

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

DATE OF DECISION : 25.1.2019

1. C.W.P. No.10055 of 2018 (O&M)
**EMTA Coal Ltd. v. Punjab State Power Corporation Limited
and another.**
2. C.W.P. No.16245 of 2018 (O&M)
M/s Emta Coal Ltd. v. Punjab State Power Corporation Ltd.

**CORAM : HON'BLE MR.JUSTICE MAHESH GROVER
HON'BLE MR.JUSTICE LALIT BATRA**

Present:- Shri Abhimanyu Bhandari, Advocate,
Shri Sangram S.Saron, Advocate,
Ms.Kartika Sharma, Advocate,
Ms.Shubhreet Kaur, Advocate and
Ms.Rukhmini Bodge, Advocate for the petitioner.

Shri Atul Nanda, Senior Advocate with Shri Vinod Bhardwaj,
Advocate and Ms.Rameeza Hakeem, Advocate for PSPCL.

MAHESH GROVER, J.

By this order we dispose of C.W.P. Nos.10055 and 16245 of 2018
and all pending applications.

The petitioner in these two petitions is a Company and questions the
order dated 6.4.2018 passed by the respondent/Punjab State Power Corporation
Limited (hereinafter known as the Corporation).

After going through a competitive bidding, the petitioner was chosen
to float a joint venture by the name of Panem Coal Mines Limited, a partner with
the Punjab State Electricity Board the predecessor of the Corporation, to

undertake mining of a Coal Block. In this venture, the Corporation owned a 26% share, while the petitioner along with its nominees, held 74%. The purpose for setting up the venture was to facilitate the mining of the Captive Coal Blocks. The Corporation being a Power Generating Company, was eligible to seek allotment of Coal Block for the purpose of development on captive basis to resource coal for their Power Generating Projects, but since it lacked experience in mines, the necessity to set up a joint venture.

The process to select a company to undertake mining was initiated by the Punjab State Electricity Board, the predecessor of the Corporation on 6.2.1999 and on 12.3.1999, the petitioner submitted its bid in response to the tender documents floated by the Corporation. After negotiations, the petitioner was selected for formation of a joint venture on 9.2.2000. An agreement was executed on 5.5.2000. On 21.3.2001, the joint venture agreement was also executed. The petitioner then invested a huge amount of money since the joint venture agreement stipulated that the Corporation would have no financial liability towards Panem, - the joint venture Company. The petitioner was promised operational rights for 30 years or till the total coal resource of the captive block is exhausted. Since the Corporation did not commit itself to any financial contribution, all the obligations were thrust on the petitioner.

On 26.12.2001, the Union of India allocated the Captive Coal Block at Pachwara Central Block in the State of Jharkhand, the predecessor of the Corporation i.e. the Punjab State Electricity Board who on 2.1.2002 informed the Union of India about the joint venture company namely Panem and requested the Union of India to make arrangements for granting a mining lease for the coal block in favour of Panem. On 22.1.2002, Mining Operation Agreement was executed to enable the petitioner to give effect to the purpose of joint venture agreement. A month later i.e. on 22.2.2002, the Union of India notified the supply of coal from the Coal Block by the Joint Venture Company to the power plants run by the

Punjab State Electricity Board (now the respondent/corporation). The proceedings continued - to result in mining lease dated 6.1.2007 and the mine was developed after huge investments to make it functional.

The allocation of Coal Blocks came to be questioned before the Hon'ble Supreme Court resulting in a decision reported as **Manohar Lal Sharma v. Principal Secretary and others** 2014(9) S.C.C. 516, wherein the Hon'ble Supreme Court found fault with the process of allotment adopted by the Union of India to hold that allotment of Coal Block made by the Central Government during the years 1993 to 2011 was arbitrary and illegal and all the allotments were cancelled, except some which were mentioned in the judgment/order dated 25.8.2014.

