

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WP(C) No.68 of 2025

Petitioner : TT Energy Private Limited

versus

Respondents : The Principal Chief Engineer-cum-Secretary,
Energy and Power Department,
Government of Sikkim and Another

Application under Articles 226 and 227 of the Constitution of India

Appearance

Mr. M. G. Ramachandran, Senior Advocate with Ms. Mani Gupta, Ms. Srishti Khindaria and Ms. Parvin Manger, Advocates for the Petitioner.

Mr. Aarohi Bhalla, Additional Advocate General with Mr. Sujan Sunwar, Assistant Government Advocate for the Respondents.

Date of hearing : 31-03-2026

Judgment reserved : 31-03-2026

Judgment pronounced & uploaded : 09-04-2026

JUDGMENT

Meenakshi Madan Rai, J.

1. The Petitioner is a Company incorporated under the Companies Act, 1956 and claims to be a Special Purpose Vehicle, incorporated for the sole purpose of developing the Ting-Ting Hydroelectric Project, on river Rathong Chu, in West Sikkim. The Company identified the Project site in 2005 and accordingly approached the Respondents. Respondent No.2 accepted the proposal vide letter dated 05-12-2005 and the Respondent No.1 issued a Letter of Intent (LoI), dated 12-01-2006, entrusting the promoters of the Petitioner with the development of the Project. The Implementation Agreement (IA)/ Deed of Agreement, dated 03-09-2008, was executed between the Petitioner and the Respondent No. 1, for the said Project, along with a Supplementary Agreement/Deed

of Agreement, dated 11-03-2010, for a period of thirty-five years, ending on 03-09-2043.

2. The Petitioner Company now alleges that, during the subsistence of the IA (*supra*) between the Petitioner and the Respondents, the Respondent No.1 has arbitrarily and illegally issued a Request for Proposal (RFP), bearing No.022/Power/IPP/2025-26/03, dated 19-09-2025, for development of the Ting-Ting Hydroelectric Project, on Build, Own, Operate and Transfer (BOOT) basis, in Gyalshing District of Sikkim.

3. The Petitioner seeks the following reliefs;

- (a) Issue a writ of certiorari or any other appropriate writ, order, or direction quashing and setting aside the Request for Proposal (RFP) No.022/Power/ IPP/2025-26/03, dated 19-09-2025, issued by the Respondent No.1, for development of the 99 MW Ting-Ting Hydroelectric Project;
- (b) Direct the Respondents to implement the Project as per the Existing Implementation Agreement, dated 03-09-2008, with the Petitioner;
- (c) Pending final disposal of the present Petition, stay the operation, implementation, and effect of the Request for Proposal (RFP) No.022/Power/IPP/2025-26/03, dated 19-09-2025 issued by the Respondent No.1;
- (d) Till the disposal of the instant Writ Petition, restrain the Respondents from creating any third-party interests in the Project including (without limitation) by way of awarding the Project to any other entity or taking any further steps pursuant to the said RFP which would render the present proceedings infructuous;
- (e) Pass such other or further orders as this Hon'ble Court may deem just, necessary and proper and in the interest of justice in the facts and circumstances of the case.

4. As per Learned Senior Counsel for the Petitioner, an amount of ₹ 30,00,00,000/- (Rupees thirty crores) only, has been invested in the Project and non-refundable processing fees of ₹ 9,00,000/- (Rupees nine lakhs) only, as stipulated in the IA (*supra*) has also been paid. Necessary clearances were obtained from various authorities from 2007 to 2012. The State Government however on 08-02-2012 abruptly communicated to the Petitioner about the closure of the Project, by Notification of the Governor, on grounds of Public Interest (Religious Sentiments), sans formal termination of the IA. Approximately fifteen letters were exchanged between the Petitioner and the Respondents pertaining to the closure of the Project. Without any response to the correspondence, the State Government issued a communication dated 05-05-2014, requesting the Petitioner to appoint an Arbitrator as per Article 9 of the IA, invoked by the Petitioner vide notice dated 03-03-2014. It is contended that the Petitioner did not pursue the arbitration proceedings as the sole reason stated for the closure of the Project was "public interest".

(i) In late 2024, the Petitioner came to learn that the concerns relating to public interest had been addressed and both the public and the State were receptive to the development of the Project. On 28-03-2025, the Petitioner proposed to implement the existing IA, on the basis of the previous preparations made. Pursuant thereto, vide letter dated 26-06-2025, the Petitioner sought permission to commence the Project. The Government, instead, issued a fresh RFP on 19-09-2025 as already described hereinabove, in breach of the existing IA.

