RAPID METRORAIL GURGAON LIMITED ETC.
v.
HARYANA MASS RAPID TRANSPORT CORPORATION LIMITED & ORS.

(Civil Appeals Nos. 925-926 of 2021)

MARCH 26, 2021

[DR. DHANANJAYA Y CHANDRACHUD,* M R SHAH AND SANJIV KHANNA, JJ.]

Constitution of India: Art. 226 – Power of High Courts to issue writ – Award of Concession Agreement to two companies-RMGL and RMSGL respectively by Haryana Shehri Vikas Pradhikaran-HSVP for developing metro rail – Meanwhile direction by State of Haryana that all metro projects would be handled by the first respondent – Thereafter, issuance of termination notice by RMGL and RMSGL to HSVP to bring an end to the Concession Agreement upon expiry of 90 days from delivery of the termination – Thereafter, HSVP issued their termination notices to RMGL and RMGSL, directing them to hand over the projects to HMRTC – However, since RMGL and RMGSL were entities of a group categorised in the Red category, they were to seek approval before transferring or encumbering any assets – Subsequently, RMGL and RMGSL permitted to handover possession and control of metro project to HSVP pursuant to termination of the Agreement – On the same day, writ petition u/Art. 226 by HSVP and HMRTC challenging the notice of termination on the ground that it was against public interest – High Court granted interim direction for continuance of the operation of metro project for 30 days, which was further extended and during which the debt due under the financing documents in terms of concession agreements was to be determined by the auditor and then HSVP was to deposit 80 % of the debt due as determined in an Escrow Account in terms of Concession Agreement, which would be subject to order of NCLAT or any other court – On appeal, held: Exercise of writ jurisdiction by the High Court u/Art. 226 was justified since non-interference, which would have inevitably led to the disruption of rapid metro lines for Gurgaon, would have had disastrous consequences for the general public – However, ordinarily the High Court in its jurisdiction u/Art. 226 would decline

* Author

to entertain a dispute which is arbitrable – Directions contained in the High Court's consent order makes it clear that the audit team appointed by CAG was to conduct a financial audit of the debt due and to examine the scope of the audit, the audit being completed within 30 days and 80 % of the debt due being deposited within 30 days after the receipt of the audit report; and that the rest of the disputes between the parties arising out of the audit report were to be agitated in arbitration – HSPV and HMRTC could not avoid compliance with the High Court's Consent Order since they willingly agreed to pay 80% of the debt due as per the auditor's findings – HSPV to deposit 80% of the amount within 3 months – Amount to be maintained in the Escrow Account subject to the orders of NCLAT or any other competent authority – RMGL and RMGSL on the one hand and HSVP on the other hand, at liberty to pursue their rights and remedies in pursuance of the arbitration clause.

Disposing of the appeals, the Court Held:

1.1 The expression 'debt due' is defined in Article 1.1 of the Concession Agreement dated 9 December 2009. The expression indicates that the term debt due comprises of three components: the principal amount of the debt provided by the senior lenders under the financing agreement; all accrued interest, financing fees and charges payable under the financing agreement; and any subordinated debt which is included in the financial package. [Para 36]

1.2 Article 18 provides for an Escrow Account into which all funds, which constitute the financing package for meeting the capital cost of the concessionaire, are to be deposited. During the operational period, all fare and non-fare revenues were also to be deposited exclusively in the Escrow Account by the concessionaire. Article 18.2.1 provided for the disbursement from the Escrow Account, which included debt service payments due to the senior lenders. [Para 37]

1.3 Where the Concession Agreement has been terminated by HUDA on account of a default by the concessionaire, HUDA was required to take over the complete project and assets, and to pay to the lenders of the Project, as per the financing documents, an amount equal to 80 per cent of the debt due as termination payment. Where on the other hand, the termination is by the concessionaire on account of a default

by HUDA, the concessionaire was entitled to receive by way of a termination payment, a sum equal to: the debt due; and 110 per cent of the adjusted equity. [Para 39]

1.4 The directions contained in the High Court's consent order dated 20 September 2019 makes it abundantly clear that the audit team appointed by CAG was to conduct a financial audit of the debt due and to examine the scope of the audit, the consent order is the time bound process which was envisaged, with the audit being completed within 30 days and 80 per cent of the debt due being deposited within 30 days after the receipt of the audit report; and that the final aspect which needs to be emphasized is that the rest of the disputes between the parties arising out of the audit report were to be agitated in arbitration. The parties clearly understood that once the debt due was ascertained in terms of the audit report, 80 per cent would be deposited by HSVP in the Escrow Account while the rest of the disputes in respect of the audit report would be governed by arbitration. A time of 30 days was envisaged for deposit the amount in Escrow Account, upon the receipt of the audit report. Subsequently, another order was passed by the High Court wherein clause (ii) of the earlier order was substituted and the substituted one envisaged that the auditors would also have to examine the scope of the audit of the debt due suggested by HSVP. Hence, CAG would also examine the scope of the audit of the debt due suggested by HSVP in terms of the Concession Agreements. Moreover, it was envisaged that the rest of the dispute either arising out of the CAG report, the validity of the termination notices issued by both the parties and any past or future claims/liabilities inter se would be agitated in arbitration. On 15 October 2019, there was a further clarification by the Division Bench that CAG would examine the scope of the audit of the debt due suggested by both the parties in terms of the Concession Agreements. Thus, it was understood by both the parties that the determination of the debt due would be in terms of the Concession Agreements. CAG specifically placed before the High Court its understanding of the role to be performed by it. In its written statement before the High Court on 19 November 2019, CAG stated that it had decided to appoint an auditor "for the financial audit of debt due as on the transfer date". [Paras 45, 46]

1.5 HMRTC and HSVP, as well as the appellants, were apprised at all material times of the work of audit being handed over by CAG to a firm appointed by it. On 24 February 2020, a draft report of the financial audit of the debt due of RMGL/RMGSL was sent to the Principal Secretary to the Government of Haryana in the Department of Town and Country Planning. HMRTC was requested to communicate its response on behalf of the State government, so that it could be incorporated in the report. On 27 February 2020, HSVP sought four weeks at the least, in view of the ongoing Session of the State Legislative Assembly. The Accountant General Audit, Haryana followed up the earlier email by subsequent communications dated 18 March 2020 and 22 April 2020. By the later communication on behalf of CAG, the response of the State government was requested to be furnished before the deadline of 29 April 2020, failing which the report would be finalized without including their response. HMRTC, HSVP and the State government, however, did not furnish their response to the draft report. Eventually, the audit reports were finalised in respect of the debt due under the Concession Agreements with RMGL/RMGSL respectively, and were placed before the High Court in sealed cover. Following the opening of the sealed cover on an application by the appellants, an objection was raised in the form of an affidavit by HMRTC on 10 October 2020. According to HMRTC, the audit report was inconclusive and incomplete, since several aspects which will have an impact on the debt due remain to be determined. The auditors stated that the scope of the audit as decided by CAG was submitted to the High Court on 19 November 2019, and it was intimated that only those issues which are relevant and related to examining the debt due under the Concession Agreements would be examined. Hence, other issues mentioned by HMRTC, such as encumbrances and liabilities on the metro project, shareholding/share in the valuation of the assets of the concessionaire, change of shareholding rights, criminal acts and liabilities, would require forensic and technical audit. Such audits are ongoing independently. The audit conducted by the auditors appointed by the CAG herein, was limited to examining the debt due as defined in the Concession Agreements. While arriving at the principal and interest component of the debt due, the auditors indicated that other matters had come to their attention, which

can have a significant impact on the debt due, and that the report was subject to the outcome of such matters. [Para 47]

1.6 Clause (ii) of the order dated 20 September 2019 makes it abundantly clear that the basic purpose underlying the entrustment of the reference to the CAG was the determination of the debt due "as defined under the Concession Contract". The High Court was seized of a proceeding under Article 226 of the Constitution, and its writ jurisdiction had been invoked to challenge the notices of termination issued by RMGL and RMGSL, and for ensuring that the consequence which would emanate on the expiry of the notice period of 90 days by the cessation of the metro operations could be prevented by the judicial intervention in the course of the public law jurisdiction. The issuance of a notice of termination, the consequences which would ensue, and the resolution of disputes is specifically provided in the arbitration agreement between the parties, which is an intrinsic part of the Concession Agreements. Hence, there was an evident interface between this element of public interest on the one hand and the contractual rights of the parties to the Concession Agreements on the other. However, when HMRTC and HSVP moved the High Court under Article 226, they did so in view of the impending threat which was looming large on the horizon of the rapid metro operations being brought to a standstill as a result of the proximate expiry of the notice of 90 days preceding termination. In the instant case, the High Court was evidently concerned over a fundamental issue of public interest, which was the hardship that would be caused to commuters who use the rapid metro as a vehicle for mass transport in Gurgaon. As such, the High Court's exercise of its writ jurisdiction under Article 226 in the instant case was justified since non-interference, which would have inevitably led to the disruption of rapid metro lines for Gurgaon, would have had disastrous consequences for the general public. However, as a measure of abundant caution, it is clarified that ordinarily the High Court in its jurisdiction under Article 226 would decline to entertain a dispute which is arbitrable. Moreover, remedies are available under the Arbitration and Conciliation Act, 1996 for seeking interim directions either under Section 9 before the Court vested with jurisdiction or under Section 17 before the arbitral tribunal itself. [Para 49]

1.7 The termination of the Concession Agreements had consequences in terms of the provisions contained in the Agreement requiring a deposit of 80 per cent of the debt due under Article 24.4. The contesting parties agreed to an independent third-party determination of this amount by a neutral entity, namely the CAG. The primary function of CAG was to appoint a team of auditors for conducting a financial audit of the debt due and in that process of also examine the scope of the audit. The orders dated 4 October 2019 and 15 October 2019 issued by the High Court also envisaged that CAG would examine the scope of the audit. While the earlier order of 4 October 2019 required CAG to examine the scope of the audit of the debt due suggested by HSVP, the subsequent order dated 15 October 2019 required the examination by CAG on the scope of the audit after bearing in mind the suggestions by both the parties "in terms of the Concession Agreement". The expression "in terms of the Concession Agreement" indicates that the basis of the audit was to be what was envisaged in the Concession Agreements, which specifically defines the expression "debt due". Pertinently, the original order of 20 September 2019 specifies a strict time schedule within which, on a determination being made by the auditor, 80 per cent of the debt due would be deposited by HSVP in the Escrow Account. This was however subject to the safeguard that it would be subject to any order that may be passed by NCLAT or by a competent statutory authority. However, it was further clarified that the rest of the disputes between the parties to the lis arising out of the audit report were to be agitated in arbitration proceedings. [Para 50]

1.8 The provision, embodied in clause (v) of the operative directions of the High Court's consent order dated 20 September 2019, is capable of a reasonable interpretation that once a determination was made in the audit report, 80 per cent would be deposited in the Escrow Account by HSVP and if any dispute arising out of the audit report remained, that would be resolved in arbitration. As a matter of fact, the subsequent order of 4 October 2019 replaced clause (v) by envisaging that the rest of the disputes between the parties arising out of: the CAG report; the validity of the termination

notices issued by both the parties; and any past or future *inter se* claims/liabilities; shall be agitated and decided in arbitration proceedings. [Para 51]

1.9 HSVP and HMRTC on the one hand, and RMGL/RMGSL on the other, were in discussion at arm's length when they invited the High Court to pass its order dated 20 September 2019, and agreed to the modifications which have been made by the orders dated 4 October 2019 and 15 October 2019. In the face of the clear stipulations contained in the order of the High Court, it would be impermissible to interdict the consequences emanating from the working out of the directions contained in the above orders of the High Court upon the submission of the CAG report. [Para 52]

1.10 CAG in the course of its affidavit filed before this Court and High Court by the Deputy Accountant General, clarified that it was decided, after examining the scope of the financial audit of the debt due suggested by both the parties, that CAG would examine only those issues which are related and relevant to examining the debt due under the Concession Agreements. CAG followed a process which is fair by making a statement on the scope of the audit before the High Court in advance; examining the scope of the audit as suggested by the parties before making its determination; appointing a firm of chartered accountants for conducting an audit as was envisaged in the order of the High Court; furnishing the contesting parities with a copy of the draft report; allowing the parties to submit their response to the draft report; granting an extension of time to the State of Haryana to submit its comments; and placing the State on notice that it would have to file its objections finally by a prescribed deadline, failing which the report would be finalized. [Para 53]

1.11 HMRTC and HSVP are themselves to blame if they did not submit their responses. CAG has specifically rebutted the objections to the audit report submitted by HMRTC on the ground that as a constitutional authority, CAG decided upon the scope of the audit of the debt in terms of the Concession Agreements, which it submitted to the High Court. Moreover, it has clarified that this was a financial audit of the debt due and the auditors reported their findings in terms of the Concession Agreements. The FIR lodged by the Economic Offences Wing,

the Income Tax Department notice, investigation by the SFIO and Forensic Audit did not form a part of the financial audit conducted by the CAG . CAG has submitted that a financial audit of the debt due is complete and conclusive under the scope of audit as decided by CAG, and submitted to the High Court.[Para 54]

1.12 The Projects in question have been funded by a consortium led by banks, among which are Canara Bank and Andhra Bank. The terms of the Concession Agreements expressly recognized that the Projects were being publicly funded through financial institutions. The audit report emphasized that the proportion between debt and equity was pegged at 70:30. The terms of the Concession Agreement dated 9 December 2009 clearly envisaged the purpose of the Escrow Account in Article 18. HUDA, the predecessor of HSVP, entered into a Concession Agreement dated 9 December 2009, which in Article 17 expressly recognizes the linkage between the financing package and the Concession Agreement. In fact, Article 17.2 emphasizes that the rights of the concessionaire would stand waived if financial closure was not to occur within six months within the cure period of six months. Further, Article 18.1 envisages that all funds constituting the financing package for meeting the concessionaire's capital cost shall be credited to the Escrow Account during the period of operations, and all fare and non-fare revenues collected by the concessionaire shall be exclusively deposited in it. Under Article 18.2, the concessionaire was required to give to the Escrow bank irrevocable instructions while opening the Escrow Account that the deposits into the Escrow Account would be appropriated in the manner indicated in clauses (i) to (ii) of Article 18.2.1. This includes provision for debt service payments. These provisions in the Concession Agreement have a vital bearing on the subject matter of the present dispute. Canara Bank in its affidavit filed before the High Court has stated that on behalf of consortium of lenders, acting as facility agent, it financed RMGSL in the aggregate of Rs 1500 crores in terms of a common loan agreement. The Escrow Account Agreement has been entered into in pursuance of the Concession Agreement, and to effectuate the funding of the Project No 2. As on 31 July 2019, the lenders of RMGSL have an outstanding of Rs 1651 crores approx. Hence, the Projects

which have been executed by RMGL and RMGSL, involved an outlay of funds from Andhra Bank and Canara Bank, who have a vital stake in the financials of the Projects. [Para 55]

