

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 5th March 2015

Petition No. 372(C) of 2013

Hitz FM Radio India Pvt. Ltd. ... Petitioner

Versus

Ministry of Information & Broadcasting ... Respondent

Petition No. 373(C) of 2013

India FM Radio India Pvt. Ltd. ... Petitioner

Versus

Ministry of Information & Broadcasting ... Respondent

BEFORE:

HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE MR. KULDIP SINGH, MEMBER

For Petitioners : Mr. Arun Kathpalia, Advocate
Mr. Abhishek Malhotra, Advocate
Mr. Angad Singh Dugal, Advocate

For Respondent : Mr. Vikramjeet Banerjee, Advocate

ORDER

Kuldip Singh:

The petitioners hold licenses granted by the Ministry of Information & Broadcasting, Government of India, for setting up FM Radio Stations in Kolkatta. The

dispute between the parties is with regard to the quantum of license fees. As per the petitioners, they are entitled to a migration from a fixed fee regime to a revenue share regime as per the policy of the respondent for phase-II. As per the petitioners, they have made all the required payments and met all the conditions in this regard. The petitioners have also prayed for quashing the revocation notices dated November 22, 2005 issued by the respondent for alleged violation of some conditions of the licenses. Since facts of the two cases are similar, they are being disposed of by this common order.

Following the policy of Government of India to open FM broadcasting to private players in 1999, the respondent invited bids from prospective parties for setting up FM radio stations in the country. The petitioners were successful in securing the bids for setting up and operating private FM radio stations in Kolkata. A Grant of Permission Agreement (GOPA) was executed on 30.10.2000 and came into effect from 2.5.2003. As per the GOPA, the petitioners were to pay a license fee of Rs. 1 crore for the first year of license and the same was to be increased by 15% every subsequent year for the term of the license.

The GOPA was to come into force from the date of issue of WPC (Wireless and Planning Coordination wing of DOT) license to the petitioners. The petitioners were also required to provide to the respondent a Bank Guarantee for an amount of Rs. 1 crore valid for a period of 10 years. The first year license fee was paid on 29.8.2002.

On 5.8.2003, a letter was sent by Kolkata FM Radio Consortium to the respondent referring to some financial difficulties being faced by the licensees. It was requested in the letter that the license fee should be payable with effect from operationalization of the radio stations and till a decision in the matter was taken, second year license fee be kept in abeyance. This letter was acknowledged on 29.8.2003 by the respondent in which it was stated that their request was under active consideration and that demand for license fee for second year shall be kept in abeyance till a decision was taken in this regard.

On 24.7.2003, the respondent set up an expert committee to make recommendations for license fee structure. The committee came out with a report dated 1.11.2003 observing that it was commercially unviable for broadcasters to continue due to huge payment of license fee and that license fee structure needs to be revised to a one time entry fee along with revenue sharing arrangement. This report of the committee was forwarded by the respondent to TRAI for its comments and recommendations.

On 6.4.2004, TRAI made an interim recommendation in which it was stated that all licensees may defer payments of license fee for the second year subject to the condition that they shall pay the amount with interest once the issue is decided by the respondent. However, on 19.4.2004, the respondent asked the petitioners to pay an amount of Rs. one crore and fifteen lakhs before 6.5.2004 towards license fee for the second year, failing which their licenses may be terminated.

The petitioners wrote to the respondent on 29.8.2004 requesting it to keep the license fee in abeyance and, thereafter, filed a W.P. No. 828 of 2004 in Calcutta High Court seeking deferment of the second year license fee and quashing the respondent's letter dated 19.4.2004.¹ On 6.5.2004, Calcutta High Court stayed the payment of license fee for the second year.

On 14.10.2004, the respondent issued a Show Cause Notice (SCN) to the petitioners alleging violation of GOPA. The petitioners had entered into a consultancy and support services agreement dated 21.7.2001 and an agreement for lease of studio facilities dated 4.3.2004 with Airtime Marketing & Sales India Pvt. Ltd. (AMSI). It was alleged in the SCN that these agreements violated clause 15 and clause 2.2 of Article 2 of GOPA. The notice was replied by the petitioners on 8.11.2004. On 22.11.2005, the respondent issued a notice to the petitioners seeking to revoke/terminate their licenses for the alleged breach of clause 15 of the license agreement and that of Article 2 (clause 2.2) and Article 4 (clause 4.3) of the schedule 'C' attached to the license agreement.

Aggrieved by this revocation notice, the petitioners challenged it before the District Judge, Alipore under section 9 of the Arbitration and Conciliation Act, 1996. The operation of revocation notice was stayed by the Court on 19.12.2005.

