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

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Date of Decision: 23.05.2017

% **LPA 401/2017 & C.M. No. 19750/2017**

M/S RAJPUR HYDRO POWER PVT LTD & ORS..... Appellants

Through: Mr. Muneesh Malhotra, Advocate
along with Mr. Rituraj Shahi,
Advocate.

versus

M/S PTC INDIA FINANCIAL SERVICES LTD Respondent

Through: Mr. Rajeeve Mehra, Sr. Advocate
along with Mr. Mayank Mishra and
Mr. Ritunjay Gupta, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE DEEPA SHARMA

VIPIN SANGHI, J. (ORAL)

Cav. 513/2017

1. Since the Caveator has put in appearance, the caveat stands discharged.

CM No. 19751/2017 (exemption)

2. Allowed, subject to just exceptions.

LPA 401/2017

3. Notice. Mr. Mayank Mishra, Advocate accepts notice on behalf of the respondent.

4. With consent of parties, arguments have been heard, and we proceed to dispose of this Letters patent appeal.

5. The appellant has preferred the present Letters Patent Appeal to assail the judgment dated 08.05.2017 passed by the learned Single Judge in W.P.(C) No. 8031/2016. Vide the impugned judgment, the learned Single Judge has dismissed the appellants said writ petition as being not maintainable against the respondent.

6. The case of the appellant/ petitioner in the writ petition was that the petitioner had started construction of the Rajpur Hydro Electrical Project in Rajpura Village, Tehsil Shimla, District Himachal Pradesh, and had entered into an agreement with the respondent, M/s PTC India Financial Services Ltd. to obtain a loan of Rs. 60 crores, out of the total project cost of Rs. 85.75 crores. The grievance of the petitioner was that the respondent disbursed only an amount of Rs. 47 crores by 01.11.2015. By that time, 80% of the project was already complete. The respondent, however, failed to release the balance loan amount which was essential for completion of the project. The said failure on the part of the respondent resulted in the petitioner's inability to complete the project. The respondent, rather than disbursing the balance loan amount, served a notice dated 17.06.2016 upon the petitioner's promoters threatening to acquire 100% equity shares of the promoters in the petitioner company. Consequently, the writ petition was

preferred to seek a writ of mandamus against the respondent so as to restrain the respondent from acquiring the promoters 100% equity share capital in the petitioner company, or taking any coercive steps against the assets of the petitioner company. The petitioner also sought a direction to the respondent to disburse the complete sanctioned credit facility and provide the overall costs of the project, on account of the alleged non-disbursal of the entire sanctioned loan as per the Agreement dated 28.03.2013.

7. Upon issuance of notice in the petition, on 15.09.2016 learned counsel for the respondent appeared and contested the maintainability of the writ petition on the ground that it was neither a 'State' nor a 'Public Authority' or a 'Government Agency', and that it was not amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India.

8. The learned Single Judge has held in the impugned judgment that the writ petition was not maintainable since the respondent was neither 'State'; nor 'an Authority' nor "an instrumentality of the State". In the course of the impugned judgment, the learned Single Judge has considered the various pronouncements of the Supreme Court on the issue, viz.:

- i) ***Praga Tools Corpn. vs. C.V. Imanual***, (1969) 1 SCC 585;
- ii) ***Motilal Padampat Sugar Mills Co. Ltd. vs. State of Uttar Pradesh and Ors.***, AIR 1979 SC 621;
- iii) ***Gujarat State Financial Corporation vs. Lotus Hotels Pvt. Ltd.***, AIR 1983 SC 848;
- iv) ***Shri Anadi Mukta Sadguru Trust vs. V.R. Rudani***, (1989) 2