(ii) It was urged that the Implementation Agreement between the Petitioner and the State Government is a binding and legally enforceable contract which sets out the rights and obligations of the parties. Besides, the IA cannot be terminated by either party except on grounds as expressly provided in Article 5 of the IA and there is no allegation of default or breach by the Petitioner, for terminating the Contact. That, the *force majeure* clause does not confer any right to terminate the IA, which merely stands suspended for the duration of such event. The Respondents cannot unilaterally treat the IA as non-existent or abandoned and proceed to invite fresh bids for implementation of the same Project by any other person. There has been no overt act on the part of the Petitioner, at any time, constituting waiver or an intention to abandon. Moreover, no permanent decision was taken by the Respondents at any stage not to implement the Project. The action of the Respondents is patently arbitrary and unjust and as there is no efficacious alternate remedy, the writ jurisdiction of this Court is being invoked. To fortify his submissions, reliance was placed on ***M. P. Power Management Company Limited, Jabalpur*** vs. ***Sky Power Southeast Solar India Private Limited and Others***¹; ***Subodh Kumar Singh Rathour*** vs. ***Chief Executive Officer and Others***² ***Whirlpool Corporation*** vs. ***Registrar of Trade Marks, Mumbai and Others***³; ***S.J.S. Business Enterprises (P) Ltd.*** vs. ***State of Bihar and Others***⁴ and ***Gujarat State Financial Corporation*** vs. ***M/s. Lotus Hotels Pvt. Ltd.***⁵. That, in the circumstances of the Petitioner's case, the matter falls squarely within the recognized exception to the general rule that the

¹ (2023) 2 SCC 703

² (2024) 15 SCC 461

³ (1998) 8 SCC 1

⁴ (2004) 7 SCC 166

⁵ (1983) 3 SCC 379

existence of an efficacious alternate remedy bars continuation of a Writ Petition.

5. Opposing the case of the Petitioner and the arguments advanced by Learned Senior Counsel for the Petitioner, Learned Additional Advocate General sought to clarify at the outset that, a preliminary objection was being raised with regard to the maintainability of the Writ Petition. That, no arguments were being advanced on the merits of the matter, as admittedly, an arbitration clause exists between the parties in terms of Article 9 of the Implementation Agreement, dated 03-09-2008, in view of which if any dispute arises between the parties, it is to be referred to arbitration. That, it is an admitted position that the Project which was to be implemented by the Petitioner was closed and the arbitration clause invoked after the Notification of closure was served on the Petitioner. The Notification of closure was however not challenged at any point of time by the Petitioner nor was a Petition under Section 11 of the Arbitration and Conciliation Act, 1996, filed for appointment of an Arbitrator.

(i) The Records with the Respondents in fact reveal that the Petitioner purchased the RFP, dated 19-09-2025 and on discovering that they would not be able to meet the requirements, lacking in economic resources, decided to agitate the issue of the previous Project. Their conduct deserves to be taken into consideration. They also abandoned the claim for more than ten years from May, 2014 till 28-03-2025 and now seek to raise the issue belatedly to foil the development plans of the Respondents.

(ii) That, vide Prayer (b) of the Writ Petition, the Petitioner seeks specific performance of the IA, dated 03-09-2008, which

cannot be granted in exercise of the Writ Jurisdiction by this Court as the dispute, if any, between the parties, is a contractual dispute which can be adjudicated by arbitration. Even after invocation of the arbitration clause, vide Notice dated 03-03-2014, the Petitioner did not take any steps for adjudication of the alleged dispute and requested the Respondents after a period of more than one year, vide letter dated 06-07-2015, to finalise the name of the Learned Arbitrator. This letter was suppressed by the Petitioner and has not been brought to the notice of this Court.

(iii) The Petitioner, as per Learned Additional Advocate General, has also suppressed letter dated 22-08-2015, issued by the Respondent No.1, vide which the Respondent had agreed to the appointment of the Arbitrator from the list of Hon'ble Judges as suggested by the Petitioner, vide its letter dated 06-07-2015. Learned Additional Advocate General invited the attention of this Court to various decisions of the Supreme Court to buttress his submissions, viz., **Reva Electric Car Company Private Limited vs. Green Mobil**⁶; **Linkwell Telesystems Pvt. Ltd. vs. State of Sikkim and Others**⁷; and **Swadhi Health Management LLP and Another vs. State of Sikkim and Others**⁸. In light of the above facts and circumstances the Writ Petition not being maintainable deserves a dismissal.

6. Due consideration has been afforded to the rival contentions canvassed by Learned Counsel for the parties. I have also carefully perused the averments and documents relied upon and the citations made at the Bar.

