

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

**DATED 29<sup>TH</sup> July, 2010**

**Petition No. 252(C) OF 2009**

Vertex Broadcasting Company Pvt. Ltd.

...Petitioner

**Vs.**

Union of India

...Respondent

**BEFORE:**

**HON'BLE MR.JUSTICE S.B. SINHA, CHAIRPERSON**

**HON'BLE MR. G. D. GAIHA, MEMBER**

**HON'BLE MR. P.K.RASTOGI, MEMBER**

For Petitioner

: Mr. Sudhir K. Makkar, Advocate  
Mr. Ankit Malhotra, Advocate

For Respondent

: Mr. Atul Nanda, Advocate  
Ms. Malika Gahlot, Advocate

**J U D G E M E N T**

**S.B. Sinha**

**Introduction :**

Legality and/or validity of encashment of a bank guarantee furnished by the petitioner herein by the respondent on the alleged ground of non-payment of the license fee in terms of a notice inviting tender is in question in this petition.

**Background Facts :**

The admitted fact of the matter is as under :-

- (a) Respondent floated a tender inviting offers for FM broadcast through private agencies upon grant of licenses therefor in 40 cities. The petitioner pursuant to or in furtherance of the said notice inviting tender submitted its bid for six stations namely Kolkata, Indore, Bhopal, Vishakhapatnam, Chennai and Hyderabad.
- (b) The petitioner's bid was accepted, indisputably in terms of the conditions contained in the said notice inviting tender.
- (c) The petitioner was required to and in fact deposited the requisite earnest money.

- (d) The allotment of stations was to take place by auction. With a view to participate in the said auction and in compliance of the terms thereof, the petitioner deposited 50% of the reserved license fee.
- (e) Be it mentioned, that for each station different license fees were prescribed. The petitioner became a successful bidder upon participating in the auctions in respect of the aforementioned six stations.
- (f) On or about 2.8.2002, letters of intent were issued wherewith
- (i) A draft license agreement,
  - (ii) A draft consortium agreement and
  - (iii) A proforma bank guarantee were enclosed.
- (g) Clause 3 of the said letter of intent reads as under :-

“Failure to furnish the bank guarantee or execute the license agreement during the stipulated period will result in forfeiture of the advance license fee deposited by you. Further, in the event of revocation of this Letter of Intent, you will not be eligible to apply directly or indirectly for any FM Radio Station license in future.”

Pursuant thereto or in furtherance thereof, bank guarantees were furnished by the petitioner. According to it, the draft agreement contained terms and conditions in departure from the terms and conditions of the original tender document.

- (h) The petitioner did not pursue its claim in respect of the stations of Chennai and Hyderabad. Out of the 4 remaining stations, Kolkata was a Metro Station for which a different agreement was to be entered into. For the non-metro stations the draft consortium agreement were not required to be entered into.
- (i) On or about 29.12.2000, frequency was allotted by the WPC Wing of the respondent. Indisputably, within a period of one year from the said date i.e. by 29.12.2001, the petitioner was to make ready all arrangements for broadcasting its programme.
- (j) It, however, for the reasons mentioned in paragraph 12 of the petition could not do so.  
We would notice the same :-

“Private FM Broadcasting, being a new concept in India most of the Private parties had teething problems in the initial phase. The problems related to sourcing of the right kind of equipment, setting up of the Antena/Tower, commissioning of a proper studio etc. Due to these problems the Claimant as well as other licensees over-shot the stipulated time Schedule and were unable to successfully commission the Broadcasting Station by 29<sup>th</sup> December, 2001.”

It sought for extension of time. Whereas for Kolkata, the prayer was allowed, for the non-metro stations, it was rejected.

The respondent, however, offered the petitioner a deemed operationalisational license, so as to enable it to obtain the license fees. The petitioner did not accept the said offer.

### **Arbitration Proceedings :**

(k) It invoked the arbitration agreement.

