

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

DATED 14th SEPTEMBER, 2007

Petition No.4(C) of 2007

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Millenium Delhi Broadcast Pvt. Ltd.
Through its Director, Mr.Gautam Radia
215, Shah & Nahar Estate
Off. E. Moses Road, Worli
Mumbai – 400 018

....Petitioner

Versus

1. Union of India
through:
The Secretary
Ministry of Information & Broadcasting
Shastri Bhavan
New Delhi – 110 001

2. The Secretary
Ministry of Communications
Sanchar Bhavan
New Delhi

....Respondents

And

Petition No.5(C) of 2007

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Millenium Chennai Broadcast Pvt. Ltd.
Through its Director, Mr.Gautam Radia
215, Shah & Nahar Estate
Off. E. Moses Road, Worli

Mumbai – 400 018

....Petitioner

Versus

1. Union of India
through:
The Secretary
Ministry of Information & Broadcasting
Shastri Bhavan
New Delhi – 110 001

2. The Secretary
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Sanchar Bhavan
New Delhi

....Respondents

BEFORE:

**HON'BLE MR.JUSTICE ARUN KUMAR, CHAIRPERSON
LT.GEN.(RETD) D.P. SEHGAL, MEMBER**

For Petitioner	:	Mr.Neeraj Kishan Kaul, Sr. Advocate with Mr.Nikhil Majithia, Mr.Joseph Pookatt, Advocates
For Respondents	:	Mr.P.P. Malhotra, Additional Solicitor General with Mr.Vineet Malhotra, Advocate

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ORDER

In these petitions the petitioner prays for injunction against the respondent from encashing the bank guarantees furnished by the petitioner to the respondent. Prayer is also made that the respondent be directed to return the bank guarantees to the petitioner.

The respondent opened up the business of FM Radio broadcasting to private operators in October, 1999 and issued tender documents for that purpose. As per instructions for applicants {Clause 8(f)}, licence fee had to be paid by each licensee every year in advance within 7 days of the beginning of the year. For the first year, balance of the licence fee was to be paid within 10 days of WPC's intimation that operational licence is ready to be issued. Failure to do so was to result in forfeiture of the amount already deposited. The licence was for a period of 10 years and the licence period was to be reckoned from the date of issue of operational licence by Wireless Planning and Coordination (WPC) Wing, Ministry of Communications.

The minimum reserve licence fee to be paid by each licensee at each centre in advance for the first year of licence period was given in Annexure-1 to the instructions document. The reserve licence fee was different for each city. For instance, for the city of Delhi, which is the subject matter in the present petitions, it was Rs.125 lakhs. All applicants desirous of participating in auction process had to deposit 50% of the reserve licence fee for the first year as prescribed in Annexure-1 vide Clause 8(b). Petitioner deposited 50% of licence fee reserved in case of Delhi and Chennai. The licence fee was payable by each licensee every year in advance within 7 days of the beginning of the year. The relevant clause is Clause 8(f) which is as under:

“8(f) The licence 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 WPC's 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 Wireless Planning & Coordination wing (WPC), Ministry of Communications.”

Another relevant clause in this connection is Clause 10(e) which is as under:

“10(e) WPC shall issue the necessary operational licence, the date of which shall be reckoned as the beginning of licence period. WPC operational licence

shall be issued after successful completion of all necessary clearances, frequency coordination and payment of licence fee and royalty for that licence, in accordance with norms and instructions prescribed from time to time.”

This clause shows that obligations of the parties regarding operation of the licence commenced only with the issue of Operational Licence by the WPC Wing.

The clause regarding furnishing of bank guarantee contained in the document containing instructions to applicants runs as under:

“9. BANK GUARANTEE

The successful applicant shall be required to furnish a Bank Guarantee valid for the entire licence period equivalent to an amount of the first year licence fee as arrived at vide Clause 7 above. The Bank Guarantee can be encashed by the Government in either of the following conditions, namely;

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

This is not disputed that in terms of the above provision regarding furnishing of bank guarantee, the petitioner furnished bank guarantees with respect to the requisite amounts for the cities involved i.e. Delhi and Chennai. It is the case of the petitioner that the occasion has not arisen which could permit the respondent to invoke the bank guarantees. None of the three conditions mentioned in Clause 9 above have come into play. So far as condition under (i) is concerned, it comes into play on the failure of the licensee to deposit licence fee within 7 days of beginning of each year. This clause read with Clause 8(f) shows that the condition about failure to deposit licence fee within 7 days every year is about licence fee for each year, but for this occasion never arose. WPC's intimation that operational licence is ready to be issued was never received. Therefore, according to learned counsel for petitioner condition (i) has no application and cannot be invoked for

encashment of the Bank Guarantee. Under condition (ii), the bank guarantee can be invoked if the licensee stops the service without giving one year's notice. This condition also does not come into play in the present case because the service never became operational. The licence to operate the service was never granted to the petitioner, therefore, the petitioner never operated the service and when the service was never operated, the question of stopping the service does not arise nor does the question of one year's notice arise. Condition (iii) is nobody's case, therefore, need not be discussed.

