

**IN THE NATIONAL COMPANY LAW TRIBUNAL
AT MUMBAI BENCH, C-IV**

IA No.419 of 2021

IN

CP (IB) No. 3176 of 2019

An application under section 66 r/w
60(5) of the Insolvency and
Bankruptcy Code,2016.

Filed by

Mr. Anup Kumar

...Resolution Professional /Applicant

IN THE MATTER OF

M/s. Noble Cooperative Bank Ltd.

...Financial Creditor

Versus

M/s. Independent TV. Ltd.

...Corporate Debtor/Respondent

Order delivered on: 22.02.2024.

Coram:

Ms. Anu Jagmohan Singh
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances:

For the Liquidator : Mr. Maulik Choksi, Proxy
Counsel for the Liquidator
present.

For the Respondent : Mr. M. S. Bhardwaj, Ld.
Counsel for the
Respondent No. 1 present
in IA419/2021. Ms.
Roshani, Ld. Counsel for
the R-2 present on behalf of
PNB.

ORDER

1. The present Application is being filed by the Applicant/Resolution Professional of the Corporate Debtor under Section 66 of the Insolvency and Bankruptcy Code, 2016 seeking restitution of Rs. 50,00,00,000/- (Rupees Fifty Crore Only) which has been fraudulently misappropriated by Respondent No. 1 in connivance

with the Suspended Board of Directors after initiation of Corporate Insolvency 'Resolution Process (hereinafter referred to as "CIRP") on 26.02.2020. That Respondent No. 1 after fraudulently misappropriating the Bank Guarantees had vide its letter 2.03.2020 admittedly informed the Pay and Accounts Officer of the Ministry of Information and Broadcasting that the same has been forfeited and requested the said amount to be credited under head "encashment of Bank Guarantee". The details regarding the Bank Guarantees which has been fraudulently misappropriated by the Respondent No.1 in collusion with other mentioned Respondents is as follows:

Sr. No.	Name of the Bank	Bank Guarantee No.	Period	Amount in Crores
1.	Punjab and National Bank	2726ILG00531	27.11.2017 to 26.11.2018 extended up to 28.02.2020	10.00
2.	Punjab and National Bank	2726LG001918	26.06.2018 to 25.06.2019 extended up to 28.02.2020	40.00
Total				50.00

2. Submissions on behalf of the Resolution Professional/Applicant

2.1. On 24.05.2007, Ministry of Information and Broadcasting i.e. the Respondent No. 1 had granted DTH Licence to M/s Reliance Blue Magic Pvt. Ltd (now referred to as M/s Independent TV Ltd.) under Section 4 of the Indian Telegraph Act 1885 and the Indian Wireless Telegraphy Act, 1933 under the terms and conditions enumerated in the Licence Agreement dated 24.05.2017 for a period of 10 (ten) years. That on 19.06.2019 Respondent No. 1 took on record the change of name of M/s Reliance Big TV Ltd to M/s Independent TV Ltd. and granted interim renewal of DTH Licence to M/s Independent TV Ltd.

2.2. The Respondent No, 1 was provided with Bank Guarantees by the erstwhile management of the Corporate Debtor worth Rs. 50 Crores comprising of Bank Guarantee No. 27261LG001918 with cover period from 26.06.2018 to 25.06.2019 extended up to 28.02.2020 from Punjab National Bank worth Rs. 40 Crores and Bank Guarantee No. 2726116005317 with cover period from 27.11.2017 to 26.11.2018 extended up to 28.02.2020 from Punjab National Bank worth Rs. 10 Crores which was given in terms of Clause 20:1 of the Licence Agreement dated 24.05.2007.

2.3. That on 31.07.2019, Respondent No. 1 had suspended the DTH Licence of M/s Independent TV Ltd being run by the

erstwhile management as several complaints were made against M/s Independent TV Limited due to stoppage of transmission of satellite/ TV Channels by the Company and due to non-payment of licence fees for financial year 2018-19 and 2019-20.