1.13 As such, HMRTC and HSVP cannot avoid at this stage complying with the directions which were issued by the High Court in its orders dated 20 September 2019, as modified on 4 and 15 October 2019, on the plea that an FIR has been lodged on 16 December 2018 against IL&FS group in which there are allegations against RMGL and RMGSL of producing fake invoices and inflating the capital cost of the rapid metro Projects. The circumstances which have been adverted to in the affidavit filed by HMRTC in the High Court were known to it and to HSVP, when they both agreed to an order which emanated with the consent of the parties on 20 September 2019. Both HMRTC and HSVP were conscious of their obligation to deposit 80 per cent of the debt due as a consequence of the termination by the provisions contained in the Concession Agreements. They wished to lend an assurance to the determination of the debt due by seeking the involvement of the CAG. They made a solemn commitment before the High Court that within 30 days of the determination, 80 per cent of the debt due would be deposited in an Escrow Account. This amount, it must be emphasized, is not being handed over either to RMGL or RMGSL, which have been classified as "red entities" of the IL&FS group. The placement of the quantum representing 80 per cent of the debt due in Escrow Account is to abide by such directions as may be issued by NCLAT or any other competent statutory authority. Besides this provision, remedies are available either before the competent Court under Section 9 or before the Arbitral tribunal under Section 17 of the Arbitration and Conciliation Act, 1996. Hence, there being an agreement between the parties, to permit HSVP and HMRTC to obstruct or delay compliance with their obligations would be manifestly impermissible for three reasons: firstly, the obligation to deposit 80 per cent debt due as a consequence of the termination emanates from Article 24.4 of the Concession Agreement dated 9 December 2009; secondly, the obligation to deposit 80 per cent of the debt due as determined in the report of the auditor has been assumed voluntarily before the High Court by HSVP/HMRTC from which, as public bodies, they cannot be permitted to resile; and thirdly, there is a vital

public interest element in ensuring that the monies which are committed by banks and financial institutions towards financing infrastructure projects are secured to them in terms of the Concession Agreements. [Para 56]

1.14 The underlying wrongdoing which was allegedly conducted by the promoters in the erstwhile management of IL&FS undoubtedly needs to be investigated. The process of pursuing the forensic audit, the investigation by the SFIO and by the law enforcement machinery must follow to its logical conclusion. The NCLT is supervising the resolution process with a government appointed Board now being in charge of the management of IL&FS. Equally, financing arrangements entered into by financial institutions towards fulfilling infrastructure projects, based on the sanctity of the commercial contracts, are to be duly observed. This facet has to be emphasized since it embodies a vital element of public interest as well. Deterioration in loan recovery not only leads to higher provisions and diminished profitability but also constrains banks' lending capacity, thus affecting the economy adversely". Unless the dues which are assured to financial institutions as part of the arrangements which are envisaged in Concession Agreements are duly enforced, the structure of financing for infrastructure projects may well be in jeopardy. Such a consequence must be avoided by declining to accede to a request, such as that by HMRTC and HSVP, which is to allow it to resile from its obligations. These obligations arise not only in terms of the Concession Agreements, but have been solemnly assumed before the High Court. Hence, on both counts, HMRTC and HSVP cannot be permitted to resile. [Para 57]

1.15 The intervention of this Court under Article 136 of the Constitution was sought having regard to the manner in which the proceedings before the High Court were being derailed. On 12 October 2020, after HMRTC filed its affidavit, the High Court noted the appellant's submission that "the matter does not brook any delay" and yet adjourned the matter to 16 October 2020. Thereafter, when the proceedings came up on 16 December 2020, and the response filed by CAG was taken on the record, the hearing of the writ petitions was again deferred to 8 April 2021. This course of events indicates

that the whole object and purpose behind setting down the timelines in the order dated 20 September 2019 stood the risk of being defeated. This Court has been constrained to intervene in the process in order to ensure that the sanctity of the understanding that was arrived at before the High Court on 20 September 2019 is duly maintained. There is a vital public interest element in ensuring that monies which are liable to be deposited in the Escrow Account with a nationalised bank are duly deposited. HMRTC and HSVP, it must be emphasized, are not left without remedy. The deposit into the Escrow Account has to be maintained in that form and will abide by such orders that may be passed by NCLAT or by a competent statutory authority. Besides this, the Concession Agreements provides a clear-cut remedy for seeking reliefs under the arbitration agreement. [Para 58]

1.16 The invocation of the writ jurisdiction of the High Court under Article 226 of the Constitution by HMRTC and HSVP was to challenge the termination notices dated 17 June 2019, and to obviate the consequence of the cessation of the rapid metro operations, which would have ensued on the expiry of the notice period. The arbitration clause of the Concession Agreements provides sufficient recourse to remedies which can be availed of. That apart, the order of the High Court dated 4 October 2019 has also clarified that the rest of the dispute that remains after the deposit of 80 per cent of the debt due, either arising out of the CAG report, the validity of the termination notices issued by both the parties and any past or future *inter se* claims and liabilities shall be agitated and decided in the arbitration proceedings. In view of the order which is passed, the dispute between the High Court in the writ jurisdiction under Article 226 of the Constitution shall stand worked out by granting liberty to the parties to avail of their rights and remedies in accordance with law. It is directed that HSVP shall within the stipulated period deposit into the Escrow Account 80 per cent of the debt due as determined in the reports of the auditors dated 23 June 2020, in the case of RMGL and RMGSL respectively; the deposit into the Escrow Account shall continue to be maintained in Escrow, subject to any order that may be passed by NCLAT or any competent statutory authority, and shall not be appropriated by the Escrow Bank without specific permission; RMGL and RMGSL on the

one hand, and HSVP on the other, are at liberty to pursue their rights and remedies in pursuance of the arbitration clause contained in the Concession Agreements on all matters falling within the ambit of the arbitration agreement, including the validity of the notices of termination, any past or future inter se claims and liabilities as envisaged in the order of the High Court dated 20 September 2019, as modified on 4 October 2019 and 15 October 2019; in terms of clause (v) of the order of the High Court dated 20 September 2019, in the event of any dispute arising about the correctness of the CAG report, in regard to the determination of the debt due, any of the parties would be at liberty to raise a dispute in the course of arbitral proceedings; upon compliance with the directions contained in (i) RMGL and RMGSL shall execute and handover to HSVP all documents which are required for effectuating the transfer of operations, maintenance and assets to HSVP or their nominees with a view to fulfill the obligation of the concessionaires in Article 25 of the Concession Agreement dated 9 December 2009 and clause (vi) contained in the order of the High Court dated 20 September 2019, as modified on 4 October 2019 and 15 October 2019; and the writ petitions filed before the High Court by the respondents are disposed of. [Paras 59, 60]

Sanjana M. Wig vs Hindustan Petroleum Corporation Limited **(2005) 8 SCC 242 : [2005] 3 Suppl. SCR 190; *Bisra Lime Stone Co. Ltd. v. Orissa SEB,* (1976) 2 SCC 167 : [1976] 2 SCR 307; *Manish Mohan Sharma v. Ram Bahadur Thakur Limited* (2006) 4 SCC 416 : [2006] 3 SCR 97 – referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos.925-926 of 2021.

From the Judgment and Orders dated 12.10.2020 and 16.12.2020 of the High Court of Punjab and Haryana at Chandigarh in CM-7881-CWP-2020 in CWP-24949-2019 and CWP-24951-2019.

Tushar Mehta, SG, Alok Sangwan, Sr. AAG, B.K. Satija, AAG, Mukul Rohatgi, Puneet Bali, Chetan Mittal, Dhruv Mehta, Sr. Advs., Raunak Dhillon, Abhijeet Das, Aditya Marwah, Shubhankar Jain, Arup

Gupta (for M/s Cyril Amarchand Mangaldas), Rajesh Goel, Sumit Kumar Sharma, Anurag Kulharia, Sandeep, Jatin Kumar, Udit Garg, Himanshu Gupta, Devan Munjal, Akshit Jain, Dr. Monika Gusain, Sanjay Bajaj, Ms. Kanchan Kaur Dhodi, P.B.A. Srinivasan, Amit K. Nain, Parth D. Tandon, Avinash Mohapatra, Ms. Chandralekha, Keith Varghese, Ms. Ichchha Kalash, Ms. Nikitha Ross, Rajive Bhalla, Yajur Bhalla, Deepak Samota, Ashish Bajpayee, Siddharth Srivastava, Shubham Bhalla, Advs. for the appearing parties.

The Judgment of the Court was delivered by

DR. DHANANJAYA Y CHANDRACHUD, J.

This judgment has been divided into the following sections to facilitate analysis:

A Factual background

B Submissions of counsel

C Analysis of the Concession Agreements

D Terms of the consent order dated 20 September 2019 passed by the High Court

E Obligations of HMRTC and HSVP to pay the debt due

F Conclusion

A Factual background

1. In 2008, Haryana Shehri Vikas Pradhikaran ("**HSVP**"), the second respondent, issued a Request for Qualification and Request for Proposal ("**RFQ/RFP**") for developing a metro rail link from Delhi Metro Sikanderpur Station on MG Road to NH-8 ("**Project No1**"). A Consortium Agreement was entered into on 1 December 2008 between IL&FS Rail Limited ("**IRL**")**,** IL&FS Transportation Networks Limited ("**ITNL**") and DLF Metro Limited in which IRL was identified as the lead member of the consortium. **HSVP** accepted the bid submitted by the consortium and issued a letter of award of 16 July 2009, subject to the condition that a concession agreement would be executed within 60 days. Pursuant to the letter of award, the consortium incorporated the first appellant, Rapid MetroRail Gurgaon

Limited ("**RMGL**"), under the Companies Act, 1956 (the "**Act of 1956**") and requested **HSVP** to accept **RMGL** as the entity which would undertake, fulfill and exercise the rights of the consortium under the letter of award.

2. On 9 December 2009, **HSVP** entered into a Concession Agreement with **RMGL** for the execution of Project No 1 on a design, build, finance, operate and transfer basis. **HSVP** granted a concession to **RMGL** for a period of 99 years from the effective date, including the exclusive right, license and authority during the subsistence of the Concession Agreement to implement and operate Project No 1.

3. In 2012, **HSVP** issued another **RFQ/RFP** for developing a metro rail link from Delhi Metro Sikanderpur Station on MG Road to Sector 56, Gurugram ("**Project No 2**").

4. On 25 April 2012, **IRL** and **ITNL** entered into a consortium arrangement in the form of a Memorandum of Understanding, under which **IRL** was identified as the lead member of the consortium. The bid submitted by the consortium was accepted by **HSVP**, which issued a letter of award on 1 October 2012. Pursuant to the letter of award, the consortium promoted and incorporated the second appellant, Rapid MetroRail Gurgaon South Limited ("**RMGSL**"), which would fulfill the obligations and exercise the rights of the consortium under the letter of award. Thereafter, a Concession Agreement was entered into between **HSVP** and **RMGSL** for the execution of Project No 2 on 3 January 2013. The term of the concession was 98 years commencing from the effective date. **RMGSL** had the exclusive right, license and authority during the subsistence of the Concession Agreement to implement and operate Project No 2.

5. **RMGL** completed Project No 1 on 14 November 2013. **RMGSL** completed Project No 2 on 31 March 2017. In the meantime, on 11 January 2014, the Town and Country Planning Department of the Government of Haryana directed that all metro projects and projects for Haryana Mass Rapid Transport in the State would be handled by the first respondent, Haryana Mass Road Transport Corporation Limited ("**HMRTC**").

6. On 17 July 2018, **RMGL** and **RMGSL** issued notices to **HSVP** to cure material breaches they alleged had been committed under the

Concession Agreement. Responding to the cure notice dated 17 July 2018, **HSVP** addressed a communication dated 11 October 2018 to both **RMGL** and **RMGSL**.

7. On 1 October 2018, a petition[1] was instituted by the Union of India under Section 241(2) read with Section 242 of the Companies Act, 2013 (the "**Act of 2013**") before the Mumbai Bench of the National Company Law Tribunal ("**NCLT**") against Infrastructure Leasing and Financial Services Limited ("**IL&FS**") and its Board of Directors ("**Board**"), on the ground that the affairs of the company and its subsidiaries were being conducted in a manner prejudicial to public interest. Both **RMGL** and **RMGSL** form part of the **IL&FS** group of companies. Acting on the petition, the NCLT by its order dated 1 October 2018 superseded the existing Board of **IL&FS** with a newly constituted Board, which was appointed on the recommendation of the Union government. The new Board took charge of the affairs of the **IL&FS** and was authorised to conduct its business and formulate a road map for recovery.

8. The National Company Law Appellate Tribunal ("**NCLAT**") by an order dated 4 February 2019 appointed Mr Justice D K Jain, a former Judge of this Court, to supervise the resolution process for the **IL&FS** group of companies. The appellants, **RMGL** and **RMGSL**, were categorized as a "red" entity of the **IL&FS** group of companies in an affidavit[2] dated 11 February 2019 filed by the Union of India before the NCLAT.

9. On 7 June 2019, **RMGL** issued a notice of termination to **HSVP** seeking to bring an end to the Concession Agreement dated 9 December 2009 in terms of Article 24.5.1, upon the expiry of 90 days from the date of delivery of this termination notice. A similar termination notice was issued by **RMGSL** to **HSVP**, in terms of Article 32.5.1 of the Concession Agreement dated 3 January 2013. Further, on 7 June 2019, the appellants responded to the letter of **HSVP** complaining of material breaches alleged to have been committed by the appellants under their respective Concession Agreements.

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1 Company Petition No 3638 of 2018

2 Filed in Company Appeal (AT) No 346 of 2018

10. On 26 June 2019, **RMGL** wrote to **HSVP** intimating that the divestment requirements contained in Article 25.4 and Article 25.2 of the Concession Agreement dated 9 December 2009 had already been completed by it. However, **HSVP** had failed to fulfill its obligations under Article 25.4 to verify **RGML**'s compliance with such divestment requirements. A similar letter was addressed by **RMGSL** in the context of the Concession Agreement dated 3 January 2013. On 1 August 2019, **RMGL** informed **HSVP** that it had completed the formalities for handover of Project No 1, and that the Concession Agreement dated 9 December 2009 would stand terminated on the expiry of 90 days from the termination notice. **RMGL** asserted that it would stop the operation and maintenance of Project No 1 after the termination. A similar letter was addressed by **RMGSL** to **HSVP** in the context of the Concession Agreement dated 3 January 2013 and Project No 2.