To make good his submissions regarding condition (i) and (ii) never coming into play, Mr. Neeraj Kaul, learned senior counsel for the petitioner submitted that there were practical difficulties in making the service operational. In March, 2000 open auction was held to auction 11 FM licences in Delhi to private parties who were determined eligible to bid. After multiple rounds of bidding, 11 successful bidders emerged. 6 out of 11 successful bidders defaulted which left only 5 bidders in the field. As a result cost of co-location which was earlier to be borne by 11 parties had to be now borne by 5. This resulted in huge escalation in the cost. Vide letter dated 29th December, 2000 frequency 94.6 was allocated to the petitioner by the WPC Wing and the petitioner was required to operationalize the station from co-located site within 12 months i.e. 29th December, 2001. The broadcasters made various appeals to respondent for appointment of an Integrator and requested for extension of time as creation of common transmission infrastructure was not possible within the specified period. In the various meetings held with the officials of the respondent, they appreciated the difficulties of the broadcasters and agreed for extension of time. Reference was invited to minutes of the meeting held on 6th June, 2001. Suddenly, the Government took a U-turn and insisted on use of infrastructure of All India Radio, thus, withdrawing the approval to set up transmission facilities granted in the meeting held on 6th June, 2001. The broadcasters had no option

but to sign agreements with Prasar Bharti for use of transmission infrastructure of A.I.R. By letter dated 31st December, 2001, respondents extended the time for setting up of co-located facilities by 8 months i.e. from 29th December, 2001 to 29th August, 2002. The licensees thereafter negotiated with various Integrators to integrate the transmission infrastructure of the broadcasters on the A.I.R. Tower. Mediacast India who was nominated Integrator withdrew from the Indian market on 25th June, 2002. On 1st May, 2002 an MOU was signed with Broadcast Engineers Consultants of India Ltd. (BECIL) appointing them as the Integrator and a sum of Rs.61.60 lakhs was paid to them towards 90% of the cost of putting up the co-located transmission infrastructure. According to BECIL, it was to take further 24 weeks to commission the co-located transmission infrastructure. Even though as per the terms of licence the stage for payment for balance 50% licence fee for the first year did not arise, the respondents kept on demanding the same. In these circumstances the petitioner terminated the licence agreement on 28.08.2002 and surrendered the frequency. Only 3 licensees started broadcasting in Delhi from a co-located transmission facility after obtaining Wireless Operational Licence from WPC Wing on 1st May, 2003. For them the respondent kept in abeyance payment for second year's annual licence fee which shows that the parties who ultimately operated broadcasting service faced difficulties which were appreciated by the respondent and for them payment of licence fee was deferred. This is the factual position according to the petitioner. In this behalf, the learned counsel invited our attention to the official Policy on Expansion of FM Radio Broadcasting Services through Private Agencies in July, 2005 wherein it is recorded in Para 6 as under:

“6. Condone Delays in Operationalization in Three Metros: In Delhi, Chennai and Kolkata, where Government insisted on co-location, the Government extended the time limit for operationalizing the channels from December 2001 to August 2002. However, in these three metros co-location could not be achieved even by the end of the extended period in August

2002. Finally Government intervened in July 2002 and appointed BECIL as a system integrator to provide co-location facilities and common transmission infrastructure in Delhi, Chennai and Kolkata. With BECIL setting up the common infrastructure, 9 channels got operationalised within nine months i.e. by the end of May 2003. Since the delay in operationalization occurred on account of bona fide reasons, Government has decided to condone delays in operationalization in the case of the nine channels in the three metros of Delhi, Chennai and Kolkata and reckon the dates of actual operationalization as due dates for liability to pay annual license fees.”