Pursuant thereto, on 21.10.2014, the Union of India promulgated two Coal Mines (Special Provisions) Ordinance, 2014 followed by Coal Mines (Special Provisions) Act, 2015 (hereinafter referred to as the Act). Section 11(1) of the Act contemplated that notwithstanding anything contained in any other law for the time being in force, a successful bidder or allottee, as the case may be, in respect of Schedule I coal mines, **may elect, to adopt and continue such contracts which may be existing with any of the prior allottees in relation to coal mining operations and the same shall constitute a novation for the residual term or residual performance of such a contract.** For the purpose of reference, Section 11(1),(2) of the Act is extracted here below :-

**“11. DISCHARGE OR ADOPTION OF THIRD PARTY
CONTRACTS WITH PRIOR ALLOTTEES.**

(1) Notwithstanding any thing contained in any other law for the time being in force, a successful bidder or allottee, as the case may be, in respect of Schedule I coal mines, may elect, to adopt and continue such contracts which may be existing with any of the prior allottees in relation to coal mining operations

and the same shall constitute a novation for the residual term or residual performance of such a contract :

Provided that in such an event, the successful bidder or allottee or the prior allottee shall notify the nominated authority to include the vesting of any contracts adopted by the successful bidder.

(2) In the even that a successful bidder or allottee elects not to adopt or continue with existing contracts which had been entered into by the prior allottees with third parties, in that case all such contracts which have not been adopted or continued shall cease to be enforceable against the successful bidder or allottee in relation to the Schedule I coal mine and the remedy of such contracting parties shall be against the prior allottees.”

It is pertinent to mention here that the Central Government re-allocated the same Captive Coal Block i.e. Pachwara Central Block to the Corporation which had been developed by it earlier by spending more than 400 crores.

Instead of resorting to the provisions of Section 11 and granting consideration in terms thereof, the Corporation invited a notice for tender to select a Mine Developer and Operator (M.D.O.) on 31.8.2015 ostensibly placing an interpretation on clauses 12.4.1 and 12.4.2 of the Allotment Agreement for Pachwara Central Coal Mine which are extracted here below :-

“12.4.1 In case the Coal Mine is developed through contractor(s), the selection of the contractor(s) in relation to coal mining operation shall be through a competitive bidding process and the Allottee company

shall inform the State Government concerned, the Central Government and the Nominated Authority about the engagement of such contractor(s) and the terms and conditions of such engagement, as soon as it is finalized.

12.4.2 The allottee shall ensure that the criteria of bidding for engagement of the contractor(s) are not linked to CIL Notified Price.”

But before doing that, it allowed the petitioner to continue with its operation for a period of 9 months so as to enable it (Corporation) to tide over its difficulties it was confronted with, arising from the proceedings before the Hon'ble Supreme Court and resultant disruption in coal supply that would have throttled the power plants of the State as well as caused huge financial loss to the Corporation.

It is at this stage that the petitioner approached this Court by filing a writ petition, i.e. C.W.P. No.26180 of 2015 with a prayer that notice inviting tender be withdrawn and the Corporation be directed to consider the petitioner's claim for 'novating' the mining lease as an interim measure. This Court on 20.2.2016, directed that the financial bids be not opened till 29.2.2016.

A statement was made by the learned Advocate General on 1.2.2018 which is extracted below :-

“Shri Atul Nanda, learned senior counsel on the basis of written instructions dated 31.1.2018 received by the assisting counsel from the Punjab State Power Corporation Limited, states that in case the petitioner, namely, EMTA Coal Ltd. and PANEM Coal Mines Ltd. submitted a representation-cum-claim as raised in the instant writ petition, the same shall be

considered by the respondent - PSPCL in accordance with the law/policy, provided that the petitioners do not press this writ petition at this stage and till such time, an appropriate decision is taken by the PSPCL.”

The petitioner then submitted detailed representations on 22.2.2018 and 8.3.2018. On 6.2.2018, the claim of the petitioner was rejected on the ground that novation as per Section 11 of the Coal Mining (Special Provisions) Act, 2015 is not permissible for the reason that the Power Corporation had already relinquished its right with respect to the existing contract with the prior allottees and that the Corporation has been mandated to select an operator through a competitive bid in terms of clauses 12.4.1 and 12.4.2.