- SCC 691;
- v) ***VST Industries Ltd. vs. Workers' Union***, (2001) 1 SCC 298);
 - vi) ***State of Bihar and Ors. vs. Jain Plastics and Chemicals Ltd.***, (2002) 1 SCC 216;
 - vii) ***Mysore Paper Mills Ltd. vs. Mysore Paper Mills Officers' Association and Anr.***, 2002 (2) SCC 167;
 - viii) ***Federal Bank Ltd. vs. Sagar Thomas and Ors.***, (2003) 10 SCC 733;
 - ix) ***ABL International Ltd. and Anr. vs. Export Credit Guarantee Corporation of India Ltd and Ors.***, (2004) 3 SCC 553;
 - x) ***Mardia Chemicals Ltd. and Ors. vs. UOI and Ors.***, (2004) 4 SCC 311;
 - xi) ***Binny Ltd. and Anr. vs. Sadasivan and Ors.***, (2005) 6 SCC 657
 - xii) ***State of Uttar Pradesh and Anr. vs. Radhey Shyam Rai***, (2009) 5 SCC 577;
 - xiii) ***United Bank of India vs. Satyawati Tondon and Ors.***, (2010) 8 SCC 110;
 - xiv) ***Devi Ispat Ltd. vs. SBI***, (2014) 5 SCC 762; and
 - xv) ***K.K. Saksena vs. International Commission on Irrigation and***

***Drainage and Ors.*, (2015) 4 SCC 670.**

9. Learned counsel for the appellants, Mr. Muneesh Malhotra, submits that the respondent company is promoted by M/s PTC India Ltd which holds 60% of the share holding in the respondent company. He submits that 16.22% of the share holding in the respondent company is held by other public sector companies namely NTPC, PFC, NHPC, Power Grid Corporation etc. Mr. Malhotra submits that M/S PTC India Limited is a Government Company, and thus the respondent is a subsidiary of the Government Company. Mr. Malhotra submits that the Board of Directors of M/s PTC India Limited, as well as of the respondent company, consists of senior Government Officers.

10. The Board of Directors of PTC India Ltd. consists of the following officers:-

Sl. No.	Board of Directors	Background of such Directors	Remarks
1.	Mr. Deepak Amitabh, Chairman	1984 batch IRS Officer	Was appointed by the GOI on deputation in Sep, 2003 and at work various position with a GOI before joining the PTC.
2.	Smt. Jyoti Arora	IAS officer	Presently serving as Joint Secretary in the Ministry of Power, GOI and on the board of PTC India Ltd. as nominee director of Ministry of Power, GOI.
3.	Mr. Ajit Kumar	Ex-technocrat	Was appointed as nominee of NTPC Ltd. and was appointed by GOI.

4.	Anil Razad	An Ex-IAS officer	Formerly known as Secretary in the Ministry of Power, GOI and Ex-IAS officer, he was appointed by the GOI on the board of M/s. PTC India Ltd.
5.	Mr. D. Swarup	Ex-IAS officer	Was former secretary in Ministry of Finance, GOI, presently working as independent director w.e.f. 09.01.2012 and appointed by the GOI.
6.	Mr. Deepak Chaterji	Ex-IAS officer	Former Secretary of Ministry of Commerce, GOI, was appointed by the GOI as director on the board of M/s. PTC India Ltd.
7.	Mr. H.L. Bajaj	Ex-Chairman of Central Electricity Authority, GOI	Was appointed as an independent director on the board of M/s. PTC India Ltd. by GOI.
8.	Mr. K. Biswal	Nominee Director of NTPC	NTPC is one of the Public Sector Undertaking and one of the promoter company of M/s. PTC India Ltd.
9.	Mr. Arun Kumar	Nominee of PTC	Nominee director of PTC on the Board of Directors of its Subsidiary namely PTC Energy Ltd.
10.	A.K. Aggarwal	Nominee Director of M/s. Power Finance Corporation Ltd.	M/s. Power Finance Corporation Ltd. is a public sector undertaking and one of the promoter company of M/s. PTC India Ltd.
11.	Mr. Hemant Bhargava	Nominee Director of M/s. LIC India Ltd.	M/s. LIC India Ltd. is a GOI corporation and one of the promoter company of the M/s. PTC India Ltd.

