Highways Authority of India (NHAI)¹ in support of her aforementioned submissions. It must however, and at the outset, be noted that *Consulting Engineers* clearly cannot be read as an authority supporting the arguments which have been addressed on behalf of the Applicant. *Consulting Engineers* was considering the question whether an individual member of a consortium could have invoked arbitration or sought interim measures. While negating the right of an individual member to move such a petition, the learned Judge had ultimately held that a constituent of a joint venture could not individually petition for interim measures. It also held that a member of the consortium cannot independently approach the Court seeking relief and that it would be the joint venture alone which would have the authority to invoke the dispute resolution clause. The judgment in *Consulting Engineers* thus in fact runs contrary to what was contended on behalf of the Applicant.

6. Dr. George while explaining the concept of a joint venture firstly relied upon a judgment rendered by the Division Bench of the Gujarat High Court in **Asia Foundations & Constructions Ltd., Bombay v. State of Gujarat**². While rendered in the context of a tendering process that was assailed, the said High Court described the essential attributes of a joint venture in the following terms: -

“47. The different forms “A” to “G” which have been referred to in the facts narrated hereinabove containing requisite particulars to be furnished by the applicants seeking prequalification, inter alia, relate to joint venture also. The particulars which are to be furnished in form “C” relating to joint venture consist of (1) name and address of joint venture; (2) name and address of all the partners of joint, venture; (3) the responsibility of the firm leading the joint venture and the responsibility of the other joint venture

¹ 2022 SCC OnLine Del 3253

² 1985 SCC OnLine Guj 93

partners; (4) the name of bankers and (5) the financial participation of each firm in the joint venture. Thus, it is clear that in case of a group of firms, the applicant-has to give, more particulars which have been set out above, namely, which firm will be responsible for applying for and submission of tender and for completion of the contract document, and also the responsibility of the lead firm as well as other member-firms is to be clearly stated. The effect of the conjoint reading of the Memorandum of instructions and information as well as the forms in which the particulars were to be furnished clearly indicates that the authorities had visualized and envisaged the group of firms as well as the joint venture consortia as different entities which could seek pre-qualification. It appears from the particulars which are required to be furnished in form "C" that the authorities envisaged that there may be cases of joint venture consortia where one of the partner-firms may have a leading role to play, and the responsibility of their joint venture partners may not be so leading and important. It is in respect of such cases that the particulars are to be furnished about the responsibility of the firm leading the joint venture, and the responsibility of the other partners thereof. The legal concept of the joint venture is very well recognised, and we do not think that the authorities in these High Powered Committees can be oblivious of this recognised legal concept. If they are, they have completely misdirected themselves. The common law did not recognise the relationship of co-adventures but with the passage of time, the judicial decisions recognised what is known as 'joint adventure' of two or more persons undertaking to combine, their property or labour in conduct of particular line of trade or a general business for joint profits. The Courts do not treat a joint adventure as identical with a partnership though it is so similar in nature, and in the contractual relationship created by such adventurers that the rights as between them are governed practically by the same rules that govern the partnership. This relationship has been defined to be a special combination of persons undertaking jointly some specific adventure for profit without any actual partnership. It is also described as a commercial or a maritime enterprise undertaking by several persons jointly; a limited partnership not limited in the statutory sense as to the liabilities of partners but as to its scope and duration. Generally speaking the distinction between a joint adventure and a partnership is that former relates to a single transaction 'though it may comprehend a business to be continued over several years' while the later relates to a joint business of a particular kind (see: 48 American Law Reports at p. 1055 under the caption "what amounts to a joint adventure" at pages 1056-57 and 1060). It is generally agreed that in order to constitute a joint venture, there must be community of interest and right to joint