It was submitted by the learned counsel for the petitioner that the petitioner had to deposit substantial amount by way of 50% of the reserved price for the first year regarding both the licenses for Delhi and Chennai and the said amounts were still lying with the Government. The stage for payment of yearly licence fee did not arise because the WOL licence was never issued by the WPC Wing. As per the relevant clauses, the licence period has to be counted from the time of issue of WOL licence (Operational Licence). Therefore, licence period never came to be counted. The above referred conditions contained in the instructions for applicants are repeated in the licence agreement. They were not disputed by the learned ASG appearing for the respondent. However, Respondent insists on payment of licence fee.

The learned counsel for petitioner brought to our notice the fact that the licence contained an Arbitration Clause. The petitioner filed an application under Section 9 of the Arbitration & Conciliation Act before the Bombay High Court seeking injunction against encashment of the Bank Guarantee. The Court granted an injunction against encashment of the bank guarantee vide order dated 26th November, 2002. Another party situated like the petitioner had gone in for arbitration and the Additional Secretary to the Government of India who was appointed as the sole Arbitrator made an award in favour of the said

party rejecting the stand of the Government on encashment of the Bank Guarantee. The award is dated 31st May, 2005.

The respondent also terminated the license vide its letter dated 29th September, 2005 in which it also threatened to encash the bank guarantee. On the one hand the respondent threatens to encash the bank guarantee while on the other hand, under the new FM Broadcasting Policy announced on 13th July, 2005, they accept the reasons for delay vide Para 6 quoted above and announce that Government condones the delay in operationalizing the service in Delhi, Kolkata & Chennai..

The main argument advanced on behalf of the respondent by Shri P.P. Malhotra, learned ASG was that the bank guarantee is an agreement between the licensor and the beneficiary and licensor cannot be injuncted from encashing the same at the instance of the petitioner. He referred to the terms of the bank guarantee to canvass that it was in absolute terms and the Government had the right to invoke the same. Further, the learned ASG tried to blame the petitioner for the delay. In our view, in view of the minutes of the various meetings between the Government officials and the representatives of the private operators, copies of which have been placed on record, and the final policy regarding FM broadcasting announced on 13th July, 2005, this argument about blame on account of delay being foisted on the petitioner is not open to the respondent.

Regarding the argument that bank guarantee can be invoked on the strength of its own terminology so far as legal proposition is concerned there can be no quarrel. Point is what is to happen to the licence agreement as well as the instructions to applicants which were issued prior to the licence agreement containing the clause regarding bank guarantee. This clause is there at the instance of the respondent. Can the respondent be permitted to ignore the same? In this clause conditions for invocation of the bank

guarantee are contained. None of the conditions which enable invocation of the bank guarantee is satisfied. If the respondent itself says that it will invoke the bank guarantee only in given circumstances, can it be permitted to invoke the same in the absence of those circumstances? In our view the answer is clear no. It may be correct that the bank guarantee is an agreement between the bank and the beneficiary, yet it is settled law that under certain circumstances invocation of the bank guarantee at the instance of the person who has furnished bank guarantee can be interjected. Such may be rare cases of special equity, fraud and irretrievable damage. These are the conditions recognized by the Apex Court wherein bank guarantees can be interjected. The present is a case in which one of these conditions is attracted. The respondents says that it will invoke bank guarantee only on occurring of one of the three events in clause 9. None of the events has occurred. How can respondent be allowed to go back on its own promise and invoke the bank guarantee? In our view, the respondent cannot be permitted to invoke the bank guarantees in question. We order accordingly.

The next question which arises for consideration is the prayer of the petitioner that respondent be directed to return the bank guarantees to the petitioner. We have gone through the bank guarantees furnished by the petitioner to the respondent in these cases. These are basically performance bank guarantees and are intended to ensure due performance of the licence agreement. In the present case the stage of performance of the licence agreement never came nor will it ever come so far as petitioner is concerned. The licence which could permit performance was never issued. The agreement stands terminated by both the parties. Whether termination was right or wrong is not an issue arising before us in the present case. We have only to note that in the present circumstances there will be no occasion for performance of the licence agreement. The bank guarantees being performance bank guarantees, therefore, need not be kept alive and need not be kept with the respondent. In our view to allow the bank guarantees to

remain with the respondent, when we have injuncted the respondent from encashing the same, is neither necessary nor just nor proper. Therefore, we direct the respondent to return the concerned bank guarantees to the petitioner forthwith.

The petitions stand disposed of.

.....**J**
(Arun Kumar)
Chairperson

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(D.P. Sehgal)
Member