

Ntpc Ltd & Anr vs.m/s Bgr Mining & Infra Ltd

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Court : Delhi

Decided On : Feb-15-2019

Appellant : Ntpc Ltd & Anr

Respondent : M/S Bgr Mining & Infra Ltd

Judgement :

+ IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment reserved on: February 06, 2019 Judgment delivered on: February 15, 2019 LPA572019, CM No.4359/2019 NTPC LTD & ANR Appellants Through: Mr. Tushar Mehta, SG with Mr. Puneet Taneja, Mr. Kanu Agarwal, Ms. Shaheen and Ms. Laxmi Kumari, Advs. for NTPC M/S BGR MINING & INFRA LTD versus Respondent Through: Mr. Jayant Bhushan, Sr. Adv. with Ms. Priya Kumar, Mr. Adhish Srivastava and Mr. Tejas Chhabra, Advs. for R1 & R2 CORAM: HON'BLE THE CHIEF JUSTICE HON'BLE MR. JUSTICE V. KAMESWAR RAO

JUDGMENT

V. KAMESWAR RAO, J1 This Intra-Court appeal has been filed by the NTPC Ltd. and another challenging the judgment dated January 21, 2019 passed by the learned Single Judge in W.P.(C) No.463/2018 where by the learned Single Judge has allowed the writ petition and directed the appellant NTPC to hold Good Faith Discussions with the respondent herein in terms of Clause 23.1 (b) of the Project Agreement, which shall also be construed as compliance of Clause 24.4(c) of the said Agreement. LPA572019 Page 1 of 22 2. Some of the facts as noted from the record are the respondent is a company registered under the Companies Act,

1956 and is engaged in the business of mining and infrastructure. NTPC is a Government of India enterprise and is, inter alia, engaged in the business of generation of power. On March 05, 2016, NTPC issued a Request for Proposals (RFP) inviting online bids for selection of a Mine Operator cum Developer for developing and operating the Chatti Bariatu Coal Block situated in the State of Jharkhand. In response to the RFP, the petitioner submitted its proposal. The same was accepted and the NTPC issued a letter of acceptance on November 13, 2017. Thereafter, on November 28, 2017, the parties entered into the Project Agreement. On December 07, 2017, an FIR was registered by the Central Bureau of Investigation (CBI) against Mr. Kulamani Biswal, Director (Finance) NTPC, Mr. B. Rohit Reddy, Director of the respondent Company, Mr. T. Prabhat Kumar and other unknown persons. The subject matter of the FIR was that an information was received that Mr. Biswal was to travel abroad with his wife and daughter on December 08, 2017, from Bhubaneswar. It was alleged that Mr. Biswal requested Mr. Rohit Reddy to arrange US Dollars equivalent to 5 lakhs for him LPA572019 Page 2 of 22 to travel overseas and Mr. Reddy offered to deliver the same at Delhi or Bhubaneswar. It was also alleged that subsequently, Mr. Biswal asked Mr. Reddy to give him cash in Indian currency which he would convert to US Dollars on his own. It is alleged that Mr. Reddy informed Mr. Biswal that one Mr. T. Prabhat Kumar would deliver the said amount to Mr. Biswal at Delhi. CBI alleged that it has information that Mr. Reddy had arranged to deliver 5 lakhs in cash through hawala channels to Mr. T. Prabhat Kumar to further deliver to Mr. Biswal at Delhi. It was also alleged that Mr. T. Prabhat Kumar was likely to deliver the aforesaid amount to Mr. Biswal at his residence shortly. CBI had alleged that Mr. Biswal had attempted to obtain for himself, valuable things without consideration from the respondent with whom he had dealings due to business transacted between NTPC and the respondent.