⁶ (2012) 2 SCC 93

⁷ 2021 SCC OnLine Sikk 69

⁸ 2025 SCC OnLine Sikk 89

7. This Court is now called upon to examine and determine firstly the maintainability of the Writ Petition, in light of the existence of the arbitration clause in the IA.

8. Admittedly, the IA was executed between the opposing parties on 03-09-2008 followed by a Supplementary Agreement (SA) dated 11-03-2010. Article 9 of the SA provides at 9.1 *inter alia* that all matter, questions, disputes or difference whatsoever arising between the parties in respect of construction, meaning, operation or effect of the contract or relating to the Contract of breach thereof, shall be settled by way of arbitration, in accordance with the provisions of the Arbitration and Conciliation Act, 1996, which would include any statutory modification or variation thereof. Reference in case of such disputes would be to a Single Arbitrator in case the parties agreed upon one and in the absence of such agreement, by reference to three Arbitrators, one to be appointed by the first party and one to be appointed by the second party. The two Arbitrators then would appoint the third Arbitrator. Records also reveal (Annexures R1 and R2) that the Petitioner had suggested three names for selection of Arbitrator on 06-07-2015. Vide letter dated 22-08-2015, the Respondent No.1 had proposed the appointment of Justice Malay Sengupta, former Judge of this High Court as the sole Arbitrator. This choice was duly confirmed by the Petitioner vide letter dated 03-09-2008 (Annexure R3).

(i) Relevantly, reference at this juncture can be made to Section 2(b) of the Arbitration Act which defines an arbitration agreement to mean the agreement referred to in Section 7. As per Section 7, an arbitration agreement is an agreement by the parties to submit to arbitration, all or certain disputes, which have arisen or

which may arise between them in respect of a defined legal relationship whether contractual or not. It further provides that an arbitration agreement would be in the form of an arbitration clause in a contract, or in the form of a separate agreement. The arbitration agreement is necessarily to be in writing.

9. It is pertinent to notice that the object of Business entities opting for arbitration is to obviate cumbersome judicial processes. In ***Bihar State Mineral Development Corporation and Another vs. Encon Builders (I) (P) Ltd.***⁹ the Supreme Court enlisted the essential elements of an arbitration agreement viz., (a) There must be a present or future difference in connection with some contemplated affair; (b) There must be the intention of the parties to settle such disputes by a private tribunal; (c) The parties must agree in writing to be bound by the decision of such tribunal; and (d) The parties must be ad idem.

(i) There is no dispute with regard to the inclusion of the arbitration clause in the IA which indubitably is a written agreement. That having been said, it is essential to consider the provisions of Section 16 of the Arbitration Act which provides as follows;

"16. Competence of arbitral tribunal to rule on its jurisdiction.—(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

- (a) **an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and**
- (b) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."

[emphasis supplied]

⁹ (2003) 7 SCC 418

(ii) In *Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, In Re*¹⁰ the Supreme Court had been called upon to resolve an issue which arose in the context of three Statutes. During the discussions, it was held that a plain reading of the Section may suggest that Section 16 has incorporated the separability presumption only for the particular purpose of allocation of competence over jurisdictional disputes. However, the Digest of Case Laws on UNCITRAL Model Law states that the language used in the second sentence does not prevent the application of the separability presumption when a jurisdictional question is raised before a Court. The *separability* presumption contained in Article 16(1) states a general rule of contractual validity which is applicable for all purposes. That, the judicial view that emerges from the Indian Courts also seems to suggest that an arbitration agreement is treated as distinct and separate from the underlying contract as a general rule of substantive validity. Section 16(1)(b) provides that, a decision by the Arbitral Tribunal that the contract is null and void, shall not entail *ipso jure* the invalidity of the arbitration clause. It thus concludes that, even if the underlying contract is declared null and void it would not result in the invalidity of the arbitration agreement. The Supreme Court detailed as extracted hereinbelow;

"120. In view of the above discussion, we formulate our conclusions on this aspect. First, the separability presumption contained in Section 16 is applicable not only for the purpose of determining the jurisdiction of the Arbitral Tribunal. It encapsulates the general rule on the substantive independence of an arbitration agreement. Second, parties to an arbitration agreement mutually intend to confer jurisdiction on the Arbitral Tribunal to determine questions as to jurisdiction as well as substantive contractual disputes between them. The separability presumption gives

¹⁰ (2024) 6 SCC 1

effect to this by ensuring the validity of an arbitration agreement contained in an underlying contract, notwithstanding the invalidity, illegality, or termination of such contract. Third, when the parties append their signatures to a contract containing an arbitration agreement, they are regarded in effect as independently appending their signatures to the arbitration agreement. The reason is that the parties intend to treat an arbitration agreement contained in an underlying contract as distinct from the other terms of the contract; and Fourth, the validity of an arbitration agreement, in the face of the invalidity of the underlying contract, allows the Arbitral Tribunal to assume jurisdiction and decide on its own jurisdiction by determining the existence and validity of the arbitration agreement. In the process, the separability presumption gives effect to the doctrine of competence-competence.”