12.	Mr. Jayant Kumar	Nominee Director of NHPC Ltd.	M/s. NHPC Ltd. is a public sector undertaking on the promoter of the M/s. PTC India Ltd.
13.	Mr. Ravi Prakash Singh	Nominee Director of M/s. Power Grid Corporation	M/s. Power Grid Corporation public undertaking and one of the promoter of the M/s. PTC India Ltd.

11. Similarly, the Board of Directors of the respondent company consists of the following officers:-

Sl. No.	Board of Directors	Background of such Directors	Remarks
1.	Mr. Deepak Amitabh, Chairman	1984 batch IRS Officer	Was appointed by the GOI on deputation in Sep, 2003 and at work various position with a GOI before joining the PTC. He is also on Board of Directors of PTC India Ltd. he is chairman of the respondent company as well as the holding company of the respondent company i.e. (PTC India Ltd.)
2.	Dr. Ashok Haldia	Member of ICAI, ICSI, ICWAI	MD & CEO of the respondent Company.
3.	Dr. Pawan Singh	Former member of civil services (IRAS) and is MBA and PHD in Infrastructure Finance.	He has been in Board of Director for nearly 10 years.
4.	Sh. Ved Kumar Jain	A member of the ICAI with more than 30 years of standing has held various positions	He is on the board of Governors of the Indian Institute of Corporate Affairs (India) and is a Government

		like Chairman and Vice-Chairman of Fiscal Laws Committee and Chairman of Audit Committee.	Nominee Director on the Board of IL&FS Engineering and Construction Ltd. In addition, he is one the Board of the National Aluminium Co. Ltd., a public sector undertaking, and PTC India Ltd. and is Chairman of ASSOCHAM, National Council of Direct Taxes.
5.	Mr. Ajit Kumar	Ex-technocrat	Was appointed as nominee of NTPC Ltd. and was appointed by GOI. He is also on Board of Directors of PTC India Ltd.
6.	Mrs. Pravin Tripathi	Worked at various senior positions in Govt. of India.	
7.	Mr. H.L. Bajaj	Ex-Chairman of Central Electricity Authority, GOI.	Was appointed as an independent director on the board of M/s. PTC India Ltd. by GOI. He is also on Board of Directors of PTC India Ltd.
8.	Mr. Arun Kumar	Nominee of PTC	Nominee director of PTC on the Board of Directors of its Subsidiary namely PTC Energy Ltd. He is also on Board of Directors of PTC India Ltd.

12. Mr. Malhotra seeks to place reliance on the decision of the Supreme Court in *Ajay Hasia and Ors. vs. Khalid Mujib Sehravardi and Ors.*, 1981 *ISCC* 722 and, in particular, to para 9 thereof where the tests for determining whether a corporation can be said to be a instrumentality or agency of the state have been culled out, and submits that the first and the

fourth tests are attracted in the facts of the present case. The relevant extract from this decision, wherein the tests at Serial Nos. 1 & 4 were laid down by the Supreme Court reads as follows:

“9. The tests for determining as to when a corporation can be said to be a instrumentality or agency of Government may now be called out from the judgment in the International Airport Authority's case. These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation. We may summarise the relevant tests gathered from the decision in the International Airport Authority's case as follows:

- (1) One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.*
- (2) xxx xxx xxx*
- (3) xxx xxx xxx*
- (4) Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.”*

(emphasis supplied)

13. He has also referred to ***Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology & Ors***, (2002) 5 SCC 111, in particular, to para 40 which

reads as under:-

“40. The picture that ultimately emerges is that the tests formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.”
(emphasis supplied)

14. Mr. Malhotra submits that the PTC India Ltd. exercises control over the respondent company and in this regard, he places reliance upon the definition of the expression “ *Control*” under Section 2 (27) of the Companies Act 2013, which reads as under:-

“(27) “control” shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.”