The dispute between the parties was referred to an Arbitral Tribunal. However, the learned arbitrator referred the matter to this Tribunal on the question as to whether it has the requisite jurisdiction to deal with the dispute between the parties. By an order dated 24<sup>th</sup> November, 2009 this Tribunal held that the arbitration proceeding was not maintainable and only this Tribunal has the requisite jurisdiction therefor. It was on the aforementioned premise, this petition has been entertained by us.

### **Issues :**

By an order dated 23<sup>rd</sup> March, 2010 the following issues were framed :-

1. Whether the respondent wrongly and illegally invoked the Bank Guarantees as alleged in para No. 19 of the statement of claim. If so, its effect ?
2. Whether the respondent wrongly and illegally forfeited the amount of advance licence fee as alleged in para No. 20 of the statement of claim. If so, its effect thereto ?
3. To what amount, if any, the claimant is entitled to ?
4. To what amount, if any, the claimant is entitled to on account of interest?

However, a statement was made before us by the learned counsel for the parties on 27<sup>th</sup> April, 2010 that no witness need be examined and the matter can be decided on the basis of the affidavits and contractual agreements entered into by and between the parties and in that view of the matter no oral evidence was adduced.

### **Submissions :**

Mr. Sudhir Makkar, the learned counsel appearing on behalf of the petitioner, in support of this petition, made three fold submissions before us, namely:-

- (1) No license having been granted to the petitioner by the respondent, the question of failure on its part to commit any breach thereof does not arise.
- (2) Grant of frequency by the WPC Wing of the respondent being not amounting to grant of license, in terms whereof the license fee was required to be paid, encashment of Bank Guarantee by the respondent must be held to be illegal.
- (3) In any event, payment of the license fee for the first year being governed by the Schedule 'B' of the agreement and not the Schedule 'C' thereof which governs payment of license fee for subsequent years and which only contained a provision for encashment of bank guarantee, the impugned action on the part of the respondent must be held to be wholly illegal and bad in law.

Mr. Atul Nanda, the learned counsel appearing on behalf of the respondent, on the other hand, urged :-

1. The term 'license' contemplated under the agreement are two in number; one required to be granted by WPC Wing being a Telecom license and the other by the Ministry of Information & Broadcasting for operating the FM stations.
2. The conditions of the agreement having provided for payment of the license fee within the time stipulated from the date of taking a decision to grant a wireless operational license, the petitioner

must be held to have made itself liable to pay the license fee and as it had failed and/or neglected to do so, the respondent could en-cash the Bank Guarantee.

3. Bank guarantees having been furnished for covering the entire period of the agreement namely 10 years, it is idle to contend that same was not enforceable for non-payment of the license fee for the first year.
4. The FM radio station having not been commissioned owing to failure on the part of the petitioner itself, it can not take advantage of its own wrong.
5. Grant of license to operationalising FM station was not the trigger point for payment of license fee and a decision to grant a license would be sufficient to attract the liability on the part of the petitioner to pay the same.

### **License Documents :**

Before adverting to the rival contentions for the parties, as noticed hereinbefore, we may notice certain provisions of the license agreement whereupon reliance has been placed by the learned counsel.

A copy of the proposed license agreement has been placed before us; Clause 3 whereof provides that the effective date of the license period shall be reckoned from the date of issue of the wireless operational license of the

WPC.

Schedule 'A' appended thereto contained the definitions of the terms specified therein, and provisions relating to the conditions.

We may notice the definition of 'effective date', 'frequency assignment', 'license', 'license fee' and 'wireless operational license' as contained in clauses 1.7, 1.9, 1.10, 1.12 and 1.18 respectively.

They read as under :-

- (i) "Effective date" shall mean the date of issue of the wireless operating license by the WPC.
- (ii) "Frequency Assignment" shall mean the specific RF carrier with associated technical parameters such as RF power, bandwidth etc. to the particular FM station as assigned by the Wireless Planning & Coordination Wing, Department of Telecommunication, Ministry of Communication, Government of India.
- (iii) "License" shall mean the License granted to the licensee in pursuance of this license agreement and having effect as if granted under Section 4 of the Indian Telegraph Act, 1885 and Indian Wireless Telegraphy Act, 1933, for setting up the FM Radio Station by the Ministry of Information and Broadcasting, Government of India.