control. It is recognised on authority that each of the parties must have an equal voice in the matter of its performance and control over the agencies used therein, though one authority may entrust the performance, to another. There, is also an authority to the effect that a joint venture may exist although the parties have unequal control of operations. The rights, duties and liabilities of joint venturers are similar or analogous to those which govern the corresponding rights, duties and liabilities of the partners. As in the case of partners, joint venturers may be jointly and severally liable to third parties for the debts of the venture (see: American Jurisprudence, Second Edition, Vol. 46, para 12 at pages 33-34 and para 57 to p. 76). Joint Venture groups are internationally recognised in form of cooperation in the joint fulfilment of the construction contract obligations. Joint venture groups in the construction, industry come about through agreements for combination of legally independent contractors for the joint rendering of construction services limited in both time and content. Typically they are restricted to a single project in which case the members of the group act jointly at both the tendering and award stages. Joint venture groups are generally unincorporated associations. The legal systems in general have not kept pace with the growing economic means of joint venture groups and there is no special legal form for this type of co-operation which has come to stay in construction industry. However, in Australia and Germany, joint venture groups as also unincorporated civil law partnerships are subjected to law of partnership. In United States also the law of partnership is applied to joint venture consortia. It is only in France that a special legal form has been created in this behalf. The joint venture groups have got, inter alia, the characteristics of joint organisation, joint action through co-operation of all members of all individual persons acting on the instructions of the members, and joint liability for rendition of services to third parties, and the relation between the partners inter se to be governed according to the joint venture group agreements. The economic importance of joint venture consortia on the one hand, and absence of specific legal provisions on the other has raised a host of problems of interpretation in individual cases since a wide variety of model contracts and pre-printed contract forms are adopted to suit the needs and convenience of a particular construction project. These problems have direct effect on the partners inter se and indirect effect on the third parties, such as customers. If several construction enterprises tender jointly and have been jointly awarded the construction contract, they are obliged to perform the contract jointly as joint venture group. One of the difficult problems which is likely to arise when a construction contract is about to be entered into since the customer when concluding the

contract with a joint venture is dealing with all the members of the group, who are jointly committed to rendering the services. The contract has, therefore, to be concluded by an authorised representative of all the members of such a group en-bloc for the simple reason that joint venture groups are unincorporated associations. The services to be rendered by the group are to be allocated amongst the members of the same by internal agreement, and consequently the rights and duties of the members inter se are also regulated by the group agreement. These internal agreements are not effective vis-a-vis the third parties, and they operate amongst the members inter se. Thus, all the members are jointly and severally liable for performance of the construction work jointly undertaken irrespective of internal division of the work. If one member of the joint venture group does not fulfil his commitments, the others are under joint and several obligation to carry out such obligations vis-a-vis the customer. Such a situation may arise when a member of a joint venture group drops out prematurely because of the liquidation or insolvency. When a contract is concluded with a joint venture group all members are made jointly and severally liable even if only one is capable of rendering the service in question. The joint and several liabilities of the members of a joint venture group may cover the marginal areas of the contract performance such as late performance, faults, deficiency of goods and services etc. It is, therefore, very necessary while entering into such contracts with joint venture group that the construction contracts are carefully drafted, and the members of such group must also enter into detailed agreements amongst themselves, (see: Article on Joint Venture Groups — Effects of construction Contract: Dr. Manfred Straube, Professor of Commercial Law, Technical University, Vienna in “International Business Lawyer”, March 1985, a monthly published by a Section of Business Law of International Bar Association, London)

48. In India, a person can become a partner with another person in a particular adventure or undertaking (see: S. 8 of the Partnership Act, 1932). This is described as a particular partnership also since it is confined to a particular adventure or undertaking, or it may be one limited even to a particular advantage or undertaking or an isolated transaction in course of trade or business. However, the three elements of partnership, namely, agreement, business and mutual agency must exist as a matter of course. The only difference between such partnership in nature of joint venture and an ordinary partnership is that in joint venture partners incur no responsibility beyond the limits of the particular adventure or business or undertaking and the rights and obligations are, therefore, less extensive than those of partners in ordinary

partnership (See: *Karmali v. Karimji*, 39 ILR Bom 261 : (AIR 1914 PC 132)).”

7. The views as expressed in *Asia Foundations* were reiterated again by the Gujarat High Court in **Continental Construction Ltd. and Ors. v. State of Gujarat & Anr.**³ as would be evident from the following observations as appearing in paragraph 14 of the report:-

“14. It should not be lost sight of that internal agreements between the members of a joint venture group are not generally effective vis-a-vis the third parties, and they merely constitute the basis for mutual services and entitlements within the joint venture group. The members of joint venture are jointly and severally liable for performance of the construction work jointly undertaken irrespective of the internal division of work. If a member of a joint venture group does not fulfil his commitments, the other members thereof are under obligation to provide the missing services to the customer. If the customer enters into a contract with a joint venture group, it increases the liability of the members of the joint venture for due performance of the construction work. As noted above, when a contract is concluded with a joint venture group, all members are made jointly and severally liable, even if only one is capable of rendering the services in question. The justification for such liability is the possibility of bringing pressure to bear on a member of the group in order to induce him to render his share of the services or, if necessary, to arrange for a substitute. Of course, members of a joint venture group who do not fulfil their commitments remain liable to co-share to indemnify their co-venturers (see : Articles on Joint Venture Groups (supra)). The joint and several liability of co-venturers is not only for the execution of the works but also in respect of any claims for damages by the customer and in respect of all joint financial commitments to suppliers, planners and architects and also in respect of fees, dues, penalties or other payments to public authorities. In any case the internal agreements regarding liability have no force vis-a-vis third parties.”