3. It is the case of the CBI that the same discloses, prima facie, commission of an offence under Sections 11 and 12 of the Prevention of Corruption Act, 1988 r/w Section 120-B of the Indian Penal Code, 1860. On December 12, 2017, the appellant NTPC issued a letter calling upon the respondent to explain why suitable action under the provisions of the Project Agreement LPA572019 Page 3 of 22 should not be initiated against it in view of the registration of the FIR. The

respondent responded to the same by a letter dated December 14, 2017, inter alia, stating that it is too premature to comment anything as the matter is under investigation. The respondent denied all allegations levelled in the FIR and stated that neither the Company nor its Directors had indulged in any corrupt practices. Thereafter, on December 16, 2017, the Secretariat of Independent External Monitors (IEMs) issued a letter referring to the FIR registered by the CBI and called upon the respondent to present the necessary facts, documents and evidence with regard to the aforesaid allegations. The said communication indicated that it was in reference to the Project Agreement dated November 28, 2017 and LoA dated November 13, 2017 entered into by NTPC for appointment of a Mine Operator for the Chatti Bariatu Coal Mine and the LoA dated November 13, 2017 issued to a consortium for appointment of a Mine Operator for the Talaipalli Coal Mine. In response to the aforesaid letter, representatives of the respondent appeared before the IEMs and made oral and written submissions along with supporting documents.

4. On December 20, 2017, NTPC issued a notice under LPA572019 Page 4 of 22 Clause 24(1)(c) of the Project Agreement directing the respondent to suspend all mining services under the Project Agreement till further notice. In response to the aforesaid notice, the respondent sent a letter dated December 22, 2017 disputing that the registration of an FIR would fall within the scope of Clause 24(1)(c) of the Project Agreement as the same did not constitute any material breach of obligation, which was not capable of being remedied. A reference is also made to the fact that it had mobilized its resources and requested NTPC to withdraw the letter dated December 20, 2017 suspending the mining operations. The aforesaid letter was followed by another letter dated December 24, 2017 claiming that there were certain inadvertent errors in the letter dated December 14, 2017; the principal concern being that the respondent desired eight weeks to respond to the allegations but that request was not incorporated in the said letter. Finally, on December 29, 2017, NTPC issued a notice, inter alia, stating that in view of the seriousness of the allegations made in the FIR, in the reasonable judgment of NTPC, the respondent had engaged in a corrupt practice constituting an event of default under the provisions of Clause 24.3(b) of the Project Agreement. Thereafter, the respondent LPA572019 Page 5 of 22 issued a letter dated January

06, 2018 under Clause 23.1(a) of the Project Agreement.

5. The case of the respondent before the learned Single Judge was that the default has not occurred in terms of Clause 24.3(b) of the Project Agreement and mere registration of an FIR did not amount to an event of default and accordingly NTPC could not form a reasonable judgment that the respondent had engaged in corrupt practice. The case also put forward on behalf of the respondent was that there was no material to hold that the respondent had indulged in any corrupt or fraudulent practice. It was also contended that Article 9 of the Project Agreement contains provisions with regard to the corrupt or fraudulent practices and fraud prevention policy of NTPC. Even if the allegation made against the Director of the respondent is accepted, the same would not constitute a corrupt practice within the meaning of the said expression as defined under sub-clause (a) of Clause 9.1 of the Project Agreement. It was also pleaded on behalf of the respondent that the concerned Court had not even formed a prima facie opinion whether any offence has been made out and thus even the charges have not been framed. Thus, no further action was required to be taken by NTPC at that stage. It LPA572019 Page 6 of 22 was also contended that the procurement process was completed in a transparent manner and there is no allegation that the respondent had offered or solicited anything of value to influence the decision of NTPCs officials. It was also contended that there was no allegation of giving any bribe for execution of the Project Agreement. In other words, the expression execution of the Project Agreement does not mean performance of the contract in question but the act of entering into (signing) the Project Agreement.

