

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated 29TH APRIL 2009

Petition no. 73 (C) OF 2008

Music Broadcast Pvt. Ltd.Petitioner

Versus

Union of IndiaRespondent

Petition no. 4(C) OF 2009

Union of IndiaPetitioner

Versus

Music Broadcast Pvt. Ltd.Respondent

BEFORE:

<p>HON'BLE Mr. JUSTICE ARUN KUMAR HON'BLE Dr. J.S. SARMA HON'BLE Mr. G.D. GAIHA</p>	<p>CHAIRPERSON MEMBER MEMBER</p>
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For Music Broadcast Pvt. Ltd. : Mr. C.S. Vaidyanathan, Senior Advocate, with
 Mr. Pragyan Sharma,
 Ms. Kanika Mehra, Advocates

For Union of India : Mr. Mohan Parasaran, Senior Advocate, with
 Mr. Sanjay Katyal, Advocate

ORDER

Petition no. 73 of 2008 was filed by the Petitioner in April 2008 seeking an order that the two Bank Guarantees dated 12.10.2000 executed by The Bank of Nova Scotia in favour of the Respondent be returned to it without enforcing the same. When this matter came up for consideration on 15.7.2008, the learned counsel appearing for Respondent submitted that an application for restoration of the Appeal, filed before the Bombay High Court was still pending. On 10.11.2008, the counsel for Petitioner submitted that the Bombay High Court had restored the Appeal filed before it and that vide an order dated 12.9.2008, the Bombay High Court was

pleased to transfer the entire proceedings to this Tribunal. Vide a letter dated 16.12.2008, the Bombay High Court forwarded the original record and proceedings of the Appeal no. 837 of 2003, indicating that the Division Bench of the Bombay High Court had directed the transfer of the aforesaid Appeal to this Tribunal. It was accordingly numbered as Petition no. 4 (C) of 2009. The Parties and subject matter, insofar as this Tribunal is concerned, being the same in both these cases, it was decided to consider and dispose of these two cases together.

2. The case of the Petitioner in Petition no. 73 (C) of 2008 is that in October 1999, the Respondent invited tenders for issuing FM radio broadcasting licences for about 108 channels across 40 centres in India and that, in an open auction held in March 2000, the Petitioner was declared as the highest bidder for Mumbai and Delhi as well as for four non-Metro centres -- Bangalore, Lucknow, Nagpur and Patna (In this Petition, we are concerned only with Nagpur and Patna.). Consequently, the Petitioner was issued the letter of intent on 3.8.2000 which included the condition that the licence fee for the first year would be Rs. 7.4 crore and Rs. 4.75 crore for Nagpur and Patna respectively, to be increased by 15% every year; that two Bank Guarantees, equivalent to the first year's licence fee, were to be submitted for Nagpur and Patna within a period of 75 days from the date of the letter of intent; and that the Petitioners needed to apply for obtaining a wireless operational licence from the wireless planning and coordination wing (WPC wing) of the Department of Telecommunications, within a period of 3 months from the date of the letter of intent. Accordingly in October 2000, the Respondent got two Bank Guarantees executed by The Bank of Nova Scotia, Mumbai on 12.10.2000 for Nagpur and Patna. On 23.10.2000, the Petitioner applied for frequency allocation and was allocated the same in December 2000 by the WPC wing which required the Petitioner to complete installation of all facilities by 29.12.2001. The case of the Petitioner is that although it applied for SACFA clearance in July 2001, the same was not granted until the passage of the deadline of 29.12.2001 or even thereafter. Having realised subsequently that the radio stations at Nagpur and Patna were not economically feasible on account of the general economic conditions as well as the delay in being granted the wireless operational licence, the Petitioner informed the Respondent on 21.12.2001 that it did not wish to proceed further in respect of Nagpur and Patna. Having come to know that the Respondent was proposing to invoke Bank Guarantees of licensees who had failed to commence broadcasting by 29.12.2001, the Petitioner addressed a letter dated 2.2.2002 reiterating its letter of 21.12.2001 and requesting the Respondent to return the two Bank Guarantees. Simultaneously, the Petitioner also filed an arbitration petition which was disposed of by the Bombay High