15. The submission of Mr. Malhotra is that the Board of Directors of the respondent company controls its policies and functions. Since the Board of Directors of the respondent company is controlled by PTC India Limited and other public sector companies, it is under the indirect control of the Government and is, therefore, amenable to the jurisdiction, as it falls within the definition of ‘other authority’.

16. Mr. Malhotra also places reliance on ***State of Uttar Pradesh & Anr. Vs. Radhey Shyam Rai***, (2009) 5 SCC 577 and, in particular, on para 23 of the said decision where the Supreme court took into consideration the fact that the majority of the office-bearers of the Government Council of Uttar Pradesh Sansathan were holders of various offices of the Government, and the Supreme Court observed that there was dominance of the holders of the offices of the Government of Uttar Pradesh and the Governing Council of the said Sansathan. He also relies on para 26 of this decision which reads as follows:-

“26. From the materials placed before the Court there cannot be any doubt whatsoever that the State exercises a deep and pervasive control over the affairs of the Sansthan, the Cane Commissioner being at the helm of the affairs. The Accounts Officer is the officer of the State Government and, is also sent on deputation. The majority of the members of the Governing Council, as noticed hereinbefore, are holders of different offices of the State Government. They play a vital role in carrying out the affairs of the Sansthan. They alone have power to appoint anybody of their choice on the post. It is required to obey all the directions issued by the State Government from time to time. We, therefore, are of the opinion that the Full Bench of the High Court has rightly held the Sansthan “State” within the meaning of Article 12 of the Constitution of India.”

17. Mr. Malhotra also places reliance on the observations made in para 11 of the judgment of the Supreme Court in ***Mysore Paper Mills Ltd. vs. Mysore Paper Mills Officers’ Association and Anr.***, (2002) 2 SCC 167. The relevant extract thereof reads as under:-

“11. A careful consideration of the principles of law noticed supra and the factual details not only found illustrated from the memorandum as well as articles of association of the appellant

but enumerated from the day-to-day running of the business and administration of the Company leave no room for any doubt as to the identity of the appellant-Company being “other authority” and consequently “the State” within the meaning of Article 12 of the Constitution of India.”

18. On the other hand, Mr. Mehra, learned Sr. counsel for the respondent/Caveator supports the impugned judgment. He submits that PTC India Ltd itself is not an “instrumentality” of the State in as much, as, only 16% shares in the PTC India Ltd are held by the promoters and the remaining are held by the Domestic and the International Financial Institutions. Thus, the foundation of the appellant’s argument is itself fallacious, since the same is premised on the assumption that PTC India Ltd. is a Government Company. He points out that PTC India Ltd is a registered Company whose shares are traded on the stock exchange. He further submits that the respondent is a finance company and its activities are like any other private finance company. He submits that notice under Section 13 (2) of the SARFAESI Act has already been issued to the petitioner. As and when the respondent takes any steps under section 13(4) of the SARFAESI Act, the petitioners will be entitled to approach the Debt Recovery Tribunal for relief under Section 17 of the SARFAESI Act.

19. In rejoinder, Mr. Malhotra submits that when the writ petition was preferred, action under Section 13 (4) of the SARFAESI Act had not yet been initiated, and merely because the same was initiated subsequently, the issue of maintainability of the writ petition cannot be decided on the basis of such subsequent development.

20. We have heard learned counsels and given our thoughtful

consideration to the matter. We have also gone through the impugned judgment.

21. In ***Federal Bank*** (supra), the eight categories of bodies/ persons who may be found amenable to writ jurisdiction under Article 226 of the Constitution of India were stated as follows:

- i) the State (Government);
- ii) an authority;
- iii) a statutory body;
- iv) an instrumentality or agency of the State;
- v) a company which is financed and owned by the State;
- vi) a private body run substantially on State funding;
- vii) a private body discharging public duty or positive obligation of public nature; and
- viii) a person or a body under liability to discharge any function under any Statute, to compel it to perform such a statutory function.