6. On the other hand, it was the case of the NTPC as canvassed by Mr. Tushar Mehta, learned Solicitor General that the writ petition was not maintainable, inasmuch as no element of public law is involved and even if it is accepted that NTPC was acting contrary to the terms of the Project Agreement, the respondent had private law remedies. It was also the case of the NTPC that in view of the aforesaid allegation, the event of default as alleged is not of a nature that can be remedied by good faith discussions and, therefore, no purpose will be served by holding any discussion under Clause 23 of the Project Agreement. The learned Single Judge has referred to Clause 9.1 which defines corrupt or fraudulent

practices. He also referred to Clause 24.3 LPA572019 Page 7 of 22 relating to Termination by the owner, Clause 24.4 relating to Show Cause / Termination for an event of default and Clause 23.1 relating to Amicable Settlement. The learned Single Judge finally concluded that the NTPC is willing to hold good faith discussions under Clause 24.4(c) of the Project Agreement but it resisted holding such discussions under Clause 23.1(b) of the Project Agreement. Clearly, the stand of NTPC is not sustainable. He held that if NTPC is willing to hold good faith discussions in terms of Clause 24.4 (c) of the Project Agreement to discuss the options for cessation of the event that led to the issuance of the notice, there is no reason whatsoever for NTPC to resist holding of such discussions in terms of Clause 23.1(b) of the Project Agreement and accordingly, gave directions.

7. Before us it was the submission of Mr. Tushar Mehta, learned Solicitor General of India that the learned Single Judge has erred in giving a direction to comply with the mandate of Clause 23.1 (b) of the Project Agreement, which direction is, in the nature of specific performance, which the learned Single Judge could not have given without adverting to any legal right or fundamental right which has been violated by the appellant, that too at a show cause notice stage. According to him, in view of LPA572019 Page 8 of 22 serious charges alleged in the FIR filed by the CBI against the Director (Finance), a reference of which is made above, which indeed amounts to corrupt practice, the event of default is of such a nature that cannot be remedied by good faith discussions and therefore, no purpose will be served by holding any discussion under Clause 23.1(b) of the Project Agreement. He also stated that a charge sheet under the conduct rules for major penalty has also been issued against Mr. Biswal. In view of such seriousness of the charges, interdicting the appellant / NTPC from taking further action on the notice issued to the respondent, is unsustainable when the contract is with regard to coal block and a larger public interest is involved. That apart, it has been his endeavor to contend that if the respondent is aggrieved by any order to be passed by the appellant on the notice, it is at liberty to seek remedy of arbitration against NTPC / appellant, which may include a claim for compensation for wrongful termination. Mr. Mehta argued, the plea of huge investment having been made by the respondent is not sustainable as the notice under Clause 24.3 (b) of the project agreement was issued within 1 months of award of the contract inasmuch as the award of work

was on November 13, 2017, FIR was registered on December 07, 2017, LPA572019 Page 9 of 22 suspension of work was on December 20, 2017 and notice was issued on December 29, 2017. 8 . On the other hand, Mr. Jayant Bhushan, learned Senior Counsel for the respondent would submit that the respondent herein has, pursuant to the award of the LoA made huge investments. The contract was given after following due process as contemplated. Unfortunately, for totally extraneous reasons, the appellant without following the due process of law as contemplated in the Agreement intends to terminate the Agreement, which is clearly impermissible. He by drawing our attention to Clause 9.1 of the Project Agreement, which defines corrupt or fraudulent practices, submitted that the said corrupt or fraudulent practices must be for procuring the contract or the execution of contract Agreement, which is not the case of the appellant NTPC. According to him, when there is a clear stipulation in the Project Agreement to resort to the Good Faith Discussions, even in case of corrupt or fraudulent practices, there is no reason for the NTPC to resist the same. This resistance does not show good faith on the part of the NTPC. He states, if the plea of the NTPC is agreed to, then in no case where there are allegation of corrupt practices, Clause 23.1(b) for LPA572019 Page 10 of 22 holding Good Faith Discussions can be implemented. According to him, the FIR does not reflect any offence having been committed and with such kind of an allegation in the FIR, and without any finding to that extent against the respondent herein, the action of the NTPC to prematurely terminate the contract would be highly unjust. He stated despite there being a provision of Independent External Monitors to monitor the bidding process and execution of Project Agreement and to oversee implementation and execution of the integrity pact, which authorize the monitors to examine / consider the allegation made against the respondent and the monitors having called upon the respondent to respond, but had not taken any decision, as nothing has been heard from them is unjust. He also meets the argument of Mr. Mehta on the maintainability of the petition by contending that the appellant has approached the Court seeking implementation of a provision of a contract entered by NTPC, which has a public law element, the respondent was within his right to approach the Court seeking its implementation and such a writ petition was maintainable before the learned Single Judge of this Court. In support of this