11. On 8 August 2019, NCLAT issued directions for the entities forming a part of **IL&FS** group of companies which had been categorized in the "red" category, inasmuch as that they had to seek the approval of Justice D K Jain before alienating, encumbering, transferring or creating third party rights on assets. **RMGL** presented a memorandum on 19 August 2019 to Justice D K Jain to seek his approval for handover of the Project No 1 to **HSVP**. A similar approval was sought by **RMGSL** in the context of Project No 2.

12. On 26 August 2019, the respondents issued a notice of termination to **RMGL** under Articles 24.1 and 24.2 of the Concession Agreement dated 9 December 2009. Terminating the agreement, they directed **RMGL** to handover Project No 1 to **HMRTC**, which in turn would hand it over to Delhi Metro Rail Corporation ("**DMRC**"). A similar notice of termination was issued to **RMGSL**, coupled with an analogous direction for handing over Project No 2.

13. On 6 September 2019, Justice D K Jain permitted **RMGL** to handover possession and control of Project No 1 to **HSVP** pursuant to the termination of the Concession Agreement dated 9 December 2009, on or before 9 September 2019. By a separate order on the same date, **RMGSL** was permitted to handover possession and control of Project No 2 by the same date.

14. Further, also on 6 September 2019, the same day as the order of Justice D K Jain permitting handover, the respondents instituted a Writ Petition[3] under Article 32 of the Constitution before the High Court for the State of Punjab and Haryana challenging notice of termination dated 7 June 2019 issued by **RMGL**, *inter alia*, on the ground that the period of 90 days shall start from the date of permission, which had not been yet granted by Justice D K Jain. An interim direction was sought for the continuance of the operation of Project No 1 by **RMGL**. Another Writ Petition[4] was instituted to challenge the notice of termination by **RMGSL** on similar grounds, and similar interim directions were sought in respect of Project No 2. The observations of Justice D K Jain, contained in his order dated 6 September 2019, in respect of the Concession Agreement dated 9 December 2009, were produced before the High Court, which were as follows:

"20. Nevertheless, Clause 24.6 of Article 24 stipulates that upon termination of the Concession Contract, "for any reason whatsoever" HUDA shall take possession and control of Metro link forthwith, including the material, construction plan, implements, equipment, etc., on or about, the site. Therefore, except for the stipulation of a prior 90 days' notice in writing to HUDA by the Concessionaire for termination of the Concession Contract, where after such termination takes effect, upon termination of the Concession Contract by either of the Parties, HUDA is, obliged to take possession of the Metro link forthwith. I am inclined to agree with the Ld. Counsel appearing for RMGL that requirement of the said prior notice is to enable HUDA to prepare itself to take over the possession and control of the Metro link. In that view of the matter, the Notice of termination of the Concession Contract having been served by RMGL on HSVP (earlier known as HUDA), in writing on June 7, 2019, the said termination notice takes effect on the expiry of the 90 days therefrom i.e. September 8, 2019 and RMGL is required to handover the possession and control of the subject Metro link to HSVP on or before, September 9, 2019 and HSVP is obliged to take possession and control of the Metro link forthwith. There is no explanation as why HSVP did not take any steps to ensure smooth handing and taking over of the project by RMGL to HSVP, all this while. In so far as the question

3 WP (C) No 24949 of 2019
4 WP (C) No 24951 of 2019

of validity of the termination notice issued by RMGL to HSVP is concerned, the issue is to be decided at an appropriate forum and not by the undersigned in terms of the afore-extracted direction by the Hon'ble NCLAT."

The observations of Justice D K Jain in respect of the Concession Agreement dated 3 January 2013 were as follows:

"19. It is evident that both the parties are ad-idem that both the parties having issued notices for terminating the Agreement, the metro link has to be taken over by HSVP/HMRTC but the dispute is only with regard to the time when the handing over and taking over after the same should take place. No explanation whatsoever is forthcoming as to why, on the receipt of Termination Notice dated June 7, 2019, HSVP/HMRTC did not take any steps to ensure smooth handing over of the project by RMGSL to them, all this while. In so far as the question of validity of the termination notice issued RMGSL to HSVP is concerned, the issue is to be decided at an appropriate forum and not by the undersigned in terms of the afore-extracted direction by the Hon'ble NCLAT.

20. Accordingly, RMGSL is permitted to handover the possession and control of Metro link from Delhi Metro Sikanderpur Station on MG Road to Sector 56, Gurugram to ASVP, pursuant to the termination of the Concession Agreement dated January 3, 2013. It goes without saying that this permission is without prejudice to the rights and contentions of the contesting parties to take recourse to appropriate legal proceedings' to assail the validity and consequences of termination of the Concession Agreement by both of them. It is, however, clarified that HSVP, shall still be free to engage the services of RMGSL, albeit at the mutually discussed/negotiated terms and charges to run the subject Metro link till, such time, appropriate/ alternative arrangements are made by HSPV to run the same."

15. On 6 September 2019, the High Court, while issuing notice, adjourned the proceedings to 9 September 2019 and directed that until then the operation of the Rapid Metro Rail by the appellants shall continue on both the lines, till midnight on 9 September 2019. On 9 September 2019, the High Court deferred the hearing to 17 September 2019, with a consequent extension to its interim order as well. The High Court observed:

"***Order dated 09.09.2019***

"We propose to pass this order in both the cases i.e. CWP Nos.24949 and 24951 of 2019.

Although both the contracts dated 03.01.2009 and 03.01.2013 executed for both the lines of the Rapid Metro Rail at Gurgaon have been terminated by both the parties i.e. HSVP (previously known as "HUDA") on 26.08.2019 (forthwith) and the RMGSL by giving 90 days notice with effect from 07.06,2019 which comes to an end on 09.09.2019. But the operations are still continuing under the orders of this Court dated 06.09.2019 till the midnight of 09.09.2019.

After lengthy arguments addressed by counsel for the parties, the Court has found that the dispute between the parties may be resolved by negotiation for which they both would require some time and, therefore, the hearing of this case is deferred to 17.09.2019 and the order of stay granted on 06.09.2019 is also extended till 17.09.2019 till midnight.

During the course of hearing, learned senior counsel appearing on behalf of the respondent has submitted that with the termination of the contract with effect from 09.09.2019, the respondent would not act as a concessionaire rather would act as an agent.

On the other hand, learned senior counsel for the petitioners has submitted that the respondent can act as a licensee.

Be that as it may, the question as to whether the respondent would act for the purpose of operation and management till 17.09.2019 till midnight as a licensee or an agent shall be decided on the next date of hearing.

Learned senior counsel for the respondent has also referred to the terms and conditions for the purpose of discussion in the meeting during this period which are also reproduced as under:-

(1) Time bound handover of the Project to HSVP;

(2) Commitment to take handover the Project by HSVP;

(3) Commitment to pay at least 80% of debt due as termination payment to RMGL/RMGSL by HSVP;

(4) Handover to start immediately;

(5) RMGL/RMGSL to act as agent of HSVP for further work post 09.09.2019;

(6) Cost and benefit to be on HSVP's account;

(7) Indemnification of RMGL/RMGSL from any third party claims and from HSVP's actions;

(8) Rights and benefits of parties get frozen on the date termination of Concession Agreement becomes effective, be-09-09-2019— and.

(9) Issuance of vesting certificate by HSVP.

Learned senior counsel appearing on behalf of the petitioners has submitted that all these issues would be discussed in the joint meeting of the parties.

Till the next date of hearing i.e. 17.09.2019, the respondent shall operate and manage the Rapid Metro Rail at Gurgaon on both the lines but subject to reimbursement of the insurance and operation and maintenance cost by the petitioners of this period.

A copy of this order be given to both the parties under signatures of Bench Secretary of this Court.

To be taken up in the urgent list.

A photocopy of this order be placed on the file of other connected case."

On 18 September 2019, the following order was passed:

"Order dated 18.09.2019

Learned senior counsel appearing on behalf of the Rapid Metrorail Gurgaon Ltd. (RMGL) and the Rapid Metrorail Gurgaon South Lid. (RMGSL) has made the following proposals:-

i) RMGL/RMGSL will continue to operate their Metro Link for a period of 30 days (i.e. until October 16, 2019) during which (a) the 'debt due' as per financing documents in terms of the concession agreement may be determined by an auditor appointed by the Hon'ble Court; and (b) the process for transfer of the Metro Links may be undertaken under the supervision of two Hon'ble (retired) High Court Judges, one being nominated by RMGL/RMGSL and one being nominated by HSVP;

ii) During this extended period since 9 September 2019 RMGL/ RMGSL will act as agents of HSVP, RMGL and RMGSL will be responsible for all liabilities arising on account of their gross negligence and fraud during this time;

iii) The conditions set forth in (i) and (ii) above are subject to an undertaking from HSVP that once the debt due is determined by the auditor appointed by the Hon'ble Court at least 80% of the 'debt due' so determined shall be, deposited in the escrow account inter alia in terms of the Concession Agreement Escrow Agreement and Substitution Agreement.

iv) The above proposal is made to safeguard immediate interest of the public sector lenders of the project and is without prejudice to the rights and, remedies of RMGL/RMGSL under contract or applicable laws including inter alia the right to claim any differential amounts that may be due and payable to the lenders or RMGL/RMGSL as Termination Payments or any other payments.

He has also submitted that since the petitioners may take some time to consider the aforesaid proposals, RMGL/RMGSL shall continue its operation and management till 20.09.2019 (midnight).

Adjourned to 20.09.2019.

To be shown in the Urgent List.

A photocopy of this order be placed in the file of the connected case."

16. In the order of the High Court dated 18 September 2019, there was a specific reference to the proposals which were made on behalf of the **RMGL** and **RMGSL**. The proposals essentially were that: firstly, **RMGL** and **RMGSL** would continue to operate the rapid metro link for 30 days, during which the 'debt due' as per the financing documents in terms of their respective Concession Agreements would be determined by an auditor; and secondly, an undertaking would have to be furnished by **HSVP** that on determination of the 'debt due' by the auditor, at least 80 per cent of the amount so determined should be deposited in the Escrow Account in terms of the Concession Agreements. The respondents **HMRTC** and **HSVP** submitted their response to the proposal which was made by the appellants, which was adverted to in the earlier order. The response was in the following terms:

"(i) With respect to the request of the RMGL and RMGSL to continue to operate the said Metrolines fora period of 30 days, it is stated that HMRTC and HSVP have already entered into a formal agreement with the Delhi Metro Rail Corporation Ltd. "(DMRC)" on 16" September, 2019 for Operations and Maintenance "(O&M)" of the said Metro Lines. And it is categorically stated that HMRTC and HSVP has signed the said agreement on account of the fact that previously RMGL/RMGSL were not acceding to the request of HMRTC/HSVP to run the said Metrolines for sufficient period during which effective resolution of the entire matter could be achieved. Now, after having signed the said agreement with DMRC, HMRTC/HSVP is also of the view that the entire process of handover of O&M for the said Metro Lines to DMRC be done under the supervision of Hon'ble (Retd.) High Court Judge as may be appointed by the Hon'ble Court within reasonable time.

(ii) Secondly, the aspect of the ascertainment of "debt due" is linked with the definition of the words "debt due "in the concession agreement linked with the ascertainment of the Total Project Cost. However, the HMRTC and HSVP do hereby agree with the proposal of the RMGL and RMGSL that an auditor may be appointed to ascertain the actual figures in that respect. In this, matter, the HMRTC and HSVP proposes that Comptroller and Auditor General of India "(CAG)" may be given the assignment of financial audits under the order of the Hon'ble Court to ascertain financial aspects including determination of over invoicing into the project. HMRTC/HSVP are agreeable for the appointment of CAG subject to full cooperation by RMGL and RMGSL and all documents and other information pertaining to the 'debt due' may be provided to CAG or the auditor so appointed with a copy to HMRTC and HSVP.

(iii) Thirdly, during the transition period the period during which O&M of the said Metro lines shall be transferred from RMGL and RMGSL, to DMRC, RMGL & RMGSL have proposed to act as an agent of the HMRTC and HSVP during the said period. In this respect it is stated that it will lead to further complications. HMRTC and HSVP have transferred the amount of insurances and the entire control will remain with the RMGL and RMGSL during this period. RMGL and RMGSL shall continue their

O&M in terms of concession agreements and the HMRTC and HSVP have no objection that RMGL/RMGSL may receive all the revenues arising from O&M and incur all expenses therefrom itself and pay the same as is being done currently. In other words the RMGL and RMGSL remain responsible and liable for all their acts and deeds with are generally associated with the running of the said Metro Lines, not limited to only the Gross negligence and fraud during this time.

(iv) Fourthly, the aspect of HMRTC and HSVP undertaking to deposit the 80% of the debit due in Escrow Account as would be ascertained by the auditors depends solely on the outcome of the report as would be submitted by the learned auditor as shall be appointed by the Hon'ble Court and the HMRTC and HSVP do hereby commit and confirm to adhere to the directions as would be passed by the Hon'ble High Court or NCLAT or any other court or any other order under any other legal proceeding(s) passed by any other competent authority in that respect, in terms of the concession contract subject to the all other rights and entitlements in favour of both the parties arising out of the same.

(v) With respect to the submission that RMGL/RMGSL is reserving their right to claim differential payment, it is apprised that by having stated that, RMGL/RMGSL are trying to keep options open to challenge whereby RMGL/RMGSL may rekindle this entire matter again after having settled the matter in the light of aforesaid statement i.e. after having settled the amount which becomes due i.e. 80% of the debt due in terms of the definition contained in the concession agreement as linked with the total project cost which shall be ascertained by an auditor as shall be appointed by the Hon'ble Court. As such the same cannot be acceded to since this would lead to multiplicity of litigation and could be a serious dampener on this entire matter. This matter is being settled under the directions of the Hon'ble Court and as such the same should be acceptable to you gracefully.

(vi) That the HMRTC and HSVP hereto reserves its right to make any further submissions in the light of any further arguments or facts that may be brought to light in this matter during the audit process and course of proceedings."