It is thereafter that the petitioner preferred the present writ petition with a prayer that the decision dated 6.4.2018 be set aside.

The ground to question the impugned order is largely a reliance on Section 11 and the fact of heavy investment made in the mine which upon consideration in terms of the said provisions of the Act would require a serious deliberation by the Corporation to the petitioner's claim for novation for the residual term and a right to operate the mine and even confer a first right of refusal in view of not only the heavy investment, but the fact that there have neither been any complaints against the petitioner in the entire period, including the one when the petitioner functioned for 9 months in the changed scenario, resulting from the Hon'ble Supreme Court's order.

Meat to the aforesaid, skeletal arguments was provided by placing reliance on certain precedents which we intend to deal with at a subsequent stage.

The Corporation, on the other hand, denied any preferential right in favour of the petitioner in view of the clauses 12.4.1 and 12.4.2 ; to read in these clauses a mandate to go for competitive bidding with no option to consider

petitioner's claim in terms of Section 11.

It has been urged before us that since the petitioner never even participated in the tendering process, he would have no right to raise any grievance regarding the bidding process initiated by the Corporation particularly when the petitioner was alive to the issues. That apart, it has been argued before us that the Corporation being a State entity, entering into a contract with the Union of India would be bound to the terms thereof, as would any other private person, and the Court's power of judicial review would also flow from appreciation of this fact and this power by courts of a judicial review is constricted and not to be exercised unless there is a breach of any public interest or violation thereof, resulting from an agreement.

The facts as such are not in dispute and therefore, what we have been called upon to determine is the claim of the petitioner to insist upon a meaningful consideration in terms of Section 11 for novation of a contract, while the respondents insist that once the earlier contract stood extinguished to be replaced by another agreement, the Corporation is under no obligation to novate a contract because the law would forbid so, more particularly when the successor agreement with the Central Government clearly mandates choosing an operator thorough a competitive bid.

The petitioner placed reliance on a judgment of the Karnataka High Court where the present petitioner was embroiled in an identical controversy with the Power Corporation and it was held that the petitioner would be permitted to make a bid to match the lowest bid but claim no benefit of any term or condition under the erstwhile contractual relation. It was specifically observed that in the circumstances of the case, the nominated authority was bound to take into account the injustice that would be caused to the petitioner, if the benefit of Section 11 is not afforded to it.

It was argued before us that the petitioner has a right to invoke the

provisions of Section 11 and seek novation particularly when all the factors would heavily lean towards the genuineness of the petitioner's claim stemming from huge investments of more than 400 crores resulting in an option of right of first refusal, which is as a principle acknowledged by the courts.

It has also been pleaded that the Corporation has not granted a meaningful consideration to the petitioner by mis-interpreting clauses 12.4.1 and 12.4.2.

The respondents have with some vehemence argued that if the facts are taken in entirety, the best case of the petitioner seems to be of a legitimate expectation emerging from the previous situation, but this can never be the basis to novate a contract. Besides, the plea of legitimate expectation cannot stand in the face of a statute. Emphasis was placed on the inherent limitation of the Court to exercise its power of judicial review in matters of contract, restricting intervention only if public interest is violated or threatened. The ratio of the judgment in **Tata Cellular v. Union of India** (1994) 6 S.C.C. 651 was highlighted, wherein the Hon'ble Supreme Court observed as under :-

“71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy ; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

... ..

74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.

... ..

77. The duty of the court is to confine itself to the question of legality. Its concern should be :

- (1) Whether a decision-making authority exceeded its powers ?
- (2) Committed an error of law,
- (3) Committed a breach of the rules of natural justice,
- (4) reached a decision which no reasonable tribunal would have reached, or
- (5) abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

- (i) Illegality : This means the decision-making must understand correctly the law that regulates the decision-making power and must give effect to it.
- (ii) Irrationality, namely Wednesbury unreasonableness.
- (iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, In R. v. Secretary of State for the Home Department, ex Brind, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, consider whether something has gone wrong

of a nature and degree which requires its intervention.”