Court vide an order dated 26.11.2002 restraining the Respondent from invoking and/or encashing the Bank Guarantees. Although the Respondent preferred an Appeal in the Bombay High Court, the same was dismissed in default on 28.11.2007. The case of the Petitioner is that the grant of licences issued to it to operate FM radio stations at Nagpur and Patna was only a formality and that the non-commencement of broadcasting at the centres was due to the inordinate delay on the part of the Respondent to give a wireless operational licence. Besides the contention of the Petitioner is that the term of the licence was to commence from the date of issuance of the wireless operational licence from the WPC wing, a licence that it never received. It is also contended that as per clause 16.2 of the Licence Agreement, the Bank Guarantee can be invoked only in the eventuality of failure on the part of the licensee to deposit licence fee, stoppage of service without giving one year's notice or in the event of the licensee being declared insolvent or bankrupt. The prayer of the Petitioner is that since none of these events are attracted in this case, the Bank Guarantees be returned to the Petitioner without invoking the same.

3. In its reply, the Respondent stated that the Petitioner had failed to comply with the terms and conditions as laid down in the tender document, Letter of intent and the Licence Agreement and as such the Respondent is entitled to forfeit and encash the Bank Guarantee. Stating that frequency was allotted to the Petitioner by the WPC wing on 29.12.2000, the Respondent referred to the letter admittedly written by the Petitioner on 9.4.2001 wherein the Petitioner stated that it would making its best efforts to commission all non-metros before the target date of 29.12.2001. But on 21.12.2001, the Petitioner stated that it is no longer commercially viable to operationalise the services in the two cities of Nagpur and Patna and that in a meeting dated 21.12.2001, the Petitioner had actually asked for exchange of these two FM stations with Kolkata and Chennai. The case of the Respondent is that the Appeal in the Bombay High Court which was originally dismissed was subsequently restored vide an order dated 22.8.2008, whereafter the High Court ordered transfer of the matter to this Tribunal. According to the Respondent, as per clause 6 of the licence Agreement and clause 2.1 of Article 2 of schedule C of Licence Agreement, the licensee is required to complete installation of infrastructure and facilities within 12 months from the date of allocation of frequency by the WPC, i.e. by 29.12.2001. Immediately thereafter, it could have applied for the issue of the wireless operational licence which would have been given to it and that the non-issue of this licence was only on account of the inaction of the Petitioner. Stating that the Petitioner was liable to pay the licence fee in advance on the expiry of one year from the date of allocation of frequency, i.e. 29.12.2001, the Respondent stated that the Petitioner was offered deemed

operational status subject to payment of the licence fee but that the Petitioner did not accept the same offer. According to the Respondent, the Petitioner had executed irrevocable and unconditional Bank Guarantees for due performance of the Licence Agreement and that the Bank Guarantee clearly indicated that the bank undertakes to pay immediately on the first written demand, without cavil, demur, argument, reservations, recourse, contest or protest, the amount demanded for encashment by the licensor, if in its opinion the licensee failed or neglected to perform and/or discharge its duties and obligations. The case of the Respondent is that it is entitled to invoke the two Bank Guarantees.

4. The case having come up for hearing, counsels for Petitioner and the Respondent were heard. The learned counsel for Petitioner, Mr. Vaidyanathan, argued that this Tribunal had already decided in the Millennium Delhi Broadcast case -- decision dated 14.9.2007 in Petition no.4 (C) of 2007 -- the circumstances in which the Bank Guarantee can be invoked. According to him, the decision in that case has not been stayed or set aside by the Hon'ble Supreme Court. Stating that there is a well-settled law in this regard, the counsel cited the case of **Hindustan construction Co. Limited v. State of Bihar [(1999) 8 SCC 436]**, wherein the Supreme Court held that "the terms of the Bank Guarantee are .. extremely material. Since the Bank Guarantee represents an independent contract between the bank and the beneficiary, both the parties could be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the Bank Guarantee, or else, the invocation itself would be bad."

