

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, SPECIAL BENCH II**

*** **

**IA No. 1031 of 2020 in
[CP (IB) No. 01/MB/2018]**

Under Section 60(5) of Insolvency and Bankruptcy Code, 2016

*** **

In the matter of

STATE BANK OF INDIA

Versus

VIDEOCON TELECOMMUNICATIONS LIMITED

Between

ABHIJIT GUHATHAKURTA,

Resolution Professional for 13 Videocon Group Companies

Flat No. 701, A Wing,

Satyam Springs, Cts No. 272a/2/1,

Off BSD Marg, Deonar,

Mumbai City, Maharashtra, 400088

... **Applicant**

and

DEPARTMENT OF TELECOMMUNICATIONS

Ministry of Communications,

Access Service Branch, AS-1 Division,

Sanchar Bhawan,

20, Ashoka Road, New Delhi- 110001

... **Respondent No. 1**

BANK OF BARODA

3rd Floor,

10/12, Mumbai Samachar Marg,

Fort, Mumbai- 400 001

... **Respondent No. 2**

Date of Order: 07.10.2020

CORAM:

Hon'ble Janab Mohammed Ajmal, Member Judicial

Hon'ble Ravikumar Duraisamy, Member Technical

Appearance:

For the Applicant : Senior Counsel Mr. Gaurav Joshi with Ms.
Meghna Rajadhyaksha.

For the Respondents : None

Per: Janab Mohammed Ajmal (Member Judicial)

ORDER

This is an Application by the Resolution Professional of the Corporate Debtor seeking necessary direction against the Respondent(s).

2. Facts leading to the Application may briefly be stated as follows. The Videocon Telecommunications Limited (hereinafter referred to as the Corporate Debtor) had availed various credit facilities from the State Bank of India and other Banks including Bank of Baroda (Respondent No. 2). The Department of Telecommunications, Government of India (Respondent No. 1) has provided certain services including 2G Spectrum Licences to the Corporate Debtor. The Bank of Baroda as one of the Financial Creditors had issued certain bank guarantees in the nature of performance bank guarantees and financial bank guarantees on behalf of the Corporate Debtor to the Respondent No. 1 for securitization of Usage Charges in different parts of the Country in terms of licence agreement.
3. The State Bank of India preferred an Application under Section 7 of Insolvency and Bankruptcy Code (the Code) against the Corporate Debtor seeking initiation of Corporate Insolvency Resolution Process (CIRP). Simultaneously the SBI had also moved various Applications under Section 7 of the Code against other Companies of the Videocon Group.
4. This Tribunal by order dated 8th August, 2019 directed consolidation of 13 out of 15 Videocon Group Companies and admitted the Company Petitions against them. It appointed Mr. Mahender Khandelwal as the Interim Resolution Professional (IRP). The consolidated Committee of Creditors (COC) held its first meeting on 16th September, 2019 with requisite majority resolved to replace the IRP with the present Applicant as the Resolution Professional (RP).
5. This Tribunal by an order dated 25th September, 2019 in MA No. 3173 of 2019 approved the appointment. The Hon'ble Supreme Court vide

its judgment dated 2nd February, 2012 cancelled 122 Unified Access Services (UAS) Licences in the 2G Spectrum allocations. The cancelled licences included 21 licences of the Corporate Debtor. The bank guarantees procured by the Respondent no. 1 related to the cancelled UAS licences of the Corporate Debtor. Consequent upon the order of cancellation by the Hon'ble Supreme Court continuance of the bank guarantees or their renewal did not arise. The Corporate Debtor by its letter dated 26th May, 2014 requested release of the bank guarantees in response to the demand by the Controller of Communications, Madhya Pradesh (of DoT) for renewal of the bank guarantees. In response to the letter the Respondent no. 1 on 16th June, 2014 indicated that bank guarantees were required to be renewed from time to time till clearance of all the dues in terms of the UAS licences agreement. Consequently, the Corporate Debtor continued to maintain the bank guarantees with the Respondent no. 1.

6. Meanwhile the Hon'ble Supreme Court passed certain orders on 24th and 26th of October, 2019 during the continuance of the CIRP of the Corporate Debtor. As the consequence of such orders the Respondent No. 1 issued notices to the Corporate Debtor demanding payment of outstanding dues. Communications by the Corporate Debtor to the Respondent no. 1 that payments pertaining to the period prior to the commencement of CIRP could not be made by the Applicant, went unheeded. Despite such communication, the Respondent no. 1 issued notices to the Corporate Debtor as well as to the Respondent no. 2 for encashment of the bank guarantees or for their renewal scheduled between 4th July, 2020 and 6th September, 2020. During the process of CIRP the Respondent no. 1 filed claims amounting to Rs. 262.15 Crores before the RP. On 5th December, 2019 it filed a revised claim which is under verification/evaluation by the Applicant. The revised claim submitted included the amount corresponding to the outstanding SUC which have been secured by way of bank guarantees.
7. Moreover, the Respondent. No. 2 has also included the amount corresponding to the uninvoked bank guarantees as part of its claim

against the Corporate Debtor. In case the bank guarantees are renewed the Corporate Debtor would be doubly liable for the amount. First, as a part Respondent no. 1's claim against it and secondly as part of Respondent no. 2's claim against it. This would prejudicially impair the financial situation of the Corporate Debtor and deter prospective Resolution Applicants. In the event the bank guarantees are returned by the Respondent no. 1 the corresponding amount thereof would get reduced from the claim of the Respondent no. 2 which ultimately would reduce the claim liability of the Corporate Debtor. In addition, such return would not in any way affect the Respondent no. 1's claim. On account of the moratorium that had kicked in, upon admission of the Insolvency Petition, no action could be taken by the Respondent no. 1 against the Corporate Debtor. Otherwise that would have the effect of eroding the net worth of the Corporate Debtor and would be detrimental to the interest of the creditors. The invocation of the bank guarantees by the Respondent no. 1 would not only be prejudicial but would severally undermine the objects to the Code. Anticipating any coercive action by the Respondent no. 1 in invoking the bank guarantees the Applicant came up with the present Application seeking the following prayers:

