IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP-25345-2014 (O & M)

Judgment Reserved on: 27.11.2015

Date of Decision: 24.12.2015

SREI Infrastructure Finance Limited and another

... Petitioner(s)

Versus

State of Haryana and others

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE PARAMJEET SINGH

1) Whether Reporters of the local papers may be allowed to see the judgment ?.
2) To be referred to the Reporters or not ?.
3) Whether the judgment should be reported in the Digest ?

Argued by: Mr. Ashok Aggarwal, Sr. Advocate with
Mr. Mukul Aggarwal and Mr. Amit Jhanji, Advocates,
for the petitioners.

Mr. Rajneesh Chadwal, DAG, Haryana.

Mr. Vishal Garg, Advocate for
Mr. Deepak Balyan, Advocate,
for respondent No.2.

Mr. Puneet Bali, Sr. Advocate with
Mr. Jai Singh Brar and Ms. Neha Sonawane, Advocates,
for respondent Nos.4 and 5.

Paramjeet Singh, J.

CM-7314-CWP-2015

Instant application under Section 8 read with Section 5 of the Arbitration and Conciliation Act, 1996 (for shot, 'the Arbitration Act, 1996) has been filed by applicant-respondent No.4 for referring the matter to the arbitration.

Main writ petition has been filed for issuance of direction to the respondents-authorities to safeguard the interest of the petitioner No.1 as a KMP Project Lender and take into account petitioner No.1's KMP Project Debt in computation of the compensation/termination payment in connection with the KMP Project and also to safeguard the interest of the petitioners and to disburse the amount due to petitioner No.1 outstanding as on date. During the pendency of writ petition, respondent No.4-KMP Expressways Limited has filed instant application with the averments that matter is required to be referred to the arbitration in view of terms of the agreement dated 19.10.2011 i.e. rupee loan agreement entered into between applicant and petitioner No.1.

I have heard learned counsel for the parties and perused the record.

Learned senior counsel for applicant-respondent No.4 vehemently argued that there is arbitration clause in the rupee loan agreement dated 19.10.2011, as such dispute is required to be referred to arbitration and jurisdiction with regard to arbitration falls in the territory of Calcutta. Learned senior counsel contended that in view of Sections 5 and 8 of the Arbitration and Conciliation Act, 1996, instant writ petition is barred. There are catena of judgments rendered by the Hon'ble Supreme Court that where a valid arbitration clause exists, the intervention by the judicial authorities is barred and dispute be referred to arbitration. In support of his contentions, learned counsel relied upon ***Ashish Gupta vs. I.B.P Co. Ltd. and Anr.*** 2005 (85) DRJ 395, ***Rashtriya Ispat Nigam Ltd. and another vs. Verma Transport Co.*** (2006) 7 SCC 275, ***Everest Holdings Limited vs. Shyam Kumar Shrivastava and others*** (2008) 16 SCC 774, ***Hindustan Petroleum Corpn. Ltd. vs. Pinkcity Midway Petroleums*** (2003) 6 SCC 503, ***W.P.I.L. Vs. NTPC Ltd. and Ors.*** 2009(108) DRJ 404 and ***Maruti Clean Coal and Power Ltd. vs. KolhaiInfotech Pvt. Ltd. and Ors.*** ILR (2010) Supp. (5) Delhi 491.

Per contra, learned senior counsel for non-applicants/petitioners vehemently argued that there is no dispute with regard to validity or otherwise of *inter se* agreement between petitioner No.1 and respondent No.4. The only dispute involves in the present petition is with regard to declaration of petitioner No.1 as subordinate lender in terms of agreement dated 31.01.2006 (Annexure PB) entered into between respondent No.2-Haryana State Industrial and Infrastructure Development Corporation (for short, 'HSIIDC') and respondent No.4, as such no issue arises for referring the matter to arbitration. It is petitioner No.1 who seeks the relief that it should be declared as a project lender for the loan amounting to ₹200 crores along with interest which is admitted by respondent No.4 vide letter dated 20.05.2014 (Annexure P-15) under the concession agreement dated 31.01.2006 (Annexure PB).

I have considered the rival contentions of learned counsel for the parties.

There is no *inter se* dispute between the petitioners and applicant/respondent No.4. Petitioner No.1 has sought the relief for declaration with regard to subordinate lender in terms of agreement dated 31.01.2006 (Annexure PB). The present dispute is not based on the agreement entered into between the petitioners and respondent No.4, rather is an independent dispute which has nothing to do with the said agreement. There is no privy of agreement between petitioner and respondent No.2, therefore, clause 39.2 of agreement (Annexure PB) is not applicable.

In view of above, instant application is dismissed.

CM-13737-CWP-2015

Instant application has been filed under Order 6 Rule 17 read with Section 151 CPC for amendment of the above mentioned writ petition.

By filing the instant application, the petitioners want to add following prayer in prayer clause as clause no.(1-a):

"Issue a writ in the nature of certiorari for quashing

the letter dated 09.09.2014 (Annexure P-20) whereby respondent No.2 had illegally and in an arbitrary manner and contrary to the concession agreement dated 31.01.2006 has refused to recognise the petitioner as a project lender."

The petitioners also want to add para nos.50-A and 50-B in writ petition which read as under:

"50-A. That the action of respondent No.2 in issuing the letter dated 09.09.2014 (Annexure P-2) is itself contrary to the concession agreement dated 31.01.2006 and specifically the clause whereby, the project agreement has been defined as under:

Project agreement means this agreement, the Financing documents, the EPC contract, if any, the O & M contract, if any, the Tolling Contract, if any, and any other agreements or contracts entered into by the concessionaire with HSIDC or others relating to the project during the subsistence of this agreement."