³ 1986 SCC OnLine Guj 16

8. Dr. George also drew the attention of the Court to the decision of the Supreme Court in **New Horizons Ltd. v. Union of India**⁴. which explained the concept of a joint venture in the following terms:-

“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.

25. As noticed earlier, in its tender NHL had stated that it is a joint venture company established by TPI, LMI and WML and IIPL wherein TPI, LMI and WML and other companies in the same group as well as Mr Aroon Purie own 60% shares and IIPL owns 40% shares. It was also stated that the joint venture has received approval of the Government of India and is currently in operation and that the promoter will increase their capital/contribution to

⁴ (1995) 1 SCC 478

commensurate with the project need and that the company has been established as an information and database management company with expertise in database processing, publishing, sales/marketing and the dissemination of related information. In the tender it is also stated that as a joint venture in the true sense of the phrase, the company will have access to expertise in database management, sales and publishing of its parent group companies. It would thus appear that the Indian group of companies (TPI, LMI and WML) and the Singapore-based company (IIPL) have pooled together their resources in the sense that TPI, LMI and WML have made available their equipment and organisation at various places in the country while IIPL has made available its wide experience in the field as well as the expertise of its managerial staff. All the constituents of NHL have thus contributed to the resources of the Company (NHL). This shows that NHL is an association of companies jointly undertaking a commercial enterprise wherein they will all contribute assets and will share risks and have a community of interest. We are, therefore, of the view that NHL has been constituted as a joint venture by the group of Indian companies and IIPL, the Singapore-based company and it would not be correct to say that IIPL which has a substantial stake in the success of the venture, having 40% of shareholding, is a mere shareholder in NHL.

26. Once it is held that NHL is a joint venture, as claimed by it in the tender, the experience of its various constituents namely, TPI, LMI and WML as well as IIPL had to be taken into consideration if the Tender Evaluation Committee had adopted the approach of a prudent businessman.”

9. A more detailed exposition on the concept of a joint venture is found in *Corpus Juris Secundum*, which defines the nature of such enterprises in the following terms:-

“A. DEFINITION AND NATURE OF JOINT VENTURES

Research References

A.L.R. Library

A.L.R. Index, Joint Ventures

West's A.L.R. Digest, Joint Ventures ⇨ 1, 1.1, 1.13

§ 1 Generally

Research References

West's Key Number Digest, Joint Ventures ⇨ 1, 1.1, 1.13

A joint venture is a legal relation created by the American courts and is generally described as an association of two or more persons to carry on a single business enterprise for profit.

"Joint venture," a term used inter-changeably and synonymous with "joint adventure," or coventure, has been defined as a special combination of two or more persons wherein some specific venture for profit is jointly sought without any actual partnership or corporate designation. It features an association of two or more persons to carry out a single business enterprise for profit or a special combination of persons undertaking jointly some specific adventure for profit," for which purpose they combine their property, money, effects, skill, and knowledge."

A joint venture or enterprise has also been defined as being in the nature of a partnership and existing when two or more persons contribute cash, labor, or property to a common fund with the intention of entering into some business or transaction for the purpose of making a profit to be shared in proportion to the respective contributions. Under yet another definition, a joint venture is created when parties contribute money, property, knowledge, skill, or other assets to a common undertaking; the parties have a joint property interest in the subject matter of the venture and a right of mutual control over management; the parties have expectations of profits or presence of venture; the parties are given the right to participate in profits; and the objective of the parties is limited to a single undertaking. In fact, no exact definition can be given of a joint venture, and the decisions have not established any fixed or certain boundaries to the legal concept of joint venture. Rather, the answer in each case depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case, the terms of the agreement, the acts of the parties, the nature of the undertaking, and other facts.

Among the acts or conduct which are indicative of a joint venture, no single one of which is controlling in determining whether a joint venture exists, are: (1) joint ownership and control of property; (2) sharing of expenses, profits and losses, and having and exercising some voice in determining division of net earnings; (3) community of control over, and active participation in, management and direction of business enterprise; (4) intention of parties, express or implied; and (5) fixing of salaries by joint agreement.