17. The proposal submitted by **RMGL** and **RMGSL**, which had been responded to by **HSVP** and **HMRTC**, was then deliberated in the High Court. Accordingly, the following directions were issued by the Division Bench on 20 September 2019, recording that "a consensus" had been arrived at in the presence of senior officers of the contesting parties namely, the Managing Director of **HMRTC**, Chief Administrator of **HSVP,** the Managing Director of **RMGSL** and Director of **RMGL**. Thereupon, the directions which were issued by the Division Bench of the High Court on 20 September 2019 were in the following terms:

"(i) RMGL and RMGSL have decided to continue the Operation and Maintenance (for short "O&M") of both the metro lines for the period of 30 days w.e.f. 16.09.2019. In the meantime, process of transfer of control and management of operation and maintenance of both the Metro links shall start w.e.f. 23.09.2019. The operation and maintenance by RMGL and RMGSL shall be in terms of the order dated 09.09.2019 passed by this Court.

It is needless to mention that in case of any clarification/ modification, the parties shall be at liberty to approach this Court by moving an appropriate application(s) in these petitions.

Both the parties have requested to appoint two retired Hon'ble Judges of the High Court on payment of suitable remuneration to supervise the aforesaid transfer and in this regard petitioners have suggested the name of Hon'ble Mr. Justice Kailash Gambhir (Retd.) and the respondent(s) has suggested the name of Hon'ble Mr. Justice V.K. Gupta (Retd.).

Keeping in view the magnitude of work involved, we direct that £10.00 Lakh, towards remuneration, shall be paid to Hon'ble Mr. Justice Kailash Gambhir (Retd.) by the HSVP and remuneration to the tune of 710.00 Lakhs shall be paid to Hon'ble Mr. Justice V.K. Gupta (Retd.) by the — RMGL- RMGSL.

(ii) As far as "debt due" as defined under the concession contract is concerned, direction is issued to the Comptroller and Auditor General of India (for short 'CAG') to appoint a team of auditors for the financial audit of the "debt due" and also for examining the scope of the audit of "debt due" audited by the HSVP with the assistance of the auditors appointed by the parties to the *lis*.

It is needless to say that the CAG shall complete the aforesaid audit within a period of 30 days.

(iii) It is directed that the arrangements made by this Court vide order dated 09.09.2019 shall continue till the process of handing over the operations is complete.

(iv) It is further directed that amount of 80% of the debt due, determined in terms of the audit report of the CAG, shall be deposited by the HSVP in the Escrow account which shall be subject to any order passed by the NCLAT or any other competent statutory authority, within a period of 30 days after the receipt of the audit report.

(v) It is further directed that rest of the disputes between the parties to the lis, arising out of the audit report, shall be agitated and decided in the arbitration proceedings, a mode provided in the concession contracts.

(vi) It is also directed that whatever documents are required for the purpose of final transfer of operation and management and the assets, the same be given by the RMGL and RMGSL to HSVP after the payment of "debt due"."

This order dated 20 September 2019 was subsequently modified by the High Court on 4 October 2019, in the following terms:

"Notice in the applications was issued to which no reply has been filed, however, suggestions made by the applicant(s)- respondent(s) are accepted by the non- applicant(s)/petitioner(s) and therefore, three Clauses i.e. Clause No. II, V and VI of the order dated 20.09.2019 are hereby clarified/modified to the following extent:-

In Clause II at pages No. 12 and 13 of the order, the words

i.e. "also for examining the scope of the audit of "debt due" audited by the HSVP with the assistance of the auditors appointed by the parties to the lis." be replaced with the words "also for examining the scope of the audit of the debt due suggested by the HSVP with the assistance of the auditors appointed by the parties to the lis. The CAG will also examine the scope of the audit of debt due suggested by the HSVP in terms of the concession agreement."

As regards to Clause V, it is being replaced with the following:-

> V) It is further directed that rest of the dispute between the parties to the lis either arising out of the CAG report, the validity of the termination notices issued by both the parties and any past or future inter se claims/liabilities shall be agitated/decided in the arbitration proceedings, a mode provided in the concession agreement. Needless to say that arbitration proceedings shall be subject to any permission that may be required from NCLAT or any other competent Court of law.

Insofar as Clause VI is concerned, Learned Senior Counsel appearing on behalf of the applicant(s)-respondent(s), after taking instructions from Mr. Rajiv Banga, Managing Director, RMGSL and Director RMGL, has submitted that the same be read as under:-

> VI) It is directed that whatever documents are required for the purpose of transfer of operation and maintenance is concerned, the same will be handed over by the RMGL and RMGSL to the petitioners or their agent/licensee DMRC in terms of direction No. I and rest of the documents which are for final transfer of the assets the same be given by the RMGL and RMGSL to HSVP after payment of the debt due. However, in the meanwhile the proposed documentation in terms of concession agreement may also be communicated by the RMGL and RMGSL to the petitioners.

With the aforesaid clarifications/modifications, present applications are hereby disposed of. Further, on the joint request, of counsel for the parties, CAG is directed to complete the audit, as ordered by this Court, by counting the period of 30 days from the date of receipt of certified copy of this order."

18. On 15 October 2019, the High Court allowed an extension of seven days for implementing the directions issued in its orders dated 20 September 2019 and 4 October 2019. The High Court also corrected its earlier order with the consent of the contesting parties, in the following terms:

"Accordingly, the applications are allowed.

However, Mr. Puneet Bali has pointed out that there is an error in the order dated 04.10.2019. He has further submitted that instead of reading the order, "The CAG will also examine the scope of the

audit of debt due suggested by the HSVP in terms of the concession agreement" be read as "The CAG will also examine the scope of the audit of debt due suggested by both the parties in terms of the concession agreement."

19. In pursuance of the order of the High Court, the Comptroller and Auditor General of India ("**CAG**") presented a statement dated 19 November 2019 in regard to:

(i) The scope of the audit; and

(ii) Deliverables and timelines.

The statement has a bearing on the controversy, and is hence extracted in entirety:

"

1. Verify that the Debt Due has been arrived at with reference to the terms & conditions of respective Concession Contracts and all Financing Agreements/Documents which may have bearing on the computation of Debt Due.

2. Verify that all funds constituting the financial package (debt and equity) for meeting the concessionaire's capital cost has been credited / received in the Escrow Account, as per the quantum/ ratio/priority/procedure prescribed in Common Loan Agreement and assessing the impact on the amount of debt due.

3. Verify that the funds of financial package, deposited in the Escrow account, were used for the project assets as defined in the Concession Contract and assess the impact on the amount of debt due.

4. Verify receipt and check that all non-fare revenues were duly accounted for referring to the agreements governing such revenues. Similarly, verify receipt and deposit of all fare revenues in the Escrow account including reconciliation with DMRC/other relevant document assessing the impact on the amount of debt due.

5. Verify that all amounts standing to the credit of Escrow Account has been appropriated and dealt with in the order prescribed in the Concession Contract and Escrow Agreement assessing the impact on the amount of debt due.

6. Verify that all other receipts and payments have been routed through Escrow Accounts. Review all other bank accounts maintained/operated by the concessionaire during concession period with a view to assess the impact of the operation of such account on the amount of Debt Due.

7. Verify that the information contained in Annual Reports (i.e. Audited Financial Statements, Directors Reports and Statutory Audit Reports) of the concessionaire, to the extent this information has a bearing on the amount of Debt Due, has been arrived at by following the applicable Accounting Standards and Guidelines in particular, Ind_AS 11 on Construction Contracts, Ind_AS 23 on Borrowing Costs, Ind_AS 38 on Intangible Assets, Ind_AS 115 on Revenue from Customer Contracts.

8. Audit would cover verification of other aspects as may be considered necessary, ring the course of audit, to verify the amount of Debt Due.

9. Above Audit would be conducted for the concession period, since inception, by following the applicable standards of Auditing issued by CAG/CAI (inter alia 200- 299 on General Principals and Responsibilities, 300-499 on Risk Assessment and Response to Assessed Risks, 500-599 on Audit Evidence with emphasis on SA 530 on Audit Sampling and 600-699 on Using Work of Others).

10. Nature, timing and extent of audit procedure will be impacted by the audit evidence obtained. A risk assessment or problem analysis may be conducted and the scope may be revised as necessary in response to the audit findings. Unimpeded and quick access to relevant records/ documents may be ensured by the auditee. Any delay in getting records would be recorded so as to maintain Audit trail.

Deliverables and timelines

1. Within two weeks from date of award, the Auditor shall submit Inception Report indicating results of risk assessment, audit methodology for conducting audit and constraints, if any.

2. Draft Audit Report to be submitted by Auditor within three months from date of award of audit.

3. Monthly appraisal meetings to be held to review the audit progress and modify the scope of audit, if necessary."

20. **CAG** then filed a Civil Miscellaneous Application, together with the compliance affidavit, before the High Court on 25 June 2020, stating that it had appointed a firm of chartered accountants, SARC & Associates, to undertake a financial audit of the debt due between **HMRTC/HSVP** and the concessionaires, **RMGL/RMGSL**. It was noted that in terms of the audit process followed by **CAG**, the draft audit report was furnished to both sets of contesting parties by emails dated 19 February 2020 and 24 February 2020. Though the appellants had responded to the emails, **HMRTC** had addressed a communication on 27 February 2020 stating that since the budget session of the Haryana Vidhan Sabha was in progress, it was difficult at this stage to have consultations and to respond to the draft audit report. As such, a period of four weeks was sought to respond to the draft. In view of this, **CAG** had sought an extension of eight weeks before the High Court by filing an application, on which notice was issued on 18 March 2020, returnable on 3 April 2020. Thereafter, the lockdown occasioned by Covid-19 ensued. **CAG** by its further communications dated 18 March 2020 and 22 April 2020 sought the response of the **HMRTC** and the State government by 29 April 2020, a deadline beyond which it was stated that the final audit report would be prepared. **CAG** stated before the High Court that the financial audit of the 'debt due' had been performed by the auditors to whom the work had been assigned in accordance with the "limited scope of audit which has been submitted in the Court earlier". **CAG** stated that the financial audit had then been finalized, since no response had been received from **HMRTC** or the State government.

21. On 18 August 2020, a Civil Miscellaneous Application[5] was filed before the High Court by **RMGL** and **RMGSL**, pursuant to the order of the High Court dated 20 September 2019 in accordance with which the **CAG** had submitted its report in a sealed cover to the High Court, wherein the appellants sought a direction for:

    (a) Opening the sealed cover submitted by **CAG** containing its report of the financial audit of the debt due in terms of the Concession Agreements; and

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(b) Directing the deposit of 80 per cent of the debt due in terms of the order of the High Court dated 20 September 2019.

22. On 2 September 2020, the High Court issued notice on the application filed by the appellants and listed it on 10 September 2020. On 28 September 2020, the sealed cover was opened and the report of the **CAG** was taken on the record. The **CAG** report adverts to the scope of the audit which was undertaken in respect of the debt due under the Concession Agreement dated 9 December 2009 with **RMGL** in the following extract:

"The scope of audit was suggested by RMGL and HMRTC through communications and presentations. The scope of audit as suggested by both the parties were examined and the scope of audit of "debt due" was accordingly firmed up. The suggestions made through presentations and the scope of audit, as decided by were submitted to the Court vide CMA no. 15397 dated 20 November 2019 by CAG.

It was also informed to the Court that only those Issues that are related and relevant to examination of the "debt due" as per concession agreement would be examined. The scope of audit decided by CAG and as intimated to the Court has been placed at Annexure 1B. The issues mentioned in the scope provided by HMRTC like encumbrances and liabilities on the said metro project, shareholding / share in valuation of the assets of the concessionaire company, change of shareholding fights, criminal acts and liabilities etc. which are said to have been inflicted on the Company require detailed forensic and technical audits. It is understood that such audits are ongoing. This audit is limited to the examination of "debt due", as defined in the Concession Agreement."

23. In computing the debt due, the audit report notes that the actual cost of the project was Rs 1,199 crores as against the budgeted cost of Rs 1,088 crores. Since the cost overrun is to be contributed by the sponsors under the loan agreement, this would not have any impact on the debt due. Hence for the purpose of computing the debt due, the project cost was taken as Rs 1,088 crores. In computing the debt due, the audit report took into consideration:

(i) The principal component of the term loan; and

(ii) The interest component on the term loan.

In arriving at the debt due, the conclusion which was drawn in the audit report is extracted below:

> "6. Conclusion
>
> The amount of debt-due as per the audit, which has been conducted within limited scope as detailed in earlier sections of the report, has been worked out as Rs. 797.52 crores including interest upto 8 September 2019.
>
> Other matters that have come to our attention and can have a significant impact on debt due are listed below. Our report is subject of the outcome of such matters.

- An entity specific forensic audit of RMGL is being conducted by the lenders.
- NCLT as part of its resolution proceedings ordered on 01 January 2019 for the reopening and recasting of the accounts of IL&FS and two of its subsidiaries IL&FS Transportation Networks Limited (ITNL) and IL&FS Financial Services Limited (IFIN) in respect of financial years 2013-14 to 2017- 18, under Section 130 of the Companies Act 2013.The same is one of the basis of disclaimer of opinion given by statutory auditors of IL&FS for FY 2018-19. The contracts were awarded by RMGL to related parties, i.e. IRL worth Rs.623 crore (52 per cent of total project cost) is a subsidiary of ITNL. Further, INL and IRL are the promoters in the RMGL.
- New board of Directors, in January 2019, has initiated a third-party forensic examination for the period from April 2013 to September 2018, in relation to certain companies of the Group, which is currently ongoing. The same is one of the basis of disclaimer of opinion given by statutory auditors of IL&FS for FY2018-19,
- 9 packages which were awarded to IRL, were sub-contracted to various related and unrelated parties as explained by the management. This includes companies with irregularities as pointed out by Income Tax Department as mentioned in the income Tax Show Cause Notice!!, dated: 15.11.2018, ref no. ADIT(INV]-3{4}/Show Cause Notice/ENSO/2018-19/251. Income tax scrutiny/assessments on-going.

Table 12 - Party-wise break-up of the packages sub- contracted by IRL (Amount in crore)

Related parties	Sub-contracting of IRL Level
IECCL	248
Unrelated Parties	
Others	311
Companies with irregularities as pointed out by Income Tax Department	31
Balancing figure	33
Total	623

Our report is submitted solely for the purpose set forth in the first paragraph of this report. This report relates only to the items specified and does not extend to any financial statements of RMGL, taken as a whole."