¹ Writ petition filed by petitioner no. 2 was W.P. No. 829 of 2004.

On 21.12.2005, the respondent issued letters to various licensees, who had actually operationalized their channels offering them to opt to migrate to phase II policy regime in accordance with the terms and conditions of migration or to continue under phase I or surrender their licenses with one month's notice. Since, this letter is of some importance, relevant extracts of the same are reproduced below:

“ As you are aware, the Government of India has notified “Policy of expansion of FM Radio Broadcasting Services through private agencies (Phase II)” on 13.7.2005. The policy, inter alia, provides for migration of licensees of phase I, who have actually operationalized their channels to opt to migrate to phase II regime. According to this policy, licensees of phase I have to exercise their initial option by the prescribed date to automatically migrate to phase II policy regime in accordance with the Terms and conditions of migration or continue under phase I or surrender their licenses with one month's notice.

2. The policy stipulates that licensees of operationalized channels shall be considered for migration to phase II provided they have paid all their dues from due date up to cut of date and are not in default of any other license condition till the date of migration to phase II. The cut of date for automatic migration is April 1, 2005. Payments made by phase I licensees in excess of amount due till cutoff date shall be given credit and adjusted against their one time entry fee (OTEF) for phase II.

3. On migration they shall pay OTEF amount equal to average of all successful bids received under phase II in that city and in the event of no successful bid in the city, such OTEF shall be equal to the average of all successful bids received in that category of cities in that region. In the event of no successful bid in any Metro city, such OTEF amount shall be equal to the average of all successful bids received in all the four Metro cities.

4. As per our records, amount due in respect of FM channels operated by you in different cities along with interest @ 8% p.a. on deferred payments, works out as per the statement enclosed. In accordance with the policy, you are requested to exercise your initial option to migrate to phase II policy regime latest by 4.1.2006 after remitting the dues as per enclosed statement. In case you do not want to migrate to phase II policy regime and wish to continue under phase I policy regime, then you are requested to exercise your option accordingly by 4.1.2006 and pay license fee as per phase-I policy regime along with interest @ 8% p.a. up to 31.12.2005 on deferred payments. If you neither wish to migrate to phase II nor continue under phase I, you may surrender your

licenses with one month's notice after payment of all dues up to date of surrender along with interest @ 8% p.a.

5. *It may please be noted that option to migrate to phase II policy regime would be considered valid only after all amount due up to cut off date are received in the Government account. On exercising your option to automatic migration to phase II, and payment of OTEF within prescribed period, you shall be required to sign a fresh Grant of Permission Agreement with Government on the same Terms and Conditions as for the successful bidders of phase II.*

6. *You may please further note that after opting for migration to phase II, if you fail to deposit OTEF, or fail to sign Grant of Permission Agreement within prescribed period, your automatic migration to phase II shall stand cancelled and you shall be governed by the terms and conditions of your original license under phase I policy regime as modified from time to time."*

As per this migration policy, licensees were required to pay a One Time Entry Fee (OTEF) amount equal to average of all successful bids received under phase II in that city.

Since the petitioners did not receive offer for migration on 22.12.2005, they wrote to the respondent requesting it to issue a letter for clearance of their dues to enable them to migrate to phase II. In this letter attention was also drawn to the fact that the petitioners had obtained a stay order from the appropriate Court against termination notice issued by the respondent. The intention of the petitioners to migrate to phase II was subsequently reiterated vide letter dated 10.2.2006. On 20.02.2006 it was clarified by the Calcutta High Court that its order dated 6.5.2004 shall not stand in the way in the event the respondent decides to give such an offer to the petitioner in accordance with the existing policy.

On 1.2.2007, the petitioners intimated the respondent that their agreement with AMSI had expired and that they had entered into a new agreement dated 21.7.2006. They also provided a copy of the same. Subsequently, on 18.7.2007, they again wrote to the respondent for permission to migrate and expressed their willingness to clear all dues. On 21.7.2008, the respondent communicated its in-principle acceptance to permit the petitioners to migrate to phase II subject to the petitioners making a payment of Rs. 8,06,06,003/- towards arrears of license fees and interest thereon. The respondent also asked the petitioners to withdraw all the cases filed by them. This letter of the respondent is as under:

“Kindly refer to your bid for an FM channel in Kolkata which was finalized on 4.3.2000. Though the channel is operational and continues to realize revenue since 03.5.2003, the license fees have not been paid to Government since 29.4.2004. In this connection, I am directed to refer to the communication resting with your letter dated 22.12.2005 and 01.02.2007 requesting to settle the matter and willingness to immediately pay the outstanding fee to Ministry of Information & Broadcasting (MIB) subject to withdrawal of notice of revocation (which is currently stayed by the Court) and receiving appropriate demand letter(s) relating to migration fee etc. from MIB and say that it has been decided in principle to accede to your above request provided you agree and are willing to pay the arrears of license fee and the migration fee, as per the calculation sheet enclosed, and withdraw both the cases (WP No. 828/2004 in the Kolkata High Court and T.S. 201/05 in the District Court, Alipore) filed against the Ministry, which are pending in the courts of law.