50-B. That it is further pertinent to mention here that in fact the termination payment has also been defined in the concessionaire agreement dated 31.01.2006 and the same reads as under:

"Termination Payment: means the amounts payable by HSIDC to the concessionaire under this agreement upon the termination of this Agreement and shall consist of payments relating to debt due, subordinated debt and equity as the case may be and such other amounts as are expressly provided for under

> *this agreement provided, however, that for purposes of determining termination payments to be made by HSIDC under this agreement, the capital cost of the KMP expressway shall at all times be reckoned as an amount not exceeding the total project cost and the liability of HSIDC to make such termination payments relating to debt due subordinated debt and equity shall be determined as if such capital cost was restricted to total project costs."*

The petitioners also want to add following grounds No.xxii-A in the writ petition after ground no.xxii in para no.52:

> *"xxii-A. Because it is further submitted that the action of respondent No.2 in issuing the letter dated 09.09.2014 (Annexure P-20) is totally illegal and arbitrary and the same is contrary to the terms and conditions of the concession agreement 31.01.2006. It is further submitted that a bare perusal of the clauses of the concession agreement clearly shows that the respondent No.4 was under no obligation to seek permission of respondent No.2 for seeking financial assistance from any other person including the petitioner as defined under project agreement. It is further relevant to mention here that the petitioner is seeking adjudication and recognition of its rights as a project lender which respondent No.4 has already admitted in their letter written to respondent no.2 i.e. letter dated 23.05.2014 (Annexure P-15). Therefore, the action of respondent No.2 in issuing the letter dated 09.09.2014 (Annexure P-20) is totally*

illegal, arbitrary and is liable to be set aside.

Xxii-B. Because it is further submitted that once the rights of the petitioner is recognized under the concession agreement dated 31.01.2006, therefore, respondent No.2 by issuing the letter dated 09.09.2014 (Annexure P-20) cannot deny the right of the petitioner as a project lender. It is further relevant to mention here that even respondent No.4 in their letter dated 20.05.2014 (Annexure P-15) have admitted that the petitioner has advanced a loan of Rs.200 crores for the purpose of the construction of the KMP Express Way. On this ground also, the letter dated 09.09.2014 (Annexure P-20) issued by respondent No.2 is liable to be set aside."

In pursuance of notice of motion, learned senior counsel for non-applicant/respondent Nos.4 and 5 submitted that reply filed to main petition be read as reply to application for amendment of petition as material averments are almost the same except few paragraphs which have been sought to be added.

I have heard learned counsel for the parties and perused the record.

By filing the main petition, the petitioners have prayed for issuance of direction to the respondents-authorities to safeguard the interest of petitioner No.1 as a KMP Project Lender and take into account petitioner No.1's KMP Project Debt in computation of the compensation/termination payment in connection with the KMP Project and also to safeguard the interest of the petitioners and to disburse the amount due to petitioner No.1 outstanding as on date.

By way of proposed amendment, the petitioners want to add prayer for quashing the letter dated 09.09.2014 (Annexure P-20) alleging that respondent No.2 has illegally and in an arbitrary manner and contrary to the concession agreement dated 31.01.2006 refused to recognize the petitioner as a project lender.

Perusal of file reveals that there are pleadings in the main petition with regard to letter dated 09.09.2014.

On 07.1.2015, learned senior counsel for the petitioners submitted that he would restrict his claim only to the right as a subordinate lender and no part of the relief claimed in the writ petition could be taken in any way to cause any obstruction or fetter the liberty of respondent Nos.1 to 4 to re-adjust their respective rights for the implementation of the project.

On 07.01.2015, following order was passed by a Coordinate Bench of this Court:

> *"The learned Senior Counsel appearing on behalf of respondent No.2 seeks for time to file reply. The 4th respondent, before filing the reply, points out that there is a case pending before the Supreme Court in CWP No. 13029 of 1985 in which an application IA No. 344 of 2012 seeking for certain directions has been filed. The learned Senior Counsel Shri Dhruv Mehta points out that the Supreme Court in its order dated 28.11.2914 directed that no*

Court/Tribunal including an Arbitrator shall pass any order which would come in the way of implementation of the Eastern Peripheral Expressway Project. The contention is that it will be inappropriate for the court to entertain this writ petition and call upon the parties to file reply when the Supreme Court is seized of the matter and has passed a general interdict against any court from passing any order that may impact the implementation of the project. The Senior Counsel would refer me several paragraphs in the writ petition to show that even apart from staking monetary claims on the debts advanced to the concessionaire-4th respondent, there are also references to the petitioner's entitlement to take over the project in the event of termination. This, according to him, would show that the petitioner is not interested merely in securing the amounts lent by it but has an active interest in the manner in which the project is executed and has its own interest in the manner of such implementation through this writ petition.

The Senior Counsel appearing on behalf of respondent No.2 would also contend, apart from seeking time to file reply, that the petitioner is not one of the registered lenders and respondents No. 1 to 3 cannot be compelled to make any provision for protecting the interest of the petitioner at the time of entering into any form of negotiation for either continuing with the project with the concessionaire or terminating the contract.

The learned Senior Counsel appearing on behalf of the petitioners submits that he would restrict his claim only to the right as a subordinate lender and no part of the relief claimed in the writ petition could be taken in any way to cause any obstruction or fetter the liberty of respondents

No. 1 to 4 to re-adjust their respective rights for the implementation of the project.

Having regard to the submissions made by the learned Senior Counsel for the petitioners, I do not think that there is any impropriety involved in entertaining the writ petition and calling upon the respondents to file their respective replies. Replies be filed within a period of four weeks.

Adjourned to 5.2.2015."

On 31.08.2015, following order was passed by this Court:

"Learned counsel for respondent No. 4 has sought many adjournments for filing reply to the writ petition and many dates were granted to learned counsel for respondent No. 4 for filing reply of the writ petition. On 26.05.2015, a prayer was made by learned Senior counsel for respondent No. 4 that they want to file an application under Section 8 of the Arbitration Act.

In pursuance of that, application under Section 8 of the Arbitration Act was filed.

I have heard the arguments partly on that application on 28.08.2015.

On 07.01.2015 an order was passed by a Co-ordinate bench in this petition, the relevant extract of which reads as under :-

> *"The learned Senior counsel appearing on behalf of the petitioners submits that he would restrict his claim only to the right as a subordinate lender and no part of the relief claimed in the writ petition could be taken in any way to cause any obstruction or fetter the liberty of respondents No. 1 to 4 to re-adjust their respective rights for the implementation of the project."*

In view of this, since there is no agreement between

> *the HSIIDC and the other banks and the petitioner, question whether arbitration is possible is to be examined. Petitioners are not claiming any other relief except mentioned in order dated 07.01.2015. So, it would be appropriate that the respondents should file their respective replies to the main writ petition. Both the applications as well as the main writ petition will be taken up together for final disposal. Any reply filed by respondent No. 4 shall be without prejudice to the rights under Section 8 of the Arbitration Act.*
>
> *It has come to notice of this Court that in the earlier zimni orders, learned counsel for the respondent No. 4 has stated that he does not want to file reply to the petition, however, he wants to file reply with regard to maintainability of the writ petition at this stage only. Today, again learned counsel for respondent No. 4 prays that at this stage he may be permitted to file short reply with regard to maintainability which may be taken as preliminary issue. He may do so.*
>
> *Adjourned to 09.09.2015."*

Since learned counsel for the petitioners restricted his prayer qua subordinate lender, therefore, lis between the parties is yet to be determined with regard to declaration of subordinate lender. Other amendments as sought cannot be taken into consideration in view of specific statement of learned senior counsel for the petitioners.