There can be no legitimate exception on the face of a statute according to the respondents. Reliance was placed on a decision of the Hon'ble Supreme Court in **Sri Nivasa Theatre and others v. Government of Tamil Nadu and others** (1992) 2 S.C.C. 643, wherein it was observed as under :-

“22. Another argument urged by Sri Parasaran is that the petitioners had come to entertain a legitimate expectation based upon legislative practice that they would not be brought over to admission system. Factually speaking, we must say that no such legislative practice has been brought to our notice. Prior to 1978, all the theatres all over the State were governed by admission system alone. Even after introduction of Sections 5-A and 5-B it was made applicable to several local areas in two stages i.e. in 1978 and 1982. Indeed by Amendment Act 20 of 1983 and 48 of 1986 certain local areas governed by Sections 5-A and 5-B were removed from their purview and brought back to admission system. The entire experiment has been spread over a period of only about 14 years. We cannot say that this period is sufficient to establish, what may be called, a 'legislative practice'. Even otherwise, we are not satisfied that the said theory can be brought in to defeat or invalidate a legislation. It may at the most be used against an administrative action, and even there it may not be an indefeasible right. No case has been brought to our notice where a legislation has been invalidated on the basis that it offends the legitimate expectation of the persons affected thereby. We may in this connection refer to the

decision of the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service* wherein this theory is referred to. In this case, the staff of Government Communications Headquarters (G.C.H.Q.) had the right to unionisation. By an order made by the Government this right to unionisation was taken away in so far as the employees of G.C.H.Q. are concerned. The Union questioned the same. It was held by the House of Lords that though the Unions had a legitimate expectation that before barring them from unionization they would be consulted, the security considerations, put forward by the Government, over-ride the right of the petitioner's to prior consultation."

To the same effect are the judgments reported as **Sri Nivasa Theatre and others v. Government of Tamil Nadu and others** (1992) 2 S.C.C.643, **P.T.R.Exports (Madras) Pvt. Ltd. and others v. Union of India and others** (1996) 5 S.C.C. 268 and **Bajaj Hindustan Limited v. Sir Shadi Lal Enterprises Limited and another** (2011) 1 S.C.C. 640.

That apart, it was contended that Section 62 of the Contract Act, 1872 which contemplates novation of a contract, specifically lays down that if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. It was thus, argued that no mandamus can be issued to any person/entity to novate a contract against his wishes.

It was then argued that in matters of contract if conditions are breached, the grievance necessarily has to be put before a Civil Court where the remedy of damages can be pursued.

It was lastly argued by the respondents that even if the best case of the petitioner is to be accepted today, it cannot be awarded the relief in the absence

of the subsequent awardee being a party in the present proceedings, furthermore, when the petitioner never participated in the tender process.

These arguments were largely countered by the petitioner who contended that in matters where the statute provides, the issue would not be of legitimate expectation, and the right of the petitioner for consideration would flow from the statute. Besides, the petitioner had challenged the initiation of the process of tender and it is because of this reason that he could not have participated having once challenged the process itself. Reliance was placed on a decision of the Hon'ble Supreme Court in **Merrut Development Authority v. Association of Management Studies and another** (2009) 6 S.C.C. 171, wherein it was held as under :-

“27. The bidders participating in the tender process have no **other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground**, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.”

Upon consideration, this Court is of the opinion that the peculiar facts offered in the present controversy would have an immense bearing on our quest for an answer, besides the stated legal position.

Initially in 1999 when the Captive Coal Block was allocated at

Pachwara Central Block and the contracts emerging therefrom created a right in favour of the petitioner to mine in terms of the agreement inter-se between the parties which was acted upon till the time the arrangement was disrupted for the reasons, not within the control of either of the contracting parties. It was not the case that the Corporation had gained an access to Captive Coal Block through a manipulative process, but it was largely the process adopted by the Central Government that was deprecated affecting all the cases of Captive Coal Block allocations.