- (iv) "License Fee" shall mean the annual fee to be paid by the Licensee to the Licensor conforming to the details as provided in Schedule 'B'.
- (v) "Wireless operational licence" shall mean the licence granted by the Wireless Planning and Coordination Wing of the Ministry of Communication, Government of India for operation of the Radio station.

Clause 4 of the said agreement mandates the licensee to apply to the WPC, Deptt. of Telecommunication for frequency allocation and SACFA clearance within 3 months from the date of issue of the letter of intent.

Clause 6 of the said agreement reads as under :-

"The Licensee shall complete the installation of the Broadcast Facility including studios, infrastructure etc. and commission the Applicable Systems within twelve months from the date of frequency earmarking by the WPC."

The licensee, as provided for in clause 2 of the said agreement, was required to comply with the terms and conditions of the agreement including those enumerated in Schedules A, B, C and D appended thereto.

The said agreement empowered the licensor to revoke the license by giving a written notice of 30 days and upon compliance of the principles of natural justice. Schedule 'B' provided for the quantum of license fee and Schedule 'C', schedule of payments.

Clauses 1 and 2 of Schedule 'B' reads as under :-

- (i) "The Licensee shall pay the licence fee annually to the Licensor as detailed in the annexed chart arrived at in accordance with the procedure laid down in the Section 3, Clause 8 of the Tender Document, in consideration for grant of the Licence for the entire period of the Licence.
- (ii) Balance of the Licence fee for the first year shall be paid by the Licensee within 40 days of the intimation from the WPC that the Wireless Operational Licence is ready to be issued and failure to do so will result in forfeiture of the amount already deposited by the Licensee and the revocation of this licence. The Licensee shall not be entitled to any interest on the advance Licence fee deposited by him."

Schedule 'C' provided for the terms of the licenses.

We may notice clause 1.2 thereof :-

“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.”

Clause 1.6 of the said Schedule provides for furnishing bank guarantee, which reads as under :-

“A Bank Guarantee, equivalent to the first year’s License 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.

The Licensor, without prejudice to its rights to any other remedies, is free to encash the Bank Guarantee in part or in full, in case of any breach of terms and conditions of the Licence by the Licensee.

The licensor may encash the bank guarantee without any notice in any of the following conditions :

- i) If the licensee fails to deposit the license 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.”

## Correspondences :

The frequency allotment letter was issued on 29<sup>th</sup> December, 2000. It merely contained a decision to grant WT license for the FM broadcast which was not a license.

We have noticed heretofore that the petitioner was offered a deemed operationalised station 'status' by the respondent in terms of its letter dated 31.12.2001. It reads as under :-

"In response to your letter No. nil dated 24.12.2001, I am directed to inform you that your request has been examined. As already conveyed to you during the meeting on 21.12.2001, all licensees of Non-Metro centers are required to deposit the balance of the first year's license fee immediately. You will be granted a 'deemed operationalised station' status and will be required to start providing services at the earliest. Failure to deposit the license fee will be dealt with, in accordance with the terms and conditions of the licence agreement keeping in view all the circumstance and related documentation."

The said offer of the respondent was not accepted by the petitioner, for which it sent a communication on 7<sup>th</sup> February, 2002, the relevant portions whereof are :-

“This has reference to your letter dated 31<sup>st</sup> December 2001 in respect of FM Broadcasting for non-metro stations viz. Bhopal, Indore & Vishakapatnam. Vide the said letter we were informed that all licensees of non-metro centers are required to deposit the balance of 1<sup>st</sup> year’s license fee immediately and subject to the said payment the licensees shall be granted a “deemed operationalised station” status and shall be required to start providing services at the earliest.

“We invite your attention to the license agreement dated 30<sup>th</sup> October, 2000 wherein the terms and conditions of the license are specifically detailed. Schedule ‘A’ to the said license defines the effective date as the date of issue of Wireless Operating License by WPC. Please note that the effective date of payment of license fee has not yet arrived.