The audit report for second appellant **RMGSL** computed the debt due at Rs 1,609.88 crore, including interest upto to 8 September 2019. The conclusion in the audit report is extracted below:

"6. Conclusion

The amount of debt-due as per the audit, which has been conducted within limited scope as detailed in earlier sections of the report, has been worked out as Rs.1,609.88 crore including interest upto 8 September 2019.

Other matters that have come to our attention and can have a significant impact on debt due are listed below. Our report is subject to the outcome of such matters.

- An entity specific forensic audit of RMGSL is being conducted by the lenders.
- NCLT as part of its resolution proceedings ordered on 01 January 2019 for the reopening and recasting of the accounts of IL&FS and two of its subsidiaries IL&FS Transportation Networks Limited (ITNL) and IL&FS Financial Services Limited

(IFIN) in respect of financial years 2013-14 to 2017- 18, under Section 130 of the Companies Act 2013. The same is one of the basis of disclaimer of opinion given by statutory auditors of ILAFS for FY 2018-198. The contract was awarded by RMGSL of related party, i.e., TNL worth Rs. 1,803 crore (77 per cent of total project cost).

- New board of Directors, in January 2019, has initiated a third-party forensic examination for the period from April 2013 of September 2018, in relation to certain companies of the Group, which is currently ongoing. The same is one of the basis of disclaimer of opinion given by statutory auditors of IL&FS for FY 2018-19.
- 14 packages which were awarded to ITNL, as detailed above, were subcontracted to various related and unrelated parties.

Table 12 – Party-wise break-up of the packages sub-contracted by ITNL

- IRL further sub-contracted it to the related parties and other parties which includes companies with irregularities as

Sub-Contract Parties	Package No.	Amount in crore
Related parties		
IECCL	PI	367
IRL	P2, P2(a), P4-14	1025
Unrelated parties		
Others	P3	144
Balancing figure		267
Total		**1,803**

pointed out by Income Tax Department as mentioned in the Income Tax Show Cause Notice', dated: 15.11.2018, ref no. ADITIINV]-3(4]/Show Cause Notice/ENSO/2018-19/251. Income tax scrutiny/assessments is on-going.

Table 13- Party-wise break-up of the packages sub-contracted by IRL

(Amount in crore)

Our report is submitted solely for the purpose set forth in the first paragraph of this report. This report relates only

Particulars	**Total Cost**	**% of Total Cost incurred**
Related parties		
IL&FS Technologies	29	3
IRL	75	7
Unrelated parties Siemens	595	58
Companies with irregularities as pointed out by Income Tax Department	66	7
Others	221	22
Balancing fiture	**39**	**3**
	1,025	**100**

for the items specified and does not extend to any financial statements of RMGSL, taken as a whole."

24. On 10 October 2020, an affidavit was filed before the High Court by the Advisor (Planning) **HMRTC** on behalf of the respondents, objecting to the audit report. The substance of the objection was that the audit report had not considered "critical aspects…which shall have a direct bearing" on the amount of the debt due. In the course of the affidavit, the following circumstances were highlighted:

(i) In exercise of powers under Section 241(2) of the Act of 2013 and in terms of the permission granted by the NCLT, the Central government had reconstituted the Board of the **IL&FS,** the appellants' parent company whose affairs were being conducted in prejudicial to the public interest. On 6 December 2018, a First Information Report ("**FIR**") had been lodged against **RMGL**, **RMGSL** and sister concerns alleging that monies had been siphoned off from the group companies. As against **RMGL** and **RMGSL**, there were allegations that fake invoices had been raised as a result of which the cost of the metro rail project was significantly higher than comparable projects of **DMRC**, as a result of which the rapid metro was incurring losses year on year. The losses were occasioned by high interest cost entailed on "huge capital expenditure", which in turn was due to false and bogus invoices;

(ii) Notices have been issued by the Income Tax Department against **IRL** indicting that the group companies were shell entities who had raised funds through bogus and unsecured loans and invoices;

(iii) Serious Fraud and Investigation Office ("**SFIO**") had commenced a probe into the affairs of the associated companies including **IL&FS** Financial Services ("**IFS**") and **ITNL**; and

(iv) Investigations under the Prevention of Money Laundering Act, 2002 have been initiated against **IL&FS**.

In this backdrop, it was urged that the **CAG** had not audited the accounts of the concessionaire, **RMGL** and **RMGSL,** in accordance with the scope of audit finalised by them. The auditors, it is stated, had indicated that the amount of the debt due is subject to the outcome of various matters which can have a significant impact on the debt due. Hence, it was urged that the audit is "incomplete and inconclusive".

25. **HMRTC** tabulated its objections to the audit report in the course of the affidavit before the High Court. **HMRTC** has submitted that the scope of audit finalised by **CAG** "still remains incomplete and inconclusive".

26. **RMGL** submitted its reply in which, firstly, it drew attention to the fact that the High Court's order dated 20 September 2019 unequivocally obligates the respondents herein to pay 80 per cent of the debt due within 30 days of the CAG report, and no liberty has been granted to challenge the report at this stage. Secondly, it was urged that despite ample opportunities provided by **CAG**, **HMRTC** had not furnished any objections to the draft report. Thirdly, it was alleged that the objections filed before the High Court is an attempt to delay the fulfillment of the obligation to pay 80 per cent of the debt due despite the entirety of Project No 1 having been handed over. A similar reply was also filed by **RMGSL**.

27. An affidavit was also filed before the High Court by **CAG** in response to the objections filed by **HMRTC**. In its affidavit dated 28 October 2020, **CAG** noted:

"That the scope of financial audit of debt due suggested by both the parties was examined by CAG being the Constitutional authority,

and after due consideration, decided the scope of audit of debt due to be conducted and further it was decided that CAG will examine only those issues, that are related and relevant to examination of the debt due as per the concession agreements. It was also decided that the issues mentioned in the scope provided by the HMRTC like encumbrances and liabilities on the said metro projects, shareholdings/share in valuation of the assets of the concessionaire companies, change of shareholding rights, criminal acts & liabilities etc. which have been inflicted on the company are not related to the present audit. These issues as well as other issues which may have impact on the viability of the project of relate to criminal acts etc, as stated by the HMRTC can be got audited/examined by HMRC through other agencies or through a separate forensic audit. These facts and scope of audit decided by CAG was duly submitted in this Hon'ble Court vide Additional Affidavit dated 19.11.2019 submitted along with CM No. 17584 of 2019 in CM No. 15397 of 2019."

CAG further noted in the course of its affidavit that it had ensured that:

(i) The firm appointed for conducting the audit had no conflict of interest with **RMGL**/**RMGSL** or any group company of the **IL&FS** group;

(ii) After the auditors had conducted the audit of the debt due, it was examined by the office of the **CAG** to ensure that the financial audit had been conducted and completed in terms of the scope of audit submitted before the High Court on 19 November 2019;

(iii) The auditors had completed the financial audit of the debt due in terms of the Concession Agreements;

(iv) The draft audit report was submitted to both the parties by emails dated 19 February and 24 February 2020, which was followed up with reminders on 18 March and 20 April 2020;

(v) Since no response had been received from **HMRTC** and the State government, the report of the financial audit was finalised and submitted in a sealed cover to the High Court;

(vi) The objection that the audit report was incomplete and inconclusive did not hold any substance. In that context, CAG stated:

"11, That the objections/response, as submitted vide affidavit dated 11.10.2020 has been considered and the same does not hold any substance on account of the following facts:

1) CAG of India, being constitutional authority, decided the scope of audit of debt due in terms of concession agreement and the same was also submitted to the High Court on 20.11.2019.

2) This is a financial audit of debt due and has been performed by the auditors M/s, SARC and Associates as per the limited scope of audit. The Auditors have reported their findings as per the limited scope to arrive at the amount of debt due in terms of the applicable Concession Agreements. The amount of debt due has been worked out after examination of documents as well as verification of records, wherever required.

3) The draft report was shared with the HMRTC but it did not respond despite repeated requests. So the CAG was constrained to finalise the report without the response of HMRTC.

4) The issues pointed out like reconstitution of Board of Parent Company IL&FS and investigation against its officers by Enforcement Directorate, FIR lodged by Economic offence wing, issue of income tax notice to group company, investigation by SFIO etc. are matter of investigation / forensic audit and does not form part of financial audit. It was categorically informed to the High Court that issues relating criminal acts etc, can be got audited/examined by HMRTC through other agencies or through separate forensic audit.

5) Although the debt due has been worked out as on 08 September 2019, the Report was neither required nor delve upon / comment upon which party's 'Event of default' occurred."

CAG has thus submitted that the report of the financial audit of the debt due "is complete and conclusive as per the scope of audit as decided by CAG" and stands submitted to the High Court on 19 November 2019 on affidavit.

28. On 12 October 2020, the Division Bench of the High Court noted the affidavit that had been filed by the Advisor (Planning) **HMRTC** and took the affidavit on record, while also noting the submission of **RMGL** and **RMGSL** that the matter "does not brook any delay". The hearing was then adjourned to 16 October 2020 to facilitate filing of replies. The proceedings then came up before the High Court on 16 December 2020, when on the request of the counsel for the petitioners before the High Court (**HMRTC** and the State of Haryana), the hearing was deferred to 8 April 2021.

29. At this stage, the appellants filed Special Leave Petitions challenging orders dated 12 October 2020 and 16 December 2020 passed by the High Court. The order of this Court dated 5 February 2021 issuing notice is extracted below:

"1 Mr Mukul Rohatgi and Mr Puneet Bali, learned Senior Counsel appearing on behalf of the petitioners, submit that:

(i) The High Court, by its order dated 20 September 2019 (Annexure P-8), directed the CAG to prepare a report on the debt which is due to the petitioners and 80% of the debt was directed to be deposited in an Escrow account within thirty days of the report;

(ii) Any dispute arising out of the CAG report was to be decided in an arbitration proceedings;

(iii) The CAG report was submitted on 23 June 2020; and

(iv) Though 80% of the debt due, as determined by the CAG, was required to be deposited in an Escrow account within thirty days, this has not been carried out and the High Court has simply adjourned the proceedings to 23 April 2021.

2. Mr Mukul Rohatgi submitted that the dues which are to be deposited in the escrow account will be to the benefit of the secured creditors of the petitioners who form a part of the Infrastructure Leasing & Financial Services Limited group of companies presently under the management of a Board of Directors constituted by the Union Government.

3. Issue notice, returnable on 22 February 2021.

4. Dasti, in addition, is permitted."

30. On 22 February 2021, two financial institutions, Andhra Bank and Canara Bank, were permitted to file their responses. The Special Leave Petitions were listed thereafter, and have been taken up for final disposal. We have heard Mr Mukul Rohatgi and Mr Puneet Bali, learned Senior Counsel appearing on behalf of the appellants, Mr Tushar Mehta, learned Solicitor General appearing on behalf of the respondents and Mr Dhruv Mehta, learned Senior Counsel appearing on behalf of Andhra Bank and Canara Bank.

B Submissions of counsel

31. Mr Mukul Rohatgi and Mr Puneet Bali, learned Senior Counsel appearing on behalf of the **RMGL** and **RMGSL**, submitted that:

    (i) The directions contained in the order of the High Court dated 20 September 2019 are by consent of parties, the High Court having recorded that a consensus had been arrived at in the presence of senior officials of the contesting parties;

    (ii) The appointment of **CAG** has to be understood in the backdrop of the earlier orders of the High Court dated 9 September 2019 and 18

    September 2019, which highlighted the concerns of **RMGL** and **RMGSL** that in terms of the Concession Agreements between the parties 80 per cent of the debt due was required to be deposited as termination payment by **HSVP**;

    (iii) Responding to these concerns, **HMRTC** and **HSVP** had agreed to the proposed appointment of an auditor for determination of the debt due, and proposed the reference to **CAG**. **HMRTC** and **HSVP** specifically committed to complying with the orders that may be passed by the High Court, NCLAT or any other legal proceedings;

    (iv) The Metro Rail Projects, Projects No 1 and Project No 2, which were undertaken by **RMGL** and **RMGSL** were funded by a consortium of banks and finance was made available subject to execution of:

        a. Consortium Agreement;

        b. Escrow Agreement;

        c. Debt Due Agreement; and

d. Financial documents;

(v) The object and purpose hence was to secure the dues of the banks and financial institutions;

(vi) Article 24.4 of the Concession Agreement dated 9 December 2009 contains specific provisions in the event of a termination by **HSVP**, while Article 24.5.2 contains provisions in the event that it is terminated by the concessionaire, **RMGL**;

(vii) The requirement of depositing 80 per cent of the debt due in an Escrow Account is to protect the interest of the banks and financial institutions which were involved in funding the Projects;

(viii) In pursuance of the order passed by Justice D K Jain, the Projects were handed over to **HMRTC** and the petitioner agreed to run the Metro Rail despite the termination in view of the necessity to avert disruption of metro services;

(ix) The order dated 20 September 2019 was passed by the High Court based on consent of parties, under which:

a. **RMGL/RMGSL** were to continue the operation and maintenance of the metro lines for 30 days commencing from 16 September 2019, during which period the process of transfer of control and management of the operation and maintenance of both the metro links was to commence;

b. The debt due was to be determined by the **CAG** in terms of the Concession Agreements;

c. Upon the determination by the **CAG**, 80 per cent of the debt due was to be deposited by **HSVP** in an Escrow Account subject to the order of NCLT or any other statutory authorities within 30 days of the receipt of the audit report; and

d. All other disputes were to be decided in arbitration proceedings, as provided in the Concession Agreements.

(x) Once a report has been submitted by **CAG**, there was no occasion for **HMRTC** to raise any objections, since 80 per cent of the debt due was required to be deposited in an Escrow Account within 30 days;

(xi) The High Court has no jurisdiction to reopen the terms of a consent order;

(xii) The **CAG** submitted the scope of audit to the High Court. Right from the inception, it was evident that the audit was to be carried out for determining the debt due in terms of the Concession Agreements. **CAG** has specifically clarified in the affidavit filed before the High Court that the audit is neither incomplete nor inconclusive and that the objections which have been raised by **HMRTC** are without any substance;

(xiii) On the above facts which have been submitted, **RMGL**/**RMGSL** have handed over the entire assets consisting of the rapid metro links to **HSVP**. The ground that there is an FIR against the **IL&FS** group of companies cannot furnish a valid basis for defeating a contractual obligation to deposit 80 percent of the debt due in Escrow Account, which has been confirmed by the consent order of the High Court. The amount will not be paid over to either **RMGL**/**RMGSL** but would be deposited in an Escrow Account with Andhra bank and Canara bank, which are public financial institutions. The amount deposited would abide by the ultimate directions of the NCLT or any other statutory authority; and

(xiv) No charge sheet has been filed as against one of the companies.

