

ORDER

Though many collateral facts have been mentioned and contentions have been raised in this Petition, what really calls for our consideration is the validity of the letter of revocation dated 20th May, 2003 issued by the Respondents revoking the Radio Broadcasting Licence granted to the Petitioner.

For this purpose, we will only refer to such of those facts which are necessary for the disposal of the above question and for the grant of both substantial and consequential reliefs.

The Petitioner was one of the successful bidders for the grant of licence to operate FM radio broadcasting service at Mumbai along with four other licensees. In this petition, the Petitioner contends that the said broadcasting licence issued to it was revoked by the impugned order of the Respondents dated 20th May, 2003 without giving an opportunity of hearing or the required notice of 30 days, which fact is not denied by the Respondents. Consequent to this order of revocation the Petitioner was constrained to stop the Broadcasting.

The Petitioner challenged the said revocation before the Hon'ble High Court of Delhi by way of Writ Petition No.4195 of 2003 wherein the High Court was pleased to pass an interim order permitting the Petitioner to recommence the radio broadcasting in accordance with the interim Order of the High Court of Delhi, the Petitioner recommenced the radio broadcasting on its individual interim facilities w.e.f.2nd July, 2003 on certain terms and conditions imposed by the Hon'ble High Court of Delhi in the above Writ Petition. The Petitioner also submits that pursuant to the revocation of the licence, the Respondents had enforced a Bank Guarantee given by the Petitioner to the extent of Rs.9.75 Crores. The Petitioner also submits that during the pendency of the Writ Petition certain sums of money demanded by the Respondent have also been paid, but in spite of Order of the High Court permitting the Petitioner to continue the service of broadcaster, it had to discontinue the same in view of some onerous conditions imposed on it by the Respondents for renewing its licence for the subsequent licence year.

The above Writ Petition before the High Court came to be withdrawn by the Petitioner on this Tribunal's being conferred with the jurisdiction to adjudicate and settle the disputes involved in the Writ Petition in view of the amendment to the Telecom Regulatory Authority of India Act.

The Petitioner submits that the revocation of the Licence being in

contravention of the clause 9 of the Licence Agreement dated 27th October, 2003 the said revocation is liable to be set aside and consequently, the Petitioner is entitled to utilize the licence granted to it on such terms and conditions as are applicable to other similarly situated licensees. The Petitioner also contends that because of the illegal revocation of its licence, the Petitioner could not make use of the said licence; hence it is entitled to a pro-rata refund of the licence fee for the period between 28th May, 2003 and 3rd July, 2003 (the dated between the order of revocation and the Order of the High Court permitting the broadcaster).

The Respondents in their reply have stated that the Petitioner defaulted in the payment of the licence fee for the second year. Hence as per the terms and conditions of the licence, the Respondent was constrained to revoke the same for the said default. The Respondents have contended that it had the right to do so under the various terms and conditions of the licence which empowers the Respondent to revoke the licence without giving any notice.

In view of the above pleadings, it becomes necessary for us to examine these clauses and Articles of the terms and conditions for the licence governing revocation of licence and decide whether issuance of a notice as well as giving a reasonable opportunity of hearing is a condition precedent for revocation of a licence.

This Petition was heard at length on 5th September, 2005 when we heard Mr. Neeraj Kishan Kaul, Senior Advocate for the Petitioner and Mr. Suresh Kait, Advocate for the Respondents. At the end of the hearing on that day, time was sought to explore the possibility of arriving at a settlement, hence the matter was adjourned to 8th September, 2005. On that date since the Tribunal was busy with another part heard matter, it was listed for further hearing to 19th September, 2005. On this date the learned counsel for the Respondents was not present, hence after hearing the learned senior counsel for the Petitioner, since we had already heard Mr. Suresh Kait on the earlier date of hearing, we were not inclined to grant any adjournment. At that point of time Shri. L.P. Singh, Assistant Engineer, Ministry of Information and Broadcasting who was present in the Court expressed his desire to supplement the argument already advanced by Mr. Kait which we have permitted and heard Mr. L.P. Singh.