(iii) Undeniably the legal position is that, the concept of 'separability' or 'severability' of an arbitration agreement from the underlying contract is a legal fiction, which acknowledges the separate nature of an arbitration agreement. The concept of separability reflects the presumptive intention of the parties to distinguish the underlying contract, which captures the substantive rights and obligations of the parties, from an arbitration agreement which provides a procedural framework to resolve the disputes arising out of the underlying contract. This presumption has various consequences in theory and practice, the most important being that an arbitration agreement survives the invalidity or termination of the underlying contract.

(iv) In **National Agricultural Coop. Marketing Federation India Ltd. vs. Gains Trading Ltd.**¹¹ the Court was considering an application under Section 11 and whether an Arbitration clause would come to an end if the Contract containing such clause is repudiated. The Court was of the view that even if the underlying Contract comes to an end, the arbitration agreement contained in such Contract

¹¹ (2007) 5 SCC 692

survives for the purpose of resolution of disputes between the parties.

(v) The concept of *separability* having been clarified it may be pointed out that regardless of the Contract existing or not if an arbitration clause is embedded in the Contract, such remedy is to be exhausted first.

(vi) In this context, this Court in ***Linkwell Telesystems*** (*supra*) had referred to the decision of the Hon'ble Supreme Court wherein it was *inter alia* held as follows;

"6. The Hon'ble Supreme Court, recently in *Bhaven Construction through Authorised Signatory Premjibhai K. Shah v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd.* [2021 SCC OnLine SC 8] referred to the ratio in *Nivedita Sharma v. Cellular Operators Association of India* [(2011) 14 SCC 337] and *inter alia* observed as follows;

"17. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a Constitutional right. In *Nivedita Sharma v. Cellular Operators Association of India*, (2011) 14 SCC 337, this Court referred to several judgments and held:

"11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation - *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261. **However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/ instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy.** Rather, it is settled law that when a statutory forum is created by law for redressal of grievances,

a writ petition should not be entertained ignoring the statutory dispensation.”
(emphasis supplied)

18. It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient.”

In the above extracted matter, the RFP contained an “arbitration agreement” as defined under Section 7 of the Arbitration and Conciliation Act, 1996. Consequently, the Court opined that the Petitioner had failed to put forth any exceptional circumstances for invoking the Writ jurisdiction of this Court under Article 226 of the Constitution of India when an arbitration clause was existing in the contract between the parties.

(vii) In **Swadhi Health Management** (*supra*) this Court was again considering a contract between parties into which an arbitration clause was embedded. Reference was made to a plethora of Judgments of the Supreme Court including that of **Union of India vs. Parmar Construction Company**¹², where a dispute had arisen between the Contractors and the Railway Establishment in the context of payment of escalated cost as demanded by the Respondent Contractors. An arbitration clause existed in the agreement. The Supreme Court observed *inter alia* in Paragraph 39 that, it is advisable for the Court to ensure that the remedy provided as agreed between the parties in terms of the Contract is first exhausted. This exact same view was also posited in **Northern**

¹² (2019) 15 SCC 682

Railways Administration, Ministry of Railway, New Delhi* vs. *Patel Engineering Company Limited¹³.

10. It is therefore no more *res integra* that the arbitration clause cannot be ousted merely on the ground that the Court has powers to exercise its extraordinary jurisdiction under Article 226 of the Constitution.

11. In light of the foregoing discussions, it needs no reiteration that an arbitration clause was inserted in the IA and an Arbitrator selected by the contending parties. Be that as it may, regardless of the IA subsisting or not (as the dispute between the parties pivots on this point), the arbitration clause, which as already discussed, if it is embedded in the contract survives for the purpose of resolution of disputes between the parties, in view of the concept of *separability* which is therefore applicable to the instant case.

12. It may be noted that no discussions on the merits of the matter have ensued.

13. In conclusion, the Writ Petition is not maintainable and is disposed of accordingly.

14. Pending applications, if any, also stand disposed of.

(Meenakshi Madan Rai)
Judge
09-04-2026

Approved for reporting : **Yes**

ds/sdl

¹³ (2008) 10 SCC 240