32. Mr Tushar Mehta, learned Solicitor General appearing on behalf of the respondents, on the other hand, submitted that:

(i) Investigations are underway in respect of the **IL&FS** group of companies, and as a matter of fact both **RMGL** and **RMGSL** have been classified as 'red entities':

(ii) FIR No 253 was registered on 6 December 2018, in which **RMGL** and **RMGSL** have been named as accused nos 21 and 22, and there are specific allegations of fake invoices and that the cost of projects implemented by them was higher than for **DMRC** projects, resulting in losses being incurred;

(iii) Subsequent to the original order of the High Court dated 20 September 2019, a modification was effected on 4 October 2019, in terms of which it was envisaged that **CAG** would appoint a team of auditors to conduct a financial audit of the debt due,

with the assistance of the auditors appointed by the parties to the *lis*. **CAG** was to hence examine the scope of the audit of the debt due suggested by **HSVP** in terms of the Concession Agreements;

(iv) The reports submitted by the auditors appointed by **CAG** indicate that the audit was limited in nature, confined to ascertaining the debt due under the Concession Agreements. On the other hand, the conclusions in the audit reports would demonstrate that "other matters had come to the attention of the auditors which could have significant impact on the debt due";

(v) The detailed objections filed by **HMRTC** would indicate that the audit is incomplete and incomprehensive; and

(vi) Since the proceedings are pending before the High Court, there is no reason for the appellants to move this Court, and the objections raised by **HMRTC** to the audit reports would have to be determined on their merit.

33. Mr Dhruv Mehta, learned Senior Counsel appearing on behalf of the Canara Bank and Andhra Bank, submitted that on the request of **RMGSL**, the consortium led by Canara Bank provided facilities in aggregate of Rs 1,500 crores in the form of a Rupee Term Loan Facility under a Common Loan Agreement dated 26 March 2013. Thereafter, **RMGSL** also availed the External Commercial Borrower as well as Derivate Facility. Hence, on the basis of supplementary documents executed on 29 September 2014, a sum of Rs 1,109 crores was availed of by **RMGLS** from the Senior Lenders, Rs 391 crores from India Infrastructure Finance Company (UK) Limited, ECB Lenders (forming part of Senior Debt) as well as USD 30 million from IndusInd Bank Limited, being the Derivate Facility Lender. As such, an Escrow Account Agreement dated 2 July 2013, read with Supplementary Agreements dated 15 January 2014 and 24 September 2014, was executed between **RMGSL**, **HSVP** and Canara Bank, under which Canara Bank was appointed as the Escrow Agent. It was stated that as on 31 July 2019, the lenders of RMGSL had an outstanding claim of Rs 1651 crores approx. Hence, on termination of the Concession Agreement dated 3 January 2013 by "**HUDA**", now **HSVP**, under Article 32.4 of the Concession Agreement dated 3 January 2013, an amount of 80 per cent of the debt due has to be paid to the lenders

of Project No 2. The lenders had filed a reply before Justice D K Jain stating that they had no objection of the handing over of the assets to **HMRTC**, subject to the deposit of the amount due to the lenders in an Escrow Account. Hence, the debt due having now been determined in terms of the audit report, it has to be deposited in the Escrow Account maintained by Canara Bank. Similarly, the consortium led by Andhra Bank provided credit facilities for Project No 1 to **RMGL**, and maintained a similar Escrow Account. In the affidavit submitted by Andhra Bank, it was noted that the debt due to all the members of the consortium led by Andhra Bank was Rs 943 crores approx.

34. It was submitted by both the Banks that the Projects were completed by utilizing funds from the lenders, who are biggest stakeholders. On the other hand, **HMRTC** and **HSVP** have taken possession of the Projects, and are utilizing the revenue from **DMRC**. Supporting the contents of the affidavits filed by Canara Bank and Andhra Bank, Mr Dhruv Mehta urged that 70 per cent of the Projects' cost is comprised within debt. Hence, the deposit of 80 per cent of the debt due amounts only to 56 per cent of the Projects' cost. Further, the amount coming to the Escrow Accounts would be subject to the orders of the NCLAT. It has been submitted that the amount, upon deposit in Escrow Accounts, will be in the hands of the nationalized banks which have financed the Projects.

35. The rival submissions will now be considered.

C Analysis of the Concession Agreements

36. At the outset, it is necessary to advert to some of the salient features of the Concession Agreements. For the purposes of the discussion, we are referring to the terms of the Concession Agreement dated 9 December 2009, but similar terms are also present within Concession Agreement dated 3 January 2013. The expression 'debt due' is defined in Article 1.1 of the Concession Agreement dated 9 December 2009 in the following terms:

> **"Debt Due"** means the aggregate of the following sums expressed in Indian Rupees outstanding on the Transfer Date:
>
> (a) the principal amount of the debt provided by the Senior Lenders under the Financing Agreements for financing the Total Project

Cost (the "Principal") but excluding any part of the Principal that had fallen due for repayment two years prior to the Termination Date;

(b) all accrued interest, financing fees and charges payable under the Financing Agreements on, or in respect of, the debt referred to in Sub-clause (a) above until the Transfer Date but excluding (i) any interest, fees or charges that had fallen due one year prior to the Transfer Date, (ii) any penal interest or charges payable under Financing Agreements to any Senior Lender, and (iii) any pre-payment charges in relation to accelerated repayment of debt except where such charges have arisen due to Authority Default; and

(c) any Subordinated Debt and all accrued interest thereon, which is included in the Financial Package and disbursed by Lenders for financing the Total Project Cost as per the Financing Documents."

The above expression indicates that the term debt due comprises of three components:

(i) The principal amount of the debt provided by the senior lenders under the financing agreement;

(ii) All accrued interest, financing fees and charges payable under the financing agreement; and

(iii) Any subordinated debt which is included in the financial package.

37. In terms of Article 3.1, **HUDA** granted to the concessionaire the exclusive right, license and authority during the subsistence of the Concession Agreement to implement the project and the concession over a period of 99 years. Under Article 17.1, the concessionaire was to provide to **HUDA** a copy of the financing package furnished by it to the prospective lenders. As and when the financing package was agreed upon by the lenders and the Concession Agreement was confirmed by the signing of the agreed financing package by both the concessionaire and the lenders, a copy was required to be furnished to **HUDA** forthwith. Financial closure was to be completed within six months within the signing of the Concession Agreement, with a cure period of six months, failing which all rights and claims

under the Concession Agreement were to stand waived. Article 18 provides for an Escrow Account into which all funds, which constitute the financing package for meeting the capital cost of the concessionaire, are to be deposited. During the operational period, all fare and non-fare revenues were also to be deposited exclusively in the Escrow Account by the concessionaire. Article 18.2.1 provided for the disbursement from the Escrow Account, which included debt service payments due to the senior lenders. Article 18 insofar as is relevant is extracted below:

"ARTICLE 18

ESCROW ACCOUNT

18.1 Opening of Escrow Account and Deposits into Escrow Account On Financial Close, (in any case not later than 30 days of financial close) the Concessionaire shall open and establish the Escrow Account with a Bank (the "Escrow Bank") and ail funds constituting the Financing Package for meeting the Concessionaire's capital costs shall be credited to such Escrow Account During Operations Period all Fare and Non-Fare Revenues collected by the Concessionaire shall be exclusively deposited therein, separately.

18.2 Disbursements from Escrow Account

18.2.1 The Concessionaire shall give, at the time of the opening of the Escrow Account, irrevocable Instructions by way of an Escrow Agreement substantially in form set forth in Schedule 'F' (the "Escrow Agreement') to the Escrow Bank instructing, inter alia, that the deposits Into the Escrow Account shall, be appropriated in the following order every month and if not due in a month then appropriated proportionately in such month and retained in the Escrow Account and paid out there from in the month when due unless otherwise expressly provided in the instruction latter:

(i) All taxes due and payable by the Concessionaire

(ii) All Lease charges payable to HUDA as per Lease Agreement

(iii) All expenses in connection with and relevant to the Concessionaire's Works by way of payment to the EPC Contractor and such other persons as may be specified in the Financing Documents

(iv) O&M Expenses subject to the ceiling, if any set forth in the Financial Documents

(v) Connectivity charges and Revenue Share due to HUDA from the Concessionaire under this Concession Contract

(vi) Monthly proportionate provision of debt service payments due to Senior Lenders in an accounting year and payment of Debt Service Payments to Senior Lenders in the month when due

(vii) Debt service payment in respect of Subordinate Debt;

(viii) Any reserve of requirements required to be settled in terms of financial document.

(ix) Balance in accordance with the instructions of the Concessionaire.

18.2.2 The Concessionaire shall not in any manner modify the order of payment specified in Sub-Article 18.2.1 except with the prior written approval of HUDA

18.3 Notwithstanding anything to the contrary contained in the Escrow Agreement and subject to the provisions contained in Sub-Articles 25.5 and Article 27, upon Termination of this Concession Contract, all amounts standing to the credit of the Project Escrow Account shall be appropriated and dealt with in the following Order:

(a) all Taxes due and payable by the Concessionaire

(b) all Connectivity charges / non-fare revenue share due and payable to HUDA under this Concession Contract

(c) all accrued Debt Service Payment

(d) any payments and Damages due and payable by the Concessionaire to HUDA pursuant to this Concession Contract, including Termination claims

(e) all accrued O&M Expenses;

(f) any other payments required to be made under this Concession Contract; and

(g) balance, if any, on the instructions of the Concessionaire.

18.4 The instructions contained in the Escrow Concession Contract shall remain in full force and effect until the obligations set forth In Sub-Article 18.3 have been discharged,"

38. Article 24 provides for termination. Article 24.1.1 sets down events of default on the part of the concessionaire. According to Article 24.4:

"24.4 Upon Termination by HUDA on account of occurrence of Concessionaire Event of Default during the Operations Period, the HUDA shall take over the complete system (all Project Assets), HUDA shall pay the Lenders of the Project, as per financial documents, an amount equal to 80% of debt "due, as Termination payment. No termination payment shall be due or payable on account of Concessionaire's default occurring prior to COD."

39. Article 24.5.2 provides for the consequences of termination by the concessionaire, due to a default by **HUDA**:

"24.5.2 Upon Termination by the Concessionaire on account of an HUDA Event of Default, HUDA shall take over the complete system (all Project Assets) and the Concessionaire shalt be entitled to receive from HUDA by way of Termination Payment a sum equal to :

(a) Debt due

(b) 110% of the Adjusted Equity"

Accordingly, where the Concession Agreement has been terminated by **HUDA** on account of a default by the concessionaire, **HUDA** was required to take over the complete project and assets, and to pay to the lenders of the Project, as per the financing documents, an amount equal to 80 per cent of the debt due as termination payment. Where on the other hand, the termination is by the concessionaire on account of a default by **HUDA**, the concessionaire was entitled to receive by way of a termination payment, a sum equal to:

(a) The debt due; and

(b) 110 per cent of the adjusted equity.

Article 24.7 which provides for the termination payments reads as follows:

"24.7 **Termination Payments:** The Termination Payment pursuant to this Concession Contract shall become due and payable to the Concessionaire by HUDA within thirty days of a demand being made by the Concessionaire with the necessary particulars duly certified by the Statutory Auditors. If HUDA fails to disburse the full Termination Payment within 30 (thirty) days, the amount remaining unpaid shall

be disbursed along with interest an annualised rate of SBI PLR plus two per cent for the period of delay on such amount."

40. Article 30 of the Concession Agreement provides for dispute resolution.

Article 30.2 contains an arbitration agreement, which reads as follows:

"30.2 Arbitration

30.2.1 Dispute Due For Arbitration

Disputes or differences shall be due for arbitration only if all the conditions in Sub- Article 30.1 are fulfilled."

D Terms of the consent order dated 20 September 2019 passed by the High Court

41. Pursuant to the petition filed under Section 241(2) read with Section 242 of the Act of 2013 before the NCLT, the Board of **IL&FS** was superseded on 1 October 2018, with a new Board appointed on the recommendations of the Central government. On 6 December 2018, an FIR No 253 was registered by the Economic Offences Wing. As pointed out by the Solicitor General, **RMGL** and **RMGSL** were named as accused nos 21 and 22 in the FIR, the allegation being in respect of the procuring of fake invoices, as a result of which the cost of projects implemented were alleged to be higher than those implemented by **DMRC**, resulting in the rapid metro link projects at Gurgaon incurring losses. **RMGL** and **RMGSL**, which belong to the **IL&FS** group of companies, were thus classified as "red entities". On 4 February 2019, Justice D K Jain was appointed by the NCLT to supervise the resolution process for the **IL&FS** group. On 7 June 2019, **RMGL** issued a notice for the termination of the Concession Agreement dated 9 December 2009 to **HSVP** under Article 24.5.1, with the period of notice being 90 days. A similar notice of termination was issued by **RMGSL** in terms of Article 32.5.1 of Concession Agreement dated 3 January 2013. **RMGL** and **RMGSL** addressed communications on 1 August 2019 to **HSVP** for completing the handover of the rapid metro link Projects. On 26 August 2019, **HMRTC** issued a notice of termination to **RMGL** in terms of the Articles 24.1 and 24.2 of the Concession Agreement dated 9 December 2009. A similar notice was issued to **RMGSL**. In the interim, Justice D K Jain was moved by **RMGL** and **RMSL** to grant his approval to the

handing over of possession of the rapid metro link Projects. By his order dated 6 September 2019, Justice D K Jain permitted **RMGL** and **RMGSL** to handover possession and control of the rapid metro link Projects to **HSVP** on or before 9 September 2019. **HMRTC** and **HSVP** then moved the High Court in writ proceedings under Article 226 of the Constitution seeking:

(i) Writ of certiorari for quashing the notices of termination dated 7 June 2019, on the ground that there was no permission of the competent authority appointed by the NCLAT, and that it was against the public interest because the rapid metro project of Gurgaon, which was operational since 2013, would come to a halt on 8 September 2019; and

(ii) A writ of mandamus directing that the notice period of 90 days would commence only from the grant of the permission by the NCLAT.

