

**(1998) 06 GAU CK 0030**

**Gauhati High Court**

**Case No:** Civil Rule No. 1381 of 1996

Frontier Construction Co. and  
Others

APPELLANT

Vs

A.S.E.B. and Others

RESPONDENT

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**Date of Decision:** June 23, 1998

**Acts Referred:**

- Constitution of India, 1950 - Article 12, 14, 19, 21, 226
- Contract Act, 1872 - Section 37, 62
- Electricity (Supply) Act, 1948 - Section 5

**Citation:** (1998) 4 GLT 8

**Hon'ble Judges:** D.N. Chowdhury, J

**Bench:** Single Bench

**Advocate:** P.K. Goswami, R. Gogoi and N. Tagia, for the Appellant; P.G. Baruah, A.G., R. Baruah, G.N. Sahewalla and A. Goswami, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

D.N. Chowdhury, J.

The focal point of controversy raised in this writ petition centres round the action of the Respondents, more particularly of Respondent No. 1 in withholding and/or refusing the admitted outstanding dues payable to the petitioner/firm.

2. The planning Commissioner approved of setting up of a hydro electric project in the Karbi Anglong Autonomous District in the State of Assam in the year 1979 for generating 100 MW of hydel power. Respondent No. 1, Assam State Electricity Board (ASEB in short) was entrusted with the task and responsibility of constructing and commissioning of the said project. The Respondent No. 1 accordingly invited tenders for variegated items of works. The Petitioner/ firm also submitted tenders for some works and in due course, amongst others, the Petitioner/firm was also selected for allotment of the following items of works as mentioned hereinbelow:

1. Construction of Power House and appurtenant works;
2. Construction of anchor blocks and saddles for penstock and appurtenant works
3. Construction of anchor and saddles of penstock and appurtenant works (balance works);
4. Site preparation and earth work in excavation for 2 x 50 M.W. Power House and tailrace associated works, and
5. Concreting of two numbers of penstock tunnels adjacent to the Power House.

3. After acceptance of the tenders, the parties entered into contract and signed agreement, in pursuance thereto, work orders were issued in favour of the Petitioner/firm in respect of the above works. The firm acquitted and executed the contracted works and even completed and executed some supplementary items of works as per order issued by and on behalf of Respondent No. 1. In respect of the four items of contracted works except the Power House, according to the Petitioner, works were completed on different dates in the year 1992 and the final bills were accordingly submitted to Respondent No. 1 for payment. Separate bills on account of price escalation and the supplementary items of works were also submitted by the Petitioner/firm. During the course of execution of the works-in-question, the Petitioner/firm received from time to time various running bills from Respondent No. 1. In so far as the Power House is concerned, the final bill submitted by the Petitioner/firm was in respect of the works executed up to the date of the final bill. In the case of the said items of works, the Petitioner/firm submitted separate bills for price escalation, supplementary items and also received payment of running bills submitted from time to time. On 25th of March, 1993, the parties, viz., Respondent No. 2, the State of Assam, Respondent No. 1, ASEB and the proforma Respondent No. 3, Subhas Projects and Marketing Ltd. (hereinafter referred to as the proforma Respondent No. 3) entered into an agreement by way of a Memorandum of Understanding (hereinafter referred to as the MOU) whereby it was agreed by and between the parties that entire Karbi Langpi Hydro Electric Project (hereinafter referred to as the Project) as existed on the date including the land on which the Project was set-up and all buildings, plants, machinery, etc. in connection with the aforesaid Project were to stand transferred to a Company to be incorporated for the said purpose in terms of the relevant clauses of the MOU. The total consideration at which the Project including the entire property connected therewith was to stand transferred was worked out at Rs. 116, 21, 12,000.00 which was calculated to be the expenditure incurred by the Respondent No. 1/ Board in the Project-in-question till the date of execution of the MOU. In the aforesaid MOU, a total of Rs. 14,30,19,054"93 was worked out on account of (a) current liabilities; (b) outstanding bills of contractors not yet settled; and (c) claim under litigation not yet settled. It was agreed by and between the parties that the new Company taking over the Project would also take over the said liability amounting to Rs. 14,30,19,054"93 for