The petitioner had a functional arrangement through a legitimate contract with the Corporation and had commenced work by making investments. The same Captive Coal Block, Central Block, Pachwara was restored to the Corporation after the judgment of the Hon'ble Supreme Court and ostensibly Section 11 of the Act contemplates a such like situation where the Coal Blocks initially allocated and possibly made functional in collaboration with the operators could be saved, of course, with the consent of the parties.

The respondents' plea with reference to Section 62 of the Contract Act that no party can be mandated to novate a contract in law is correct, but stems from a misconception when juxtaposed against the Act.

The language of Section 11 is unambiguous as it addresses a situation of existing contracts with the prior allottees, disrupted for the reason noticed and warrants a consideration to them for either electing, adopting, or continuing such existing contracts awarded to any of the prior allottees in relation to coal mining operations, in which eventuality, it shall be construed as a novation of contract for the residual term.

Therefore, it is not a mandate to novate a contract that flows from Section 11, but a permissibility to elect, adopt and continue with the existing contract to be construed as a novation and for which a proper and meaningful consideration alone is a mandate.

Consequently, there is no violence to the language or spirit of Section 62 of the Contract Act and protects the underlying concept of meeting of minds and the voluntary character in executing contracts by the parties. Section 62 of the Contract, 1972 is extracted here below :-

“62. Effect of novation, rescission and alteration of contract.- If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.”

The afore-extracted provision when read alongside Section 11 of the Act re-enforces our view that the parties to a contract may willingly agree to substitute a new contract or to rescind it or alter it.

The plea of the respondents, therefore, on this count is unacceptable.

In so far as the plea of a legitimate expectation being unavailable in the face of the statute is concerned, we are afraid this situation is non-existent. The petitioner who was in a legitimate contractual relationship with the Corporation, would certainly be within its rights to rely on Section 11 and demand a consideration of continuation for the residual term either on the same terms or as per novated terms. Legitimate expectation of the petitioner is a natural corollary of a meaningful consideration under Section 11 coupled with conduct of the Corporation which permitted the petitioner to continue performing the contract for as long as nine months during the transitory period. Not for a minute has the petitioner asserted before us that the Corporation is bound by the earlier terms.

Likewise, the insistence of the respondents on clauses 12.4.1 and 12.4.2 to rebuff the claim of the petitioner is misplaced. Indeed, the clauses do permit the Corporation to choose an operator through a competitive bid, but only if they had exercised the option offered under section 11 to negate the claim of the

petitioner for novation by giving reasons that may withstand the test of judicial scrutiny. They could have very well said that the petitioner's performance was perfunctory or unsatisfactory and denied continuance of any further contractual relationship to the petitioner. But it seems rather strange that on the one hand, in the changed scenario emerging from a fresh allocation, in a transitory period resulting therefrom, they selfishly chose the petitioner to continue performing on the existing terms for a period of 9 months since it suited them. It has nowhere been pleaded before us that at any point of time, the petitioner's performance was not satisfactory.

The respondents would certainly have an argument available to them to contend that in matters of contract, the courts would have a limited role to play while exercising their power of judicial review and intervene only if a public interest is threatened, and leave the parties to their civil remedies that a breach of contract offers.

We are conscious of the pitfalls that a contractual issue would offer to the court's power of judicial review. But time and again, the courts have held that the action of the State or its entities in contractual matters would undoubtedly have public interest as an end result making it extremely difficult for it to escape judicial scrutiny, no matter, how restrictive. To borrow the words of Lord Denning who while commenting favourably on court's power of intervention in the issues related to a public policy, where equal constraint is cautioned said, "with a good man in the saddle, an unruly horse can be kept in control. It can jump over obstacles."