submission, he relied upon a judgment in the case of Joshi Technologies International Inc. v. LPA572019 Page 11 of 22 Union of India and others. (2015) 7 SCC728 9. Having heard the learned counsel for the parties, the only issue which needs to be decided is whether the learned Single Judge was justified in directing the NTPC / appellant to hold Good Faith Discussions under clause 23.1(b) of the Project Agreement, which shall be construed as discussion under Clause 24.4(c) of the said agreement,. The relevant contractual provisions, as noted by the learned Single Judge are as under:-

"9.1 Corrupt or Fraudulent Practices The Mine Operator shall observe the highest standard of ethics during the execution of the Project Agreement. For the purposes of this provision, the terms set forth below are defined as follows: (a) corrupt practice means the offering, giving, receiving or soliciting in any manner whatsoever, directly or indirectly, of anything of value to influence the decision or action of a public official or Owners official or its engaged consultant(s) or advisor(s) during any stage of the procurement process or execution of the Project Agreement; and (b) fraudulent practice means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of Owner and includes collusive practice among Mine Operators (prior to or after Project Proposal submission) designed to establish Project Proposal prices at artificial non competitive levels and to deprive Owner of the benefits of free and open competition, if the Mine Operator, in the judgment of the Owner has engaged in corrupt or fraudulent practices in competing for or in executing the Agreement, the Owner shall take any and all such actions including termination as may be considered necessary or desirable by Owner in such circumstances. LPA572019 Page 12 of 22 24.3 Termination by the Owner XXXX XXXX XXXX (b) Mine Operator's Events of Default The following events or the circumstances shall be "Mine Operator's Events of Default: (i) Any of the warranties offered by the Mine Operator in Clause 3.1.2 is not true or incorrect; (ii) The Mine Operator fails to renew the Contract Performance Guarantee, in accordance with Clause 6.2, at least 3months prior to its expiry; (iii) The Mine Operator fails to make satisfactory progress or achieve milestones in accordance with the agreed Operational Plan specified at Clause 8.2(a) (duly considering any extension under Clause 8.3 or subsequently), except where the progress has been held up because of delay in

achieving Owner's milestones identified .considering any the Operational Plan(duly extension under Clause 8.3 or subsequently); (iv) The Mine Operator does not maintain or timely renew the required Approvals, as specified in Clause 7.2, resulting in material suspension of Mining Services for a continuous period of 3 months during the Operations Stage; (v) The Short Delivery is more than 50% pursuant to Clause 15.3.1 for a continuous period of three (3) months or the Short Delivery, in aggregate for any Operating Year is more than 30% of ACQ specified in AAPP for that Operating Year; (vi) The coal delivered by the Mine Operator continues to be in rejected for a continuous period of three months in any Operating Year on account of quality of coal not meeting the criteria specified in Clause 15.6.5 (vii) If the Mine Operator-disposes of all or a substantial part of the Mine Operator's Plant and Equipments without the prior LPA572019 Page 13 of 22 written consent of the Owner; (viii) If the Mine Operator disposes of any of the Owner's Facilities without the prior written consent of the Owner in violation of Clauses 13.5(c) and 13.5(d); (ix) If the Mine Operator becomes bankrupt or insolvent, has a receiving order issued against it, enters into a compromise with its creditors, or, its governing body approves a resolution or order is made for its liquidation/winding up (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), a receiver is appointed over any part of its undertaking or assets, or if the Mine Operator takes or suffers any other analogous action in consequence of debt; (x) If the Mine Operator assigns or transfers the Agreement or any right or interest therein in violation of the provisions of this Agreement; (xi) If the Mine Operator, in the reasonable judgment of the Owner has engaged, in corrupt or fraudulent practices in competing for or in executing the Agreement pursuant to Clause 9.1; (xii) If the Mine Operator does not recommence providing the Mining Services within 15 days of receipt of the Owner's notice under Clause 24.1(d); (xiii) If the Mine Operator fails to meet the obligations setout in Clause 8.2; (xiv) Change in the shareholding of paid up share capital of the Joint Venture Company without the prior written approval of NTPC. (xv) Any other Event of Default in respect of the Mine Operator, not explicitly covered above.