2.4. Further on 3.02.2020, Respondent No. 1 had issued a Show Cause Notice (hereinafter referred to as SCN") to the erstwhile management of the Corporate Debtor stating that the Bank Guarantees worth Rs. 50 Crores comprising of Bank Guarantee No. 272611G001918 with cover period from 26.06.2018 to 1.06.2019 extended up to 28.02.2020 from Punjab National Bank worth Rs. 40 Crores and Bank Guarantee No. 27261LG005117 with cover period from 27.11.2017 to 26.11.2018 extended up to 28.02.2020 from Punjab National Bank worth Rs. 10 Crores would stand forfeited under Article 20.1 of the Licence Agreement dated 24.05.2007 unless satisfactory explanation is provided. The relevant portion of Article 20.1 is reproduced below:

“...For violation of license conditions, in addition to any other action which may include revocation of license, a penalty up to Rs. 50 Crores can be imposed by the Licensor on the License. However, before taking such action the licensing authority shall give the Licensee an

opportunity of being heard. The decision of the licensing authority shall be final...”

2.5. That on 21.02.2020, Mr. Suman Chakraborty who is one of the Suspended Board of Directors on behalf of Corporate Debtor had sent its response to the said SCN dated 3.02.2020 stating that a new set of management was introduced to the Corporate Debtor from 1.04.2018 in terms of the Share Purchase Agreement (herein after referred to as the SPA) dated 27.11.2017 and in light of the said SPA the payment of Licence fee as per the SCN 3.02.2020 was the personal obligation of the previous management before the implementation of the SPA. In light of the said submissions it was the contention of the Suspended Board of Directors that there could be no levy of License fee on the Corporate Debtor as the same was the personal liability of the management which was existing before the implementation of the SPA. The relevant portion of the reply is reproduced herein below:

“..... As you are aware that the present Management of Independent Tv Limited had taken over from the erstwhile management of Reliance Communication Ltd, with effect from 1 April 2018, in terms of Share Purchase Agreement skated 27.11.2017 Accordingly, she payment of Licence fee for financial sear 2017-18 and submission of Form D was the obligation

of the erstwhile management of Independent Tv Limited (management of Reliance Communication Ltd.). It has been informed to us by the erstwhile Management, that form D as per the Licence Agreement dated 24 may 2007 read with the DTH Guidelines 9 as amended up to 6.11.2007) has been duly submitted to RESPONDENT NO. 1... ”

2.6.It is pertinent to mention at this stage that on 27.02.2020, the Ministry of Information and Broadcasting (hereinafter referred to as *Respondent No. 1*) fraudulently sent a Letter of Invocation to Punjab And National Bank (hereinafter referred to as Respondent No. 2") for encashment of Bank Guarantees worth Rs. 50 Crores (Rupees Fifty Crores Only), knowing the fact that CIRP of the Corporate Debtor had already been initiated against the Corporate Debtor on 26.02.2020.

2.7.That meanwhile, a Broadcasting Petition No. 177 of 2020 which was filed by the Suspended Board of Directors before the Hon'ble TDSAT challenging the Invocation Letter, seeking restraint on the invocation and encashment of the Bank Guarantees worth Rs. 50 Crores comprising of Bank Guarantee No. 27261LG001918 with cover period from 26.06.2018 to 25.06.2019 extended up to 28.02.2020 from

Punjab National Bank worth Rs. 40 Crores and Bank Guarantee No. 2726ILG00531 with cover period from 27.11.2017 to 26.11.2018 extended up to 28.02.2020 from Punjab National Bank worth Rs. 10 Crores.

2.8. It is pertinent to mention that it is an admitted fact that Bank Guarantees worth Rs. 50 Crores has been encashed by the Respondent No. 1 and the Respondent No. 2 has made the said amount available to Respondent No. 1 vide two Demand Drafts dated 28.02.2020 and the said Demand Drafts have been deposited by the Respondent in their account. That the said facts have been recorded in the Order dated 2.03.2020. That only subsequent to the encashment of the said Bank Guarantees, the Respondent No. 1 directed the Pay and Accounts Officer to abide by the Order dated 2.03.2020 by maintaining a status quo in this matter. The said Letter was only written by the Respondent No. 1 to hide its fraudulent act of encashment of Bank Guarantees of Rs. 50 Crores.