42. Taking note of the order passed by Justice D K Jain, the High Court by its order dated 6 September 2019 directed **RMGL** and **RMGSL** to continue the operation of the rapid metro rail till the midnight of 9 September 2019. On 9 September 2019, the High Court observed that the dispute between the parties would have to be resolved by negotiations, and hence the order of stay, under which the rapid metro rail projects were to be continued in operation by **RMGL** and **RMGSL**, was continued till midnight of 17 September 2019. From the order of the High Court dated 9 September 2019, it is evident that **RMGL** and **RMGSL**, while referring to the terms of the proposed discussion which **HMRTC HSVP**, catalogued *inter alia*:

(a) A time bound handover of the project to **HSVP** and corresponding commitment for taking it over by **HSVP**; and

(b) A commitment to pay at least 80 per cent of the debt due as termination payment to **RMGL** and **RMGSL** by **HSVP**.

43. On 18 September 2019, the appellants proposed that they would continue to operate the metro link Projects until 16 October 2019, during which period the debt due under the financing documents, in terms of the Concession Agreements, may be determined by an auditor to be appointed by the High Court. Further, the process for transfer of the rapid metro link Projects was to be supervised by two former judges of the High Court. Both the appellants specifically

stated that this proposal was subject to the condition that once the debt due is determined, **HSVP** must deposit 80 per cent of the debt due as determined in an Escrow Account in terms of the Concession Agreement, Escrow Agreement and Substitution Agreement. This proposal, it was clarified, was made to safeguard the interest of the public sector lenders of the Projects. Responding to the above proposal of the appellants, **HMRTC** and **HSVP** specifically stated in their written responses that:

(i) An agreement had been entered into with **DMRC** on 16 September 2019 for operation and maintenance of the rapid metro lines;

(ii) As regards the ascertainment of the debt due, this was linked to the definition of the expression under Concession Agreements;

(iii) **HMRTC**/**HSVP** agreed with the proposal of **RMGL**/**RMGSL** that an auditor may be appointed to ascertain the actual figures, and stated that the **CAG** may be entrusted with the assignment to ascertain financial aspects and determining the over invoicing of the Projects; and

(iv) The deposit of 80 per cent of the debt due as determined in an Escrow Account would depend on the outcome of the report of the auditor, and **HMRTC** and **HSVP** "commit and confirm to adhere to the directions as would be passed by the Hon'ble High Court or NCLAT or any other Court or any other order under any other legal proceedings passed by any other competent authority" in terms of the Concession Agreements.

44. The above course of events indicates that the entire order which was passed by the High Court on 20 September 2019 was the outcome of sustained negotiations which took place between **RMGL** and **RMGSL** on the one hand, and **HMRTC** and **HSVP** on the other, commencing from the invocation of the writ jurisdiction under Article 226. Now, it is significant to note that recourse to the proceedings under Article 226 was taken by **HMRTC**/**HSVP**, which challenged the termination notice and sought the continuation of the operation of the rapid metro lines at Gurgaon, which were under imminent threat of closure, once the notice period expired on 8 September 2019. The narration of events would make it abundantly clear that initially as a result of the order of stay granted by the High Court on 6 September

2019, and thereafter consequent upon mutual discussions, **RMGL**/ **RMGSL** agreed to operate the rapid metro link Projects until 16 October 2019, within which period the handover to **DMRC** would take place. Equally, the concerns by **RMGL**/**RMGSL**, as concessionaires, was that in terms of the Concession Agreements, 80 per cent of the debt due had to be deposited in the Escrow Account in terms of the provisions contained in Article 24.4 in Concession Agreement dated 9 December 2009. All the parties specifically agreed before the High Court that there would be a reference to the **CAG** for conducting an audit for the purpose of determining the debt due. The High Court by its order dated 20 September 2019, issued directions which were specifically noted to be emanating from the "consensus...arrived at in the presence of senior officers of both the parties" namely Mr D Suresh, IAS, Managing Director, **HMRTC**, Chief Administrator, **HSVP**, Mr Rajiv Banga, Managing Director, **RMGL** and Director, **RMGSL**. The consensual order passed by the High Court envisaged that:

(i) **RMGL** and **RMGSL** would continue to operate the rapid metro lines for 30 days from 16 September 2019;

(ii) The transfer of the rapid metro lines would be overseen by two former judges of the High Court;

(iii) The debt due as defined under the Concession Agreements would be determined under the auspices of the **CAG** who would appoint a team of auditors "for the financial audit of the debt due and for examining the scope of the audit of the debt due audited by the HSVP with the assistance of the auditors appointed by the parties to the *lis*";

(iv) The process of audit would be completed within 30 days, and 80 per cent of the debt due determined by the audit report shall be deposited by **HSVP** in an Escrow account, which would be subject to the orders of the NCLAT or any other competent statutory authority, within a period of 30 days of the receipt of the report; and

(v) The rest of the disputes between the parties arising out the audit report, would be agitated and decided in arbitration proceedings, which was a mode already provided in the Concession Agreements.

45. Clause (ii) of the directions contained in the High Court's consent order dated 20 September 2019 makes it abundantly clear that the audit team appointed by **CAG** was to conduct a financial audit of the debt due and to examine the scope of the audit. The next important aspect of the consent order is the time bound process which was envisaged, with the audit being completed within 30 days and 80 per cent of the debt due being deposited within 30 days after the receipt of the audit report. The final aspect which needs to be emphasized is that the rest of the disputes between the parties arising out of the audit report were to be agitated in arbitration.

46. This would leave no manner of doubt that parties clearly understood that once the debt due was ascertained in terms of the audit report, 80 per cent would be deposited by **HSVP** in the Escrow Account while the rest of the disputes in respect of the audit report would be governed by arbitration. A time of 30 days was envisaged for deposit the amount in Escrow Account, upon the receipt of the audit report. Subsequent to the order dated 20 September 2019, another order was passed by the High Court on 4 October 2019. Clause (ii) of the earlier order was substituted. As substituted, it was envisaged that the auditors would also have to examine the scope of the audit of the debt due suggested by **HSVP**. Hence, **CAG** would also examine the scope of the audit of the debt due suggested by **HSVP** in terms of the Concession Agreements. Moreover, it was envisaged that the rest of the dispute either arising out of the CAG report, the validity of the termination notices issued by both the parties and any past or future claims/liabilities *inter se* would be agitated in arbitration. On 15 October 2019, there was a further clarification by the Division Bench that **CAG** would examine the scope of the audit of the debt due suggested by both the parties in terms of the Concession Agreements. Thus, it was understood by both the parties that the determination of the debt due would be in terms of the Concession Agreements. **CAG** specifically placed before the High Court its understanding of the role to be performed by it. In its written statement before the High Court on 19 November 2019, **CAG** stated that it had decided to appoint an auditor "for the financial audit of debt due as on the transfer date". The terms as envisaged define the scope of the work of the auditor to be:

(i) Verification of the debt due with reference to the terms and conditions of the Concession Agreements and all financing agreements/documents which have a bearing on the computation of the debt due;

(ii) Verification that all funds constituting the financial package both debt and equity, for meeting the capital cost had been credited and received in the Escrow Account;

(iii) Verification that the funds of the financial package were used for the project assets as defined in the Concession Agreements and their impact on the debt due;

(iv) Verification that all non-fare revenues were duly accounted and that all fare revenues were deposited in the Escrow Account;

(v) Verification that the amounts standing to the credit in the Escrow Account had been appropriated in the order prescribed in the Escrow Agreement;

(vi) Verification that all other receipts and payments were routed through the Escrow Account, together with the review of all other bank accounts maintained/operated by the appellants; and

(vii) Information in the annual reports of the appellants was arrived at by following the applicable standards and guidelines.

E Obligations of HMRTC and HSVP to pay the debt due

47. **HMRTC** and **HSVP**, as well as the appellants, were apprised at all material times of the work of audit being handed over by **CAG** to a firm appointed by it. On 24 February 2020, a draft report of the financial audit of the debt due of **RMGL**/**RMGSL** was sent to the Principal Secretary to the Government of Haryana in the Department of Town and Country Planning. **HMRTC** was requested to communicate its response on behalf of the State government, so that it could be incorporated in the report. On 27 February 2020, **HSVP** sought four weeks at the least, in view of the ongoing Session of the State Legislative Assembly. The Accountant General Audit, Haryana followed up the earlier email by subsequent communications dated 18 March 2020 and 22 April 2020. By the later communication on behalf of **CAG**, the response of the State government was requested to be furnished before the deadline of 29 April 2020, failing which the

report would be finalized without including their response. **HMRTC**, **HSVP** and the State government, however, did not furnish their response to the draft report. Eventually, the audit reports were finalised in respect of the debt due under the Concession Agreements with **RMGL**/**RMGSL** respectively, and were placed before the High Court in sealed cover. Following the opening of the sealed cover on an application by the appellants, an objection was raised in the form of an affidavit by **HMRTC** on 10 October 2020, as noticed in the earlier part of this judgment. According to **HMRTC**, the audit report was inconclusive and incomplete, since several aspects which will have an impact on the debt due remain to be determined. Now, at this stage, it is necessary to note that the auditors stated that the scope of the audit as decided by **CAG** was submitted to the High Court on 19 November 2019, and it was intimated that only those issues which are relevant and related to examining the debt due under the Concession Agreements would be examined. Hence, other issues mentioned by **HMRTC**, such as encumbrances and liabilities on the metro project, shareholding/share in the valuation of the assets of the concessionaire, change of shareholding rights, criminal acts and liabilities, would require forensic and technical audit. It is important to note that such audits are ongoing independently. The audit conducted by the auditors appointed by the **CAG** herein, was limited to examining the debt due as defined in the Concession Agreements. While arriving at the principal and interest component of the debt due, the auditors indicated that other matters had come to their attention, which can have a significant impact on the debt due, and that the report was subject to the outcome of such matters. These included:

(i) An entity specific forensic audit which is conducted by the lenders;

(ii) The order passed by NCLT on 1 January 2019 for reopening and recasting the accounts of **IL&FS** and two of its subsidiaries (**INTL** and **IFIM);**

(iii) The initiation by the new Board in January 2019 of third-party forensic examination for the period between April 2013 to September 2018 in relation to certain companies of the group; and

(iv) The sub-contracting by **IRL** of nine packages to various related and unrelated parties including companies, with irregularities pointed in a notice to show cause issued by the Income Tax department on 15 November 2018.

Indeed, the submission of the learned Solicitor General that the audit under the auspices of the **CAG** is incomplete and inconclusive is based on the above statements contained in the audit report noticing other matters which may have a bearing on the debt due.

48. Now the issue before the Court in this backdrop is whether the consequences envisaged in the consent order of the High Court dated 20 September 2019 can stand obviated on the above grounds. At the very outset, it is important to note that the FIR in respect of **IL&FS** group of companies was lodged on 6 December 2018. The termination notices of June and August 2019, and the institution of the writ proceedings, took place thereafter. Evidently the appellants on the one hand, as well as **HSVP**/**HMRTC** on the other, were conscious of the developments which were taking place in respect of the **IL&FS** group of companies in the proceedings before Justice D K Jain on 19 August 2019. When the consent order was passed before the High Court, **HSVP** was represented by counsel as well as the Chief Administrator of **HSVP** and Managing Director of **HMRTC** who were also present. The financial institutions including Andhra Bank were also in appearance. The consent order before the High Court on 20 September 2019 was also preceded by mutual discussions between the parties and the exchange of written proposals. which have been referred to expressly by the High Court. The consent order of the High Court envisages:

(i) The manner in which the expression 'debt due' would be determined;

(ii) The manner in which the scope of the audit report would be prescribed; and

(iii) The consequence of the determination by the auditors to be appointed by the **CAG**.

49. Clause (ii) of the order dated 20 September 2019 makes it abundantly clear that the basic purpose underlying the entrustment of the reference to the **CAG** was the determination of the debt due "as

defined under the Concession Contract". The High Court, it must be emphasized, was seized of a proceeding under Article 226 of the Constitution, and its writ jurisdiction had been invoked to challenge the notices of termination issued by **RMGL** and **RMGSL**, and for ensuring that the consequence which would emanate on the expiry of the notice period of 90 days by the cessation of the metro operations could be prevented by the judicial intervention in the course of the public law jurisdiction. The issuance of a notice of termination, the consequences which would ensue, and the resolution of disputes is specifically provided in the arbitration agreement between the parties, which is an intrinsic part of the Concession Agreements. Hence, there was an evident interface between this element of public interest on the one hand and the contractual rights of the parties to the Concession Agreements on the other. However, when **HMRTC** and **HSVP** moved the High Court under Article 226, they did so in view of the impending threat which was looming large on the horizon of the rapid metro operations being brought to a standstill as a result of the proximate expiry of the notice of 90 days preceding termination. In **Sanjana M. Wig vs Hindustan Petroleum Corporation Limited**[6], a two judge Bench of this Court, speaking through Justice S B Sinha, has observed:

"12. The principal question which arises for consideration is as to whether a discretionary jurisdiction would be refused to be exercised solely on the ground of existence of an alternative remedy which is more efficacious…

13. However, access to justice by way of public law remedy would not be denied when a *lis* involves public law character and when the forum chosen by the parties would not be in a position to grant appropriate relief.

[…]

18. It may be true that in a given case when an action of the party is dehors the terms and conditions contained in an agreement as also beyond the scope and ambit of the domestic forum created therefor, the writ petition may be held to be maintainable; but indisputably therefor such a case has to be made out. It may also

6 (2005) 8 SCC 242

be true, as has been held by this Court in Amritsar Gas Service [(1991) 1 SCC 533] and E. Venkatakrishna [(2000) 7 SCC 764] that the arbitrator may not have the requisite jurisdiction to direct restoration of distributorship having regard to the provisions contained in Section 14 of the Specific Relief Act, 1963; but while entertaining a writ petition even in such a case, the court may not lose sight of the fact that if a serious disputed question of fact is involved arising out of a contract qua contract, ordinarily a writ petition would not be entertained. **A writ petition, however, will be entertained when it involves a public law character** or involves a question arising out of public law functions on the part of the respondent."

(emphasis supplied)

In the present case, the High Court was evidently concerned over a fundamental issue of public interest, which was the hardship that would be caused to commuters who use the rapid metro as a vehicle for mass transport in Gurgaon. As such, the High Court's exercise of its writ jurisdiction under Article 226 in the present case was justified since non-interference, which would have inevitably led to the disruption of rapid metro lines for Gurgaon, would have had disastrous consequences for the general public. However, as a measure of abundant caution, we clarify that ordinarily the High Court in its jurisdiction under Article 226 would decline to entertain adispute which is arbitrable[7]. Moreover, remedies are available under the Arbitration and Conciliation Act, 1996 for seeking interim directions either under Section 9 before the Court vested with jurisdiction or under Section 17 before the Arbitral Tribunal itself.