the consideration amount of Rs. 116,21,12,000.00. Clause 19 of the MOU specifically deal with the taking over of the liabilities by the New Company to be incorporated. In terms of the MOU, as mentioned earlier, Bharat Hydro Power Corporation Limited, the 4th Respondent, was incorporated for the purpose of transferring the Project in question along with all assets and liabilities. Thereafter a deed of assignment dated 8.4.93, was executed between the 1st and the 4th Respondent purporting to transfer the entire project in question to the 4th Respondent along with all assets and liabilities. The said Deed of assignment was, however, not registered as per provisions of the Registration Act. The Petitioners have not questioned the rationale or expediency of the policy behind the MOU and the deed of assignment. They only questioned the manner in which the liability of Respondent No. 1 was sought to be shifted by the Respondent No. 1 to a non-contracting party without taking into confidence the Petitioners as according to them, the Petitioner/firm was not a party either to the MOU or to the Deed of assignment; nor they were ever consulted or intimated about the transfer of the Project. The Petitioners came to know about the above transaction through a Public Notice which appeared in the Assam Tribune dated 18.7.94 issued by the Secretary of the Respondent No. 1/Board to the effect that pursuant to the MOU and the Deed of assignment, all assets and liabilities, movable and immovable, and all claims relating to litigation etc. of the project was handed over to the 4th Respondent. The Petitioner/firm in this case referred to the decision of the Task Force for determining the total dues of the Petitioner/ firm. The Task Force was constituted at the instance of Respondent No. 1 for scrutinising the claims relating to matters in respect of works executed by some of the contractors including that of the Petitioners/firm which it insisted for payment of the final bills for the works done. The Task Force was constituted to go into the question of the dues of the firms. The Task Force for the purpose held different meetings with the Firms and reached at its own conclusion and decided that the total dues of the Petitioner/ firm at Rs. 207.52 Lakhs in respect of the five contract works-in-question, the determination of which was enclosed as Annexure-D to the writ petition. Respondent No. 1 through its Chief Engineer (Civil), by its communication dated, 8th October, 1994, intimated the decision of the Board about the transfer of its liabilities towards the works contract indicated in the communication to proforma Respondent No. 4, M/s. Bharat Hydro Power Corporation Ltd. which reads as follows:  
No: CE (C) /W/93/37/pt-III/35, Dated

Guwahati, the 8th Oct., 94.

To: The Bharat Hydro Power  
Corporation Limited,  
113, Park Street, South Block,  
3rd Floor,  
CALCUTTA-700016

Sub: TRANSFER OF LIABILITY.

Dear Sirs,

As decided by ASEB in its meeting on 4.10.94 the liabilities of ASEB towards the following works contract are hereby transferred to your company in terms of the Clause 19 of the MOU.

1. Construction of Low Pressure tunnel, audit, surge shaft and penstock tunnel excluding steel liners -Contractor: M/s. Hydel Constructions Limited, New Delhi-110019.
2. Construction of Power, House and appurtenant works - Constructor: M/s. Frontier Construction Co., Guwahati -781001.
3. Construction of anchor blocks and saddles for penstock (Group -I) - Contractor: M/s. Frontier Construction Co., Guwahati - 781001.
4. Construction of anchor blocks and saddles for penstocks (balance works)- Contractor: M/s. Frontier Construction Co., Guwahati - 781001.
5. Fabrication, transportation and erection of steel liners and penstocks - Contractor: M/s. Texmaco Ltd., Agarpara, Calcutta -56
6. Site preparation and earthwork in excavation for Power House-Contractor: M/s. Frontier Constn. Co., Guwahati -781001.
7. Concreting around 2 Nos. Penstock tunnels near Power House-Contractor: M/s. Frontier Constn. Co., Guwahati -781001