24.4 Show cause/Termination for an Event of Default (a) In case of an occurrence of a Mine Operators Event of Default, the Owner may issue the Mine Operator a written notice confirming its intent to terminate this Agreement.

Such notice LPA572019 Page 14 of 22 specify the alleged event along with shall: (i) state that it is a notice under Clause 24.3(b) of this Agreement; and (ii) information/documents that the Owner may have. (b) In case of an occurrence of an Owners Event of Default, the Mine Operator may issue the Owner a written notice confirming its intent to terminate this Agreement. Such notice shall: supporting specify supporting the alleged event along with (i) state that it is a notice under Clause 24.2(b) of this Agreement; and (ii) information/documents that the Mine Operator may have. (c) Upon receipt of notice of termination by the non-terminating Party pursuant to Clause 24.4 (a) or 24.2 (b), as the case may be, the Parties shall discuss in good faith for a period of thirty (30) days the options for the cessation of event that led to the issue of the notice. It is clarified that during the period of thirty (30) days the obligations of the Parties shall continue to subsist. (d) At any time after the expiry of such period of thirty (30) days after the terminating Party gave notice to the other Party pursuant to 24.4(a) or 24.4(b), as the case may be, unless the circumstances constituting the termination event have either been fully remedied to the satisfaction of such terminating Party or have ceased to apply, such terminating Party may terminate this Agreement by giving a forty five (45) day prior written notice of such termination to the non terminating Party. 23.1 Amicable Settlement (a) In the event of any dispute or claim of any kind whatsoever that may arise between the Parties as a result of construction, interpretation or application of any of the terms and conditions of this Agreement or performance of it, either Party may be written notice inform the other Party of such dispute (Dispute Notice). (b) The Parties shall within a period of 30 days from the date of LPA572019 Page 15 of 22 receipt of Dispute Notice by such other Party meet and endeavour to settle such dispute in an amicable manner through good faith discussions.

10. The notice dated December 29, 2017 delineates the event of default to be the allegation contained in the FIR, from which the following is noted:-

"INFORMATION A reliable source information has revealed that Sh. Kulamani Biswal is presently posted as Director (Finance), NTPC Limited, New Delhi and is on the Board of Directors of the company. M/s BGR Mining & Infra Private Limited is a private limited company which is part of a consortium with NCC Limited and