A joint venture or joint adventure is not based on any statute and is purely a creature of American courts.

Participants.

The participants in a joint venture or adventure are coventurers, coadventurers, or, more commonly, joint adventures.

§ 2 Joint enterprise

Research References

West's Key Number Digest, Joint Adventures ⇨ 1, 1.1, 1.13

The term "joint enterprise" may be used interchangeably with joint venture although a distinction often is made in that joint ventures apply to business ventures while joint enterprises do not.

A joint enterprise has been defined as an informal association of two or more persons, partaking of the nature of a partnership, usually, but not always, limited to a single transaction in which the participants combine their money, efforts, skill, and knowledge for gain, with each sharing in the expenses and profits or losses. "Joint enterprise" is not a status created by law but is a contractual relationship of mutual agency employed to represent unity between persons in pursuit of common purpose as the result of which negligence of one member of the unity may be imputed to another. A joint enterprise is created when the following factors are established: (1) an agreement, express or implied, among members of a group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among the members; and (4) an equal right to a voice in the enterprise's direction, which gives an equal right of control.

The term "joint enterprise" is often used interchangeably with "joint venture," and it has been stated that when the term "joint enterprise" is used to describe a business or commercial undertaking, no significant differences between the terms may be drawn. The terms are often distinguished, however, in that a joint venture, unlike a joint enterprise, necessarily involves the factor of a common commercial purpose. Stated another way, the basic difference between a joint venture and a joint enterprise is that a business relationship is needed for a joint venture but not for a joint enterprise; that is, there is no business motive underlying the parties' efforts in a joint enterprise. Further, although it has been said that the elements of joint ventures and joint enterprises are essentially the same, with the distinction that joint ventures apply to business ventures while joint enterprises do not, there is authority indicating that another distinction between a joint enterprise and a joint venture is that the latter requires an express or implied agreement to share profits, as well as an express or

implied contract demonstrating the existence of the joint relationship.”

10. While distinguishing a joint venture with more formal associations and those which are well known and duly recognized by law, the *Corpus Juris Secundum* holds as follows:-

**“B. OTHER RELATIONS COMPARED AND DISTINGUISHED
Research References**

A.L.R. Library

A.L.R. Index, Joint Ventures

West's A.L.R. Digest, Joint Ventures § 1.12, 1.13

§3 Partnership

Research References

West's Key Number Digest, Joint Ventures § 1.13

Joint venture and partnership are separate legal relationships, which are governed by the same rules of law.

At common law, an enterprise of a limited character, such as is now called a joint venture, was regarded in law as merely an informal kind of partnership, and the courts made no attempt to distinguish one from the other. However, in the middle of the last century, the courts began to find it convenient to draw a distinction between them; hence, there is now a body of American law applicable to the relation of joint ventures which may or may not apply to the relation of partners. The divergence between the two relations is still very slight and is difficult to ascertain in some circumstances.

A joint venture is in the nature of or closely akin to a partnership. Indeed, the legal principles for determining the existence of a joint venture have been said to be identical to those for determining a partnership, and the two may be created in the same ways. Thus, the legal principles applicable to partnerships apply to joint ventures, or as some courts have stated, partnership law governs joint ventures. Moreover, in some jurisdictions, the statutory provisions of the Uniform Partnership Act are applicable to joint ventures.

The parties in a joint venture stand in the same relationship to each other as partners in partnership, and thus, the relations among joint venturers are mainly governed by partnership law. Stated another way, the rules of law governing the rights, duties, and

liabilities of joint venturers are substantially the same as those which govern partnerships.

Nevertheless, the courts do not treat a joint venture as in all respects identical with a partnership as they are separate and distinct legal relationships. A joint venture is generally a less formal relationship than a partnership. Also, a joint venture is not a legal entity separate from the participants in the venture as a partnership is unless, of course, the attributes of the joint venture are such that the venture is in actuality a partnership. As respects the character of the business undertaken, the principal difference is that, while a partnership is ordinarily formed to carry on a general and continuing business, a joint venture is generally more limited in scope and duration. Specifically, a joint venture is usually formed for a single business transaction or a single series of transactions, or for a particular, defined purpose.”