Construction of 2 Nos. of small penstock tunnel adjacent to Power House (KLHEP)- Contractor: M/s. Hydel Constructions Ltd., K-1987, Chittaranjan Park, New Delhi - 110019

The said communication was confined to eight works of contract including two works contract executed by M/s. Hydel Constructions Ltd., K-1987, Chittaranjan Park, New Delhi as shown at items Nos. 1 and 8 as well as five works contract rendered by the Petitioner/firm mentioned at serial Nos. 2,3,4,6 and 7.

4. The Petitioners moved the authority for payment of the admitted amount that was outstanding. The Petitioners also on good faith and on representations made by the authorities of the Board, took-up the matter with the fourth Respondent regarding payment of the dues payable to Petitioner/firm by the Respondent/ Board in terms of its letter dated 8.10.94 as referred to above. Failing to get adequate response from the authorities, the Petitioner/firm served notices on the first Respondent calling for immediate payment of the admitted amount due to the Petitioner/firm as per the determination made by the authorities of the Board vide Annexure-D to the writ petition. The Petitioner/firm in this writ petition confined itself to its claim of five items indicated above. The performance of the contract by

the Petitioners, the legitimacy and admissibility of the dues of the Petitioner is not in dispute. No complain was raised regarding the quality and performance of the contractual work performed by the Petitioner. Incite of admission of liability on the part of the Respondents, since no payment for the works performed was forthcoming, the Petitioners moved this Court praying for a writ of mandamus commanding the Respondents for payment of the admitted amounts due to the Petitioners. The Petitioners also questioned the legitimacy of the MOU as well as the deed of assignment dated 8.4.93, purportedly transferring its liability of the Respondent No. 4, The Petitioners also questioned the action of the Respondents in withholding the outstanding dues of the Petitioner as arbitrary, discriminatory on the ground that the Board during the pendency of the writ petition, in its meeting dated 2nd April, 1997, took a decision to settle the admitted dues of M/s. Hydel Construction Ltd.

5. The Respondent/Board submitted its affidavit and did not dispute its outstanding liability. According to the Respondent, in order to attract private participation in the Project, the Government took a Policy decision for transfer of the Project to Respondent No. 4. The Petitioners have got no right to question the validity of transfer of the Project. The Respondent did not dispute the fact about the assignment of liability of the Board which owed to the Petitioner and that the same was transferred to Respondent No. 4 without taking the Petitioner into confidence. According to the Respondent/Board, consultation and/or consent of the Petitioner was not necessary; nor did the Petitioner raise any objection at the time of transfer. The Respondent did not dispute the correctness of the determination of the Task Force owning liability of Rs. 207.52 Lakhs to the Petitioner in respect of the five contract works. According to the Board, the claim of the Petitioner was examined by the Task Force constituted for the purpose. The Task Force completed the scrutiny after the Project was transferred and handed over to the Respondents Nos. 3 and 4 as per the MOU. According to Respondent No. 1, the liability owed to the Petitioner was extinguished by virtue of the MOU and the Petitioner ought to have pursued its claim with Respondent No. 4, if necessary, by constituting a Civil Suit before the appropriate Court and/or by arbitration proceeding as provided in the contract. The Respondents defended its above action on the efficacy of the policy decision of the Government which was taken in greater public interest and at any rate, no injustice was done to the Petitioner by Respondents Nos. 1 and 2, it was pleaded inter-alia. All liabilities, according to the Respondents, in regard to the contract was to be discharged by Respondent No. 4, The Respondent No. 1 also questioned the maintainability of the writ petition relating to payment of money arising out of the Contract.