2.9. That as it has been stated herein above that the Corporate Debtor went under the CIRP vide Order dated 26.02.2020 passed under Section 7 of the IBC. Code 2016. That thereafter the Resolution Professional immediately subsequent to the Public announcement also vide email dated 7.03.2020 and speed post-dated 6.03.2020 communicated to Respondent No.

1 and all other statutory Authorities about the initiation of the CIRP of the Corporate Debtor on 26.02.2020.

2.10. That on 1.06.2020, the Resolution Professional once again sent a Letter to the Respondent No. 1 with reference to the encashment of the Bank Guarantees worth Rs. 50 Crores comprising of Hank Guarantee No. 2726ILG001918 with cover period from 26.06.2018 to 25.06.2019. extended up to 28.02.2020 from Punjab National Bank worth Rs. 40 Crores and Bank Guarantee No. 27261LG00531 with cover period from 27.11.2017 to 26.11.2018 extended up to 28.02.2020 from Punjab National Bank worth Rs. 10 Crores on behalf of Independent TV Lid on 3.02.2020.

2.11. That, on 10.08.2020, Respondent No, 1 had vide a letter enquired from the Resolution Professional about the payment of the total outstanding licence fees due from the Corporate Debtor.

2.12. However, since the said letter dated 10.08.2020 was not in the correct format, on 22.01.2021 Respondent No, 1 had submitted its Claim as an Operational Creditor in Form B of Schedule under Regulation 7 of the Insolvency and bankruptcy Board of India Regulations, 2016 against the Corporate Debtor to the Resolution Professional.

3. Reply by Respondent No.1

3.1.The R1 states that the invocation of Bank guarantee is not illegal and fraudulent. M/s. Independent TV Ltd never informed the R1 about the CIRP. The first intimation of Insolvency Process in respect of M/s Independent TV Limited was informed by the Shri. Anup Kumar, Interim Resolution Professional vide an email dated 07.03.2020 that is after the invocation letter dated 27.02.2020 issued to Punjab National Bank by the R1 was apprised of the factual position by the R1 with regard to encashment of Bank Guarantees dated 10.08.2020 in response to his communication dated 01.06.2020. The allegation of mismanagement by the Respondents is strongly denied.

3.2.Further, on 31.07.2019 the R1 suspended the DTH license of M/s. Independent TV Ltd since several complaints against the DTH operator poured in the Ministry of I & B due to stoppage of transmission of the satellite TV channels by the company and not for the reason of non- payment of license fees for the Financial Year 2018-2019 and 2019-2020 as claimed by the applicant.

3.3.M/s. independent TV Ltd also did not inform the Hon'ble TDSAT about CIRP in Broadcasting Petition No. 177/2020

which was filed by them on 28.02.2020. The allegation of fraud by the R1 is baseless, false and hence denied.

3.4. The present application is not maintainable as it is in violation of order dated 10.01.2020 of the Hon'ble Appellate Tribunal wherein the Hon'ble tribunal has directed that "*Company Applications in Insolvency matter shall not be entertained by any adjudicating authority as the Interlocutory Applications are maintainable under I & B Code, 2016*".

