

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. 2332-2333 OF 2008**

UNION OF INDIA & ANR.

... APPELLANT(S)

Versus

**MILLENIUM DELHI BROADCAST
LLP ETC.**

...RESPONDENT(S)

J U D G M E N T

L. Nageswara Rao, J.

1. In the year 1999, a notice was issued by the Ministry of Information and Broadcasting, on behalf of Government of India inviting tenders for licensing of private F.M. broadcasting services at 40 centres across India. The said notice was issued pursuant to a decision taken by the Ministry of Information and Broadcasting to open Radio Broadcasting in the VHF FM band (87-108 MHz) with the following objectives :-

- Open up the FM Broadcasting for entertainment, education and information dissemination by commercial broadcasters.
- To make available quality programmes with a localised flavour in terms of content and relevance ; encourage new talent and generate employment opportunities directly and indirectly.
- Supplement the service of AIR and promote rapid expansion of the broadcast network in the country for the benefit of the society.

Clause 8 in the Tender Document thereof relates to license fee, auction process and license period. According to clause 8(f), a license fee has to be paid by each licensee every year in advance within seven days of the beginning of the year. For the first year, balance of the licence fee will have to be paid within 10 days of Wireless Planning & Coordination Wing's (for short "**WPC**") intimation that operational licence is ready to

be issued. Failure to do so will result in forfeiture of amount already deposited. The licence period will be reckoned from the date of issue of operational licence by **WPC**, Ministry of Communications. The Reserve Licence Fee for Delhi and Chennai for the first year was fixed at Rs. 125 Lakhs and Rs.100 Lakhs respectively. The respondent bid for allotment of a channel in Delhi and Chennai after depositing 50% of the Reserve Licence Fee. 11 Companies were declared as successful bidders for Delhi and Chennai. However, only 5 companies in Delhi and 4 companies in Chennai signed an agreement for operationalization.

2. On 27.10.2000, the respondent signed an agreement to operationalize F.M. Stations at Delhi and Chennai. The respondent was granted a licence to establish, maintain and operate FM Radio Broadcasting Station within Delhi and Chennai, on a non-exclusive basis, for a period of 10 years . The effective date of the licence period shall be reckoned from the date of issue of the Wireless Operational Licence (for short "**WOL**") by

the **WPC**. Article 2.1 of Schedule C to the agreement requires the licensee to complete installation of broadcasting facility including studios, transmitter, infrastructure etc. and commission the Applicable System within 12 months from the date of frequency earmarking by **WPC**. According to Article 2.3 of Schedule C, the licensee was to apply for **WOL** for frequency allotment and SACFA clearance within three months from the date of issuance of letter of intent. Article 16 of Schedule C refers to Bank Guarantee. This article requires the licensee to furnish a Bank Guarantee which is equivalent to the first year's licence fee. The said bank guarantee is valid for a period of 10 years and has to be issued by a Scheduled Bank in the prescribed form which shall be renewed till the expiry of licence period. Article 14 of Schedule C refers to Dispute Resolution and Jurisdiction. According to the said clause, in case of a dispute or difference arising under this licence, the same shall be referred to the sole arbitration

of the Secretary, Department of Legal Affairs or his nominee.

3. On 30.10.2000, respondent applied for frequency allocation. On 29.12.2000, the respondent was allocated frequency 94.6 by the **WPC**. A notice of termination of the agreement was issued by the respondent on 27.08.2002. Thereafter, the respondent preferred an arbitration petition before the High Court of Bombay seeking an injunction restraining the appellants from encashing the Bank Guarantee. The High Court of Bombay passed an interim order dated 26.11.2002 in favour of the respondent and directed the appellant to keep the bank guarantee alive.

4. On 02.01.2006, the respondent filed a petition under Section 14A(1) of the Telecom Regulatory Authority of India Act, 1997 before the Telecom Disputes Settlement and Appellate Tribunal (for short "Tribunal") for the following reliefs :

“(A) Declare that Petitioners delay in commencing broadcast on 29.08.2002 is

condoned due to *bona fide* reasons as applicable to other broadcasters in Chennai vide order of Union Cabinet dated 13.07.2005.