22. In the present case, though the appellant claims that M/s PTC India Ltd. is a government company i.e. a company of which the over-whelming majority of shares are held by the government, there is nothing placed on record to substantiate this assertion of the appellant. On the contrary, it appears that only about 16% shares in M/s PTC India Ltd. are held by the

promoters and the remaining are held by the Domestic and International Financial Institutions. This fundamental premise of the appellant's case is, therefore, knocked out. The respondent company is, undisputedly not discharging a sovereign function, a public duty or positive obligation of public nature. It is not pointed out that the respondent company is under an obligation or a statutory liability to discharge any function under any Statute, the performance whereof can be compelled through the writ of a court. The respondent company is a finance company. The appellant itself claims to have agreed to obtain finances from the respondent company for its hydro electric project in Himachal Pradesh.

23. The observations of the Supreme Court in *Federal Bank* (supra) are aptly attracted in the present scenario. The Supreme Court, inter alia, observed as follows:

“26. A company registered under the Companies Act for the purposes of carrying on any trade or business is a private enterprise to earn livelihood and to make profits out of such activities. Banking is also a kind of profession and a commercial activity, the primary motive behind it can well be said to earn returns and profits. Since time immemorial, such activities have been carried on by individuals generally. It is a private affair of the company though the case of nationalized banks stands on a different footing. There may well be companies, in which majority of the share capital may be contributed out of the State funds and in that view of the matter there may be more participation or dominant participation of the State in managing the affairs of the company. But in the present case we are concerned with a banking company which has its own resources to raise its funds without any contribution or shareholding by the State. It has its own Board of Directors elected by its shareholders. It works like

any other private company in the banking business having no monopoly status at all. Any company carrying on banking business with a capital of five lakhs will become a scheduled bank. All the same, banking activity as a whole carried on by various banks undoubtedly has an impact and effect on the economy of the country in general. Money of the shareholders and the depositors is with such companies, carrying on banking activity. The banks finance the borrowers on any given rate of interest at a particular time. They advance loans as against securities. Therefore, it is obviously necessary to have regulatory check over such activities in the interest of the company itself, the shareholders, the depositors as well as to maintain the proper financial equilibrium of the national economy. The banking companies have not been set up for the purposes of building the economy of the State; on the other hand such private companies have been voluntarily established for their own purposes and interest but their activities are kept under check so that their activities may not go wayward and harm the economy in general. A private banking company with all freedom that it has, has to act in a manner that it may not be in conflict with or against the fiscal policies of the State and for such purposes, guidelines are provided by Reserve Bank so that a proper fiscal discipline, to conduct its affairs in carrying on its business, is maintained. So as to ensure adherence to such fiscal discipline, if need be, at times even the management of the company can be taken over. Nonetheless, as observed earlier, these are all regulatory measures to keep a check and provide guidelines and not a participatory dominance or control over the affairs of the company. For other companies in general carrying on other business activities, maybe manufacturing, other industries or any business, such checks are provided under the provisions of the Companies Act, as indicated earlier. There also, the main consideration is that the company itself may not sink because of its own mismanagement or the interest of the shareholders or people generally may not be jeopardized for that reason. Besides taking care of such interest as indicated above, there is no other interest of the State, to control the affairs and management of the private

companies. Care is taken in regard to the industries covered under the Industries (Development and Regulation) Act, 1951 that their production, which is important for the economy, may not go down, yet the business activity is carried on by such companies or corporations which only remains a private activity of the entrepreneurs/companies.

