CASE NO.:
Appeal (civil) 1150 of 2006

PETITIONER:
Union of India

RESPONDENT:
M/s. Millenium Mumbai Broadcast Pvt. Ltd.

DATE OF JUDGMENT: 28/04/2006

BENCH:
S.B. Sinha & P.P. Naolekar

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

Union of India is before us aggrieved by and dissatisfied with the judgment and order of the Telecom Disputes Settlement & Appellate Tribunal, New Delhi dated 3rd October, 2005 in Petition No.49(C) of 2005, whereby and whereunder the application filed by the Respondent herein was allowed.

The basic fact of the matter is not in dispute. A Notice inviting tender was issued by the Government of India, Ministry of Information & Broadcasting in the month of October, 1999 from the companies registered in India for grant of licence to operate FM broadcasting service at Mumbai. The Respondent herein was one of the successful bidders along with four others. It is not in dispute that in terms of the agreement, it was stipulated that holders of 10 licences, which were planned for the city of Mumbai, would co-locate the transmission infrastructure on a common transmitter tower, as required in Clause 14 of the Licence Agreement, as also Article 7.1(i) of the Schedule (C) of the said Licence Agreement. Pursuant to or in furtherance of the said scheme, the cost of creating the common infrastructure to transmit from a common transmission tower was to be shared by the ten licensees in Mumbai. It is admitted that five licensees who were successful bidders in the auction process defaulted and did not sign the agreements for grant of licences in Mumbai. Having regard to the default on the part of the said five bidders, the costs of co-locating on a common transmission tower for the remaining five licensees was almost doubled. The Appellant herein, thereafter, issued guidelines permitting the five licensees in Mumbai to broadcast from interim independent facilities for an interim period of 24 months, during which period the five licensees were required to set up a common transmission tower.

It is also not in dispute that the said guidelines were followed for two years only, but, having regard to the difficulties faced by the said five licensees to co-locate the transmission for broadcasting, they were permitted to make their own arrangement to enable them to operationalize their individual interim stations within a period of four months. It stands admitted that the Respondent herein paid licence fees and also furnished a Bank Guarantee to the tune of Rs.9.75 crores.

After the completion of the term of one year, a reminder was sent to the Respondent on 6.3.2003 stating:

"It will be recalled that vide letter No.212/216/2001-B(D)/FM dated 31.12.2001 you had been informed that in respect of Mumbai you are permitted to set up permanent co-located facilities by 29th December, 2003.

The deadline for setting up co-located facilities is approaching. You are requested to inform this Ministry of the actions that have been taken by you in setting up the co-located infrastructure in Mumbai and to shift your operation from the interim set up.

This is also to inform that the license fee for the second year will become due on 29th April, 2003."

In terms of the said licence, in the event of default on the part of the licensee to pay the consideration therefor, i.e., furnishing lincence fee within a period of seven days of the beginning of each year, the Bank Guarantee furnished could have been encashed. It is furthermore not in dispute that for the second year of the licence, the Respondent was to pay a sum of 15% more than the original licence fee. Union of India by a letter dated 2.5.2003 reminded the Respondent as regard payment of licence fee for the second year. The Respondent herein responded to the said letter stating:

"Our Company is committed to FM Broadcasting and on that basis we would like to reassure you that we are arranging for payment of second year licence fee amounting to Rs.11.2 crores at the earliest.

We should be in a position to deposit the said licence fee amount in full by May 16, 2003. We are also willing to pay interest for the delay of 9 days.

We request not to encash our bank guarantee during this period i.e. May 17, 2003."

However, it stands admitted that the Respondent did not pay the amount of licence fee by 16.5.2003, but, at the same time, the Appellant also did not communicate to the Respondent as to whether its request to extend the time for deposit of the said amount was accepted or not.

The Appellant, by an order dated 20.5.2003, revoked the licence stating:

"In continuation of our earlier letter dated 2.5.2003, I am directed to inform you that you have failed to pay the 2nd year’s licence fees within the prescribed period, your licence stands revoked and therefore you should stop broadcasting immediately."

The Appellant, thereafter, invoked the Bank Guarantee and encashed the same on 28.5.2003. The Respondent, questioning the validity of the said order of revocation of licence, filed a writ petition before the Delhi High Court, which was marked as WP(C)No.4195 of 2003. An interim order was passed by the Delhi High Court on 2.7.2003 directing the Appellant herein to permit the Respondent to broadcast until further orders and that from the amount recovered through invocation of the Bank Guarantee, the Appellant would be permitted to appropriate the sum towards licence fee for the period of broadcasting as per the interim orders. The High Court also extended the operation of the interim order on 3.9.2003, subject to the condition that the Respondent herein deposits a sum of Rs.1 crore. Yet again, by an order dated 15.3.2004, the Respondent herein was permitted to deposit a sum of Rs.23 lacs by 26.3.2004 and furthermore furnish a Bank Guarantee for another sum of Rs.23 lacs in favour of the Appellant herein to the satisfaction of the Joint Registrar of the High Court. The said direction, indisputably, was issued in the light of the submissions made by the Appellant herein that out of the total sum of Rs.11,21,50,000/- towards the second year’s licence fee, a sum of Rs.9.75 crore stood paid (by invoking the bank Guarantee of the said amount) and another sum of Rs.1 crore had been paid pursuant to the order dated 3.9.2003 passed by the High Court and as such the balance sum of Rs.46 lacs had become due towards the licence fee