- a. Direct the DoT to refrain from invoking the BGs or taking any coercive steps against VTL.
- b. Restrain the DoT from demanding renewal of the BGs and permit the Applicant to allow the BGs to lapse.
- c. Direct DoT to return the various BGs furnished by VTL and accordingly direct the BoB to reduce its claims on VTL to the extent of returned BGs.
- d. Pending hearing and final disposal of this Application, direct the DoT to refrain taking any adverse or coercive action against VTL and the Applicant in relation to the renewal/encashment of BGs.
- e. Any other orders and/or directions as this Hon'ble Tribunal may deem fit and expedient in the interest of justice, equity and good conscience.

8. Despite service of notice, none of the Respondents appeared to contest the Application nor any of them appeared when the matter was heard. Thus, it was heard in their absence.
9. Upon admission of an Insolvency Petition under the Code, moratorium under Section 14 thereof comes into effect. There is no dispute that the Corporate Debtor went under CIRP, as per order dated 8th August, 2019. Section 14 of the Code reads as under:

“14. Moratorium. - (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

[*Explanation.*—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

[(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified;]

[(3) The provisions of sub-section (1) shall not apply to—

[(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;]

(b) a surety in a contract of guarantee to a corporate debtor.].

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.”

10. It is contended by the Applicant that moratorium having set in the bank guarantees furnished by the Respondent no. 2 on behalf of the Corporate Debtor against availing of certain services provided by the Respondent no. 1, would be in the nature of securities. Thus, would come within the embargo under section 14 (1)(c) of the Code. There is no quarrel that the Respondent no. 1 is an Operational Creditor of the Corporate Debtor. It has already submitted its claim to the RP (Applicant) and the same is under consideration. But would that have any bearing on the invocation or otherwise of the bank guarantees, is required to be looked into.

11. 'Security interest' is defined under section 3(31) of the Code as:

“(31) “security interest” means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a performance guarantee;”

12. The bank guarantees furnished for availing certain services are performance guarantees which could be invoked on the failure of the corporate debtor to perform certain acts. Thus, would fall squarely under the above definition and would be beyond the purview of section 14 of the Code. Further the Hon'ble NCLAT in the matter of GAIL (India) Limited v. Rajeev Manaadiar & Others (Company Appeal (AT) (Insolvency) No. 319 of 2018 decided on 24.07.2018) referring to section 3(31) of the Code observed thus.

“From sub-section (31) of Section 3, it is clear that the 'security interest' do not include the 'Performance Bank Guarantee', therefore, we hold that the 'security interest' mentioned in clause (c) of Section 14(1) do not include the 'Performance Bank Guarantee'. Thereby the 'Performance Bank Guarantee' given by the 'Corporate Debtor' in favour of Appellant – 'GAIL (India) Ltd.' is not covered by Section 14. The Appellant – 'GAIL (India) Ltd.' is entitled to invoke its 'Performance Bank Guarantee' in full or in part.”

13. It is thus clear from the finding that bank guarantees would not come within the restrictions imposed upon by section 14 of the Code. Besides bank guarantees represents an independent contract between the Bank and the beneficiary, both the parties would be bound by the terms thereof. The Hon'ble Apex Court in the case of Hindustan Construction Company v. State of Bihar: (1999) 8 SCC 436 held as follows.

“Now, a Bank Guarantee is the common mode, of securing payment of money in commercial dealings as the beneficiary, under the Guarantee, is entitled to realise the whole of the amount under that Guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the Guarantee was

given and the beneficiary. In contracts awarded to private individuals by the Government, which involve huge expenditure, as, for example, construction contracts, Bank Guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as "Advance" from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such Guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to the "Government Advance", the Guarantee is invoked and the amount is recovered from the Bank. It is for this reason that the Courts are reluctant in granting an injunction against the invocation of Bank Guarantee, except in the case of fraud, which should be an established fraud, or where irretrievable injury was likely to be caused to the Guarantor. This was the principle laid down by this Court in various decisions. [In UP Cooperative Federation Ltd. v. Singh Consultants & Engineers Pvt. Ltd.](#), [1988] 1 SCC 174, the law laid down in [Bolivinter Oil SA v. Chase Manhattan Bank](#), [1984] 1 All E.R. 351 was approved and it was held that an unconditional Bank Guarantee could be invoked in terms thereof by the person in whose favour the Bank Guarantee was given and the Courts would not grant any injunction restraining the invocation except in the case of fraud or irretrievable injury.”

14. This Authority need not however concern itself with the propriety of the bank guarantees. Nor can the matter of fraud or irretrievable injury can be gone into. The same is not canvassed either. What needs consideration is if a restraint order can be passed within the parameters of the Code, now that the CIRP has commenced. As already indicated and authoritatively decided, bank guarantees would not come within the scope of section 14 of the Code. No order of restraint is thus contemplated. Therefore, the prayer made in the Application does not merit consideration. The Application deserves to be disallowed. Hence ordered.

ORDER

The Application be and the same is rejected without contest. There would however be no order as to costs.

Sd/-
(RAVIKUMAR DURAISAMY)
MEMBER TECHNICAL

Sd/-
(MOHAMMED AJMAL)
MEMBER JUDICIAL