We invite your attention to Schedule ‘C’ of the License which spelt out the terms and conditions of the license. Clause 1.2 of the Schedule maintains that the Licensee shall pay the license fee every year in advance within 7 days of the beginning of the year failing which the Licensor reserves the right to revoke the license and encash and forfeit the Bank Guarantee furnished by the Licensee without giving any notice. Schedule ‘B’ of the License deals with payment of balance licence fee for the first year and therefore, constitutes a specific exception which is carved out of the general rule embodied in clause 1.2 in Schedule ‘C’.

From the combined reading of the above provisions it is envisaged that in the event of failure of the licensee to pay the balance of advance license fee for the first year, the amount already deposited is

liable to be forfeited and the license is liable to be revoked. In other words, in the event of non-deposit of the balance license fee of the first year the Ministry of I&B can forfeit the amount already deposited and revoke the license and can do nothing more. There is no question of revocation of Bank guarantee on account of non-payment of the balance amount for the first year license fee. You may kindly note that Schedule 'B' which deals with payment of balance license fee makes no reference whatsoever to the Bank Guarantee. Whereas you have invoked the bank guarantees furnished by us with respect to all 3 non-metro stations and the said guarantees have been invoked for the full guarantee amount of Rs. 190 lacs."

### **Precedent :**

It is not in controversy that almost similar questions came up for consideration before this Tribunal in two cases; one being Petition No. 4 (C) of 2007, Millennium Delhi Broadcast Pvt. Ltd. Vs. Union of India and another being petition No. 73 (C) of 2008; and the second being Petition No. 4 (C) of 2009, Music Broadcast Pvt. Ltd. Vs. Union of India and Union of India Vs. Music Broadcast Pvt. Ltd.

The case of Millennium Delhi Broadcast (Supra) was disposed of on 14<sup>th</sup> September, 2007 wherein it was held as under :-

“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 license agreement as well as the instructions to applicants which were issued prior to the license 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 respondent 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.”

We may notice that the Tribunal interpreted the relevant provisions of the license agreement in the following terms :-

“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 license fee within 7 days of beginning of each year. This clause read with Clause 8(f) shows that the condition about failure to deposit license fee within 7 days every year is about license fee for each year, but for this occasion never arose. WPC's intimation that operational license 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 license 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.”

Music Broadcast (Supra) is almost an identical case. Therein too the petitioner accepted the auctions in terms of two stations namely Nagpur and Patna. The petitioner therein had applied for frequency allocation and the same was allotted in December 2000 in terms whereof installation of all facilities was to be completed by 29.12.2001. The petitioner applied for grant of SACFA clearance which was not granted until the passage of deadline of 29.12.2001 or even thereafter.

Are the said decision binding in this case ?

Indisputably, no license to operationalise FM station had been granted. The petitioner had made the said statement at least in three places in the petition. It being however, not disputed, we need not refer thereto.

Submission of Mr. Nanda however, is that the petitioner had not made any averment that it had not been granted any license by the WPC Wing. The learned counsel may be correct but then we fail to understand as to why no such averment was made by the respondent either in its reply or in the evidence of Shri Indradeep Kandwal. What was highlighted was alleged non-compliance on the part of the petitioner to commission the service within 12 months' period from the date of frequency earmarking by the WPC. Why the respondent failed and/or neglected to make any averment with regard to either grant of WPC license or SACFA clearance is not understood. Respondent was in possession of all the facts. SACFA clearance was also to be granted to the license by the respondent only. If the petitioner did not make any averment; the same would not mean that the respondent would not do so and seek to take benefit of non-averments of certain facts by the petitioner and, thus, raising merely a technical point. We may notice that the fact obtaining in the case of Music Broadcast (Supra) and the present case is almost identical.

As a 'State', within the meaning of Article 12 of the Constitution of India, it was expected that the respondent would place all necessary documents before us. Even otherwise, as a party to the lis, it should have done so.