In view of above, instant application is allowed to the limited purpose of consideration of rights of the petitioners with regard to subordinate lender. Otherwise also, this Court is of the opinion that this type of amendment is only clarification as pleadings with regard to amendment as sought are already in the main petition, however, instant application is allowed to the aforesaid limited extent in order to avoid technical objections and clarification has been made to this extent.

CWP-25345-2014

Instant writ petition has been filed under Articles 226/227 of the Constitution of India for quashing the letter dated 09.09.2014 (Annexure P-20) alleging that respondent No.2 has illegally and in an arbitrary manner and contrary to the concession agreement dated 31.01.2006 (Annexure PB) refused to recognize petitioner No.1 as a project subordinated lender; for issuance of direction to the respondents-authorities to safeguard the interest of petitioner No.1 as a KMP Project Lender and take into account petitioner No.1's KMP Project Debt in computation of the compensation/termination/any other payment in connection with the KMP Project; for issuance of direction to the respondents and/or each of them to safeguard the interest of petitioners and to disburse the amount to petitioner No.1 outstanding as on date; for restraining the respondents and/or each of them from disbursing any part of the compensation/termination payment to any of the respondents without safeguarding the rights of petitioner No.1 as a KMP Project Lender under the rupee loan agreement SRE 235 including its right to be considered as a subordinate lender to the KMP Project; for issuance of direction to respondents-authorities to involve petitioner No.1 being a

KMP Project Lender in all deliberations, restructuring, substitution proceedings with respect to the KMP Project; for restraining the respondents-authorities and/or each of the respondents from entering into any agreement and/or settlement with each other and/or with any other third party in relation to the said KMP Project as proposed in respondent No.4's letter dated 20.05.2014 without safeguarding and/or projecting the interest and right of petitioner No.1 under the rupee loan agreement SRE 235 and for issuance of direction to respondent No.2 and/or each of them to consider petitioner No.1's representations as made in its letters dated 25.11.2013 and 07.05.2014 and petitioner No.1's right under rupee loan agreement SRE 235 to take over the said KMP Project and take steps for speedy implementation thereof.

Brief facts relevant, as averred in the petition, for disposal of the present case are to the effect that petitioner No.1 is a notified public financial institution under the Companies Act, 1956 and has been carrying on its aforesaid business for the last 25 years. One of the major areas of expertise of petitioner No.1 is development and construction of roadway projects. Respondent No.2 is a company incorporated under the provisions of the Companies Act, 1956 with the object of developing industrial infrastructure in the State of Haryana under the aegis of the Department of Industries and Commerce, Haryana. Respondent No.3 is a body corporate and a bank within the meaning of the Banking Regulation Act, 1949. Respondent No.4 is also a company incorporated under the provisions of the Companies Act, 1956. Respondent No.4 is a Special Purpose Vehicle incorporated for the specific purpose of development of Kundli-Manesar Palwal Expressway (hereinafter referred to as 'KMP') and is a subsidiary of respondent No.5. Respondent No.4 is part of the DSC group of companies. The flagship company of DSC group is respondent No.5. Respondent No.5 was previously known as DS Construction Limited. Respondent No.4 was successful bidder for the KMP Project on a 'build, operate and transfer' basis pursuant to a tender floated by respondent No.2 consequent to which a concession agreement dated 31.01.2006 was executed by and between respondent Nos.2 and 4. Respondent No.4 had received financial assistance for the purpose of executing the project from a consortium of lenders including different State Banks and financial institutions led by respondent No.3. The consortium of lenders led by respondent No.3-IDBI Bank which had financed the KMP Project includes the following: IDBI Bank, State Bank of India, State Bank of Mysore, State Bank of Indore, United Bank of India, IIFCL, State Bank of Patiala, UCO Bank, Vijaya Bank, Dena Bank, Canara Bank and State Bank of Travancore. Petitioner No.1 and/or its other group companies had in the past made diverse loans to different companies of the DSC Group for the purpose of executing infrastructure projects. Petitioner No.1 and/or its associate companies had also provided financial assistance to some of the DSC Group Companies which were used by such companies to infuse equity capital in respondent No.4. In around September, 2011, respondent No.4 through its promoters namely Mr. H.S.Narula and Mr. M.S.Narula approached petitioner No.1 for additional finance for the implementation and development of KMP Project and represented *inter alia* that:

(a) The loan sanctioned by the said consortium of banks led by respondent No.3 was insufficient to fund the execution of the project.

(b) There has been a considerable overrun in the project cost, inter alia, due to various breaches and delays on the part of respondent No.2:

(c) There had been further increase in cost due to change of scope of work.

In view of past association with the DSC group and its promoters and petitioner No.1's core business area of financing infrastructure projects, petitioner No.1 was agreeable to advance funds to respondent No.4 for the aforesaid 'KMP Project' considering request and representation made by respondent No.4. Thereafter, petitioner No.1 agreed to advance a sum of ₹100 crores to respondent No.4 under a rupee loan agreement SRE 235 dated 19.10.2011 (Annexure P-1). Respondent Nos.4 and 5 and their promoters to secure the due repayment of the aforesaid loan to petitioner No.1 executed various documents including *inter alia* the following:

“(a) Deed of Personal Guarantee dated October 19, 2011 furnished by H.S.Narula, being a Promoter of respondent No.4 (Annexure P-2).

(b) Deed of Guarantee dated October 19, 2011 furnished by respondent No.5 in favour of petitioner No.1 (Annexure P-3).

(c) A Deed of Undertaking, Warranty and Indemnity dated October 19, 2011 by respondent No.4 and respondent No.5 (Annexure P-4).

(d) A Deed of Hypothecation dated October 19, 2011 executed by respondent Nos.4 and 5 (Annexure P-5).