11. Proceeding further to identify the essential elements of the relationship between the parties and constituents of a joint venture, the Court finds the following passages which would be relevant for our purposes:-

“§ 11 Common purpose; community of interest

Research References

West's Key Number Digest, Joint Ventures ⇨ 1.2(2), 1.2(6)

Among the requisite elements of a joint venture are a common purpose and a community of interest in the venture or in the performance of its purpose.

One of the often-stated elements of a joint venture is a common purpose. It has been said that on judicial review, a court first looks to the evidence of an agreement or agreements among the members of the group to ascertain their possible common purposes, and then, it considers if the evidence supports a finding of a joint enterprise with respect to each possible common purpose.

As a general rule, in order to constitute a joint venture, there must also be a community of interest in the venture or in the performance of its purpose. Simply sharing the costs of accomplishing a common purpose does not render the parties' respective interests in that purpose "community" in nature. Rather, the term "community of interest" as applied to the relation of joint venture means an interest common to both parties, that is, a mixture of identity of interest in a venture in which each and all are reciprocally concerned and from which each and all derive a material benefit and sustain a mutual responsibility.

Under some authority, the community of interest must be pecuniary. Whether parties have a common business or pecuniary interest is not the same as whether they have a community of pecuniary interest. To establish a community of pecuniary interest among the members of a proposed joint enterprise, the interest must first be monetary in nature, and that monetary interest must be common among the members of the group, that is, it must be one shared without special or distinguishing characteristics.

Question of fact or law.

The element of community of interest requires a factual determination, but the state of the evidence may render the joint enterprise issue a question of law.

§ 12 Joint management and control

Research References

West's Key Number Digest, Joint Ventures ⇨ 1.2(8)

Among the requisite elements of a joint venture is joint participation in the management and control of the enterprise or a right of mutual control.

In a joint venture, there is often joint participation in the management and conduct of the enterprise; however, all that is required in this regard for purposes of joint venture status is a joint, mutual, or equal right of control. Where this element is framed as an "equal right to control" the venture, each joint venturer must share, to some extent, in the control of the venture. In other words, the agreement among the venturers must indicate, either expressly or implicitly, that each party to the venture has the authority to act for all in respect to control of the means or agencies employed to execute such common purpose, and each party must have an equal right to direct and govern the movements and conduct of each other with respect thereto and must have some voice and right to be heard in its control or management. The right to control necessary for the existence of a joint venture is a right existing between the parties to the joint venture by virtue of their express or implied agreement, and rights to control existing between a member of the joint venture and a third party are not relevant to a determination of the existence of a joint venture or as to rights of control as between participants in the joint venture.

The rights of the parties with respect to the management and control of the venture may be fixed by agreement so as to shift control, and each joint venturer need not exercise actual physical control of the instrumentalities used in the enterprise. In other words, one or more joint venturers may be entrusted with primary

operational responsibility for the enterprise without changing its status as a joint venture.

Question of fact or law.

The elements of equality of right to control require a factual determination, but the state of the evidence may render the joint enterprise issue a question of law.

§ 13 Interest in, and contribution to, property or subject matter of enterprise

Research References

West's Key Number Digest, Joint Ventures ⇨ 1.2(2), 1.2(8)

It may be essential to the formation of a joint venture that there be a joint interest in the property or subject matter of the enterprise and a contribution by each of the parties of capital, materials, services, or knowledge.

While many decisions hold that a joint venture requires a joint proprietary interest in the property or subject matter of the enterprise, it is also held that only a joint interest in the property or enterprise is essential to a joint venture and that joint interest is not necessarily joint ownership of property. Thus, joint ownership of the property used in carrying on the business is not essential to the existence of a joint venture although joint ownership or a joint proprietary interest is a circumstance to be considered with other circumstances in determining the existence of a joint venture.

In any event, it is essential to a joint venture that the parties contribute property, money, efforts, skill, or knowledge to the common undertaking. The contribution made by each party need not be equal or of the same character so long as each coadventurer contributes something promotive of the enterprise.

§ 14 Sharing of losses, profits, and expenses

Research References

West's Key Number Digest, Joint Ventures ⇨ 1.2(7)

Generally, in order to constitute a joint venture, there must be a right to share in the profits and a duty to share in any losses which may be sustained.

With the exception of those jurisdictions who apply joint venture theory equally to social circumstances, where participation in profits and losses is not a requirement for such social joint ventures, as a general rule, the right to share profits and losses is an essential element of a joint venture so that if the amount that one

party receives is fixed, regardless of the success or failure of the enterprise, there is no profit sharing as an element of a joint venture. "Profit" is the benefit of or the advantage remaining after all costs, charges, and expenses have been deducted from income and refers to a net financial gain or return for the joint venture, not merely for the parties individually. "Share of losses" means to be responsible or liable for losses created by the venture and any liability to creditors or third parties.