6. Proforma Respondents Nos. 3 and 4 filed a joint affidavit denying the liability of the Respondent No. 1 in view of the MOU. The above Respondents also questioned the contents of the communication dated 8th October, 1994 issued by the Chief Engineer of the Board to the Respondent No. 4. Respondent No. 4, however, did not

deny that the said letter was not received by them or that the said letter at any time was questioned by Respondents Nos. 3 and 4. The said two respondents also disputed the claim of the Petitioner.

7. Mr. P.K. Goswami, the learned senior Counsel appearing on behalf of the Petitioner, firstly submitted that the liability to pay as well as the quantum payable to the Petitioner was not in dispute. The Respondent No. 1 being a "state" within the meaning of Article 12 of the Constitution, cannot wriggle out from its duty and its liability. Mr. P.K. Goswami, the learned Sr.Counsel for the Petitioner has submitted that the Respondent/Board being a Public authority, owed a public duty to discharge its liability under the law. The Board is under an obligation to discharge its debt under the law. The Board, submitted the learned Counsel for the Petitioner, under no circumstance can refuse its obligation to discharge its contractual debt taking cover of the purported transfer of its liability by the MOU and the deed of assignment. The learned Counsel further submitted that the transactions involved in the writ petition pertain to the public law field and the same can, therefore, be legitimately be enforced under Article 226 of the Constitution of India. Mr. Goswami, learned Sr. Counsel appearing on behalf of the petitioner, in the course of his argument invited attention of the Court to the contractual stipulations as well as the law relating to the contracts. For that purpose, the learned Sr. Counsel, referred to passages from Cheshire and Fifoot's "Law of Contract", Vol 66 of the Corpus Juris Secundum and a host of authorities.

8. Mr. P.G. Baruah, learned Advocate General for the State of Assam, on the other hand, sought to justify the action of the Respondent relying on the policy of the Government. The Respondents were committed to improve the power situation in the State and accordingly the Karbi Langpi Hydro Electric Project was initiated in public interest and to overcome the financial crunch the Govt., of Assam thought it fit to seek for private sector participation. For that purpose, a new company, viz., Respondent No. 4, Bharat Hydro Power Corporation Ltd., was formed for completing the task. However, the Respondent No. 4 could not complete the Project and failed to honour its commitment. To master the situation, the State Government enacted the Bharat Hydro Power Corporation Limited Acquisition and Transfer of Undertaking Act, 1996 to provide for the acquisition, in the public interest, of the right, title and interest of the undertaking of the Bharat Hydro Power Corporation Ltd. and for matters connected therewith. The Act provided for acquisition, transfer of the undertaking or the company and a mechanism for payment of money. Mr. Baruah, the learned Advocate General, submitted that in view of the Statutory provisions of the Act since held *ultravires* by this Court, the same cannot now be enforced against the state. The learned Advocate General however, admitted that the decision of the Single Judge is pending before the Division Bench of the High Court on appeal, the judgment of the learned Single Judge has declared the above statute *ultravires*, is now kept in abeyance by the order of this Court. Mr. Baruah submitted that since the liability has arisen out of a contract, the Petitioner could

not claim any benefit under the public law and the Petitioners, as a matter (if fact, ought to have sought for a remedy as provided by private law.

9. It is needless to state that the dues of the Petitioners are not disputed, the legal obligation arising out of the contract is also not disputed. The Respondent No. 1 being an instrumentality of the State, cannot avoid its Constitutional commitments. The Respondent No. 1 is a creature of the Statute constituted u/s 5 of the Electricity (supply) Act, 1948. The Board is conferred with the statutory powers and duties under the provisions of the statute. The powers and the responsibilities conferred on the Board are of public character, the nature of duties pertains to the public law origin. All the actions of the Respondents/Board are to be informed by reason and legitimacy, guided by public interest, for the public good. The statutory power is vested on the Board as a trust to enable it to discharge its public duties meant for public good. All actions of the State and its instrumentalities are to conform to the preamble of the Constitution as well as to parts in and IV of the Constitution. All state actions whether executive in nature or contractual in hue, are required to conform to Article 14 of the Constitution of India. Avoidance of arbitrariness is the main theme of the rule of law. The Indian Constitution envisage fairness in action which is required to be conformed to by the law of the Court. The actions of the State and its instrumentalities cannot be equated to those of a private individual. Its actions must be uniform, just, fair and reasonable. It is worthwhile to recall the following passages from the decision of the Supreme Court rendered in the case of [Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others](#),