(B) Hold and declare that the Applicant was not required to deposit the balance of the first year's license fee on 29.08.2002 even before the WPC's intimation that the wireless operational license was ready for being issued.

(C) Hold and declare that the Respondent could not have issued the Deemed Operational Status to the Petitioner on 29.08.2002 which would have reduced the effective license period as stated in the license agreement.

(D) Hold and declare that the action of the Respondent Union of India to invoke and encash the bank guarantee of Rs.7.125 Crores is arbitrary, high handed and is contrary to the license agreement and the tender document and further restrain the Union of India from encashing the bank guarantee.

(E) Direct the Respondent to return the Bank Guarantee for an amount Rs.7.125 Crores to the Petitioner.

(F) Direct the Respondent to refund with penal interest, the advance license fee of Rs.62.5 Lakhs paid by the Petitioner in March 2000 and the earnest money deposit (EMD) of Rs. 2 Lakhs paid by the Petitioner in October 1999 keeping in mind the condonation of delay due to *bona fide* reasons as per the order of the Union Cabinet dated 13.7.2005.

(G) Direct the Respondent to compensate the petitioner to compensate the Petitioner with a sum of Rs.40 Lakhs which is the approximate cost incurred by the Petitioner in keeping its Bank Guarantee of Rs.7.125 Crores alive till date and a sum of Rs.20 Lakhs in maintaining its operations from March 2000 till 29.8.2002.

(H) Pass such other relief as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."

5. The Tribunal, by an order dated 14.09.2007, allowed the said petition and declared the invocation of bank guarantee by the appellant as illegal. The Tribunal further directed the appellants to return the bank guarantees to the respondent. Therefore, the appellants have approached this Court by filing these appeals which have been pending consideration since 2008.

6. The respondent contended before the Tribunal that the conditions for encashment of the bank guarantee were not satisfied and therefore, the invocation of bank guarantee by the appellants was unjustified. It was argued before the Tribunal, that only 5 bidders were left as 6 out of 11 successful bidders dropped out. Resultantly, cost of co-location had to be borne by the 5 surviving bidders which originally was to be shared by

the 11 bidders. Consequently, this resulted in high escalation of the cost.

7. The respondent further contended that several representations were made by the broadcasters to the appellants for appointment of an Integrator, and for extension of time as completion of common transmission infrastructure within the specified timeframe was not possible. The difficulties of the Broadcasters were considered favourably and the appellants agreed for extension of time. However, on 06.06.2001, the Broadcasters were directed to utilize the facilities of Prasar Bharati. Having no alternative, the Broadcasters were forced to enter into an agreement with Prasar Bharati for the usage of All India Radio's transmission infrastructure. On 01.05.2002, the Broadcast Engineers Consultants of India Ltd. (**BECIL**) was appointed as Integrator. In a meeting held on 08.08.2002, it was proposed by **BECIL**, that the timeframe for commissioning the co-located infrastructure be extended by a period of 24 weeks from the date of the meeting. As

the appellant was insisting on payment of balance 50% licence fee for the first year though there was no occasion for the said payment, the respondent terminated the licence agreement on 28.08.2002 and surrendered the frequency.

8. The respondent relied on the official Policy on Expansion of FM Radio Broadcasting Services through private agencies in July, 2005 wherein it was decided to condone the delays in operationalization in the case of nine channels in the three metros viz., Delhi, Chennai and Kolkata. It was argued on behalf of the respondent before the Tribunal, that there was no intentional delay on its part in operationalizing the said FM Stations. According to the respondent, as **WOL** was not issued by **WPC**, the question of payment of licence fee did not arise.

9. The appellants contended before the Tribunal that there was no error in invoking the bank guarantee clause as the respondent had failed to abide by the terms of the agreement in not operationalizing the FM

service within the time schedule. The Tribunal was convinced that the conditions enabling invocation of bank guarantee were not satisfied. The Tribunal further held that the bank guarantee which was essentially a performance bank guarantees could not have been invoked as the stage of performance of the license agreement did not arise.