3. *You are advised to take immediate steps with regard to the above and intimate the same within a period of 15 days of the receipt of this letter to enable further processing of your case.*

Annexure

s.no.	Particulars	Period	Amount (Rs.)	Period for which interest is payable	Amount of interest @ 8% compounded annually (Rs.)	Total amount due (Rs) (4+6)
1	2	3	4	5	6	7
i)	License fee #	29.4.04 to 31.03.05	1,07,00,000	29.4.04 to 31.05.08	39,68,034	1,46,68,034
ii)	OTEF in case of migration	01.4.05 (due date)	4,71,00,000	01.4.05 to 31.05.08	1,30,25,702	6,01,25,702
iii)	License fee ^	01.4.05 to 31.03.06	15,27,000	1.4.05 to 31.05.08	4,22,298	19,49,298
iv)	License fee ^	1.4.06 to 31.03.07	15,27,000	1.4.06 to 31.05.08	2,77,906	18,04,906

v)	License fee^	1.4.07 31.03.08	to	15,27,000	1.4.07 to 31.05.08	1,44,209	16,71,209
vi)	License fee^	1.4.08 30.6.08	to	3,81,750	1.4.08 to 31.05.08	5,104	3,86,854
	Total			6,27,62,750		1,78,43,253	8,06,06,003

phase I
^ phase II"

As per the petitioners, due to some financial difficulty they were not in a position to clear the entire amount. They also disputed the interest imposed by the respondent in its letter dated 21.7.2008 above. However, the request of the petitioners was rejected by the respondent who asked them vide letter dated 31.12.2008 to clear the entire outstanding along with interest thereon. Subsequently, there was some further correspondence between the parties and also some meetings were held.

On 21.12.2011, the respondent communicated its willingness to permit the petitioners to migrate to phase II subject to the petitioners clearing outstanding license fees and not being in default of other license conditions till the date of migration to phase

II. This letter is as under:

"I am directed to refer to your letters dated November 12, 2011 and December 05, 2011 on the above subject and meeting on 20.10.2011 with Additional Secretary, Ministry of Information and Broadcasting in this regard and to reiterate that one of the vital conditions for migration to phase II is that your company pays all dues and is not in default of any other license conditions till the date of migration to phase II. As discussed in the meeting and agreed it is reiterated as under:

- (a) *For migration to phase II of FM Radio Broadcasting services, your company is required to credit all dues pending against it in Government of India account. An updated statement of total outstanding dues as on 31.12.2011 indicating the principal amount of arrears of License fee, Migration Fee and the interest showing details in the form of Tabulation is enclosed in this regard. The revocation notice would be withdrawn on depositing all dues in Government Account by your company.*

- (b) For permission to migrate to phase II of FM Radio Broadcasting services, your company is to make payment of all outstanding dues (as per updated statement enclosed) pending as on 31.12.2011 and also should not be defaulter of any other license conditions till the date of migration.
- (c) In this connection, it is informed that clause 14.1 of the agreement signed by your company with AMSI may be modified as under :

“The parties may assign, transfer or novate this agreement or any of their respective rights or obligations in whole or in part emerging out of this agreement and upon prior intimation to the other party subject to clause 2.2 of this agreement and subject also to the license agreement signed with the government. Further, the parties shall execute all documents necessary to affect such assignment novation or transfer.”

The above modification would enable your company to rectify default, which was the reason for issue of revocation notice dated 22.11.2005 and as such pave the way for withdrawal of all the cases pending in Calcutta High Court / Show cause notice dated 14.10.2004 and migration to phase II.

2. *The Ministry hopes that your company would pay all the dues as indicated in the statement annexed at the earliest positively to avoid further mounting of interest and does not seek extension of time for the same.”*

The same position was reiterated by the respondent vide its letter dated 29.11.2012.

On 26.2.2013, the respondent wrote to the petitioners that since it has not yet migrated to FM Radio phase II policy and only about 2 months of the 10 years of permission period is left, the permission to run the FM channel would have to be treated as under phase I condition for calculation of license fees. The relevant paras of the letter are as under :

“(iii) The 10 years of permission period of the FM Channel permitted to you is going to expire in April, 2013 (10 years from the date of operationalization of the channels i.e. 29.4.2003). The Bank Guarantee provided by you was valid till October 2010. You are running the FM Channels without payment of license fee/interest. You have also not yet migrated to FM Radio phase II policy, and only about two months of the 10 years of permission period is left. Therefore, the permission to run FM channel permitted to you would have to be treated as under phase I condition for calculation of license fee and interest.