In November, 2011, respondent No.4 required additional funds for the KMP Project and once again approached petitioner No.1 for further financial assistance to the extent of ₹100 crores for the said KMP Project and petitioner No.1 agreed to grant a further loan of a sum of ₹100 crores to respondent no.4 thereby enhancing principal loan amount to ₹200 crores and pursuant to it a supplementary agreement dated 23.11.2011 (Annexure P-6) was entered into by and between, inter alia, petitioner No.1 and respondent No.4. The said agreement was amended from time to time and loans were advanced by petitioner No.1 to respondent No.4. It is further averred in the petition that in the event of termination of concession agreement dated 31.01.2006, compensation amount was to be paid directly into Escrow Account No27103000000602 with IDBI Bank. After payment of dues of consortium of the bankers led by the IDBI Bank in terms of concession agreement, the amount remaining therein can only be dealt with at the instruction of respondent No.4 and was required to be deposited by the said respondent into the designated account to be maintained by respondent No.4 with Axis Bank for the benefit of petitioner No.1 as mentioned hereinabove. The claim of petitioner No.1 for declaring it as a senior lender has been rejected vide letter dated 09.09.2014 (Anexure P-20) by respondent No.2. A relevant extract of the letter dated 09.09.2014 reads as under:

> *"In this regard, it is brought out that as per Terms and Conditions of Concession Agreement and Common Rupee Loan Agreement, Concessionaire has not taken prior written consent from HSIIDC for creating charge on residual cash flows of KMP and movable assets of KMP in favour of SREI and/or approval from the Senior Lenders to create parri passu charge in favour of SREI.*
>
> *In absence of the above approvals required by Concessionaire, Concessionaire is not entitled to create a parri passu charge in favour of SREI. Therefore, SREI does not qualify as Senior Lender under the terms of the Concession Agreement."*

Hence, this petition.

In pursuance of notice of motion, respondent No.2 filed written statement. It is averred that as per the terms of the concession agreement dated 31.01.2006 executed between respondent No.2 and respondent No.4, respondent No.4 being Concessionaire was required to obtain financial closure within a stipulated time period and under clause 22.1, it was required to provide a copy of financing package, furnished by it, to the prospective senior lenders and was also required to submit the financing package finally approved by the senior lenders to respondent No.2. As per the financial closer documents submitted by respondent No.4 with respondent No.2, the concessionaire had tied up with the following banks/lenders for debt of ₹1149 crores as per details given below:

Sr. No.	*Name of Bank*	*Amount*
1	IDBI Bank	₹150 crores
2	State Bank of India	₹150 crores
3.	India Infrastructure Finance Company Ltd.	₹149 crores
4	Canara Bank	₹90 crores
5	State Bank of Mysore	₹90 crores
6	UCI Bank	₹40 crores
7	Dena Bank	₹.40 crores
8	State Bank of Travancore	₹90 crores
9	State Bank of Patiala	₹120 crores
10	Vijaya Bank	₹90 crores
11	United Bank of India	₹50 crores
12	State Bank of Indore	₹90 crores
	Total	₹1149 crores

As far as respondent No.2 is concerned, petitioner No.1 had never been recognized banker/lender as per the financial closer documents submitted by the concessionaire-respondent No.4 since the alleged loan/debt/financial assistance was accorded by petitioner No.1 to respondent No.4 without any prior approval/consent of HSIIDC. As per clause 9.1 (iv) of the Concession Agreement (Annexure PB), the concessionaire was required to take prior approval/consent of HSIIDC before availing such loan/debt/financial assistance from any financial institution including petitioner No.1. However, contrary to the aforesaid clause, the alleged loan/debt/financial assistance was availed by respondent No.4 without any prior approval/consent of HSIIDC and, therefore, petitioner No.1 does not qualify as a project lender under the concession agreement. Respondent No.2 had specifically informed petitioner No.1 vide letter dated 13.01.2014 (Annexure P-11) that the agreement alleged to be executed between petitioner No.1 and respondent Nos.4 and 5 viz. Rupee Term Loan Agreement and loan agreement dated 19.10.2011 are not in the record of respondent No.2 and respondent No.2 had never been informed about the said agreements by the concessionaire. Vide impugned letter dated 09.09.2014 (Annexure P-20), respondent No.2 again informed petitioner No.1 that petitioner No.1 does not qualify as the senior lender as the alleged loan was taken by the concessionaire without permission from respondent No.2 which was a pre-requisite under the concession agreement. It is further averred that matter regarding Kundli-Manesar-Palwal Expressway is already pending before the Hon'ble Supreme Court and settlement proceedings are going on between the concessionaire, senior lenders and respondent No.2 which was being monitored by EPCA and an amount of ₹1,300/- crores was proposed by respondent No.2 towards settlement/termination payment vide letter dated 05.08.2014. The matter was again reconsidered by a Committee comprised of Principal Secretary Finance, Principal Secretary Industries and Managing Director, HSIIDC, who after considering the report came to the conclusion that "termination payment/work done consideration" outside the concession agreement needs to be revisited and simultaneously, MOR&H should also be required to take over the work "on as is where is bases" by stepping into the shoes of HSIIDC. In toto, respondent No.2 pleaded that petitioner No.1 has no right to claim to be a lender of the KMP Project.

Respondent No.4 also filed short written statement with the averments that all facts, averments, grounds and contentions made in the writ petition under reply are categorically denied unless specifically and expressly admitted in the present written statement. The present writ petition is an abuse of the process of law and as such, is not maintainable on the preliminary objections, one of them being the existence of an arbitration clause between the petitioner and the respondent no.4, for which respondent No.4 had moved an application under Section 8 of the Arbitration Act, 1996 for rejection of the present petition for want of maintainability in view of the existence of arbitration clause between the parties. The said application under Section 8 of the Arbitration and

Conciliation Act 1996 was heard by this Court and this Court vide its order dated 28.08.2015 allowed the prayer of respondent No.4 to file short written statement restricting the contents of the same to the preliminary objections on the maintainability of the writ petition on the ground of existence of a valid arbitration clause between the parties. It is further averred that relief as claimed by the petitioners is specifically barred by provisions of Sections 5 and 8 of the Arbitration Act, 1996. It is settled law that where a valid arbitration clause exists, the intervention by judicial authorities is barred. The entire focus in the writ petition is to recover the money and enforcement of rights by the petitioners. The rupee loan agreement entered into between petitioner No.1 and respondent No.4 contains arbitration clause. It is further averred that as per clause 10.4 of the rupee loan agreement, all disputes shall be subject matter within the exclusive jurisdiction of court at Kolkota and as such, the present petition is barred for want of jurisdiction. In the rupee loan agreement, respondent No.4 and petitioner No.1 are parties and respondent Nos.1` and 2 have been arrayed as party only to invoke the writ jurisdiction of this Court. It is held in catena of judgments rendered by the Hon'ble Supreme Court and this Court that where purely contractual rights are sought to be enforced, writ petition cannot be entertained as the writ jurisdiction provides for a public law remedy and not to protect private interests, such as the one attempted to be enforced by way of the present petition. This Court would not entertain a petition such as the present one where private interests are involved under its writ jurisdiction.