for the second year which expired on 29.4.2004. Despite a demand notice issued for payment of licence fee for the third year, the same was not done and in fact, on 20.4.2004, the Respondent herein made a submission before the High Court that it did not intend to make any broadcast w.e.f. 29th April, 2004.
We may notice that before the High Court, the Appellant herein categorically stated that in the event the Respondent did not intend to make any broadcast from 29th April, 2004, no deposit was required to be made. In the interregnum, the Union of India came up with a new policy.

The Respondent filed an application before the Tribunal questioning the validity or otherwise of the revocation of broadcasting licence by letter dated 20.5.2003, inter alia, contending that the same was in violation of the said Agreement and was, thus, liable to be set aside. It was furthermore prayed that the Respondent be declared to be entitled to utilize the licence agreement on such terms as are applicable to other similarly situated licensees. It was also contended that as by reason of illegal revocation of licence, the Respondent could not use thereafter the facilities to broadcast, they are entitled to pro-rata rebate in licence fee from 28.5.2003 to 5.7.2003.

The Appellant herein, on the other hand, contended that as the Respondent had defaulted in payment of licence fee for the second year as per the terms and conditions thereof the licence has rightly been revoked.

The Tribunal, upon examining the relevant clauses of the licence, opined that the action on the part of the Appellant revoking the licence of the Respondent was illegal. It was observed:

"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, the petitioner shall now on demand from the respondents furnish a bank guarantee as required under the terms and conditions of the licence."

The licence agreement was entered into on 27.10.2000 between the parties herein. The said licence had four Schedules. Schedule (C) appended to the said agreement laid down the terms and conditions of the licence.

Clause 1 of the said agreement reads as under:

"1. Unless otherwise mentioned in the subject of 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 the wireless Operational Licence to be issued by the Wireless Planning & Coordination Wing in the Ministry of Communications, Government of India shall form part and parcel of this Licence 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. In this Agreement, words and expressions shall have the same meaning as is respectively assigned to them in the Schedule A."

Clause 9 of the said Agreement reads as follows:

"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."

We have noticed hereinbefore that Schedule-C relates to terms and conditions of licence, the relevant clauses whereof are:

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."

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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.

In the event of termination/revocation of the licence, the licensee will not be eligible to apply directly or indirectly for any FM Radio Station licence, in future.

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16.1 A Bank Guarantee, equivalent to the first year Licence 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.
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 licence 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."

Mr. A. Sharan, learned Additional Solicitor General of India appearing on behalf of the Appellant submitted that having regard to the provisions contained in Clause 1.2 and Clause 12.1 of the terms of the licence, it is evident that the condition precedent for grant of 30 days' notice as also an opportunity of hearing, were required to be complied with only in the cases of breach of any of the terms and conditions of agreement and not in relation to the default in payment of licence fee as Clause 12.1 dealt with different situation.

It was also submitted that the right of the Appellant in terms of Clause 1.2 of the terms of licence contained in Schedule-C thereof provides first to distinguish the powers of the Appellant, i.e., to revoke the licence and to encash and forfeit the bank guarantee without giving any notice. According to the learned Additional Solicitor General that revocation of the licence is permissible without complying with the principles of natural justice. Clause 9 of the Agreement must be harmoniously read with the conditions of licence and when so read, the same would show that issuance of 30 days' notice and affording a reasonable opportunity of hearing relate to breach of any of the terms and conditions of the licence, but, the said requirements are not to be complied with in case where the licence is revoked for default in payment of any consideration payable towards payment of licence fees.

It was further submitted that the Tribunal committed a manifest error in so far as it issued a direction upon the Appellant to issue the said notice.

The licence granted in favour of the Respondent is a statutory one. The terms and conditions thereof are governed by the statutory provisions. It was initially granted for ten years. Clauses 14 and 15 of the said agreement provide:

"14. The Licence for four metros (Calcutta/Chennai/Delhi/Mumbai) shall form consortium and enter into an agreement for using same power transmitter, utilize common transmitter tower and share certain common facilities as per the format of agreement enclosed at Annexure II.