3.5. The Respondent No.1 was informed about the interim order of Hon'ble TDSAT via e-mail dated 02.03.2020. However, the Respondent had already deposited the Demand Drafts worth Rs. 50 crores with the Pay & Accounts Office, Ministry of I&B. Thereafter, immediately in compliance to Hon'ble Tribunal's order, the Respondent No.1 on 02.03.2020 requested Pay and Accounts officer, Pay and Accounts Office, Ministry of Information and Broadcasting to maintain status-quo in the matter till next date of hearing i.e. 13.04.2020. However, Pay and Accounts Officer, Pay & Accounts Office, Ministry of Information and Broadcasting had informed that the above-mentioned Demand Drafts worth Rs.50 crore being high value receipt has already been deposited to the Government Account on 02.03.2020. The allegation of fraudulent act on part of Respondent No. 1 is false, malafide

and denied. A thorough process in accordance with the provisions of DTH guidelines was followed in letter and spirit by the Respondent No. 1 before encashment of the Bank Guarantees of M/s Independent TV Ltd.

4. Reply by Respondent No.4 &5

4.1.The R4 & R5 states that, the Suspended Directors/ Key Managerial Personnel should not be treated as One entity and the culpability/involvement of each should be examined before passing appropriate orders against the Suspended Directors/ Key Managerial Personnel. In this regard, it is relevant to note that the Applicant has only arrayed (2) two Suspended Directors out of total of (5) five suspended directors. Therefore, it is submitted that an omnibus direction against the suspended Directors/ Key Managerial Personnel, without examining their culpability/ involvement, would be a miscarriage of justice. Further, the applicant has failed to implead all the Suspended Directors and has strangely hand-picked the Respondent No. 3 ,4 & 5 only, without establishing any basis for the same.

5. Submissions advanced by the applicant through its Affidavit in Rejoinder

5.1.The applicant states that, R1 to R5 have acted in collusion with each other by not only encashing the said Bank

Guarantees despite the moratorium declared by this Tribunal. The averments and the contentions made by the Respondent in its reply have been specifically denied.

6. Submissions advanced by Ministry of Information and Broadcasting and Respondent No.1 through its Affidavit in Sur-Rejoinder

6.1. The Respondent denies in toto that R1 in collusion with R2 misappropriated the assets of the Corporate Debtor. The averments and the contentions made by the Respondent in its reply have been specifically denied.

Findings

7. The brief point that falls for consideration in the instant application is whether Bank Guarantees can be invoked/encashed during moratorium under Section 14 of the Code.

7.1. Heard the learned Counsel, The Tribunal vide order dated 24.07.2023 directed R2 to inform whether the guarantee which was encashed by the Ministry of Information and Broadcasting was a performance guarantee or Financial Guarantee. The said matter was listed on 20.11.2023 however, despite notice, nobody was present from the side of PNB. As per the request of Counsel of the R1 this tribunal granted time to the Counsel of R1 to obtain certificate from the R2, as to

whether the guarantee is the performance guarantee or Financial Guarantee. Accordingly, the captioned application was listed for hearing on 20.12.2023, the matter was called out for hearing R2 produced a certificate the certificate states that the guarantee is Performance Guarantee and also facilitated the presence of Mr. Anil Sharma, Deputy Manager of the R2. The Tribunal noted the presence of the said official and directed the counsel for R1 to file an affidavit for taking on record the said certificate.

7.2. In the recent decision of ***IDBI Bank v. Indian Oil Corporation Limited***, the National Company Law Appellate Tribunal (“NCLAT”) has held that *an irrevocable and unconditional bank guarantee can be invoked even during moratorium period in view of the amended provision under Section 14 (3) (b) of the Insolvency and Bankruptcy Code, 2016 (“IBC”) Bank Guarantees are outside the scope of the moratorium under [Section 14](#) of the Code and [Section 3 \(31\)](#) specifically excludes Performance Bank Guarantees (PBGs)*. Keeping in view the provisions of the Code, we are of the considered view that an irrevocable and unconditional Bank Guarantee can be invoked even during moratorium period.

7.3. In view of above-mentioned judgement, this bench feels that, it sees no reason to interfere with the encashment of Bank Guarantees by the Respondent. Therefore, the Application of Claimant is dismissed.

8. Accordingly, the **Interlocutory Application No. 419/2021** in **CP 3176/2019** is **Rejected**.

Sd/-

ANU JAGMOHAN SINGH
MEMBER (TECHNICAL)
22.02.2024.

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)