27. Such private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution.

But in certain circumstances a writ may issue to such private bodies or persons as there may be statutes which need to be complied with by all concerned including the private companies. For example, there are certain legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act or for maintaining proper environment, say the Air (Prevention and Control of Pollution) Act, 1981 or the Water (Prevention and Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance with those provisions. For instance, if a private employer dispenses with the service of its employee in violation of the provisions contained under the Industrial Disputes Act, in innumerable cases the High Court interfered and has issued the writ to the private bodies and the companies in that regard. But the difficulty in issuing a writ may arise where there may not be any non-compliance with or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to.

28. The six factors which have been enumerated in the case of *Ajay Hasia* [*Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] and approved in the later decisions in the case of *Ramana* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] and the seven-Judge Bench in the case of *Pradeep Kumar Biswas* [(2002) 5 SCC 111 : 2002 SCC (L&S) 633] may be

applied to the facts of the present case and see whether those tests apply to the appellant Bank or not. As indicated earlier, share capital of the appellant Bank is not held at all by the Government nor is any financial assistance provided by the State, nothing to say which may meet almost the entire expenditure of the company. The third factor is also not answered since the appellant Bank does not enjoy any monopoly status nor can it be said to be an institution having State protection. So far as control over the affairs of the appellant Bank is concerned, they are managed by the Board of Directors elected by its shareholders. No governmental agency or officer is connected with the affairs of the appellant Bank nor is any one of them a member of the Board of Directors. In the normal functioning of the private banking company there is no participation or interference of the State or its authorities. The statutes have been framed regulating the financial and commercial activities so that fiscal equilibrium may be kept maintained and not get disturbed by the malfunctioning of such companies or institutions involved in the business of banking. These are regulatory measures for the purpose of maintaining a healthy economic atmosphere in the country. Such regulatory measures are provided for other companies also as well as industries manufacturing goods of importance. Otherwise these are purely private commercial activities. It deserves to be noted that it hardly makes any difference that such supervisory vigilance is kept by Reserve Bank of India under a statute or the Central Government. Even if it was with the Central Government in place of Reserve Bank of India it would not have made any difference, therefore, the argument based on the decision of All India Bank Employees' Assn. [AIR 1962 SC 171 : (1962) 3 SCR 269] does not advance the case of the respondent. It is only in case of malfunctioning of the company that occasion to exercise such powers arises to protect the interest of the depositors, shareholders or the company itself or to help the company to be out of the woods. In times of normal functioning such occasions do not arise except for routine inspections etc. with a view to see that things are moved smoothly in keeping with fiscal

policies in general.

29. There are a number of such companies carrying on the profession of banking. There is nothing which can be said to be close to the governmental functions. It is an old profession in one form or the other carried on by individuals or by a group of them. Losses incurred in the business are theirs as well as the profits. Any business or commercial activity, maybe banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money are no doubt, such which do have impact on the economy of the country in general. But such activities cannot be classified as one falling in the category of discharging duties or functions of a public nature. Thus the case does not fall in the fifth category of cases enumerated in the case of Ajay Hasia [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] . Again we find that the activity which is carried on by the appellant is not one which may have been earlier carried on by the Government and transferred to the appellant company. For the sake of argument, even if it may be assumed that one or the other test as provided in the case of Ajay Hasia [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] may be attracted, that by itself would not be sufficient to hold that it is an agency of the State or a company carrying on the functions of public nature. In this connection, observations made in the case of Pradeep Kumar Biswas [(2002) 5 SCC 111 : 2002 SCC (L&S) 633] quoted earlier would also be relevant.” (emphasis supplied)

24. As rightly observed by learned Single Judge, upon examination of the shareholding pattern of the respondent company, it is clear that neither the Central Government nor the State Government holds any shares therein. The respondent company is not a creation of a Statute. It is a Public Limited Company registered with the Reserve Bank of India. Its activities are of purely commercial and private nature. It does not enjoy any State

protection or monopoly. It does not discharge any public or statutory function-enforcement whereof is sought in the present petition. Merely because its activities may be regulated by the RBI-since it is engaged in the business of money lending on commercial terms, it would not become amenable to writ jurisdiction.