15. The Licensee shall own transmitter. Further the Licensee himself will carry out the broadcast and shall not sub-contract, assign or transfer the licence in any manner to any third party. In case of such transfer or assignment, the Licensor shall have the right to revoke the Licence of the Licensee immediately.

However, the Licensee may with the prior approval of Licensor enter into an agreement with a third party so as to enable the latter to set up infrastructural and hardware facilities such as tower, transmitter etc. such permission shall not in any case be treated as permission to provide the services under the Agreement by such third party on behalf of the Licensee."

It is not in dispute that the said conditions could not be complied with in view of the relocation of the same power transmitter, utilization of common transmitter tower and sharing certain common facilities having not been possible. It was in the aforementioned situation guidelines were issued by the Appellant herein in deviation of the original terms of the licence that the Respondent and the licensees similarly situated should make their own arrangements for broadcasting of the events. Clause 1.2 of the agreement provided for the mode and manner as regard construction of the said agreement in case of any conflict between the corresponding provisions of

the schedule and the body of the agreement.

In view of the aforementioned express stipulations contained in the agreement, it is required to construe clause 9 of the agreement at the outset independently. By reason of the said provision revocation of the licence both for breach of terms and conditions as also for default in payment of any consideration must precede 30 days' written notice and a reasonable opportunity of hearing.

How the said provision can be given effect to would depend on the construction of terms and conditions of the licence. By reason of clause 1.2, as contained in the Schedule-C appended thereto, the licensor had been conferred with a power to revoke the licence as also encash and forfeit the bank guarantee without any notice. The expression 'and' occurring in between the words 'right to revoke the licence' and encash and 'forfeit the bank guarantee' must be read as two separate clauses. The same cannot be read as conjunctive in view of the fact that it is admitted that the revocation of licence is not permissible without service of 30 days' notice. What was, therefore, permissible is that the licensor in terms of the said condition of licence may encash and forfeit the bank guarantee furnished by the licensee without giving any notice. The same would evidently mean that for the purpose of encashment and forfeiture of the bank guarantee, no separate notice is required to be given in the event any cause of action arises therefor.

Clause 12.1 whereupon the learned Additional Solicitor General placed strong reliance is not in two parts. It merely provides for two different situations in terms whereof revocation of licence is permissible. The licensor by reason thereof is required to give a 30 days' written notice to the licensee before terminating the licence. The words "without prejudice to any other remedy for breach of the conditions of the licence" must be read in the context of other provisions contained therein. Sub-clause (ii) of Clause 12.1, permits termination/revocation of licence on compliance of the conditions stipulated therein; but the same would be without prejudice to any other remedy for breach of the conditions of licence, which in turn would mean that by reason thereof other remedies available to licensor, if any, are not taken out from their application.

Clause 16.2 plays an important role as it enables the licensor to encash the bank guarantee without any notice; but even for the said purpose the conditions precedents mentioned therein were required to be fulfilled. On a conjoint reading of the aforementioned provisions, it would, therefore, appear that whereas for the purpose of revocation of the licence either on the ground of default on the part of the licensee to pay the consideration in respect of the licence or for breach of the conditions of licence, 30 days' notice as also an opportunity of hearing was imperative. However, what could be done without any notice, it will bear repetition to state, is encashment of bank guarantee.

It may be true that the mode and manner of compliance of the principle of natural justice had not been specifically stated, but the same would not mean that it was necessary to be complied with at all.

However, the letter dated 06.03.2003 was merely a demand. It was not a notice in the true sense of the term as consequences for non-payment had not been stated therein. The said letter was issued only by way of reminder.

We have noticed hereinbefore that only because the licensee makes a default, the same would not mean that the licence should stand revoked without any further notice. Once it is held upon construction of the relevant provisions of the conditions of licence as also the terms thereof that 30 days' notice was required to be given before a licence is revoked, it cannot be said that the said letter dated 6.3.2003 satisfied the requirements thereof.

We may consider the matter from another angle. By reason of the provisions contained in Clause 12.1 of the terms of the licence, not only the

revocation of licence for breach of any conditions contained in any agreement; but also prevention thereof on any other ground which would include the default in payment of licence fee would result in the consequence of debarring the licensee from applying directly or indirectly for any FM Radio Station in future. The consequence of the revocation of the said licence, therefore, is penal in nature. Such penal provision is required to be strictly construed.

It is in that view of the matter, before the licensor exercises his right to revoke the licence, a notice was required to be issued. It having not been done, the conclusion is irresistible that the purported revocation of licence was a nullity.

It is now a well-settled principle of law that a document must be construed having regard to the terms and conditions as well as the nature thereof.

{See Pearey Lal vs. Rameshwar Das [AIR 1963 SC 1703] and Administrator of the Specified Undertaking of the Unit Trust of India & Anr. vs. Garware Polyester Ltd. [2005 (10) SCC 682].}

We, therefore, with respect, entirely agree with the Tribunal.