10. We have heard Mr. Nachiketa Joshi, learned counsel appearing for the appellant and Mr. Nikhil Majithia, for the respondent. Mr. Joshi relied upon the notice inviting tender document and the agreement entered between the parties to submit that there is clear non-compliance of the time lines fixed in the licence. The respondent, unlike the other similarly situated licensees, could not successfully operationalize the services and subsequently, obtained an interim order by filing a petition under Section 9 of the Arbitration and Conciliation Act, 1996. The respondent did not take any steps to refer the matter to arbitration. Mr. Joshi also found fault with the order passed by the Tribunal wherein

the conditions prescribed in Clause 9 of the tender document pertaining to bank guarantee were not satisfied. He submitted that licensee had failed to deposit the licence fee within 7 days of the beginning of first year itself which gave rise to invocation of the Bank Guarantee by the appellants.

11. Mr. Majithia, learned counsel appearing for the respondent, argued that the delay in operationalizing the services was due to unforeseen circumstances. A co-located transmission infrastructure was to be set up for operationalization of 11 successful bidders, the cost of which was to be shared by all of them but as 6 bidders backed out, the remaining 5 companies had to bear the additional burden. Realising the difficulties faced by the Broadcasters, Government of India decided to extend time. In a meeting held on 06.06.2001, Ministry of Information and Broadcasting waived the co-location requirement and insisted the private broadcasters utilize Prasar Bharati's infrastructure for co-locating the transmitters. **BECIL** was appointed as system

Integrator. On 08.08.2002, the Ministry of Information and Broadcasting informed the respondent that a 'Deemed Operational Licence' shall be issued pursuant to which it would become mandatory for payment of first year license fee. **BECIL** informed that it would require another 6 months to set up the co-located infrastructure. The respondent, having no other option, decided to terminate the contract. Mr. Majithia supported the judgment of the Tribunal that there was no occasion for invocation of the bank guarantee as **WOL** was never issued. According to him, there was no provision for issuance of a Deemed Operational Licence. He referred to a judgment of the Bombay High Court dated 26.11.2002 in an arbitration petition which dealt with similar facts and held that the bank guarantees could not have been invoked. It was argued on behalf of the respondent, that the appellant should be directed to refund 112.5 Lakhs which was deposited as reserved licence fee and Rs.3 Lakh deposited as EMD.

12. After considering the submissions of both the parties and carefully examining the material on record, we are of the opinion that the appeals deserve to be dismissed for following reasons.

Clause 9 of the tender document enables the appellant to encash the bank guarantee, in case of failure on the part of the licensee either to deposit license fee within 7 days of the beginning of each year or if the licensee stops the service without giving one year's notice. The bank guarantee can also be invoked if the licensee is declared or applies for being declared insolvent or bankrupt. There is no dispute that the licensee did not commence its operations and therefore the second condition does not apply. Admittedly, the third condition is not applicable to the facts of the case. According to the appellant, bank guarantee was invoked due to failure on the part of the licensee to deposit the licence fee within 7 days of beginning of the year. Essentially, the bank guarantee given by the respondent is a performance bank guarantee and was intended to

ensure the due performance of the license agreement. A perusal of the conditions of the relevant clauses of the agreement clearly show that according to Article 1.1 of Schedule 'C' to the agreement, the license was granted for period of 10 years which has to be reckoned from the date of issuance of **WOL** by the **WPC**. Admittedly, **WOL** was never issued by **WPC**. A Deemed Operational License, which was to be issued by the appellant, was not contemplated in the agreement. We are of the opinion, that Tribunal did not commit any error in its interpretation of the clause pertaining to bank guarantee by holding that the conditions provided therein have not been satisfied for the invocation of the bank guarantee.

13. In view of the aforesaid findings, it is not necessary for this Court to adjudicate on the other points that have been raised by the respondent in justifying the delay in operationalizing the services.

14. We are not inclined to entertain the cross-objections of the respondent seeking refund of advance licence fee as the said point was not argued before the

Tribunal. Thus, we reject the request of the respondent that the appellants should be directed to refund the advance license fee and EMD.

15. For foregoing reasons, the judgment of the Tribunal is upheld. The appeals are dismissed.

.....J.
[L. NAGESWARA RAO]

.....J.
[B. R. GAVAI]

**New Delhi,
May 02, 2022**