25. From the above quoted observations of the Supreme Court in ***Federal Bank*** (supra), and on application of the principles laid down by the Supreme Court therein, it is clear that the respondent does not qualify to be labelled as an instrumentality of the State, or an authority, or ‘*any other person*’ against whom a writ petition under Article 226 of the Constitution of India could be maintained, particularly in relation to a grievance regarding its commercial dealings.

26. Much emphasis have been laid by Mr. Malhotra on the fact that the Board of Directors of M/s PTC India Ltd. has the presence of IRS and IAS officers apart from nominee Directors of other Public Sector Companies like the NTPC, PFC, NHPC, PGC and the LIC.

27. By pointing out that the Board of Directors of the M/s PTC India Ltd. has the officers of the aforesaid class, the appellant is merely pointing out a fact. However, Mr. Malhotra has not pointed out the source of authority under which the members with the aforesaid background have been appointed on the Board of Directors of M/s PTC India Ltd. The Board of Directors of a Company enjoys autonomy in its functioning, particularly, when the company is running a commercial enterprise. In fact, the Board of Directors are duty bound to act in the interest of the

company. It is not pointed out by Mr. Malhotra that the mandate of either PTC India Ltd. or the respondent company is to discharge an obligation which could be described as a governmental or sovereign obligation. Merely because one or two members/office bearers on the Board of Directors of a company may be IRS or IAS officers, it is not sufficient to infer deep and pervasive governmental control in the affairs of the company. In the facts of the present case, the control of the government in the respondent company appears to be even more distinct and remote. Only person wearing the hat of the government is the Chairman, who is shown to be 1984 batch IRS officer, namely, Mr. Deepak Amitabh. Pertinently, he is also on the Board of Directors of M/s PTC India Ltd. Since M/s PTC India Ltd. appears to be the majority stake holder in the respondent company, his appointment as the Chairman of the respondent company is not out of the ordinary. Apart from him, all other Directors on the Board of Directors of the respondent company are free from any governmental control, since none of them appear to be serving either under the Central or the State Government. Out of the seven other Directors - apart from the Chairman, three appear to be nominee of M/s PTC India Ltd., namely, Mr. Ajit Kumar-Ex Technocrat, Mr. H.L.Bajaj-Ex Chairman of Central Electricity Authority, Government of India and Mr. Arun Kumar. In any event, this singular feature, by itself, is not sufficient to conclude that either PTC India Ltd., or the respondent company is a State instrumentality. As observed in *Pradeep Kumar Biswas* (supra), the cumulative facts have to be considered, and if – upon such consideration the body is found to be dominated financially, functionally and administratively by the government; and the control of the government is deep and pervasive, then

alone the body would be considered to be an instrumentality of the State. That is certainly not the case in hand.

28. As rightly observed by learned Single Judge, in the normal functioning of the respondent, there is nothing to suggest that the State or its authorities have any role or participation. Reliance placed by Mr. Malhotra on the definition of the expression, ‘*control*’ as defined in Section 2(27) of the Companies Act, 2013, also appears to be of no avail. It was essential for the appellant to show by reference to the Memorandum and Articles of Association of the respondent company, the existence of the right to appoint majority of the Directors, or to control the management or policy decisions in the promoter company, namely, M/s PTC India Ltd *vis a vis* the respondent company. It was also essential for the appellant to show the existence of similar control in the government over M/s PTC India Ltd. The appellant has neither established the existence of control by the government over M/s PTC India Ltd., nor the existence of control by M/s PTC India Ltd. over the respondent.

29. Reliance placed by Mr. Malhotra on *Ajay Hasia and Ors.* (supra) is out of place. Neither is it established that the entire share capital of the respondent is held by the government, nor is it established that the State exercises deep and pervasive control over the affairs of the respondent. There is nothing to show that the respondent is financially, functionally, or administratively dominated by or under the control of the government, much less to show that the said control is pervasive. At the highest, the control is merely regulatory - by the RBI, on account of nature of the business activities carried out by the respondent.