So far as the contention of the learned Additional Solicitor General that the direction issued by the Tribunal, as quoted supra, is contrary to Section 14(1)(c) of the Specific Relief Act, 1963, is concerned, the same is stated to be rejected. The provisions of the Specific Relief Act would not apply to the contracts, which are governed by the statutory provisions.

It is furthermore not in dispute that the Respondent or the licensees similarly situated had suffered a huge monetary loss. They made representations for change of the licence fee structure. Admittedly, responding to the said representations the Union of India appointed a committee known as 'Dr. Amit Mitra Committee'. The said committee submitted its report on 18.11.2003 recommending that fee structure applicable to Phase-I licensees be done away with and in its stead and place a new regime called the 'revenue sharing regime' be brought in, in terms whereof the licensees would be required to pay licence fees @ 4% of the revenue generated. In terms of the said policy decision, all Phase-I licensee would be permitted to migrate to the new revenue sharing system in Phase-II.

The Telecom Regulatory Authority of India released a consultation paper on or about 14.04.2004 on the basis of the recommendations of the said committee.

It is stated that on the relevant date, namely 20.04.2004, none of the Phase-I licensees in Mumbai had co-located on a common transmission tower nor had the Appellant granted any extension or assurance that permit the licensees would be permitted to continue broadcasting from independent individual station/facilities. Whereas the Respondent herein has expressed its desire not to make any broadcast on the expiry of the terms of the licence, other licensees allegedly continued to do the same, although the tenure of licence expired, it is in that situation, the Respondent took the stand that it should be treated alike the other four licensees, who are continuing to broadcast despite the fact that no further extension had been granted even to them by the Union of India, although they had paid the revenue therefor.

Our attention, in this connection, has been drawn to the provisions as regard migration for Phase-I to Phase-II, as laid down in the policy decision, which is as under:

"1. Licensees of Phase-I, who have actually operationalized their channels would be given the option to Migrate to Phase 2 Policy Regime. They will have to

exercise their initial option by the prescribed date to automatically migrate to Phase 2 Policy regime in accordance with the terms and conditions of migration or continue under Phase-I or surrender their licences with one month's notice."

This Court at this stage is not concerned with the question as to whether the Respondent has fulfilled the said conditions or not; but admittedly, the Tribunal proceeded on the basis that the licence having not been validly revoked, the same continued to be operative.

The Tribunal, in terms of Section 14 of the Telecom Regulatory Authority of India Act, 1997, has a wide power. The Respondent in their application, inter alia, prayed for the following reliefs :

"Pass an order directing the TRAI and the respondent to provide an appropriate migration option to the Petitioner to migrate to new license terms keeping in mind that the Petitioner has invested large sums of money in the radio broadcasting business, has paid a sum appx. Rs. 21 crores since 29.4.2002 to the respondent and has not been able to broadcast sicne 29.4.2004 due to the arbitrary implementation by the respondent of the Cabinet order communicated to the Petitioner vide guidelines dated 31.12.2001."

The Appellate Tribunal only directed the Appellant to treat the Respondent to be entitled to the benefit of the change in the policy decision as regard payment of different mode of licence as the other existing licence holders, indisputably, have been given an option to migrate from the fixed licence fee regime to the revenue sharing regime.

We may, however, notice that indisputably the Respondent had paid the entire licence fee in respect of the second year. It is interesting to note that before the Delhi High Court itself, the Appellant raised the following contention, which was recorded by the High Court in its order dated 12.04.2005:

"Learned counsel for the Respondent on instructions from Shri L.P. Singh, Assistant Engineer of the respondent states that respondent No.3 is not aware of the fact that the petitioner had stopped broadcast of his FM Channel and in these circumstances the notice dated 19.4.04 read with Corrigendum dated 21.4.04 had been issued upon the petitioner raising a demand for the period subsequent to the cessation of the broadcast by the petitioner. It is submitted on behalf of the respondent that the petitioner having stopped the broadcast would not be liable to pay the charges demanded in these communications. In these circumstances, nothing survives in this application and the same is accordingly disposed of."

Having noticed that the Respondent had complied with its interim order by depositing the requisite amount, the High Court allowed the Appellant to withdraw the said sum of Rs.23 lacs and also encash the bank guarantee furnished by the Appellant for another sum of Rs.23 lacs, the High Court directed:

"\005The petitioner shall not be liable for any further amount on account of the FM Broadcast which is the subject matter of the writ petition."

We, therefore, are of the opinion that the Tribunal did not exceed its jurisdiction in issuing the impugned directions.

For the reasons aforementioned, we are of the opinion that no case has been made out for our interference with the impugned judgment of the Appellate Tribunal.

This appeal is dismissed accordingly. No costs.