Mr. Neeraj Kishan Kaul, learned senior counsel for the Petitioner has placed heavy reliance on clause 9 of the Licence Agreement which reads thus: -

“9. The Licensor may at any time revoke the Licence by giving a written

notice of 30 days, to the Licensee after affording a reasonable opportunity of hearing on the breach of any of the terms and conditions herein contained or in default of payment of any consideration payable as provided hereunder.”

(Emphasis supplied)

According to the learned counsel, the language of this clause is mandatory, hence non-compliance of the two requirements mentioned in the said clause i.e. (a) giving of notice of 30 days; and (b) affording a reasonable opportunity of hearing on the breach of any of the terms and conditions contained in the licence; would vitiate order of revocation.

Anticipating the defence of the Respondents the learned counsel contended that Article 1.2 of Schedule ‘C’ of the terms and conditions of licence does not permit the Respondents to revoke the licence without notice. According to the learned counsel it only permits the forfeiture of the bank guarantee given by the licensee. Apart from analyzing this Article, he has also placed reliance on Article 16.2 of Schedule ‘C’ to the licence, which reads thus:-

“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 the 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 applies for being declared insolvent or bankrupt.”

Thus, placing reliance on the language of the Article 1.2 and 16.2 the learned counsel for the Petitioner has submitted that it is only the bank guarantee which could be revoked without notice and not the revocation of licence.

He further contended that assuming that there is a conflict between clause 9 of the licence conditions and Article 1.2 of Schedule ‘C’ then in view of clause 1 of the terms of agreement of licence what is mentioned in the main body of the agreement will prevail over conflicting Article in Schedule ‘C’. Therefore, he contends that since clause 9 is in the main body of the Agreement, the requirement of issuance of 30 days notice and an opportunity of hearing would prevail over the conditions found in Article

1.2 of Schedule 'C'.

Shri. Suresh Kait, learned counsel for the Respondents whom we heard on the previous date of hearing, as well as Shri. L.P. Singh who supplemented his arguments have placed heavy reliance on Article 1.2 of Schedule 'C' and contended that the

Respondents had a right to revoke the licence without any notice or an opportunity of being heard. The said Article 1.2 reads thus: -

“1.2 The Licensee shall pay the Licence fee every year in advance within seven days of the beginning of the year failing which the Licensor reserves the right to revoke the Licence and encash & forfeit the bank Guarantee furnished by the Licensee without giving any notice. This is without any prejudice to any other action that may be taken by the Licensor under the terms and conditions of the Licence.” **(Emphasis Supplied)**

It is true that on a first flush one gets an impression that under this clause the licensor has a right to revoke the licence and to encash and forfeit the Bank Guarantee without giving any notice. But on a careful reading of this Article and bearing in mind rights and obligations of the parties under the licence agreement, we cannot accept the argument advanced on behalf of the Respondents. This right to do an act without giving any notice by the licensor found in Article 1.2, in our opinion, is confined to the encashment and forfeiture of the Bank Guarantee only and not to revoke the licence without giving any notice. The word “and” found in Article 1.2 will have to be read disjunctively so as to confine the right of the licensor only to forfeit the Bank Guarantee without giving any notice and not conferring a right to the licensor to revoke the licence without giving any notice. Any interpretation as suggested by the learned counsel for the Respondent empowering the licensor to revoke the licence without any notice would run counter and will be in conflict with clause 9 of the terms of the licence agreement which provides for a notice of 30 days and a reasonable opportunity of being heard.

Assuming for argument sake that Article 1.2 of Schedule 'C' of the terms and conditions of licence does empower the licensor even to revoke the licence without notice then the said Article will be in direct conflict with clause 9 of the main terms of the agreement, in which event Article 1 of the Agreement will come into play. The relevant part of the said clause reads thus:-

“.....provided, however, in case of conflict between the corresponding provisions of the aforesaid Schedule and this Agreement, the terms set out in the main body of this Agreement shall prevail.....”

Therefore, if it is to be held that there is a conflict between clause 9 of the Agreement and Article 1.2 of the Schedule ‘C’, clause 9 prevails by virtue of the language in clause 1 of the Agreement since Article 1.2 is in the Schedule to the licence while clause 9 is contained in the main body of the agreement.

