

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CWP No. 24949 of 2019 (O&M)

Date of Decision: 20.09.2019

*HARYANA MASS RAPID TRANSPORT CORPORATION LIMITED AND
ANOTHER* *... Petitioners*

VS.

RAPID METRORAIL GURGAON LIMITED *...Respondent*

CWP No. 24951 of 2019 (O&M)

*HARYANA MASS RAPID TRANSPORT CORPORATION LIMITED AND
ANOTHER* *... Petitioners*

VS.

RAPID METRORAIL GURGAON SOUTH LIMITED *...Respondent*

CORAM: **HON'BLE MR. JUSTICE RAKESH KUMAR JAIN.**
HON'BLE MR. JUSTICE ARUN KUMAR TYAGI.

Present: Mr. Chetan Mittal, Senior Advocate, with
Mr. Rajesh Goyal, Advocate,
Mr. Udit Garg, Advocate,
Mr. Himanshu Gupta, Advocate,
Mr. Manoj Vashishtha, Advocate,
Mr. Jatin Kumar, Advocate and
Mr. Mayank Aggarwal, Advocate
for the petitioners.

Mr. Puneet Bali, Senior Advocate, with
Mr. Arun Gupta, Advocate and
Mr. Raunak Dhillon, Advocate,
for the respondent(s).

RAKESH KUMAR JAIN, J. (ORAL)

This order shall dispose of two connected writ petitions bearing

CWP No. 24949 of 2019 titled as Haryana Mass Rapid Transport Corporation

Ltd. and Another Vs. Rapid MetroRail Gurgaon Ltd. (for short "1st Petition")

and **CWP No. 24951 of 2019** titled as Haryana Mass Rapid Transport

Corporation Ltd. and Another Vs. Rapid MetroRail Gurgaon South Ltd. (for

short “2nd Petition”) because the issues involved in both the petitions are common. However, for the sake for convenience, the facts are being extracted from the 1st Petition i.e. CWP No. 24949 of 2019.

Shorn of unnecessary details, the concession contracts were entered into between petitioner No.2-Haryana Shehri Vikas Pradhikaran [‘for short ‘the HSVP’](formerly known as Haryana Urban Development Authority) with Rapid MetroRail Gurgaon Ltd. [for short ‘the RMGL’] and with Rapid MetroRail Gurgaon South Ltd. [for short ‘the RMGSL’] on 09.12.2009 and 03.01.2013 respectively for the development of Metro rail link from ***Delhi Metro Sikanderpur Station on MG Road to NH-8*** and from ***Delhi Metro Sikanderpur Station on MG Road to Sector 56, Gurugram***. Both the contracts were terminated by RMGL & RMGSL on 07.06.2019, to take effect w.e.f. 08.09.2019 after the expiry of 90 days, whereas, HSVP terminated both the contracts on 26.08.2019 forthwith. RMGL & RMGSL are the subsidiary companies of Infrastructure Leasing and Finance Limited [for short ‘IL&FS’] which is before the National Company Law Appellate Tribunal [NCLAT] in the proceedings initiated under the provisions of the Companies Act, 2013.

On 08.08.2019, NCLAT directed the Red Entities to seek the approval of Hon’ble Mr. Justice D.K. Jain (Retd.) before selling, transferring, encumbering, alienating, dealing with or creating any 3rd party right, title or interest on any moveable or immoveable assets. Pursuant thereto, the RMGL & RMGSL made a request on 19.08.2019 before Hon’ble Mr. Justice D.K. Jain (Retd.) for handing over the Metro link from the Delhi Metro Sikanderpur Station on MG Road to NH-8 to HSVP on account of termination of concession contract dated 09.12.2009. A similar application was also made on the same day in respect of the other contract dated 03.01.2013.

The present writ petitions were filed to challenge the termination order/notice dated 07.06.2019, *inter alia*, on the grounds that the period of 90 days shall start from the date of permission which has not been granted by Hon'ble Mr. Justice D.K. Jain (Retd.). These petitions were listed for preliminary hearing on 06.09.2019 and on the same day the order dated 06.09.2019, passed by Hon'ble Mr. Justice D.K. Jain (Retd.) was produced before this Court, in which the following observations have been made in respect of the concession contract dated 09.12.2009:-

“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 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 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.

21. Accordingly, RMGL is permitted to hand over the possession and control of Metro link from Delhi Metro Sikanderpur Station on MG Road to NH-8 to HSVP, pursuant to the termination of the Concession Contract dated December 9, 2009, on or before, September 9, 2019. Needless to add that the said permission is without prejudice to the rights and contentions of the contesting parties to seek appropriate remedies in law to assail the validity and consequences of termination of the Concession Contract by both of them. It is, however, clarified that HSVP, shall be free to engage the service of RMGL, at the mutually discussed/negotiated charges to run the Metro link till, such time, appropriate/alternative arrangements are made to run the same.”

In respect of the contract dated 03.01.2013, Hon'ble Mr. Justice D.K. Jain (Retd.) has made the following observations: -

“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 of 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 HSVP, 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.”

On the adjourned dates i.e. 06.09.2019, 09.09.2019, 17.09.2019, 18.09.2019, this Court had passed the following orders:-

Order dated 06.09.2019

“Notice of motion.

At this stage, Mr. Arun Gupta, Advocate, accepts notice on behalf of the respondent(s) and prays for a short accommodation to contest the prayer for stay and the case on merits on the next date of hearing.

Adjourned to 09.09.2019.

Till then operation of the Rapid Metrorail by the respondent(s) shall continue on both the lines till mid-night of 09.09.2019.

To be taken up in the urgent list.

A copy of this order be given to the counsel for the parties under signatures of the Special Secretary of this Court.

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

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, i.e. 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.”

Order dated 17.09.2019

“Although the arguments have been heard but because the Court time is over, the hearing of this case is deferred to 18.09.2019.

Interim order of stay shall continue till midnight of 18.09.2019.

To be shown in urgent list.

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

Order dated 18.09.2019

“Learned senior counsel appearing on behalf of the Rapid Metrorail Gurgaon Ltd. (RMGL) and the Rapid Metrorail Gurgaon South Ltd. (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.”

It is pertinent to mention here that in reply to the proposal made by the respondent(s), recorded by us in order dated 18.9.2019, the petitioner has made the following response: -

(i) With respect to the request of the RMGL ad RMGSL to continue to operate the said Metro lines for a 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 16th 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 Metro lines 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 i.e 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 debt 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.”

The proposal of the RMGL and RMGSL, responded by the petitioner, is deliberated in the Court today and ultimately with the able assistance of both the counsel for the parties and keeping in view the larger public interest, the following consensus has arrived at in the presence of the senior officers of both the parties, namely, Mr. D. Suresh, IAS, Managing Director, HMRTC and Chief Administrator, HSVP and Mr. Rajiv Banga, Managing Director, RMGSL and Director RMGL that:-

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 ₹10.00 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 auditor/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”.

With these observations and directions, both the petitions are hereby disposed of.

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

(RAKESH KUMAR JAIN)
JUDGE

September 20, 2019
Ess Kay

(ARUN KUMAR TYAGI)
JUDGE

<i>Whether speaking / reasoned</i>	:	<i>Yes</i>	/	<i>No</i>
<i>Whether Reportable</i>	:	<i>Yes</i>	/	<i>No</i>