

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2306 OF 2010

UNION OF INDIA

...APPELLANT(S)

VERSUS

VERTEX BROADCASTING CO. (P) LTD. &ORS.

...RESPONDENT(S)

WITH

C.A. No. 2307/2010, C.A. No. 2308/2010, C.A. No. 2309/2010,
C.A. No. 5193/2010, C.A. No. 5202/2010, C.A. No. 4530/2010

O R D E R

1. The respondents in Civil Appeal Nos.2306, 2307, 2308 and 4530 of 2010 who are also the appellants in connected Civil Appeal Nos. 2309, 5193 and 5202 of 2010 had approached the High Court of Delhi by filing the Writ Petitions (out of which the above appeals have arisen) under Article 226 of the Constitution of India seeking interference of the High Court with the action of the Union of India in forfeiting/withholding the reserved license fee, 50 percent of which was deposited by the respondents (referred to herein as "the

licensees") as a condition of their bids for obtaining FM Broadcasting license. According to the licensees, there was a unilateral departure by the Union of India from the terms of the tender document which had surfaced when the LOI was issued on 02.08.2000. It is the specific case of the licensees that the said departure became even more apparent from the Draft License Agreement which was forwarded to them by the Union. The contention before the High Court was to the effect that in view of the aforesaid unilateral departure, the Union was in breach of the tender conditions. That apart, it was also contended that in the absence of any specific clause in the tender document permitting forfeiture/retention of the license fee, the action in this regard were totally unjustified. The licensees also contended that the Union was not even justified in forfeiting the earnest money inasmuch as it was the Union which had acted in breach of the Agreement and there was no wilful default on the part of the licensees to act in terms of the offers made by them.

2. The learned Single Judge of the High Court dismissed the writ petitions filed by licensees on the ground that the departure from the conditions of the tender document as made in the LOI and the Draft License Agreement were not of significance. The learned Single Judge also took the view that retention/forfeiture of the amount by the Union would be justified as the action of the licensees in refusing to act in terms of the LOI granted to them had occasioned loss to the Union.

3. The licensees carried the matter in appeal before the Division Bench of the High Court. The Division Bench reversed the view taken by the learned Single Judge, inter alia, on the ground that the departure from the terms of the tender document were major in nature amounting to imposition of new conditions beyond those contemplated in the tender document. The Division Bench of the High Court, on an exhaustive consideration of the relevant clauses of the tender document, also came to the conclusion that there was no power vested in the Union to

forfeit/withhold the license fee. The Division Bench, therefore, directed for refund of the License fee but without any interest. Insofar as earnest money is concerned, the Division Bench took the view that the forfeiture of the said earnest money was justified.

4. Against the grant of refund of license fee, the Union has approached this Court by means of Civil Appeal. Nos. 2306, 2307, 2308 and 4530 of 2010 whereas against the refusal of interest on the refund and the forfeiture of the earnest money, the licensees have preferred Civil Appeal Nos. 2309, 5193 and 5202 of 2010.

5. We have perused the terms of the Tender Document, the LOI, the First Draft License Agreement and the Final License Agreement which have been placed on record. A perusal of the terms of the NIT and the terms contemplated in the Final Draft License Agreement (finalized after negotiations and correspondence by and between the parties) it appears that the Final License Agreement embodies terms and conditions which go

far beyond what is mentioned in the NIT. The draft agreement proposed also deals with matters on which the NIT is silent. The above would become clear from a recital of aforesaid differences in a tabular form, which for the sake of convenience, may be set out as under:

TERMS IN NIT	TERMS IN FINAL LICENSE AGREEMENT
NOT PROVIDED	<p data-bbox="826 824 1289 860"><u>Schedule C Article 12</u></p> <p data-bbox="826 904 1388 994">12.1 Termination for Default</p> <p data-bbox="826 1025 1388 1173">The licensor can terminate the license of the licensee in case of:</p> <p data-bbox="826 1205 1388 1294">I. Default in payment of license fee.</p> <p data-bbox="826 1326 1388 1473">Ii Breach of any terms and conditions contained in this Agreement.</p> <p data-bbox="826 1554 1388 1935">The licensor may, without prejudice to any other remedy for breach of the conditions of the license give a written notice to the licensee at its registered office 30 days</p>

	<p>in advance before terminating this license. <u>In the event of termination/revocation of the license, licensee will not be eligible to apply directly or indirectly for any FM Radio Slot on license, in future.</u></p>
<p><u>Section 5 Clause 3</u></p> <p>Undertake to set up the infrastructure and commission the service within specified time limit, failing which my application shall be rejected and advance license fee shall be forfeited.</p>	<p><u>Schedule C Article 4</u></p> <p><u>Prohibition of certain activities</u></p> <p>4.1. The license is non-transferable. The licensee shall not grant a sub-license or lease the channel/broadcast service in whole or part.</p> <p>4.2 The licensee shall ensure that no</p>
<p><u>Section 6 Clause 1 (c)</u></p> <p>The license is non-transferable. The licensee shall not grant a sub-license. No contractor shall be appointed for performing activities</p>	<p>objectionable, obscene, unauthorized or any other content messages or communication, infringed copyright, intellectual property right and international and domestic broadcasting laws in any</p>