It is further averred that there exists no privity of contract between the petitioners and respondents except for the answering respondent. It is an admitted position that the Rupee Loan Agreement dated 19.10.2011 was entered into only between petitioner No.1 and respondent No.4, and not by any other respondent. The endeavour of respondent No.4 is to demonstrate in the aforesaid preliminary objections that the present writ petition is an attempt to safeguard the contractual interests of the petitioners. The writ petition is also bad in law as parties who are not even privy to a contract have been arrayed as respondents and on this ground alone, the petition merits dismissal. It is further averred that the fulcrum on which the present writ petition rests ceases to exist in the light of the fact that petitioner No.1 has sought to enforce private contractual rights, emanating solely from the rupee loan agreement between petitioner No.1 and respondent No.4, by virtue of the present writ petition which is clearly not maintainable in the light of the arbitration clause governing the contractual relationship between the parties concerned and also in the light of the aforementioned jurisdiction clause by virtue of which the present writ petition is ousted from the purview of this Court. It is further averred that instant writ petition has become infructuous in view of order dated 30.01.2015 passed by the Hon'ble Supreme Court in I.A. Nos.344, 355 and 362. The settlement talks that were going on between the parties i.e., the answering respondent and the State authorities before the Monitoring Committee appointed by the Hon'ble Supreme Court have also come to an end and the answering respondent is independently exerting its rights against the State authority i.e. HSIIDC in a separate arbitration proceedings. It is further averred that as per Clause 3.1(i) to (iii) of the Common Rupee Loan Agreement (supra), which provides the security for the loan, the charge so created is subservient and with regard to the same there is an undertaking by the answering respondent that all reimbursements of costs towards CoS orders and /or any claims received from HSIIDC or any other relevant authority/organisation shall be used to prepay this facility. However, this undertaking is subject to the condition that the amount shall be deposited in the Escrow Account on which the senior lenders have an exclusive charge meaning thereby that the amount lying in the Escrow Account would be used as per agreed water flow mechanism. It is pertinent to point out that under the existing arrangement, the petitioner company itself has acknowledged that its charge over the assets of the Answering Respondent stood satisfied on 15.05.2012 and it has no claim against the company. In light of the same, the petitioner is only an unsecured creditor with an overriding priority on the assets of the Answering Respondent. True copy of the No Objection Certificate dated 15.05.2012 issued by the petitioner company has been placed on record as Annexure R-4. In view of the averments, dismissal of the writ petition has been prayed for.

I have heard learned senior counsel for the parties and perused the record with their valuable assistance.

As far as contentions of learned senior counsel for respondent Nos.4 and 5 regarding arbitration clause are concerned, the same have been dealt with and stand rejected vide order recorded in earlier part of the judgment while dealing with CM No.7314-CWP-2015.

Learned senior counsel for the petitioners contended that as per the agreement dated 31.01.2006 (Annexure PB), respondent No.4-KMP (concessionaire) was at liberty to enter into an agreement/contract with others relating to the project during the subsistence of agreement and made reference to the term 'project agreement. as mentioned in agreement (Annexure PB). Learned senior counsel further contended that in view of term 'project agreement', concessionaire can enter into a contract with any other persons besides HSIIDC during the subsistence of the agreement. Learned senior counsel further contended that perusal of terms 'senior lenders' and 'subordinated debt' defined in the agreement (Annexure PB) reveals that the petitioner falls in the definition of 'subordinated lenders/subordinated debt' as the borrowings by the concessionaire subordinated to the financial assistance provided by the senior lenders. Reference was also made to the term “termination of payment”. The said term includes the amount relating to the debt due, subordinated debt and equity. Learned counsel further contended that the petitioner entered into agreement with respondent No.4 vide rupee loan agreement dated 19.10.2011 for the amount of ₹200 crores for the development of KMP expressway which is strictly in consonance with the concession agreement (Annexure PB). Learned senior counsel further contended that respondent No.4 admitted vide letter dated 20.05.2014 (Annexure P-15) that respondent No.2-HSIIDC refused to recognize the petitioner as a project lender vide impugned letter dated 09.09.2014 (Annexure P-20) in spite of the fact that the petitioner had given the loan for the development of KMP Expressway. Learned senior counsel further contended that issuance of letter dated 09.09.2014 (Annexure P-20) is totally illegal and arbitrary and the same is contrary to the terms and conditions of concession agreement dated 31.01.2006 (Annexure PB). Learned senior counsel further contended that the petitioner is entitled to seek its recognition as one of the 'subordinated project lenders' as per the concession agreement dated 31.01.2006 (Annexure PB) in view of the order dated 07.01.2015 passed by a Coordinate Bench of this Court whereby right of the petitioner has been restricted only with regard to the subordinated lender.

Learned senior counsel for the petitioners further contended that petitioner no.1 has a right to be repaid out of the compensation/termination payment having an absolute and indefeasible right over the residuary amount. Respondent No.2 and/or respondent Nos.3 and 4 cannot have any right to deal with the amount over and above the loan advanced by the senior project lenders without the consent, knowledge and authority of the petitioner. Learned senior counsel further contended that in view of Chapter-V and Clause 22 of the concession agreement (Annexure PB), the financial lose has further been explained which clearly shows that the same pertains to the financing documents for funding by senior lenders by way of loans, guarantees etc. and the same is to be submitted within a period of 180 days further extendable to 90 days. As per clause 22.1, it has been further provided that the concessionaire shall provide to HSIIDC a copy of financing package furnished by it to a prospective lender. Lastly, learned senior counsel submitted that declaration as prayed for may be issued. In support of his contentions, learned senior counsel relied upon ***Sukanya Holderings (P) Ltd. vs. Jayesh H. Pandya and another*** (2003) 5 Supreme Court Cases, 531 and ***Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc. and others*** (2013) 1 Supreme Court Cases 641.