An agreement, express or implied, for sharing in the profits is often essential to the existence of a joint venture, but although some authority requires an express loss-sharing provision, at least where an agreement includes a provision for sharing profits, it is more commonly held that there need be no specific agreement to share in the losses since an agreement to share losses may be implied from an agreement to share profits. Further, the term "losses" is not limited to monetary losses but includes time expenditures and out-of-pocket expenses, especially where one party to the venture furnishes property, and the other only services. Thus, if there are other sufficient indicia of a joint venture, it is not essential that the parties agree, expressly or implicitly, to share the losses. Moreover, if the nature of the undertaking is such that no losses other than those of time and labor in carrying it out are likely to occur, an agreement to share in the profits might stamp it as a joint venture although nothing is said about the losses.

The fact that a contract provides for a sharing of the profits, while an important factor in determining the character of the contract, does not of itself make it one of joint venture. The profit accruing to a joint venture must be joint and not several. Profits which are severally earned, the parties merely having dealt with the same subject matter, but not for and on behalf of each other, do not meet this requirement of the existence of a joint adventure. Still, the mode of participation in the fruits of the undertaking may be left to agreement of the parties, and the benefits need not be of equal value or kind. Thus, the fact that there is to be unequal distribution of profits does not contravene the idea of joint venture, and the parties to the joint venture may limit by special contract their respective profits and agree which part of the expense each should bear before participating in profits.

Whether an agreement to share profits is merely a measure of compensation for services, or whether it extends beyond and bestows ownership and interest in the profits themselves so as to constitute a joint venture is a question of fact.

§ 15 Existence of relation in particular transactions

Research References

West's Key Number Digest, Joint Ventures ⇨ 1.11 to 1.13

General rules as to the creation and existence of joint ventures have been applied in considering the establishment of the relation in various particular transactions, such as those involving purchase and development of lands, the buying and selling of corporate stocks and the making, acquisition, or transfer of contracts for specified purposes.

In applying the rules discussed in the preceding sections, particular transactions which have been held to constitute joint ventures include agreements providing that the parties thereto shall contribute money to be used in the purchase of lands to be developed or to be sold for their mutual benefit in equal or specified proportions or that one or more shall contribute money and the others shall contribute special knowledge, experience, or a judgment as in the purchase and development of lands; an agreement between brokers to work together and to share the commission on the sale; an agreement between attorneys among whom no general partnership relation exists to jointly undertake to represent a client, on a contingent fee basis, and to share the fee if successful, otherwise to receive nothing; and the organization, consolidation, or development of corporations.

Other such transactions include the buying and selling of corporate stocks; the acquisition and performance of contracts for municipal or government works; the construction of buildings or the carrying on of building operations; the operation of a mine; the promotion of patents or inventions; the purchase and sale of goods, wares, and merchandise; and owning, operating, repairing, and controlling rental premises.

On the other hand, particular transactions have been held not to constitute joint ventures, such as an agreement to accompany another on an excursion, transactions involving acquisition or sale of shares in a corporation, a lease, an option, a purchase, and a mortgage.

Other particular transactions held not to constitute a joint venture in view of lack of essential elements of the relation include agreements for real estate development; a franchise or licensing agreement; a building or construction agreement; subcontract; a supply agreement; an agreement as to machinery, inventions, or patent rights; an auction agreement; an affiliation agreement; and attorneys' agreement to represent clients.

Other transactions in which a joint venture has been held not established include agreements involving loans, amusements or races, relationships involving hospitals and physicians, raising and disposition of livestock, manufacture and sale of feed additives,

vessels or maritime enterprises, opening and maintaining sanitary landfill, and use and repair of taxicabs and trucks.”

12. Proceedings then to deal with the subject of the liability of joint ventures to third persons and parties, the following passages of relevance from *Corpus Juris Secundum* are extracted hereinbelow:-

“B. LIABILITIES OF JOINT VENTURE TO THIRD PERSONS

Research References

A.L.R. Library

A.L.R. Index, Joint Ventures

West's A.L.R. Digest, Joint Ventures ¶1.15, 7, 8

§ 60 Generally

Research References

West's Key Number Digest, Joint Ventures ¶7

The liability of one member of a joint venture for the acts of another is founded on the voluntary relationship between them.