It is now too well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua non to its calidity and in this respect, the State cannot claim comparison with a private individual even in the fields of contract. This distinction between the state and a private individual in the field of contract has to be borne in the mind.

The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every state action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is

entrusted for the time being. It is trite that "be you ever so high, the laws are above you". This is what men in power must remember, always.

10. The commercial activities undertaken by the State and its instrumentalities cannot be shorn of the provisions of Articles 14 and 19 of the Constitution of India. The governing power of the State wherever it is located, is subject to the essentials of the Constitutional limitations and is to abide by the principles laid by the Constitution. The functions of the Board, as mentioned earlier, are statutory in content which is of public importance and, therefore, it is to be guided by the public law element. The State as well as its instrumentalities rule discharging its commercial functions are not bound to enter into contract with any private person, but at the same time, in all transactions of the State and its instrumentalities - whether in contractual field or in executive field, they are obligated to render equal treatment to the equals. The Government which deals with the public even in the commercial field, is to conform to the great equality clause enshrined in Article 14 of the Constitution, without being vitiated by arbitrariness in the transactions. The nature of the transaction that is discharged by the State and its instrumentality is of public nature and, therefore, its actions are to be just, fair and reasonable. In contractual field also, such authorities cannot adhere to unfair procedure. Fair procedure is the essence and the legitimate expectations of a citizen cannot be whittled down without adopting the fair procedure. A marked liberality in this regard is discernible in some of the recent decisions.

11. A Constitution Bench of the Supreme Court of India in the case of [Saghir Ahmad Vs. The State of U.P. and Others](#), punctured the plea that the State is free to carry on trade or business like that of a private trader. Even in the matter of distribution of State largesse, the action of the State is to be informed with non-arbitrariness and conform to the rigours of Article 14 of the Constitution of India, as was observed in the case of [Ramana Dayaram Shetty Vs. International Airport Authority of India and Others](#), In the case of [Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another](#), the Supreme Court held that every activity of the Government has a public element and, therefore, it must be acted with reasons guided by public interest. In the case of [M.C. Mehta and another Vs. Union of India and others](#), a Constitution Bench of the Supreme Court observed that it would be perilous to exempt the Corporation from the Constitutional conscience to allow such institutions to flourish as an "imperium in imperio". In [LIC of India and Another Vs. Consumer Education and Research center and Others](#), the Supreme Court pithily made the following observations:

Every action of the public authority or the person acting in public interest or any act that gives rise to public element, should be guided by public interest. It is the exercise of the public power or action hedged with public element (sic that) becomes open to challenge. If it is shown that the exercise of the power is arbitrary, unjust and unfair, it should be no answer for the state, its instrumentality, public



authority or persons whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simpliciter do in the field of private law. Its actions must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations. Every administrative decision must be hedged by reasons.

It was further observed:

In [Sterling Computers Limited and Others Vs. M and N Publications Limited and Others](#), it was held that even in commercial contracts where there is a public element, it is necessary that relevant considerations are taken into account and the irrelevant consideration discarded. In [Union of India and others Vs. M/s. Graphic Industries Co. and others](#), : this Court held that even in contractual matters public authority have to act fairly; and if they fail to do so approach under Article 226 would always be permissible because that would amount to violation of Article 14 of the Constitution. The ratio in [General Assurance Society Ltd. Vs. Chandumull Jain and Another](#), relied on by the Appellants that tests laid therein to construe the terms of insurance contracts bears no relevance to "determine the constitutional conscience of the Appellant in fixing the terms and conditions in Table 58 and of their justness and fairness on the touchstone Of public element. The actions of the state, its instrumentality, any public authority or person whose actions bear insignia of public law element or public character are amenable to judicial review and the validity of such an action would be tested on the anvil of Article 14, while exercising the power under Article 226 of the Court would be circumspect to adjudicate the disputes arising out of the contract depending on the facts and circumstances in a given case. The distinction between the public law remedy and private law field cannot be demarcated with precision. Each case has to be examined on its own facts and circumstances to find out the nature of the activity or scope and nature of the controversy. The distinction between public law and private law remedy is now narrowed down. The actions of the Appellants bear public character with an imprint of public interest element in their offers regarding terms and conditions mentioned in the appropriate table inviting the public to enter into contract of life insurance. It is not a pure and simple private law dispute without any insignia of public element....

12. The refusal of the Respondents is not honouring the contractual obligations even otherwise cannot be legally sustained. Admittedly, the parties entered into a lawful contract with Respondent No. 1. The contract being an agreement enforceable by law, creates a legal obligation until discharged. Section 37 of the Indian Contract Act, 1872 reads as follows:

Obligation of parties to contracts.-

The parties to a contract must either perform, or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representative of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations:

(a) A promises to deliver goods to B on a certain day on payment of Rs. 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay Rs. 1000 to A's representatives.

(b) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

13. Performance of the promise or promises remained to be performed is the principle and the most usual mode of discharging a contract. The right under a contract can be assigned, but not the obligation, nor the burden. A debtor cannot relieve himself from his liability to his creditors by assigning the burden of obligation to someone else. This can only be brought about by the consent of all the three and involves the release of the original debtor only by taking recourse to Section 62 of the Indian Contract Act, 1872 which reads as follows:

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.

Illustrations:

(a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

(b) A owes B 10,000 rupees. A enters into an agreement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) A owes B 1,000 rupees under a contract. B owes C 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the agreement. B still owes C 1,000 rupees, and no new contract has been entered into.

14. The same principle is also applicable in the English law. Cheshire and Fifoot in their treatise on the Law of Contract (Tenth Edition) dealt with the subject in the following passage:

The assignment of contractual liabilities. The question that arises here is whether B can assign the obligation that rests upon him by virtue of his contract with A to a third person, C, so that the contractual liability is effectively transferred from him to C. Can he substitute somebody else for himself as obligor? English law has unhesitatingly answered this question in the negative. In the words of Collins Mr:

It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to somebody else; this can only be brought about by the consent of all three, and involves the release of the original debtor.

Novation, therefore, is the only method by which the original obligor can be effectively replaced by another. A, B and C must make a new contract by which in consideration of A releasing B from his obligation, C agrees that he will assume responsibility for its performance. This transaction is frequently required upon the retirement of one of the partners of a firm. B, the retiring partner, remains liable at law for partnership debts contracted while he was a member of the firm; but if a particular creditor, A, expressly agrees with him and with the remaining members to accept the liability of the latter for past debts in place of the liability of the firm as previously constituted, the right of action against B is extinguished. As is said in the head note to *Lyth v. Ault and Wood* \*:

The acceptance by a creditor of the sole and separate liability of one of two or more joint debtors is a good consideration for an agreement to discharge all the other debtors from liability. (\* (1852) 7 Ex. 669)

15. The impugned action of the Respondent No. 1 purportedly transferring its liability to the Bharat Hydro Power Corporation cannot be sustained. A concluded contract can be avoided only with the concurrence of the parties. A party to a contract cannot pass on its liability without the consent of the other party. Such liability can only be shifted by way of novation by a tripartite agreement. Novation, however, involves a new contract which can only be done by the consent of the parties. Mr. Baruah, the learned Advocate General, Assam was right in his contention that the consent can be inferred from the conduct of the parties without any express words. But no such act can be inferred from the conduct and behaviour of the Petitioner for drawing an inference of consent. The impugned action of the Respondent No. 1 transferring its liability, therefore, cannot be sustained.