30. ***Radhey Shyam Rai*** (supra) also has no application in the facts of the present case. Unlike in the present case, in ***Radhey Shyam Rai*** (supra), the Supreme Court found that the State exercised deep and pervasive control over the affairs of the Sansthan. The Cane Commissioner was at the helm of affairs of the Sansthan. The majority of the members of the government council were holders of different government office. Unlike in the present case, it was these government officers who were carrying out affairs of the Sansthan. However, in the present case, there is nothing to show that the power to appoint officers of the respondent company vests in the government, or government appointed officers/directors who may be serving in the government. There is nothing to show that the Central, or the State Government has any power to issue any special directions to the respondent, which the respondent is bound to obey at all times.

31. ***Mysore Paper Mills Ltd.*** (supra) also is of no relevance since it was in the facts and circumstances of that case, that the Supreme Court came to the conclusion that day to day running of the business and administration of the company was within the control of the government.

32. Even otherwise, looking to the nature of the activities carried out by the respondent company, a writ petition would not be maintainable in respect of the business/ commercial activities undertaken by it. Even if the submission of the appellant were to be accepted for the sake of argument that the respondent is an instrumentality of the State, a writ petition under Article 226 of the Constitution of India would not lie to enforce private law rights.

33. In *K.K.Saksena* (supra), the Supreme Court observed;

“A private law is that part of a legal system which is a part of common law that involves relationships between individuals, such as law of contract or torts. Therefore, even if writ petition would be maintainable against an authority, which is “State” under Article 12 of the Constitution, before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law.”
(emphasis supplied)

34. In *Satyawati Tondon* (supra), the Supreme Court held that the self imposed restraint exercised by the High Court while entertaining a petition under Article 226 of the Constitution of India applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. The Supreme Court observed:

“43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust

the remedies available under the relevant statute.” (emphasis supplied)

35. In the present case, the dispute raised by the appellant essentially is a dispute arising from the contract between the parties. It is apparent that the respondent has advanced substantial moneys to the appellant under a loan agreement entered into between the parties. While the appellant claims that the remainder of the loan was not disbursed unjustifiably-leading to the appellant not being able to completely implement the hydro electric project, the respondent claims that the appellant has not discharged its obligation under the agreement. Such disputes cannot become the subject matter of adjudication in writ proceedings, when there are disputed questions and rival claims raised by the parties.

36. There is also merit in the submission of Mr. Mehra that a writ petition would not be maintainable also for the reason that the appellant would have an alternate efficacious remedy available to it under Section 17 of the SARFAESI Act, as and when the respondent takes steps under Section 13(4) of the said Act. The learned Single Judge has taken note of the fact that the respondent had issued a notice to the appellant on 02.09.2016 under Section 13(2) of the SARFAESI Act. The appellant had responded to the said notice on 27.10.2016. The respondent had again put appellant to notice that in case the appellant fails to pay the amount of Rs. 65,73,75,290/- calculated upto 15.08.2016 together with future interest within 15 days, by 17.11.2016, the respondent shall have recourse to Section 13 (4) of the SARFAESI Act. We are, thus, of the view that, in any event, looking to the nature of the dispute raised in the writ petition,

the invocation of Article 226 of the Constitution of India, is misdirected. Since there was no stay of proceedings granted by the learned Single Judge, and the writ petition was also eventually dismissed, the appellant is not justified in claiming that the further development, if any – of the invocation of Section 13(4) of the SARFAESI Act, would have no bearing for determination of the issue of maintainability of the writ petition.

37. For the foregoing reasons, we do not find merit in the present petition. The impugned judgment rendered by the learned Single Judge is exhaustive and well considered and does not call for interference.

38. Dismissed.

VIPIN SANGHI, J

DEEPA SHARMA, J

MAY 23, 2017

ss/sl