Per contra, learned counsel for respondent No.2 vehemently contended that present petition has been filed by the petitioner claiming to be a KMP Project Lender in the ongoing settlement proceedings before the EPCA for the recovery of the amount allegedly advanced by the petitioner to respondent Nos.4 and 5. The agreement dated 31.01.2006 (Annexure PB) was executed between respondent No.2 and respondent No.4-Concessionaire and the Concessionaire was required to obtain financial closer within a stipulated time period and under Clause 22.1 was required to provide to HSIIDC a copy of the financing package furnished by it to the prospective senior lenders and was also required to submit the financing package finally approved by HSIIDC. Learned counsel further contended that as per clause 9.1 (iv) of the agreement (Annexure PB), respondent No.4 was required to take prior approval/consent of HSIIDC before availing such loan/debt/financial assistance from any financial institution including the petitioner. Respondent No.3, who is a senior lender, vide letter dated 23.06.2014, has rejected the claim of the petitioners as the same was got without prior permission. It is specifically stated by respondent No.3 that charge, if any created by respondent No.4-concessionaire in favour of the petitioner is null and void as the same is violative in terms of the financing documents which specifically require the concessionaire to obtain approval of the senior lenders prior to incurring such indebtedness or securing the loan etc. Learned counsel further contended that respondent No.2 is not a privy to the contract allegedly entered between the petitioner and respondent No.4. As such, terms of agreement between the petitioner and respondent No.4 are not binding upon respondent No.2. Reference in this regard has been made to Clause 35 of the agreement (Annexure PB) to contend that it specifically provides that written consent of HSIIDC was required prior to creation of encumbrance by KMP in favour of any financial institutions, banks, funds etc. which should hold *pari passu* charge on the concession granted under the concession agreement. Reference has also been made to Clause 37.1 of the agreement (Annexure PB). Clause 3.5 of the Common Loan Agreement also does not permit respondent No.4 to create any security interest in, to or over KMP's properties, revenues or assets and, therefore, respondent No.4 was required to take prior written approval from the senior lenders before creating any *pari passu* charge in favour of any lender other than the senior lenders. However, respondent No.4 had not taken any consent from HSIIDC. Lastly, it was contended that claim of the petitioners is liable to be rejected.

Learned senior counsel for respondent Nos.4 and 5 vehemently contended that there exists no privity of contract between petitioner No.1 and any of the respondents except respondent No.4. Under the garb of present writ petition, petitioners seek to enforce a contract known as rupee loan agreement dated 19.10.2011 and supplementary agreement dated 23.11.2011 entered into between petitioner No.1 and respondent No.4. Virtually, instant writ petition is in the nature of recovery and enforcement of the said agreement. The instant writ petition is an attempt to safeguard the contractual interests of the petitioners. Learned senior counsel further contended that the petitioners have only claimed relief against respondent Nos.3 and 4 while respondent Nos.1 and 2 have merely been arrayed as party. The petitioners have not deliberately impleaded all the banks and financial institutions as party who are lenders to KMP Project and declaration if given will certainly would affect the rights of those banks and financial institutions. In fact, present writ petition is in the nature of civil suit for recovery. The petitioners should have approached the Civil Court for recovery instead of filing the present writ petition. Learned senior counsel further contended that contractual obligations cannot be enforced by way of writ jurisdiction. In support of his contentions, learned senior counsel relied upon ***State of Bihar and others vs. Jain Plastics and Chemicals Ltd.*** (2002) 1 SCC 216, ***Punjab Financial Corporation vs. Garg Steel*** (2010) 15 SCC 546 (2), ***K.K.Kalsi and other vs. Chandigarh Administration*** (U.T.) 1995 (3) PLR 694, ***Vindhya Telelinks Limited and another vs. Mahanagar Telephone Nigam Ltd.*** 2002(95) DLT 865 and ***World Tel Inc. & Anr. vs. Union of India (UOI) & Ors***. 2001 (10) SCC 513.

Learned senior counsel for respondent Nos.4 and 5 further contended that the objection with regard to maintainability of writ to enforce contractual obligations should be treated as preliminary objection.

Learned senior counsel for respondent Nos.4 and 5 further contended that Clause 3.1 (i) to (iii) of the Common Rupee Loan Agreement provides the security for the loan, the charge so created is subservient and with regard to the same respondent No.4 has given an undertaking that all reimbursement of costs towards change of scope of orders and/or any claims received from HSIIDC or any other relevant authority/organization shall be used to prepay this facility. However, this undertaking was subject to the condition that the amount should be deposited in the Escrow Account on which the senior lenders have an exclusive charge meaning thereby the amount lying in the Escrow Account would be used as per agreed water flow mechanism. Reference has also been made to Clause 9.5 of the Concession Agreement. In view of terms of concession agreement, petitioner No.1 is not an approved lender of HSIIDC and the same is only available to the senior lenders as approved by HSIIDC. Learned senior counsel made reference to Clause 25.3 of the Concession Agreement which provides disbursement of the funds to meet the outstanding liabilities of the creditors.

Learned senior counsel further contended that respondent No.3-IDBI is a senior lender, which has formed a consortium of banks to fund the project. Vide letter dated 23.06.2014, IDBI conveyed to the petitioners that the purported loans are violative of the terms of the financing documents, which specifically provide that KMPEL-respondent No.4 is required to obtain the approval of the senior lender prior to incurring any such indebtedness or securing the loan. Since the consent of the senior lender was not obtained for the purported loans, the same is in breach of the terms of the financing documents and any charge created by KMPEL to secure the same is null and void. The petitioner is an unsecured creditor and intends to create a charge on respondent No.4. Respondent Nos.3 and 4 are already before the arbitrator which will ultimately decide their rights and liabilities inter se between respondent Nos.2 and 4 to which petitioner No.1 is not a privy. The matter is already pending before the Hon'ble Supreme Court and such a writ petition is otherwise not maintainable.

I have considered the rival contentions of learned senior counsel for the parties.

So far as the preliminary objection raised by learned senior counsel for respondent Nos.4 and 5 that writ petition is not maintainable as it seeks implementation of contractual obligations is concerned, the same is not tenable, for the reason that the petitioner is seeking relief of declaration as subordinate lender against respondent No.2. This relief is not based on any contractual obligation between the petitioner and respondent No.2 and consortium of banks headed by IDBI. Moreover, the Coordinate Bench vide order dated 07.01.2015 reproduced in the earlier part of judgment has virtually decided the said issue. Hence, the objection is rejected.