Mr. Nanda, however, high-lighted the distinguishing feature of the case being that a decision to grant license by the WPC Wing had been communicated to the petitioner. We have noticed heretofore that the same had been done in the case in Music Broadcast also. This Tribunal noticed the contention of the petitioner therein that the term of the license was to commence from the date of issuance of the wireless license of the WPC Wing, which was never received. It took into the consideration, the terms of the bank guarantee to consider as to whether the same was a conditional or a unconditional one.

Upon noticing the relevant provisions of the bank guarantee, it was held as under:-

“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 license. Clause 1 of the License 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 License to be issued by the Wireless Planning & Coordination Wing in the Ministry of Communications,

Government of India shall form part and parcel of this License 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 .....

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 license Agreement which contains the terms and conditions of the license and which read as follows :

“16.1 A Bank Guarantee, equivalent to the first year's license 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 License 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 license 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.”

The bank guarantee was held to be a conditional one. It was also opined that it can be invoked by the respondent in the event of three conditions contained in clause 16 had actually arisen. It was held :-

“It is admitted that the wireless operational license 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 license 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 License Agreement has 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 materialized. Therefore, we hold that the Bank Guarantee in respect of both Nagpur and Patna cannot be invoked by the Respondent.”

This Tribunal referred to the case of Millennium Delhi Broadcast (Supra) to hold that the questions of law in both the cases are similar.

We must, however, in fairness to Mr. Nanda must place on record an order of Supreme Court of India in the case of Music Broadcast Pvt. Ltd. being Civil Appeal D No. 22205 of 2009, wherein it was directed :-

“Delay condoned.

Issue notice.

Dr. Kailash Chand accepts notice for the sole respondent and waives further notice.

Interim stay of the direction to return the bank guarantee.

It is open to the respondent to furnish a fresh bank guarantee for the original amount to the satisfaction of the appellant and take back the original bank guarantee.

The operation of the order of this Tribunal has not been stayed. We have not been informed as to whether similar order of stay had been passed in the case of Millennium Delhi Broadcast (Supra) also or not.

We, therefore, are of the opinion that the ratio of the said decision’s is binding on us.

### **Payment of Balance License Fee - Issue :**

The question which survives for consideration is as to whether non-compliance of the conditions contained in clause 6 of the agreement and communication of the allotment of frequency by WPC Wing in terms of its letter dated 29.12.2000 by the petitioner would be the trigger points for payment of license fee. It has not been denied or disputed that no license agreement had been entered into. If no license agreement had entered into it is difficult to comprehend as to why the license fee would be payable, despite the fact that the license period was to be reckoned from the date of issue of the wireless operational license by the WPC in term of the interpretation of the term 'the effective date'.

It is difficult to conceive that the license fee would have been payable from 19.12.2001, although the license itself had not come into force.

It has not been denied or disputed that 50 % of the license fee for the first year was to be deposited along with the tender document. The petitioner complied with the said order. The matter relating to payment of license fee is contained in Schedule 'B' and Schedule 'C'. By reason of clause 2 of Schedule 'B', the balance of the license fee namely 50% thereof for the first year was to be paid within 40 days from the date of intimation from the WPC that the wireless operational license was ready to be issued. The consequence of failure to do so has been stated

therein namely that the same would result in for forfeiture of the amount which had already been deposited as also revocation of the said license. No such provision is contained in Schedule 'C' of the license.

What would be the meaning of the word "licensee shall pay the license fee every year" contained in clause 1.1 of Schedule 'C' would, thus, fall for consideration.

Would it also include payment of balance 50% of the license fee for the first year is the question.

Clause 1.1.1 of Schedule 'C' states the period of license being 10 years shall be reckoned from the date of issue of the wireless operational license by the WPC.

The said period was fixed. Revocation of the license and for fixture of the amount already deposited for failure to pay balance amount of the license fee for the first year, thus, in our opinion must be considered to be distinct and separate from the matter relating to payment of license fee in terms of Schedule 'C' of the License Agreement.