<p>under the license.</p> <p><u>Section 6 Clause 1(f)</u></p> <p>The licensee shall not lease the channel/broadcast whole or in part.</p>	<p>form or inconsistent with the laws of India are carried in its Broadcast Channel. The use of the Channel or network for anti-national activities would be construed as an offence punishable under the IPC and applicable laws and will attract immediate termination of the license.</p> <p>4.3 The license shall not either directly or indirectly assign or transfer its right in any manner whatsoever under this agreement to any other into any agreement for sub-license and/or partnership relating to any subject matter of the license to any third party either in whole or in part. Any violation of the terms shall be construed as breach of the license agreement and license of the licensee</p>
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	<p>shall be terminated immediately.</p> <p>However, the licensee may with prior approval of the 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 service under the Agreement by such third party on behalf of the License.</p>
<p><u>Section 6</u></p> <p><u>1. General (a)</u></p> <p>The license shall be for free to air broadcast of audio on main carrier and data on sub carriers, both excluding News and Current Affairs.</p>	<p><u>Clause 7 of License agreement</u></p> <p>The license is for free to air broadcast of audio on main carrier and data on sub carrier both excluding news and current affairs and any other services which are under jurisdiction of Department of Telecommunications.</p>
<p><u>Section 3 Clause 10(c)</u></p>	<p><u>Clause 5 of License</u></p>

<p>The successful applicant shall also be <u>required to submit application to WPC wing of the Ministry of Communications for frequency allocation and SCAFA clearance, within three months from the date of issue of Letter of Intent.</u></p>	<p><u>Agreement</u></p> <p>The licensee shall also <u>abide by all the terms and conditions required for issuance of operational license by WPC.</u></p> <p><u>Schedule C Article 18.3</u></p> <p>The licensee <u>shall abide by all the conditions required for the issuance of all the Wireless Operational License of the Wireless Planning and Coordination Wing</u> and has to also conform with the Technical Parameters as laid down in this agreement. The licensee shall also have all the environmental clearances. The licensee has to also comply with the Electricity Act, Factories Act and other allied Acts. In case of non-compliance of any of the aforesaid requirement, the licensor shall have the right to</p>
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	revoke the license of the licensee.
<p><u>Section 3 Clause 8(f)</u></p> <p>The license has to be paid every year in advance within seven days of the beginning of the year. For the first year, <u>balance of the license fee will have to be paid within 10 days of WPC's intimation that operational license is ready to be issued. Failure to do so will result in forfeiture of the amount already deposited. The license period will be reckoned from the date of the issue of operational license by the WPC, Ministry of Communications.</u></p>	<p><u>Schedule B Clause 2</u></p> <p>Balance of the license fee of the first year <u>shall be paid by the licensee within 10 days of the intimation from the WPC that the Wireless Operating License 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 license the licensee shall not be entitled to any interest on the advanced license fee deposited by him.</u></p>

6. Clause 8(f), 10(d) and 12 of the Tender Document which is relevant to the case may now be set out as

under:

8(F) The license 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 license fee will have to be paid within 10 days of WPC's intimation that operational license is ready to be issued. Failure to do so will result in forfeiture of amount already deposited.

The license period will be reckoned from the date of issue of operational license by Wireless Planning & Coordination Wing (WPC), Ministry of Communications.

10(d) The successful applicant shall also complete the installation of the broadcast facilities including studios, transmitter infrastructure etc. and commission the service within 12 months from the date of frequency earmarking by WPC. If the successful applicant fails to do so, the first year license fee

paid by the applicant shall stand forfeited.

12. EARNEST MONEY DEPOSIT (EMD):

That applicant shall enclose with the tender document a crossed A/c payee demand draft, payable at any scheduled bank in New Delhi for the amount defined below. In favour of the Pay & Accounts Officer, Ministry of I&B, Shastri Bhavan, New Delhi - payable at Delhi Towards earnest money deposit. The earnest money deposit shall be forfeited in case the applicant does not abide by his offer. No relaxation of any kind on earnest money deposit will be given to any applicant. EMD will be returned to unsuccessful applicants. After payment of license fee and furnishing of bank guarantee, the EMD will be returned to successful applicant.

Category	EMD Rs. Lakhs
A+	2.00
A	1.00
B	0.75
C& D	0.5

7. We may also take note of another significant fact at this stage. Though an attempt has been made on behalf of the Union to assert that the retention/forfeiture of the

license fee is on account of damages/losses suffered by the Union, there is no pleading whatsoever to the aforesaid effect. In fact neither before learned Single Judge nor before the Division Bench of the High Court or even before us the Union has even remotely attempted to place relevant materials in this regard to show that the action of the licensees in refusing to act in response to the LOI granted to them had occasioned losses/damages for which the Union is liable to be compensated. In the absence of any pleading on the aforesaid score, what was urged before the High Court was primarily a legal question, namely, whether in the absence of any specific clause in the NIT, forfeiture was justified. The aforesaid issue had arisen irrespective of the question whether the licensees were justified in refusing to act on the basis of the LOI's issued/granted to them. If this was the issue raised we do not see how in the exercise of its writ jurisdiction the High Court should have felt handicapped in answering the same. Viewed in the above light, the objections of the appellant-Union regarding the maintainability of the writ petitions before the High Court must necessarily fail.