For the decision of the case there is no need to travel beyond the very elementary proposition of law that a contract is concluded when the mind of each contracting party there is a consensus *ad idem*, and that a modification or revocation of contract requires a like contract. (*Y.A. Noorbhai and Anr. v. S.P.L.K.R. Karappan Chetty* AIR 1925 PC 233 )

Similarly, the action of the Respondent No. 1 cannot be supported as an assignment. As pointed out in "Halsbury's Laws of England (Vol.9, 4th edition)"-

As a rule a party to a contract cannot transfer his liability under the contract without the consent of the other party. This rule applies both at common law and in equity and generally unaffected by Statute.... By the consent of all parties, liability under a contract may be transferred so as to discharge the original contract. Such a transfer is not an assignment but a novation of the contract.

16. From the narrations as recounted above, it thus transpires that the main Respondents, more particularly respondent No. 1, the Board, acted in an illegal fashion in transferring its liability to M/s Bharat Hydro Power Corpn. Ltd. which is per unauthorised and therefore unlawful. The purported decision of transmitting the debt and obligation of the Board to M/s Bharat Hydro Power Corporation Ltd cannot in any way exonerate the Board from its responsibility from its liability in liquidating its contractual dues to the petitioner. A contractual obligation arising out of a concluded contract cannot be sidestepped without the concurrence of the parties. No valid reason is discernible for holding back the lawful dues by the respondent No. 1 that is accrued to the petitioner.

17. What is the next step? the petitioners have moved this Court under Article 226 of the Constitution of India, where the High Court only exercises original Jurisdiction of extraordinary nature. Normally the Civil Court is the proper forum for adjudication of dispute relating to recovery of contractual debt, where the Courts can go into the facts and decided the issues on assignment of the material on record. In this case, however, there is no dispute either on facts or in law. There are vicissitudes in situations - as pointed out by Mr.P.G. Baruah, the learned Advocate General of the State. Under our jurisprudence, the Government is not even exempted from the liability to carry out the representation made by it as to its future conduct. It cannot on some hazy and tenuous ground of necessity or expediency, escape from carrying out the promises solemnly made by it. Court has its own duty to do justice and promote honesty and good faith. Law does not countenance unfettered discretion permitting free abuse of power.

Law has reached its finest moments when it has freed man from unlimited discretion of some ruler.... Where, discretion is absolute man has always suffered....

(-Justice Douglas)

18. The object of Judicial review is to secure that the individual receive fair treatment. The activities of the Board in this case possessed the public law element. The actions of the Board as being an authority within the meaning of Article 12 of the Constitution, must conform to the rigours of Articles 14 and 21 of the Constitution of India.

19. On overall consideration of the matter, it would be proper to relegate the Petitioners to the Civil Court for relief, more so where there is essentially no dispute on facts. For the foregoing reasons, the MOU dated 25.3.93 and the Deed of Assignment dated 8.4.93, are held to be inoperative and not binding so far the Petitioner/firm is concerned. The Respondent No. 1 has already cleared all the dues of M/s Hydel Constructions Ltd. which was also similarly situated and no reason is discernible for not honouring the admitted amount to the Petitioner/firm though both were similarly situated. Discretionary power is not necessarily discriminatory. The impugned action is tainted by arbitrariness and therefore discriminatory.

20. In the result, the Respondents Nos. 1 and 2 are directed to disburse forthwith the admitted dues of the Petitioner-firm as per the calculations made by the authorities of the Board as contained in Annexure- D, together with interest at the rate of 9% per annum.

21. The writ petition is allowed to the extent indicated above. But in the circumstances of the case, there shall be no order as to costs.