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

+ **W.P.(C) 8595/2015**

PCL INTER TECH LENHYDRO CONSORTIUM (JV) Petitioner

Through: **Mr. Ravi Gupta, Sr. Adv. with Mr.
Abhishek Kumar, Adv.**

Versus

THDC INDIA LTD.

..... Respondent

Through: **Mr. Parag P. Tripathi & Mr. S.K.
Taneja, Sr. Advs. with Mr. Puneet
Taneja & Ms. Shaheen, Advs.**

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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17.09.2015

1. The petitioner has filed this petition under Article 226 of the Constitution of India seeking mandamus directing the respondent THDC India Ltd. to take on record Power of Attorney dated 9th June, 2008 issued in favour of one Mrs. M. Srivani and to treat the said Mrs. M. Srivani as the authorized representative of the “petitioner company”.

2. The petitioner in fact is not a ‘company’ but a joint venture. The question thus, of Mrs. M. Srivani representing the ‘company’, does not arise.

3. The senior counsel for the respondent appearing on advance notice states that there has already been an arbitration proceeding between the petitioner Joint Venture and the respondent and the award wherein is subject matter of proceedings under Section 34 of the Arbitration Act, 1996 pending in this Court. It is further stated that in the arbitration proceedings as well as in the Section 34 proceedings, the petitioner Joint Venture is represented by

Mr. P. Nageshwar Rao and not by the said Mrs. M. Srivani. It is contended that this writ petition is filed in view of the *inter se* disputes between the constituents of the Joint Venture and the sub-contractor.

4. The same explains the purport of filing this petition, which was otherwise inexplicable on a reading of the writ petition. It is not as if the respondent had rejected the Power of Attorney of the petitioner or refused to deal with the Power of Attorney Holder. In fact, the last communication filed by the petitioner along with the petition from the respondent had asked the petitioner to contact the respondent for the needful to be done.

5. The process of this Court under Article 226 of the Constitution of India cannot be permitted to be used by the petitioner for stealing a march over its adversaries with whom it appears to have disputes and who are not even impleaded as parties.

6. The relationship even otherwise of the parties is contractual. Supreme Court recently in ***Joshi Technologies International Inc. Vs. Union of India*** MANU/SC/0616/2015 has *inter alia* held as under:

“68. *The position thus summarized in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, can refuse to exercise. It also follows that under the following circumstances,*

'normally', the Court would not exercise such a discretion:

- (a) the Court may not examine the issue unless the action has some public law character attached to it.*
- (b) Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion Under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.*
- (c) If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.*
- (d) Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.*

69. Further legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to the contracts entered into by the State/public Authority with private parties, can be summarized as under:

- (i) At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.*
- (ii) State in its executive capacity, even in the contractual*

field, is under obligation to act fairly and cannot practice some discriminations.

- (iii) Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, Involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings Under Article 226 of the Constitution. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit etc.*
- (iv) Writ jurisdiction of High Court Under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.*
- (v) Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so: and he*

can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

(vi) Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

(vii) Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

(viii) If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court Under Article 226 of the Constitutional of India and invoking its extraordinary jurisdiction.

(ix) The distinction between public law and private law element in the contract with State is getting blurred.

However, it has not been totally obliterated and where the matter falls purely in private field of contract. This Court has maintained the position that writ petition is not maintainable. Dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions Under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.

- (x) *Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due*

consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

(xi) The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes”.

7. Keeping in mind the aforesaid principles, this is otherwise also not a fit case where High Court should exercise discretionary jurisdiction under Article 226 of the Constitution. Matter is purely in the realm of Court.

8. The petition is found to be misconceived and dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 17, 2015

‘gsr’..