5. According to the counsel, the Bank Guarantees can be invoked in this case only when any of the three following conditions, listed in Article 16 of the Terms and Conditions listed in schedule B of the Licence Agreement, arise.

- (i) If the licensee fails to deposit the licence fee within 7 days of the beginning of each year;
- (ii) If the licensee stops the service without giving one year's notice under clause 12.3;
- (iii) If the licensee is declared or applied for being declared insolvent or bankrupt.

6. According to the learned counsel, clause 3 of the Licence Agreement reads as follows: "The effective date of the licence period shall be reckoned from the date of issue of wireless operational licence by the WPC." He contends that the wireless operational licence not having been granted, the question of starting operations does not arise. The contention of the counsel is that the wireless operational licence itself not having been

issued, the question of failure to deposit the licence fee within 7 days of the beginning of each year did not arise. Likewise, the question of stoppage of service also did not arise since the service itself had never been commenced. Lastly, the licensee had been neither been declared insolvent or bankrupt nor has it applied for being so declared. The counsel argues the Petitioner's prayer must be granted since this case is on all fours with the decision of this Tribunal in the Millennium Delhi Broadcast case, *cited supra*.

7. The learned counsel for Respondent, Mr. Parasaran, argued that the Bank Guarantee in this case is an irrevocable guarantee and is independent of the contract. It does not refer to the contract and is an unconditional Bank Guarantee. In this context, he pointed out that the relevant portion of the Bank Guarantee reads as follows:

"NOW THEREFORE we hereby affirm that we are the Guarantor and responsible to you , on behalf of the Licensee up to a total of Rs. 7,40,00,000/- (Amount of Guarantee) Rs. Seven Crores Forty Lakhs Only (in words) payable and we undertake to pay you immediately, upon your first written demand and without cavil, demur, argument, reservations, recourse, contest or protest any sum or sums within the limit of Rs.7,40,00,000/- (Amount of Guarantee) as aforesaid without ever needing to prove or to show grounds or reasons for your demand for this specified therein and/or without any reference to the Licensee. Further, any such demand made by the licensor on the Bank shall be conclusive and binding notwithstanding any difference between the licensor and the licensee or any dispute pending before any court, arbitrator or any other matter whatsoever. This guarantee shall not be determined/discharged/affected by the liquidation, winding up, dissolution or insolvency of the licensee and will remain valid, binding and operative against the Bank."

8. The learned counsel contended that the facts of this case are different from the Millennium Delhi Broadcast case. His case is also that the facts in the *Hindustan construction Co. case, cited supra*, are at variance with the facts in this present case. According to him in the *Hindustan construction Co. case*, the Bank Guarantee was a conditional Bank Guarantee, whereas in the present case, the Bank Guarantee is an unconditional one. He also stated that the in the Hindustan construction Co. case was again reconsidered in the case of **Mahatma Gandhi Sahakara Sakkare Karkhane v. National Heavy Engineering Coop Ltd and Another [(2007)6 SCC 470]**, wherein the Apex Court held that "if the Bank Guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee."

9. We have carefully considered the arguments of both the counsels. The case law in respect of invoking Bank Guarantees is well settled. In the *Hindustan construction Co. Case*, the Bank Guarantee was a conditional one. The Bank Guarantee therein was furnished by HCCL in terms of the conditions for Advance

mobilisation loan and in terms of the provisions of the conditions of contract. The Bank Guarantee therein stated that the State bank of India (which provided the Bank Guarantee) "agree unconditionally and irrevocably to guarantee as primary obligator the amount not exceeding Rs. 10,00,000 (Rupees ten lakhs only) in the event that the obligations expressed in the said clause of the above-mentioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advanced mobilisation loan from the contractor under the contract." The Supreme Court held that while the bank no doubt used the expression "agree unconditionally and irrevocably" to guarantee payment to the Executive Engineer, these expressions were immediately qualified by the words-- "in the event from the contractor under the contract." The Supreme Court held that this condition clearly referred to the original contract between HCCL and the state of Bihar and therefore the bank had qualified its liability to pay the amount only if the obligations under the contract were not fulfilled by HCCL or HCCL has misappropriated any portion of the advanced mobilisation loan. The court held that the Bank Guarantee could be invoked only in the circumstances referred to in clause 9 whereunder the amount would become payable only if the obligations are not fulfilled or there was misappropriation.