this consortium has recently been awarded the project relating to Mine Development and Operation of Talaipalli Coal Block by NTPC Limited. Sh. Rohit Reddy Bathina is a director of M/s BGR Mining & Infra Private Limited. Sh. Prabhat Kumar is an associate of Sh. Reddy and handles his tasks in Delhi. Source has further informed that Sh. Kulamani Biswal 2. is going abroad with his wife and daughter on 08.12.2017 from Bhubaneswar. Today, on 07.12.2017, Sh. Prabhat Kumar went and personally met Sh. Kulamani Biswal and during this meeting he engaged Sh. Rohit Reddy Bathina. Sh. Kulamani Biswal initially had asked Sh. Rohit Reddy Bathina to arrange US Dollars equivalent to Rs.5 lakhs for him for the trip abroad. Sh. Rohit Reddy Bathina offered to deliver the same at Delhi or Bhubaneshwar. Sh. Kulamani Biswal then asked Sh. Reddy to give him the cash in Indian currency at Delhi itself which he would convert to USD himself. Sh. Reddy then informed Sh. Biswal that Sh. Prabhat Kumar would deliver the amount of Rs.5 lakhs to Sh. Biswal at Delhi today. LPA572019 Page 16 of 22 3. Source has further informed that Sh. Rohit Reddy Bathina arranged for the delivery of Rs.5 lakhs cash through Hawala channels to Sh. Prabhat Kumar for further delivery to Sh. Kulamani Biswal at Delhi. Sh. Prabhat Kumar is likely to deliver the amount to Sh. Kulamani Biswal at his residence in Asian Games Village Complex, New Delhi shortly.

4. Sh. Kulamani Biswal, being a public servant, has attempted to obtain for himself valuable things without any consideration from a party, namely M/s BGR Mining & Infra Private Limited, with whom he has been dealing due to the business transacted between NTPC Limited and M/s BGR Mining and Infra Private Limited. Sh. Rohit Reddy Bathina alongwith Sh. Prabhat Kumar have conspired and abetted the aforesaid act of Sh. Kulamani Biswal, Director (Finance), NTPC.

5. The above mentioned acts of Sh. Kulamani Biswal, a public servant, Sh. Rohit Reddy Bathina and Sh. Prabhat Kumar both private persons, discloses prima facie commission of criminal offenses under Sec 11 and 12 of the PC Act 1988 r/w 120-B of IPC.

6. Hence, a regular case has been registered vide RC No.07(A)/2017 dated 07.12.2017 u/s 11 & 12 of PC Act, 1988 r/w 120-B IPC against Sh. Kulamani

Biswal, Sh. Rohit Reddy Bathina and Sh. Prabhat Kumar and unknown others and entrusted to Sh. Dharmender Kumar, Inspector, CBI AC.I for investigation and report. (Rajiv Ranjan, IPS) SP CBI Act-1 New Delhi.

11. Sub-clause (b) of Clause 24.3, which defines mine operators event of default, the same stipulates if in the LPA572019 Page 17 of 22 judgment of the owner, the mine operator is engaged in corrupt or fraudulent practices in competing for or in executing the Agreement pursuant to Clause 9.1, would be an event of default. Clause 24.4(c) contemplates the procedure to be followed on receipt of notice of termination by non-terminating party, that the parties shall discuss in good faith for a period of 30 days, the options for cessation of event that led to the issuance of notice, during which period, the obligation of the parties shall continue to subsist.

12. It was contended by Mr. Mehta that the FIR has been filed at the instance of CBI and the same is pending investigation and the FIR reflects serious charges under the provisions of Prevention of Corruption Act and IPC, is unmerited. Surely, when the parties have incorporated the clause of this nature where corrupt / fraudulent practices are events of default, they knew well such allegations shall include offences under IPC / Prevention of Corruption Act but still they thought it fit to discuss such events of default for 30 days. The appellant cannot now take a stand that no purpose will be served in holding discussions in good faith. Insofar as, the plea of Mr. Mehta that the direction of the learned Single Judge is in the nature of Specific LPA572019 Page 18 of 22 Performance and could not have been given that too at the show cause notice stage is unmerited for the reason that the respondent was primarily aggrieved by the notice dated December 29, 2017 of the NTPC issue notice under Clause 24.4(c) without first resorting to clause 23.1(b) of the Project Agreement. The parties having agreed to incorporate such a clause in the agreement, are surely required to follow it whatever be the outcome. The learned Single Judge having found that in the facts, the said clause need to be followed has given the direction. The same cannot be faulted. The plea that, any order to be passed by NTPC on the show cause notice dated December 29, 2017, can be challenged by the respondent, in arbitration proceedings, which challenge may include a claim for compensation also does not impress us, as such a procedure / action of arbitration presupposes the process of discussions

under Clauses 23.1(b) and 24.4(c). The arbitration in the last resort, if other processes fail.