8. We have already taken the view that the Union had

departed from the terms of the NIT and had incorporated new/additional terms and conditions in the LOI and the Draft License Agreements which were finalized by the Union after exchange of correspondence with the licensees. The precise content of the departures made has also been set out above. Inherent in said finding would be a further determination of the unjustifiability of the action of the Union in forfeiting the license fee. The Union could not have departed from the terms of the NIT unilaterally and on the refusal of the licensees to accept such modified terms and act in terms of the LOIs granted to them the Union could not have resorted to the forfeiture as made. This is irrespective of the question of the existence of any enabling provision in the NIT for forfeiture of the license fee.

9. Coming to the aforesaid question of availability of a power to order forfeiture, a reading of the relevant clauses i.e. 8(f), 10(d) and 12 extracted above would go to show that the Union had not protected/empowered itself to forfeit the license fee. The forfeiture contemplated by the aforesaid clauses are altogether in different contexts and situations. In the absence of any such power, the

forfeiture that has taken place in this case will have to be adjudged as null and void.

10. This would take this Court to the issue with regard to earnest money. The earnest money required to be deposited by the licensees under Clause 12 of the NIT can be forfeited only in the event there is default on the part of the licensees or if a licensee is unwilling to act on its offer. The refusal of the licensees in the present case was not on their own volition but was prompted by additions to the terms and conditions of the NIT made unilaterally by the Union of India. If that is so, it will be difficult to accept the view of the High Court insofar as forfeiture of earnest money is concerned. The refusal of the licensees to act in furtherance of the LOI's granted to them being on account of breach committed by the Union, we are of the view that the forfeiture of the earnest money is also not justified.

11. If the license fee and the earnest money have been forfeited unjustifiably by the Union as we are inclined to hold, naturally, the licensees would be entitled to payment of interest. Award of interest is a measure of re-compense for delayed payment. Interest also

seeks to offset the decline in the value of money with time. Taking into account the totality of the facts and circumstances of the case, we are of the view that interest at the rate of 6 per cent per annum from the date that the amounts were forfeited by the Union (license fee and the earnest money) would serve the ends of justice. We, therefore, order accordingly and direct the Union to pay all such amounts along with interest at 6 per cent per annum within a period of eight weeks.

12. Consequently and in the light of the above discussions, the civil appeals filed by the Union are dismissed and those filed by the licensees are allowed.

.....J.
[RANJAN GOGOI]

NEW DELHI
12TH FEBRUARY, 2015

.....J.
[PINAKI CHANDRA GHOSE]

ITEM NO.102

COURT NO.9

SECTION XIV

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G SCivil Appeal No(s). 2306/2010

UNION OF INDIA

Appellant(s)

VERSUS

VERTEX BROADCASTING CO. (P) LTD. & ORS.
(With office report)

Respondent(s)

WITH

C.A. No. 2307/2010
(With Office Report)C.A. No. 2308/2010
(With Office Report)C.A. No. 2309/2010
(With Interim Relief and Office Report)C.A. No. 5193/2010
(With Office Report)C.A. No. 5202/2010
(With Office Report)C.A. No. 4530/2010
(With Office Report)

Date : 12/02/2015 These appeals were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE RANJAN GOGOI
HON'BLE MR. JUSTICE PINAKI CHANDRA GHOSE

For Parties

Mr. A.K. Panda, Sr. Adv.
Mr. Rajeev Sharma, Adv.
Mr. Gaurav Sharma, Adv.
Ms. Sunita Sharma, Adv.
Mr. S.N. Terdal, Adv.

Mr. Shyam Divan, Sr. Adv.
Mr. Tejveer Bhatia, Adv.
Mr. Upender Thakur, Adv.
Mr. Gaurav Sharma, Adv.
Mr. Abhinav Mukerji, Adv.

Mr. Ajit Warriar, Adv.
Ms. Nisha, Adv.
Ms. Nimisha Sharma, Adv.
Mr. Vishal Nijhawan, Adv.
M/s Suresh A. Shroff & Co., Adv.

Mr. Jayant Bhushan, Sr. Adv.
Ms. Malnini Sud, Adv.
Ms. Vidhi Goel, Adv.
Ms. Bhunika Manon Kaliya, Adv.
Mr. Umesh Kumar Khaitan, Adv.

M/s. Janendra Lal & Co., Adv.

UPON hearing the counsel the Court made the following
O R D E R

The civil appeals filed by the Union are
dismissed and those filed by the licensees are
allowed.

(MADHU BALA)
COURT MASTER
(Signed order is placed on the file)

(ASHA SONI)
COURT MASTER