10. This judgement was also considered by the Hon'ble Supreme Court in the ***Mahatma Gandhi Sahakara Sakkare Karkhane case***, cited *supra*. In this case, the Apex Court held that "if the Bank Guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the Bank Guarantee in terms of the Agreement entered between the parties has not been fulfilled." Referring to the ***Hindustan construction Co. case***, the Apex Court observed that "*this Court in the Hindustan construction Co. having referred to the terms of clause (9) of principal contract between the parties therein came to the conclusion that the bank guarantee specifically refers to the original contract and postulates that if the obligations expressed in the contract, are not fulfilled by HCCL, the right to claim recovery of the whole or part of the "advance mobilisation" then alone the bank was liable to pay the amount due under the guarantee to the Executive Engineer. The court found that the bank guarantee specifically refers to clause (9) of the principal agreement and it is under those circumstances it came to the conclusion that the amount covered by the bank guarantee becomes payable and the same could be invoked only in the circumstances referred to in clause (9) of the principal agreement. The bank guarantee executed by the bank in the instant case in favour of the appellant herein does not contain any such clause. Mere fact that the bank guarantee refers to the principal agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one. In the very said judgement this Court observed that: (SCC p. 442, Para 9)*

"9. What is important, therefore, is that the Bank Guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have

cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad." (emphasis supplied)

what is relevant, therefore, is the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee, we find the guarantee to be an unconditional one. The Respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the Bank Guarantee."

11. The question is whether in this case, the Bank Guarantee is a conditional Bank Guarantee or unconditional one. It is clear from the above case law that what is critical for consideration is whether or not a given Bank Guarantee is conditional. If it is conditional, then the conditions must be satisfied before the Bank Guarantee can be invoked. On the other hand, if it is an unconditional Bank Guarantee, then the party in whose favour the Bank Guarantee has been executed cannot be stopped from invoking/encashing the Bank Guarantee. In this case, the counsel for Respondent tried to show that the paragraph reproduced below is a clear indication that the Bank Guarantees an unconditional one.

"NOW THEREFORE we hereby affirm that we are the Guarantor and responsible to you, on behalf of the Licensee up to a total of Rs. 7,40,00,000/- (Amount of Guarantee) Rupees Seven Crores Forty Lakhs Only (in words) payable and we undertake to pay you immediately, upon your first written demand and without cavil, demur, argument, reservations, recourse, contest or protest any sum or sums within the limits of Rs.7,40,00,000/- (Amount of Guarantee) as aforesaid without ever needing to prove or to show grounds or reasons for your demand for the sum specified therein and/or without any reference to the Licensee. Further, any such demand made by the licensor on the Bank shall be conclusive and binding notwithstanding any difference between the licensor and the licensee or any dispute pending before any court, arbitrator or any other matter whatsoever. This guarantee shall not be determined/discharged/affected by the liquidation, winding up, dissolution or insolvency of the licensee and will remain valid, binding and operative against the Bank."

12. But the first paragraph of the preamble to the Bank Guarantee executed by The Bank of Nova Scotia, reads as follows:

"in consideration of the President of India, through Ministry of Information and Broadcasting, Government of India, Shastri Bhawan, New Delhi-110001 (the Licensor) **having agreed to grant a licence to Music Broadcast Pvt. Ltd**, "Park Plaza", 6th floor, 71, Park Street, Calcutta-700016 (hereinafter called "the Licensee") to establish, maintain and operate FM radio broadcasting service at Nagpur (similarly worded for Patna) **on the terms and conditions of the Licence Agreement** to be executed between the licensor and the licensee (hereinafter called the 'licence Agreement') wherein it has been stipulated that the Licensee shall furnish to the Licensor with a **Bank Guarantee** from a scheduled Bank for the sum specified therein **as security for the due observance and performance of the terms and conditions of the said licence"** (emphasis supplied)