50. It is also important to note that the termination of the Concession Agreements had consequences in terms of the provisions contained in the Agreement requiring a deposit of 80 per cent of the debt due under Article 24.4. The contesting parties agreed to an independent third-party determination of this amount by a neutral entity, namely the **CAG**. The primary function of **CAG** was to appoint a team of auditors for conducting a financial audit of the debt due and in that process of also examine the scope of the audit. The orders dated 4 October 2019 and 15 October 2019 issued by the High Court also

7 Bisra Lime Stone Co. Ltd. vs Orissa SEB, (1976) 2 SCC 167

envisaged that **CAG** would examine the scope of the audit. While the earlier order of 4 October 2019 required **CAG** to examine the scope of the audit of the debt due suggested by **HSVP**, the subsequent order dated 15 October 2019 required the examination by **CAG** on the scope of the audit after bearing in mind the suggestions by both the parties "in terms of the Concession Agreement". The expression "in terms of the Concession Agreement" indicates that the basis of the audit was to be what was envisaged in the Concession Agreements, which specifically defines the expression "debt due". Pertinently, the original order of 20 September 2019 specifies a strict time schedule within which, on a determination being made by the auditor, 80 per cent of the debt due would be deposited by **HSVP** [7] **Bisra Lime Stone Co. Ltd. vs Orissa SEB**, (1976) 2 SCC 167 in the Escrow Account. This was however subject to the safeguard that it would be subject to any order that may be passed by NCLAT or by a competent statutory authority. However, it was further clarified that the rest of the disputes between the parties to the *lis* arising out of the audit report were to be agitated in arbitration proceedings.

51. This provision, which is embodied in clause (v) of the operative directions of the High Court's consent order dated 20 September 2019, is capable of a reasonable interpretation that once a determination was made in the audit report, 80 per cent would be deposited in the Escrow Account by **HSVP** and if any dispute arising out of the audit report remained, that would be resolved in arbitration. As a matter of fact, the subsequent order of 4 October 2019 replaced clause (v) by envisaging that the rest of the disputes between the parties arising out of:

    (i) the CAG report;

    (ii) the validity of the termination notices issued by both the parties; and

    (iii) any past or future *inter se* claims/ liabilities; shall be agitated and decided in arbitration proceedings.

52. **HSVP** and **HMRTC** on the one hand, and **RMGL/RMGSL** on the other, were in discussion at arm's length when they invited the High Court to pass its order dated 20 September 2019, and agreed to the modifications which have been made by the orders dated 4

October 2019 and 15 October 2019. A two judge Bench of this Court, speaking through Justice Ruma Pal, in **Manish Mohan Sharma vs Ram Bahadur Thakur Limited**[8] has observed:

"28…A consent decree has been held to be a contract with the imprimatur of the Court superadded. It is something more than a mere contract and has the elements of both a command and a contract. (See: Wentworth v. Bullen 141 ELR 769; C.F. Angadi v. Y.S. Hirannayya [1972] 2 SCR 515). As was said by the Privy Council as early as 1929, "The only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court; the second stands until and unless it is discharged on an appeal (See: Charles Hubert Kinch v. Edward Keith Walcott and Ors.)."

In the face of the clear stipulations contained in the order of the High Court, it would be impermissible to interdict the consequences emanating from the working out of the directions contained in the above orders of the High Court upon the submission of the CAG report.

53. **CAG** in the course of its affidavit filed before this Court and High Court by the Deputy Accountant General Shri KSN Prasad, IAS and AS (Deputy General (Administration), has clarified that it was decided, after examining the scope of the financial audit of the debt due suggested by both the parties, that **CAG** would examine only those issues which are related and relevant to examining the debt due under the Concession Agreements. **CAG** followed a process which is fair by:

(i) making a statement on the scope of the audit before the High Court in advance;

(ii) examining the scope of the audit as suggested by the parties before making its determination;

(iii) appointing a firm of chartered accountants for conducting an audit as was envisaged in the order of the High Court;

8 (2006) 4 SCC 416

(iv) furnishing the contesting parities with a copy of the draft report;

(v) allowing the parties to submit their response to the draft report;

(vi) granting an extension of time to the State of Haryana to submit its comments; and

(vii) placing the State on notice that it would have to file its objections finally by a prescribed deadline, failing which the report would be finalized.

54. **HMRTC** and **HSVP** are themselves to blame if they did not submit their responses. **CAG** has specifically rebutted the objections to the audit report submitted by **HMRTC** on the ground that as a constitutional authority, **CAG** decided upon the scope of the audit of the debt in terms of the Concession Agreements, which it submitted to the High Court. Moreover, it has clarified that this was a financial audit of the debt due and the auditors reported their findings in terms of the Concession Agreements. The FIR lodged by the Economic Offences Wing, the Income Tax Department notice, investigation by the SFIO and Forensic Audit did not form a part of the financial audit conducted by the **CAG**. **CAG** has submitted that a financial audit of the debt due is complete and conclusive under the scope of audit as decided by **CAG**, and submitted to the High Court.

55. It is pertinent to remember that the Projects in question have been funded by a consortium led by banks, among which are Canara Bank and Andhra Bank. The terms of the Concession Agreements expressly recognized that the Projects were being publicly funded through financial institutions. The audit report emphasized that the proportion between debt and equity was pegged at 70:30. The terms of the Concession Agreement dated 9 December 2009 clearly envisaged the purpose of the Escrow Account in Article 18. **HUDA**, the predecessor of **HSVP**, entered into a Concession Agreement dated 9 December 2009, which in Article 17 expressly recognizes the linkage between the financing package and the Concession Agreement. In fact, Article 17.2 emphasizes that the rights of the concessionaire would stand waived if financial closure was not to occur within six months within the cure period of six months. Further, Article 18.1 envisages that all funds constituting the financing package for meeting the concessionaire's capital cost shall be credited to the Escrow Account during the period of operations, and all fare

and non-fare revenues collected by the concessionaire shall be exclusively deposited in it. Under Article 18.2, the concessionaire was required to give to the Escrow bank irrevocable instructions while opening the Escrow Account that the deposits into the Escrow Account would be appropriated in the manner indicated in clauses (i) to (ii) of Article 18.2.1. This includes provision for debt service payments. These provisions in the Concession Agreement have a vital bearing on the subject matter of the present dispute. Canara Bank in its affidavit filed before the High Court has stated that on behalf of consortium of lenders, acting as facility agent, it financed **RMGSL** in the aggregate of Rs 1500 crores in terms of a common loan agreement. The Escrow Account Agreement has been entered into in pursuance of the Concession Agreement, and to effectuate the funding of the Project No 2. As on 31 July 2019, the lenders of RMGSL have an outstanding of Rs 1651 crores approx. Hence, the Projects which have been executed by **RMGL** and **RMGSL**, involved an outlay of funds from Andhra Bank and Canara Bank, who have a vital stake in the financials of the Projects.

56. As such, **HMRTC** and **HSVP** cannot avoid at this stage complying with the directions which were issued by the High Court in its orders dated 20 September 2019, as modified on 4 and 15 October 2019, on the plea that an FIR has been lodged on 16 December 2018 against **IL&FS** group in which there are allegations against **RMGL** and **RMGSL** of producing fake invoices and inflating the capital cost of the rapid metro Projects. The circumstances which have been adverted to in the affidavit filed by **HMRTC** in the High Court were known to it and to **HSVP**, when they both agreed to an order which emanated with the consent of the parties on 20 September 2019. Both **HMRTC** and **HSVP** were conscious of their obligation to deposit 80 per cent of the debt due as a consequence of the termination by the provisions contained in the Concession Agreements. They wished to lend an assurance to the determination of the debt due by seeking the involvement of the **CAG**. They made a solemn commitment before the High Court that within 30 days of the determination, 80 per cent of the debt due would be deposited in an Escrow Account. This amount, it must be emphasized, is not being handed over either to **RMGL** or **RMGSL**, which have been classified as "red entities" of the **IL&FS** group.

The placement of the quantum representing 80 per cent of the debt due in Escrow Account is to abide by such directions as may be issued by NCLAT or any other competent statutory authority. Besides this provision, remedies are available either before the competent Court under Section 9 or before the Arbitral tribunal under Section 17 of the Arbitration and Conciliation Act, 1996. Hence, there being an agreement between the parties, to permit **HSVP** and **HMRTC** to obstruct or delay compliance with their obligations would be manifestly impermissible for three reasons:

(i) Firstly, the obligation to deposit 80 per cent debt due as a consequence of the termination emanates from Article 24.4 of the Concession Agreement dated 9 December 2009;

(ii) Secondly, the obligation to deposit 80 per cent of the debt due as determined in the report of the auditor has been assumed voluntarily before the High Court by **HSVP/HMRTC** from which, as public bodies, they cannot be permitted to resile; and

(iii) Thirdly, there is a vital public interest element in ensuring that the monies which are committed by banks and financial institutions towards financing infrastructure projects are secured to them in terms of the Concession Agreements.

57. The underlying wrongdoing which was allegedly conducted by the promoters in the erstwhile management of **IL&FS** undoubtedly needs to be investigated. The process of pursuing the forensic audit, the investigation by the SFIO and by the law enforcement machinery must follow to its logical conclusion. The NCLT is supervising the resolution process with a government appointed Board now being in charge of the management of **IL&FS**. Equally, financing arrangements entered into by financial institutions towards fulfilling infrastructure projects, based on the sanctity of the commercial contracts, are to be duly observed. This facet has to be emphasized since it embodies a vital element of public interest as well. Commentators have noted that, "[d]eterioration in loan recovery not only leads to higher provisions and diminished profitability but also constrains banks' lending capacity, thus affecting the economy adversely" [9] . Unless the dues which

9 Rekha Mishra, Rajmal and Radheshyam Verma, "Determinants of Recovery of Stressed Assets in India: An Empirical Study". Economics and Political Weekly, Vol. 51, Issue No. 43, 22 Oct, 2016.

are assured to financial institutions as part of the arrangements which are envisaged in Concession Agreements are duly enforced, the structure of financing for infrastructure projects may well be in jeopardy. Such a consequence must be avoided by declining to accede to a request, such as that by **HMRTC** and **HSVP**, which is to allow it to resile from its obligations. These obligations arise not only in terms of the Concession Agreements, but have been solemnly assumed before the High Court. Hence, on both counts, **HMRTC** and **HSVP** cannot be permitted to resile.

58. The intervention of this Court under Article 136 of the Constitution was sought having regard to the manner in which the proceedings before the High Court were being derailed. On 12 October 2020, after **HMRTC** filed its affidavit, the High Court noted the appellant's submission that "the matter does not brook any delay" and yet adjourned the matter to 16 October 2020. Thereafter, when the proceedings came up on 16 December 2020, and the response filed by **CAG** was taken on the record, the hearing of the writ petitions was again deferred to 8 April 2021. This course of events indicates that the whole object and purpose behind setting down the timelines in the order dated 20 September 2019 stood the risk of being defeated. This Court has been constrained to intervene in the process in order to ensure that the sanctity of the understanding that was arrived at before the High Court on 20 September 2019 is duly maintained. As we have already observed earlier, there is a vital public interest element in ensuring that monies which are liable to be deposited in the Escrow Account with a nationalised bank are duly deposited. **HMRTC** and **HSVP**, it must be emphasized, are not left without remedy. The deposit into the Escrow Account has to be maintained in that form and will abide by such orders that may be passed by NCLAT or by a competent statutory authority. Besides this, the Concession Agreements provides a clear-cut remedy for seeking reliefs under the arbitration agreement.

59. As noted earlier, the invocation of the writ jurisdiction of the High Court under Article 226 of the Constitution by **HMRTC** and **HSVP** was to challenge the termination notices dated 17 June 2019, and to obviate the consequence of the cessation of the rapid metro operations, which would have ensued on the expiry of the notice period. The arbitration clause of the Concession Agreements provides

sufficient recourse to remedies which can be availed of. That apart, the order of the High Court dated 4 October 2019 has also clarified that the rest of the dispute that remains after the deposit of 80 per cent of the debt due, either arising out of the CAG report, the validity of the termination notices issued by both the parties and any past or future *inter se* claims and liabilities shall be agitated and decided in the arbitration proceedings. In view of the order which we propose to pass, the dispute between the High Court in the writ jurisdiction under Article 226 of the Constitution shall stand worked out by granting liberty to the parties to avail of their rights and remedies in accordance with law.

F Conclusion

60. We accordingly dispose of the appeals in terms of the following directions:

(i) **HSVP** shall within a period of three months from the date of the present judgment deposit into the Escrow Account 80 per cent of the debt due as determined in the reports of the auditors dated 23 June 2020, in the case of **RMGL** and **RMGSL** respectively;

(ii) The deposit into the Escrow Account shall continue to be maintained in Escrow, subject to any order that may be passed by NCLAT or any competent statutory authority, and shall not be appropriated by the Escrow Bank without specific permission;

(iii) **RMGL** and **RMGSL** on the one hand, and **HSVP** on the other, are at liberty to pursue their rights and remedies in pursuance of the arbitration clause contained in the Concession Agreements on all matters falling within the ambit of the arbitration agreement, including the validity of the notices of termination, any past or future *inter se* claims and liabilities as envisaged in the order of the High Court dated 20 September 2019, as modified on 4 October 2019 and 15 October 2019;

(iv) In terms of clause (v) of the order of the High Court dated 20 September 2019, in the event of any dispute arising about the correctness of the CAG report, in regard to the determination of the debt due, any of the parties would be at liberty to raise a dispute in the course of arbitral proceedings;

(v) Upon compliance with the directions contained in (i) above, **RMGL** and **RMGSL** shall execute and handover to **HSVP** all documents which are required for effectuating the transfer of operations, maintenance and assets to **HSVP** or their nominees with a view to fulfill the obligation of the concessionaires in Article 25 of the Concession Agreement dated 9 December 2009 and clause (vi) contained in the order of the High Court dated 20 September 2019, as modified on 4 October 2019 and 15 October 2019; and

(vi) The writ petitions filed before the High Court by the respondents shall stand disposed of.

61. The present judgment shall not affect any ongoing investigation or criminal proceedings in respect of the IL&FS group of companies. The appeals shall be disposed of in the above terms. There shall be no order as to costs.

62. Pending application(s), if any, stand disposed of.

Headnotes prepared by: Nidhi Jain

Result of the case:
Appeals disposed of.