Even otherwise, a perusal of the scheme and object of the terms and conditions of the licence clearly supports the above view of ours. Article 12 of Schedule ‘C’ refers to termination of licence. Though this Article refers to termination and not revocation as contemplated in Article 1.2, still it has a direct bearing on the object and scheme of the terms and conditions of the licence. This Article reads thus: -

“12.1 Termination for Default-

The Licensor can terminate the Licence of the Licensee in case of:

- i) Default in payment of the Licence Fees;
- ii) Breach of any terms and conditions contained in this Agreement.

The Licensor may, without prejudice to any other remedy for breach of the conditions of Licence give a written notice to the Licensee at its registered office 30 days in advance before terminating this Licence.”

The language of this Article which requires the issuance of 30 days notice before termination of licence also supports the view expressed by use herein above.

Similarly, language of Article 16.2 referred to hereinabove, also indicates that it is only the bank guarantee which could be encashed without any notice.

In above view of ours, we have no hesitation in holding that the impugned letter of the Respondent dated 20th May, 2003 revoking the licence of the Petitioner dated 27th October, 2000 as being contrary to the terms of licence agreement hence is unsustainable.

The learned counsel for the Respondents then contended that since before the High Court on 20th April, 2004, Petitioner himself has submitted that it does not wish to broadcast w.e.f 29th April, 2004, the Petitioner has no cause of action to approach this Tribunal. We cannot treat this submission

made by the petitioner before the High Court in isolation. When its licence was revoked the Petitioner approached the High Court challenging the same on various grounds and obtained an interim order permitting it to broadcast and it did broadcast from the date of the order till the date of its submission made before the court on 20th April, 2004. The learned counsel for the Petitioner submitted that though the High Court by the interim order had permitted the Petitioner to broadcast during the pendency of the Writ Petition, the continuation of Broadcasting became impossible because of the demand made by the Respondent as per its letter dated 19.04.2004, which compelled the Petitioner to submit to the High Court on 20.04.2004 that it will not be broadcasting any more. The learned counsel also pointed out from the correspondence in records that it had reserved its right to obtain a licence in future. In this factual background, we think that the submission of the Petitioner before the High Court that it will not broadcast will not amount to an abandonment of the cause of action.

We have noticed hereinabove that the learned counsel for the Petitioner has contended that between the periods 28th May, 2003 to 3rd July, 2003 Petitioner was compelled to stop broadcasting because of the illegal revocation of licence and in spite of the same, the Respondents have collected the licence fee for the said period by enforcing the bank guarantee. Since the act of revocation is bad in law and consequent to the revocation the Petitioner that the Respondents could not have collected the licence fee for the said period taking advantage of their own erroneous and illegal order. Therefore, in our opinion, the Petitioner is entitled to pro-rata rebate in the licence fee for the said period between 28th May, 2003 and 3rd July, 2003.

Since we are setting aside the order of revocation dated 20th May, 2003 in the eye of law, the Petitioner is entitled to have the licence continued for the duration for which it was originally issued, provided he pay the necessary licence fee for the period of his broadcast on prevailing terms as was in existence bearing in mind the order of the High Court 12.04.2005 wherein it is recorded that the Petitioner shall not be liable for any further amount on account of the FM Broadcast which was the subject matter of the Writ Petition.

We are informed that during the interregnum the Respondent /Government had come out with a new policy which entitles the existing licence holders to migrate from fixed licence fee regime to revenue sharing regime which the Petitioner submits the other licensees similarly situated have been permitted. If that be so, the Petitioner shall also be entitled to the said benefit of the change in licence fee. However, since Petitioner's bank guarantee has

been appropriated towards non-payment of licence fee for the period for which the licence fee was payable, petitioner shall now on demand from the Respondents furnish a bank guarantee as required under the terms and conditions of the licence.

As stated above, the Petitioner is entitled to pro-rata refund for the licence period between 28.05.2003 and 03.07.2003. The Petition is allowed to the above extent. There shall be no orders as to costs.

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(N. Santosh Hegde)
Chairperson

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(Vinod Vaish)
Member

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(D.P. Sehgal)
Member