Before I deal with the contentions of learned counsel for the parties, it would be appropriate to reproduce relevant clauses of the agreement (Annexure PB):

> *"Clause 9.1 In addition to and not in derogation of its obligations elsewhere set out in the Agreement, the Concessionaire shall,*
>
> *(i)*
>
> *(ii)*
>
> *(iii)*
>
> *(iv) not make any replacement, amendment or modifications to any of the Project Agreements without the prior written consent of HSIIDC, where such replacement, amendment or modification has or may have the effect of increasing or imposing any financial liability or obligation on HSIIDC in any manner, and where such amendment or modification is made without such consent, not to enforce*

such amendment or modification not permit enforcement thereof against HSIIDC in any manner whatsoever;

(v) give HSIDC not less than 30(thirty) days written notice prior to entering into, amending or replacing any Project Agreement so as to enable HSIIDC to provide its consent or offer its comments, if any, thereon which, if made, shall be duly considered and given effect to by the Concessionaire before entering into, amending or replacing such Project Agreement;

(vi) to (xxxiii) xxxxx

35.1 Subject to clauses 35.3 and 35.4, this Agreement shall not be assigned by the Concessionaire save and except with prior consent in writing of HSIDC, which consent HSIDC shall be entitled to decline without assigning any reason whatsoever.

35.2 Subject to clause 35.3, the Concessionaire shall neither create or permit to subsist any encumbrance over to otherwise transfer or dispose of all or any of its rights and benefits under this Agreement or any Project Agreements to which Concessionaire is a party except with prior consent in writing of HSIDC, which consent HSIDC shall be entitled to decline without assigning any reason whatsoever. Restrain set forth in clauses 35.1 and 35.2 shall not apply to:

(i) liens arising by operation of law (or by an agreement evidencing the same) in the ordinary course of business of the KMP Expressway; mortgages/pledges/hypothecation of goods/assets other than Project Assets, and those covered by the

Substitution Agreement and their related documents of title arising or created in the ordinary course of business of the KMP Expressway and as security only for indebtedness to the Senior Lenders under the Financing Documents and; or for working capital arrangements for the KMP Expressway,

(ii) assignment of rights, title and interest to or in favour of the Lenders pursuant to and in accordance with the Substitution Agreement in respect of financing by the Senior Lenders under the Financing Documents for the Project; and

(iii) liens or encumbrances required by any Applicable Law.

35.3 Senior Lenders may exercise the rights of step-in or substitution as provided in the Substitution Agreement to be entered into among the Concessionaire, HSIDC and Senior Lenders in the form set forth in Schedule I ("Substitution Agreement") provided that the person substituting the Concessionaire shall be deemed to be the Concessionaire under this Agreement and shall enjoy all rights and be responsible for all obligations under this Agreement as if it were the Concessionaire, Provided however, that in the event of such step-in or substitution, an additional Cure Period of 90 (ninety) days shall be provided by HSIDC to enable the Concessionaire to cure any breach or default subsisting on the day of such step-in or substitution. Provided further that if the Senior Lenders step in t operate and manage the Concession for a period not exceeding 90 (ninety) days, their liabilities shall be restricted to the obligations relating to and arising during such 90 (ninety) *days period.*

It would also be apposite to reproduce relevant definitions as provided in agreement (Annexure PB).

"*Escrow Account" means an account, which the Concessionaire shall open and maintain with a Bank in which all inflows and outflows of cash on account of capital and revenue receipts and expenditure shall be credited and debited as the case may be, in accordance with the provisions of this Agreement.*

"Financing Documents" means the documents executed during construction period also by the Concessionaire in respect of financial assistance to be provided by the Senior Lenders by way of loans, guarantees, subscription to non-convertible debentures and other debt instruments including loan agreements, guarantees, notes, debentures, bonds and other debt instruments, security agreements, and other documents, relating to the financing (including refinancing) of the project and includes amendments or modifications made in accordance with clause 90.1(iv). However, the financing Documents during construction period will be without any detriments, whatsoever, to HSIIDC's interest and without prejudice to the date of Financial close to be achieved by the concessionaire in accordance with clause 22.2 of this agreement.

"Financial Close" means the date, after expiry of 180 days from the date of Concession Agreement or in case of extension on expiry of further 90 days, on which the financing documents providing for funding by the Senior Lenders have become effective and the Concessionaire has immediate access to such funding under the Financing

documents.

"Financing Package" means the financing package of the project furnished by the Concessionaire along with its bid indicating the total project Cost and the means of financing thereof and shall be deemed to have been modified to the extent as submitted to the Senior lenders and as approved by the Senior Lenders for the purposes of funding of the project.

"*Project Agreement" means this agreement, the Financing Documents, the EPC Contract, if any, the O&M contract, if any, the Tolling Contract, if any, and any other agreements or contracts entered into by the Concessionaire with HSIDC or others relating to the project during the subsistence of this Agreement.*

"Senior Lenders" means the financial institutions, banks, funds and agents or trustees of debenture holders, including their successors and assignees who have agreed to guarantee or provide finance to the Concessionaire under any of the Financing documents for meeting costs of all or any part of the project and who hold pari passu charge on the Concession granted by this agreement.

"Subordinated Debt" means any borrowings by the Concessionaire subordinated to the financial assistance provided by the Senior Lenders for meeting the total Project Cost but does not include any interest thereon.

"Termination Payment" means the amounts payable by HSIDC to the Concessionaire under this agreement upon the termination of the agreement and shall consist of payments relating to Debt Due. Subordinated Debt and Equity as the case may be, and such other amounts as are

expressly provided or under this agreement provided. However, that for purposes of determining termination payments to be made by HSIDC under this Agreement, the capital cost of the KMP Expressway shall at all times be reckoned as an amount not exceeding the Total Project cost and the liability of HSIDC to make such termination Payments relating to Debt Due Subordinated Debt and Equity shall be determined as if such capital cost was restricted to Total Project Cost."

The term 'project agreement' means the agreement Annexure PB, the Financing Documents, the EPC Contract, if any, the O&M contract, if any, the Tolling Contract, if any, and any other agreements or contracts entered into by the Concessionaire with HSIDC or others relating to the project during the subsistence of this agreement. The 'subordinate debt' means any borrowings by the Concessionaire subordinated to the financial assistance provided by the Senior Lenders for meeting the total Project Cost but does not include any interest thereon. The vehement argument of learned senior counsel for the petitioners is that words "others relating to the project" shows that concessionaire can enter into a contract with any other person besides HSIIDC during the subsistence of the agreement. There is no force in this contention because as per the terms of the agreement, the prior permission of the senior project lenders was required. However, there is no communication on record for which it can be inferred that the petitioners received the prior permission of the senior project lenders.