### **Purposive Construction :**

In a situation of this nature the doctrine of 'purposive construction' must be applied. Indisputably, the failure on the part of the licensees to deposit the license fees in terms of clause 1.2 and 16.3.1 relate to the 2<sup>nd</sup> year of license and onwards. It has not been disputed that deposit of license fee would mean the entire license fee. It

would be impossible for the licensee to comply therewith so far as the same relates to payment of license fee for the first year is concerned as it had already deposited 50% of the license fee.

It was also required to deposit the balance in terms of clause 2 of Schedule 'B'. The license was to be granted much later namely at least after a period of one year. The parties could not have contemplated a situation that although prior to grant of license having regard to the tender conditions requiring the tenderor to deposit 50% of the license fee for the first year and payment of balance amount within 40 days from the date of allocation of frequency, the licensee will again have to deposit the same within a period of 7 days from the beginning of the first year of the period of the license.

At the cost of repetition, we may state that in a case, unlike present one, where the license was to come into the effect, the license fee for the first year could not have been required to be paid before the actual license is granted. We say so, because admittedly in terms of clause 6, the installation was to be completed within a period of one year from the allocation of frequency by the WPC Wing of the respondent. Advisedly, therefore, the payment of license fee in respect of the first year and subsequent years have been dealt with separately in Schedule 'B' and Schedule 'C'.

Clause 'C' of the letter of intent is a reproduction of Clause 3 of the letter of Intent. It is, therefore, evident that the Union of India had made a conscious decision in annexing Schedule 'B' and Schedule 'C' separately to the license agreement.

This must be held to be an additional reason as to why Encashment of Bank Guarantee would not apply to payment of license fee for the first year for so far as the balance amount is concerned. In any event, even failure to furnish the bank guarantee, as noticed hereinbefore, would also result in forfeiture of advance license fee.

The period of the license being fixed and the fees payable therefor, also being fixed, it is beyond anybody's comprehension that license fee would be payable although the license has not come into force or that one year's license fee would be payable twice over, although in a situation of this nature, the license may never come in force.

In the peculiar facts and circumstances of the case, it is not possible to hold that license fee for the first year would be payable and then again it would be payable for 10 years after the actual license is granted. Only for that purpose the doctrine of 'purposive construction' is to be resorted to. License fee, ordinarily also, becomes payable only after the license has to come into force and not from the date, the decision thereafter is taken.

### **Default of the Petitioner – Issue :**

It is difficult to accept the submission of Mr. Nanda, although very attractive at the first flush, that liability to pay the license fee would ipso facto occur on the licensee's failure to complete the constructions of installation of facilities for broadcasting within a period of one year.

The conduct of the respondent itself would go to show that even according to it, the same was not contemplated by it. Had it been so, the respondent could have, while rejecting the prayer made by the petitioner to extend the period for construction of the installation facilities, would have stated so expressly.

It was, thus, not necessary for it to offer grant of a 'deemed operationalisation license', so as to enable it to obtain the license fee. The rule of 'Executive Construction' shall in our considered view shall also apply in a case of this nature.

The respondent having issued the aforementioned letter dated 31.12.2001, in our considered opinion, could not have taken a different stand at a subsequent stage. The respondent was asked to deposit the balance of the first year's license for only in the meeting dated 21.12.2001. If its stand was that the said balance amount of the license fee for the first year also would attract clause 1.2 of the Schedule 'C' of the agreement, the same ought to have been clearly stated.

### **Conclusion :**

We, therefore, have no hesitation to hold that clause 1.2 as also clause 16.3.1 contemplate payment of license fee for the years other than the first year thereof.

For the reasons aforementioned and following the decisions of this Tribunal in the case of Millennium Delhi Broadcast (Supra) and Music Broadcast (Supra), this petition must be allowed. It is directed accordingly.

The respondent must pay and bear the cost of this petition. Counsel's fee assessed at Rs. 50,000.

.....J  
**(S.B. Sinha)**  
**Chairperson**

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

.....  
**(P.K. Rastogi)**  
**Member**