One member of a joint venture or enterprise is generally liable for the acts of another. Such liability is a vicarious one founded on the voluntary relationship that has arisen between the parties wholly from their contract. Stated another way, in a joint venture relationship, it may be said that the partners or persons engaged in the common enterprise are subject to a common duty, the breach of which will subject those persons to liability for the entire harm resulting from failure to perform the duty. On the other hand, where the community of interest in the common purpose is personal as to the individual, family, or household, rather than business related, joint enterprise liability will not be imposed.

Trust.

The decision to carry on a joint venture in the form of a trust does not change the liability of the coventurers to third parties.

§ 61 Mortgages, liens, and pledges

Research References

West's Key Number Digest, Joint Ventures ¶7

Under some circumstances, a mortgage or pledge of property belonging to persons as joint venturers,

which is given by one of such persons in connection with the joint enterprise, is binding on all.

A member of a joint venture who holds the title to real property, or the possession of personal property, belonging to all of the joint venturers is presumed to have authority to mortgage or pledge it to raise money for the purposes of the enterprise or to secure debts incurred in carrying it, on, and such mortgage or instrument of pledge, although signed individually, binds the associates as respects their interest in the property mortgaged or pledged. Further, joint venturers who did not sign the purchase-money notes secured by a mortgage or lien, given on the purchase of real property, may be personally liable for the indebtedness evidenced by such notes. A like rule applies as to personal liability under an agreement to assume the payment of a real estate mortgage where such agreement is made by one joint venturer on behalf of all. However, the associates of a joint venturer are not personally liable on an agreement to assume the payment of a mortgage, contained in a deed of real property, conveyed to such joint venturer, where such associates did not consent to or ratify, and the contract for conveyance did not require, such assumption agreement.

§ 62 Torts

Research References

West's Key Number Digest, Joint Ventures ¶7

Members of a joint venture may be liable for torts committed in conducting the joint enterprise.

The liability for torts committed by parties to a joint venture is generally governed by the law applicable to partnerships, and each coventurer is the agent of the others for purposes of tort liability. All members of a joint venture may be jointly and severally liable to third persons for wrongful acts committed in furtherance of the joint enterprise or venture. Thus, the negligence of one participant in the enterprise or venture, while acting within the scope of agency created by the enterprise, may be imputed to another participant so as to render the latter liable for the injuries sustained by third persons as a result of the negligence. Moreover, the members of a joint venture may be held liable for the intentional tort of one member committed within the scope of the agency.

With respect to a joint venture involving the control and operation of premises or places, or the use of mechanical contrivances, all joint venturers are liable for personal injuries suffered by others from negligence in the maintenance, installation, or operation of such premises, places, or contrivances, including instances in which the actual negligence is that of some, but not all,

members of the joint venture or in which the actual negligence is that of agents and employees of the joint venturers, acting within the scope of their employment. The liability in such cases is joint.

Of course, the existence of a joint enterprise is essential in order to render a person liable for the negligence of another under the foregoing rules. Moreover, where a member of a joint enterprise commits a wrongful and malicious tort not within the actual or apparent scope of the agency or the common business of the particular venture, without the other members' assent, concurrence, or ratification, then the other associates are not liable for the harm caused thereby.

Fraud.

Generally, when one joint venturer, who is acting within the scope of the joint venture and in furtherance of its agreed purpose, is guilty of fraud in procuring benefits which are retained by the joint venturers, then each joint venturer is liable for the fraud. Lack of actual knowledge of any wrongdoing and innocence of fraud, in themselves, do not absolve one joint venturer of liability for the fraud of another joint venturer acting within the scope and authority of the joint venture. However, a member of a joint venture who had no knowledge of a fraud practiced on a third person by an associate is not liable for such fraud where it was committed for the sole purposes of such associate and not in furtherance of the joint enterprise.

§ 63 Contracts with third parties

Research References

West's Key Number Digest, Joint Ventures ¶7

Generally, members of a joint venture are liable on contracts with third persons, which have been entered into pursuant to the joint venture agreement.

The members of a joint venture are generally liable on contracts with third persons which have been duly entered into on behalf, and for the purposes, of the joint venture and for debts arising out of such contracts.

While it has been held that there is an individual liability on the part of a person liable as a joint venturer, there is also authority to the effect that the liability of joint venturers on a contract is joint and joint and several. A person is not liable, however, in the absence of a contract, express or implied, creating the relation of joint venturers between such person and others. There also may be no recovery against undesignated joint venturers if there is an agreement specifying to whom the third party should look for payment.