Since the matter is already pending before the Hon'ble Supreme Court for settlement, the rights of the petitioners who may be treated as subordinate lenders are very limited as the petitioners have not sought prior permission from the senior lenders and the consortium of banks as per the terms of the agreement. The terms of agreement (Annexure PB) are to be read as a whole, not only the definition of 'project agreement'. Reference to various terms in the earlier part of the agreement is only the definitions of words and expressions i.e. 'project agreement' 'subordinated debt' etc. which have been used in the later part of the agreement (Annexure PB), but it does not mean that definitions are only governing the agreement, rather the governing clauses in the agreement are relevant for determining the issue. The petitioners who claim themselves to be subordinate lenders, cannot interfere in other proceedings which are going on between respondent No.4-Concessionaire, HSIIDC and consortium of banks. As such, the contention of learned senior counsel for the petitioners cannot be accepted and no declaration can be issued in favour of the petitioners in writ jurisdiction as it will unnecessarily affect the rights of the senior lenders and the consortium of banks.

As per the clause 'Escrow Account', concessionaire-respondent No.4 is required to maintain an account with a bank in which all inflows and outflows of cash on account of capital and revenue receipts and expenditures shall be credited and debited as the case may be. The “Escrow Agreement” has been defined in Clause 25.2 of the Agreement (Annexure PB). The main stress of learned senior counsel for the petitioners is that the petitioners could advance loan to the concessionaire in view of Clause 'project agreement' as defined in the agreement (Annexure PB). As per the said clause, concessionaire can enter into agreement or contract with HSIIDC or others in connection with the Project which agreement will be treated as a project agreement, presumably the loan has been advanced by the petitioners to the concessionaire and the stress is that the same is covered under the subordinated debt which means any borrowing by the concessionaire subordinated to the financial assistance provided by the senior lenders. Admittedly, the senior lenders have advanced loan to respondent No.4. The loan documents are in the shape of various documents mentioned in the agreement (Annexure P-1) between petitioner No.1 and respondent No.4. In the agreement (Annexure PB), it is mentioned that respondent No.4 can have created subordinated debt and relative priority and rights of each of the lenders vis-a-vis others have been specified. It is specifically mentioned in the agreement that the subordinate lender/lender's lien on respondent No.4 debtor's collateral is made secondary to respondent No.2-HSIIDC and the bankers, who are the senior lenders. It is also one of the terms of the agreement that right of the subordinate lender to receive payments in the event of default by respondent no.4 will not begin until the payments to the senior lenders are concluded. It is also one of the conditions that prior permission/consent of HSIIDC was required to be taken which has not been done. The matter with regard to the settlement of KMP Expressway is already pending before the Hon'ble Supreme Court. The settlement proceedings are going on between the concessionaire-respondent No.4 and senior lender-respondent No.2.

Now the issue arises regarding the lien's subordination in view of terms of agreement (Annexure PB), HSIIDC and the consortium of bankers being senior creditors, have also lien's priority over the other creditors. Firstly the senior lender is required to be repaid from the collateral proceeds and security of the concessionaire i.e. respondent No.4 in full. Thereafter, the subordinated lender and other unsecured creditors can claim their repayment from the remaining collateral proceeds, other assets or resources of the borrower. There is a difference between lien subordination and payment subordination. So far as payment subordination is concerned, the senior lender enjoys the right to be paid first from all assets of borrower or any applicable guarantor, whether or not constituting collateral security for the senior or subordinated lenders because payment subordination depends only on the amount owed and not on the value of any particular collateral and it is a more fundamental form of subordination and is advantageous to a senior lender. In these terms, right of the petitioners being subordinate lender is of payment subordination and as well as lien subordinated. In the facts of the case, the loan given by the petitioners is subordinated in respect of the payment in full to the senior lender. The concessionaire is not required to make any payment under or in pursuance of any subordination lien documents of petitioner No.1 without the prior permission of the senior lender in view of the terms of the agreement (Annexure PB) referred to above. In the light of above the agreement, during the period of default of payment under senior lender by the concessionaire, the petitioners have no right to claim any payment under or pursuant to the subordinate lender document i.e. rupee loan agreement and any such payment to petitioner No.1 if any already made will be held as trust money for the senior lender. The reading of clause 9.1 can be termed as the 'payment prohibition' and the rider to pay full payment to the senior lender is in the nature of acceptance of prohibition provision. Now, in the present case, the petitioners are only seeking declaration that the petitioners should be treated as subordinate lender and their debt should be treated as subordinate debt subject to their rights in accordance with law and have sought the quashing of letter (Annexure P-20) vide which their rights have been declined. In fact, vide letter (Annexure P-20) which has been sought to be quashed by way of amendment of the writ petition, the petitioners have claimed themselves as senior lender at par with original senior lender and only that part has been declined by saying that the petitioners are not senior lenders. The petitioners cannot be treated as senior lender as prior written consent from HSIIDC for creating charge on residual cash flows of KMP and movable assets of KMP in favour of SREI, has not been taken. The first charge will always remain with the HSIIDC and consortium of banks. The petitioners have no right to participate in the proceedings which are already pending between the concessionaire, HSIIDC and consortium of banks headed by IDBI as the prior consent was never obtained before advancement of loan in view of terms of agreement (Annexure PB).

In view of aforesaid discussion, present petition is disposed of with a direction that rights, if any, to the petitioners shall accrue only if some property is left after making full payment to respondent No.2-HSIIDC and consortium of banks headed by IDBI and prior to the same, petitioners will not have any right. If during the proceedings, it is found that the respondent No.4-concessionaire has made any payment to the petitioners at any stage of subsistence of agreement (Annexure PB), the same will be treated as trust money of the HSIIDC and consortium of banks headed by IDBI and they would have right to proceed against the petitioners in accordance with law, if the trust money has been paid to them by the concessionaire. In view of the terms of the agreement (Annexure PB) and issue raised, it is made clear that rights of the petitioner shall only accrue after full payment to respondent No.2-HSIIDC and consortium of banks headed by IDBI by the concessionaire.

Finding with regard to subordinate lender cannot be given as there is no inter-creditor agreement between petitioners, on the one side and HSIIDC and consortium of bankers, on the other side.

It will be open for the petitioners to proceed in accordance with law against respondent No.4 on the basis of documents/agreement executed between them, if some assets remain with the concessionaire after payment to the senior lenders.

Disposed of in the above terms.

24.12.2015 **(Paramjeet Singh)**
parveen kumar **Judge**