(iv) *As per FM phase I policy, the license fee was to be hiked at a rate of 15% over the licence fee of previous year. A calculation sheet of due licence fee and interest is enclosed. The interest is calculated @ 8% upto end of FY 2008-09 and then @ 18%, compounded annually. The total licence fee alongwith interest as on 28.1.2013 due on your company is approximately Rs. 34,93,19,169/- (Rs. Thirty Four Crore Ninety Three Lakh Nineteen Thousand One Hundred Sixty Nine Only).*

Meanwhile, as the petitioners' licenses were going to expire on 28.4.2013, they once again approached Calcutta High Court. On 26.4.2013, Calcutta High Court extended the license of the petitioners for a period of 6 months subject to the payment of Rs. 18 crores to the respondent. The relevant portion of the order is as under:

"i) for a period of two weeks the license to operate the FM channel shall stand extended unconditionally.

ii) within the said period of two weeks, the petitioners shall be obliged to pay a sum of Rs. 18 crores. Payment and receipt thereof shall be without prejudice to the rights and contentions of parties and in the event of such payment, the license in favour of the petitioners to operate the FM channel shall stand extended for a period of six months from date of such payment.

iii) all disputes between the parties including those raised in the writ petition and the application as well as the amount which the petitioner would be liable to pay on account of arrear license fees shall be decided by the TDSAT, if an approach is made in this behalf by the petitioner;

(iv) during the extended period of the license, the respondent shall charge license fees in accordance with phase II contract unless directed otherwise by the TDSAT."

Mr. Arun Kathpalia, learned counsel appearing for the petitioners submitted that the petitioners have always been willing to migrate to phase II as per terms of the policy and a number of letters have been exchanged as well as meetings held between the parties to sort out various issues. As per him, the petitioners were aggrieved by imposition of 18% interest as the delay for migration to phase II was not on their account. He further submitted that presently in terms of the order of the Calcutta High Court, a payment of

Rs. 18 crores has been made to the respondent by the petitioners, which is in excess of their liability of Rs. 17,31,31,030/-. A detailed calculation showing the same has been given to the respondent along with a copy of the modified agreement with AMSI dated 7.5.2013.

Mr. Vikramjeet Banerjee, learned counsel for the respondent, however, stated that in terms of the migration policy only such licensees who were not in default of license conditions and who had paid all their dues from the due date up to cut off date were entitled to migrate to phase-II.

From the correspondence between the parties, we find that the main issues coming in the way of petitioner's migration to phase II are:

- (a) Alleged violation of the license condition due to agreement with AMSI.
- (b) Imposition of 18% interest for the delayed payment.

We see that as late as 29.11.2012, the respondent had agreed to the migration of the petitioners to phase II provided necessary modifications in the agreements with AMSI were carried out and interest rate of 8% as applicable up to the Financial Year ending 2008-09 and 18% subsequently was paid. However, on 26.2.2013, there was a sudden change in the stand of the respondent when it asked the petitioners to pay license fees as per phase I.

As per Mr. Kathpalia, the petitioners have not only modified the agreements with AMSI, but copies of the modified agreements dated 7.5.2013 have been submitted to the respondent. Further, the amount of Rs. 18 crores paid by the petitioners covers all the dues along with interest @ 8% up to the Financial Year ending 2008-09 and 18% from Financial Year 2009-10 onwards compounded annually. Though, Mr. Banerjee is not in a position to confirm whether all the payments, including interest, have been made in terms of the phase-II policy, the statement regarding agreement with AMSI is not disputed.

We find that if the petitioners satisfy all the conditions of the letter dated 29.11.2012 issued by the respondent; there is no reason why the respondent should change its stand and not permit them to migrate to phase II and pay the license fees in terms of phase II policy.

We direct accordingly.

We note that the issue of violation of the GOPA no longer survives. Though the petitioners claim that they have made all payments in terms of the respondent's letter dated 29.11.2012 and claim that they are entitled to a refund, we make it clear that the respondent will be free to check the calculations in this regard. The dues, if any, shall be paid by the petitioner within two weeks from the date of this order. However, if any refund is found due to the petitioners, the same shall be adjusted by the respondent in the future license fee payment.

There shall be no order as to costs.

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(Aftab Alam)
Chairperson

.....
(Kuldip Singh)
Member

/NC/