13. Thus, the preamble to the Bank Guarantee itself clearly states that the Bank Guarantee was given only as security for the due observance and performance of the terms and conditions of the licence. Clause 1 of the Licence Agreement reads as follows:

"1. Unless otherwise mentioned in the subject or context appearing hereinafter, all the schedules i.e. A,B,C,D, annexed hereto including the Tender documents, Letter of Intent and the guidelines issued/or to be issued from time to time by the licensor and Wireless Operational Licence to be issued by the Wireless Planning & Coordination Wing in the Ministry of Communications, Government of India shall form part and parcel of this Licence Agreement. Provided, however, in case of conflict between the corresponding provisions of the aforesaid schedules and this Agreement, the terms set out in the main body of this Agreement shall prevail....."

14. The main body of the Agreement lists 18 clauses. There is no clause in the main body of the Agreement dealing with Bank Guarantee. The provisions relating to Bank Guarantee are contained in Article 16 of Schedule 'C' to the licence Agreement which contains the terms and conditions of the licence and which read as follows:

Article 16

BANK GUARANTEE

"16.1 A Bank Guarantee, equivalent to the first year's licence fee valid for 10 years from any Scheduled Bank in the prescribed form shall be submitted along with this Agreement by the Licensee. The Licensee shall keep the Bank Guarantee renewed till the expiry of the Licence period.

16.2 The licensor may encash the Bank Guarantee without any notice in any of the following conditions:

- (i) if the licensee fails to deposit the licence fee within 7 days of the beginning of each year
- (ii) if the licensee stops the service without giving one year's notice under clause 12.3
- (iii) if the licensee is declared or applied for being declared insolvent or bankrupt."

15. Thus, the Bank Guarantee has been given as security for the due observance and performance of the terms and conditions of the said licence. And the terms and conditions of the licence clearly stipulate that the Bank Guarantee can be invoked in the event of any of the three conditions given in Article 16. Given these facts, it is clear that the Bank Guarantee given by The Bank of Nova Scotia is a conditional Bank Guarantee, and following the judgements laid down by the Supreme Court, can only be invoked by the Respondent in the event of any of the three conditions listed in Article 16.

16. The next question is whether any of the three conditions have actually arisen, justifying the invoking of the Bank Guarantee. The argument of the learned counsel for Petitioner is that the term of the licence commences from the date of issuance of the wireless operational licence by the WPC wing of the department of telecommunications. And since the said licence has not been issued, the licence is not considered as having commenced. So the question of failure to pay within seven days of the commencement of the year does not

arise, and so is the question of stoppage of the service which had, in the first place, not commenced. clause 1.1 of the licence Agreement reads as follows: "1.1 The licence is granted for a period of ten (10) years reckoned from the date of issue of Wireless Operational Licence by the WPC, unless terminated earlier for the default or for insolvency or for convenience or for transfer of the Licence. This period is fixed and not liable to change or extension on any ground whatsoever." It is admitted that the wireless operational licence had not been given. The Respondent had stated that there was willful delay on the part of the Petitioner to apply for the requisite clearances. Besides, although the Petitioner was offered deemed operational status, the Petitioners did not accept the said offer. Irrespective of whether there is or is not evidence to support this contention, the fact remains that the licence was not issued and the service had not commenced. In the light of this, it must be held that the first two conditions listed in Article 16.2 of schedule C to the Licence Agreement have not met. Likewise, there is no contention that the Petitioner had applied for or had been declared insolvent or bankrupt. So, the third condition also has not materialised. Therefore, we hold that the Bank Guarantee in respect of both Nagpur and Patna cannot be invoked by the Respondent.

17. As regards the question whether this case is similar to that that of the Millennium Delhi Broadcast case, while the facts may be different in detail, the issues underlying the invoking of Bank Guarantee in both these cases are similar. In both the cases, the conditions listed for invoking the Bank Guarantee are same and the licence which would permit performance was also not issued.

18. We accordingly direct the Respondent to return the Bank Guarantees executed in favour of the Respondent by The Bank of Nova Scotia. Both the petitions stand disposed of accordingly.

.....J
(Arun Kumar)
Chairperson

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(J.S. Sarma)
Member

.....
(G.D. Gaiha)
Member