It was held by this Court in **Indo-American Hybrid Seeds v. Chd. Industrial & Tourism Development Corp.** 1995 A.I.R. (Punjab) 134 as follows:-

"7. We find support in our view from the authority of the apex Court in *Kumari Shrilekha Vidyarthi etc. etc. v. State of U.P. and others*, AIR 1991 Supreme Court 537 : 1991(1)

S.C.T. 575, wherein following the authorities of apex Court in *M/s Dwarkadas Marfatia and sons v. Board of Trustees of Port of Bombay*, AIR 1989 Supreme Court 1642 : 1990(1) R.C.R. (Rent) 495 and *Mahabir Auto Stores and others v. Indian Oil Corporation and others*, AIR 1990 Supreme Court 1031, their lordship observed that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. Therefore, it would be difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14.”

The Hon'ble Supreme Court in **Joshi Technologies International Inc. v. Union of India and others** 2015(7) S.C.C. 728, held in para-69 as follows :-

“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 summarised 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.

(viii) Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is a 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 Constitution 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.”

We cannot hence be oblivious to the facts of the case. The Corporation is a statutory body and a government entity. In a contract executed by such an entity, a sovereign flavor is all pervasive and behind which 'sovereign reliability', lurks as a silhouette of a 'sovereign guarantee', constantly influencing the mind the other party to a contract.

The State cannot thus afford to act unfairly or unethically in matters of contract with private entrepreneurs without facing the risk of scaring away investors and ensuring a flight of capital. Being a government entity with sovereign backing, casts a far serious duty on them to act fairly, than would be expected of private parties to a contract.

Precisely for this reason, it is a case where the observations of the Hon'ble Supreme Court in **Joshi Technologies's** case (supra) in particular the ones contained in clause (ix) (extracted above) are attracted to the present case in all its ferocity and intensity.

It is for this reason that the conduct of the Corporation cannot be equated to an ordinary contracting party. It should not have forgotten that it had chosen the petitioner to float a joint venture to operate the mines and provide coal for the thermal units run by it. Had the disruption not intervened, the petitioner would have continued to perform its functions after making heavy investments in the mine. It could not therefore, have been left in the lurch particularly when the same mine was re-allocated to the Corporation suggestive of continuity. Indeed, the respondents were very well within their rights to reject the arrangement while granting a consideration under Section 11 if the performance of the petitioner was unsatisfactory or if there was any other factor which the Corporation found relevant enough to discard the arrangement altogether.

We do not see any such worthwhile consideration being granted to the petitioner and are thus, of the view that it has severely prejudiced the petitioner's claim. We are also in agreement with the petitioner that once it had questioned the tender process initiated by the Corporation, it could not have participated in the same process without damaging its own prospects more particularly when a categoric assurance was given by the Corporation that in case the petitioner submits a representation-cum-claim as raised in the earlier petition i.e. C.W.P. No.26180 of 2015, the same shall be considered by the Corporation in accordance with law/policy. Rather, the petitioner was persuaded to give up his writ petition on the strength of the statement. It was thus, imperative for the Corporation to grant a meaningful consideration under Section 11 which, apparently has not been done.

We are also in agreement with the contention of the petitioner that the contract could not be awarded to a third party by resorting to clauses 12.4.1. and 12.4.2 without exploring the possibility of electing the petitioner as an operator in terms of Section 11. The necessity to float tender in terms of clauses 12.4.1 and 12.4.2 to our mind, arises only thereafter.

The tender process though wrongly embarked upon, has been concluded but the allottee has been put on notice that it is subject to the outcome of the present writ petition. The price obviously has been disclosed and therefore, the petitioner ought to be granted the right of first refusal, which would be only too justified in the backdrop of the the controversy noticed above.

We, therefore, accept these petitions and hold that action of the respondents in not granting a meaningful consideration under Section 11 is wrong and arbitrary. There is overwhelming material in favour of the petitioner that warrants such a consideration. The insistence on the clauses 12.4.1 and 12.4.2 without carrying out this exercise is flawed, since the tender in any case has been floated and price disclosed, the petitioner would have the first right of refusal but it

would not claim any benefit from the previous contractual agreement.

(MAHESH GROVER)
JUDGE

January 25, 2019
GD

(LALIT BATRA)
JUDGE

Whether speaking/reasoned	Yes
Whether reportable	Yes/No