13. The learned Single Judge was right in concluding that if the NTPC is ready and willing to hold discussion in good faith under Clause 24.4(c) there is no reason why such a discussion cannot take place under Clause 23.1(b), which is for amicable settlement. The direction of the learned Single Judge was to LPA572019 Page 19 of 22 comply with the mandate of Clause 23.1(b) and also 24.4(c) and nothing more. Suffice it to state, the spirit underlying the provisions of the contract i.e Clause 23.1(b) and Clause 24.4(c), as directed to be followed by the learned Single Judge, is with a view that if a dispute arises, the parties may sit together and workout an amicable settlement or for that matter ensure cessation of the said event, which is the event of default.

14. The plea of Mr. Mehta that the contract pertains to coal block and time should not be lost as it would cost the exchequer, is untenable for the reason, the delay occurred has to be attributed to NTPC / appellant for the reason (i) they should not have at the first instance, issued show cause notice for discussion under Clause 24.4(c) and not under Clause 23.1(b); (ii) even if they had issued, they should have during the course of the proceedings before the learned Single Judge accepted to hold such discussions as it entailed a matter 30 days only; (iii) that apart, they have decided to challenge the decision of the learned Single Judge in this appeal, resulting in further delay. In short, instead of 30 days, the issue has stretched to more than one year.

15. We may at this stage reproduce the following conclusion of the Ld. Single Judge in Para 36 with which we concur: LPA572019 Page 20 of 22 36. NTPCs contention that the present petition is not maintainable is not persuasive. All actions of the State, whether administrative or otherwise have to be fair, reasonable and informed by reason. Plainly, it is not open for any agency of the State to enter into a contract and not perform the obligations undertaken thereunder. In the present case, there is no dispute that the dispute resolution mechanism contemplated under Article 23 of the Project Agreement is binding on the parties and NTPC is obliged to comply with the same. It is thus not open for

NTPC to contend otherwise. 16. On the issue of maintainability, Mr. Bhushan is justified in relying upon the judgment in the case of Joshi Technologies International Inc. (supra), wherein in para 69, the Supreme Court has held that there is no absolute bar on the maintainability of the writ even in contractual matters and a writ petition can be issued where the executive action is unsupported by law or even in respect of a Corporation there is a denial of equality before law or equal protection of law and if the instrumentality is under obligation to act fairly and cannot practice discrimination. Even the plea of Mr. Mehta, that the learned Single Judge could not have interfered at the show cause notice is also untenable, when the very show cause notice is contrary to the terms of the Project Agreement. The learned Single Judge was right in giving directions which are in inconformity with the Project Agreement, more particularly when NTPC being a State within the LPA572019 Page 21 of 22 meaning of Article 12, is required to act fairly. We also find that the IEM also had not completed its task even though as per the mandate of the Project Agreement, the IEM which is an independent body was required to implement the integrity pact. The IEM having initiated the process has left the task unfinished as it is the case of Mr. Bhushan that IEM has not communicated its decision shows unfairness in the action of the NTPC.

17. From the above, we are of the view that the learned Single Judge was justified in allowing the writ petition by directing the appellant NTPC to hold Good Faith Discussions with the respondent in terms of Clause 23.1(b), which shall be construed as discussions under Clause 24.4(c) of the Project Agreement. We find no merit in the appeal, the same is dismissed. CM No.4359/2019 (for stay) Dismissed as infructuous. V. KAMESWAR RAO, J CHIEF JUSTICE FEBRUARY15 2019/ak LPA572019 Page 22 of 22