Substantially, the same rules with respect to principal and agent applicable to members of a partnership apply to members of a joint venture with respect to contracts with third persons within the scope of the joint enterprise. Members of a joint venture are liable on a contract entered into by a member pursuant to the authority conferred on that member by his or her associates. Thus, a joint venturer has the authority, which may be oral or implied from the circumstances, to bind his or her associates by a contract which is in furtherance, or within the scope, of the joint enterprise. The fact that one joint venturer did not sign the contract will not relieve him or her of liability under such contract when a fellow member of the venture had the authority to bind him or her.

As to third persons who deal with a joint venturer in good faith and without knowledge of any limitation on his or her authority, the law presumes such venturer to have been given power to bind the coventurers by such contracts as are reasonably necessary to carry on the business in which the joint venturers are engaged and that they become liable on such contracts even though they may have expressly agreed among themselves that they should not be liable. Nonetheless, if the authority of such coventurer is limited and the party with whom he or she is dealing knows of the limitation, then the joint venture is not bound by his or her unauthorized action.

A joint venturer cannot bind his or her associates by contracts made outside of the scope of the business in which they are engaged or by contracts made for his or her individual benefit, or solely on his or her individual credit, even if the borrowed money or goods are subsequently applied to the common enterprise.

Notice to a member of a joint venture may constitute notice to his or her associates of matters affecting the joint enterprise as regards liability to a third person on contract.

§ 64 Liability of undisclosed member

Research References

West's Key Number Digest, Joint Ventures ¶7

A joint venture acting within the scope of his or her authority can bind undisclosed associates by such contracts as are reasonably necessary to carry on the venture.

As a general rule, a member of a joint venture can bind his or her undisclosed associates by such contracts as are reasonably necessary to carry on the venture. However, one who is a member of a joint venture but who is unknown to be such at the time by a third person who enters into a contract with another member individually is not rendered liable to such third person on such contract, or for damages for the breach thereof, by the fact that the

contract relates to the business of the joint venture if the contracting member in making such contract exceeded his or her authority and had no power to bind his or her associates thereby.”

13. As would be manifest from the aforesaid principles which stand enunciated, a joint venture may be recognized as a quasi partnership where two or more entities jointly undertake a particular transaction or contract for mutual profit. It essentially represents a concept where two or more persons jointly take on the obligation to implement a contract or undertake an enterprise for gain and profit. While not strictly understood in law to be a legal person, a joint venture by virtue of entering into a contract binds itself to the various obligations that stands placed thereunder and to exercise all rights conferred therein. It could also be a consortium where either two or more persons or companies come together to discharge obligations.

14. Undisputedly, the contract in the present case was executed by the joint venture itself acting for and on behalf of all its constituents. It was an enterprise in which Respondent Nos. 2 and 3 came together and agreed to share profits from the venture. Insofar as the Enforcement Petitioner is concerned, it is clearly entitled in law to proceed against the Respondents jointly and severally. The Court further holds that the Enforcement Petitioner was neither obliged nor placed under a duty to array the individual members of the joint venture as party respondents. As long as the joint venture itself was before the Arbitral Tribunal, the same was clearly sufficient for the purposes of adjudication of claims that came to be laid by the Petitioner. The individual members of a joint venture cannot seek the trial of such disputes based upon their own agreed upon or perceived individual responsibilities and obligations. Those would clearly not

bind third parties. When a contract is executed in favour of the joint venture, the person awarding the same is clearly entitled to proceed on the basis that each of the members of the consortium shall be jointly and severally liable. This subject of course to any contract or agreement to the contrary. In any case, a constituent of the joint venture cannot escape from the liability which stands raised or arises from that venture. It would remain, as noted above, jointly and severally liable.

15. Accordingly, for the all the aforesaid reasons, the Court finds itself unable to sustain the prayer as is made. The application shall stand dismissed.

OMP (ENF.) (COMM.) 188/2021, CCP(O) 46/2022, EX.APPL.(OS) 1316/2021, EX.APPL.(OS) 1318/2021 (Stay), EX.APPL.(OS) 1319/2021 (Necessary Direction), EX.APPL.(OS) 2822/2022, EX.APPL.(OS) 3243/2022

16. Let the matter be called again on 21.04.2023.

MARCH 07, 2023
SU

YASHWANT VARMA, J.