
(2007) 12 DEL CK 0146

In the Delhi High Court

Case No : C.M. No. 9879 of 2000 in WP (C) No. 6485 of 2000

New Media Broadcasting (Pvt.) Ltd. and Another

APPELLANT

Vs

Union Of India (UOI)

RESPONDENT

Date of Decision : 24-12-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 299, 32
Telegraph Act, 1885 — Section 4

Citation : (2007) 12 DEL CK 0146

Hon'ble Judges : Manmohan Sarin, J

Bench : Single Bench

Advocate : Kapil Sibal Rajiv Nayyar and Shyam Moorjani, in CM No. 9879/2000 in WPC No. 6485/2000 C.S. Vaidyanathan, Ritu Bhalla and Ruchi Mahajan, CM Nos. 10109 and 10110/2000, 7373/2001, 3378/2004 and 14051/2005 in WPC Nos. 6588 and 6589/2000 Rajiv Nayyar, in CM 10453/2000 in WP C No. 6804/2000 and Sudhir Makkar, in CM 10453/2000 in WPC No. 6804/200, for the Appellant; Harish Salve and Former Addl. Solicitor General of India and Rajeev Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Sarin, J.—By this judgment, the above four writ petitions are being decided since common questions of law and facts arise in these petitions. The objections raised to the maintainability of the writ petitions are also on similar grounds.

Common Facts and Claims in Writ Petitions

2. All the petitioners in response to the "Notice Inviting Tenders" for grant of licenses for providing FM Broadcasting service in 40 cities, had submitted their bids. Petitioners are aggrieved by the action of the respondent-Union of India purporting to forfeit the earnest money deposit (EMD) and 50 per cent advance reserved license fee deposited by the petitioners. It is the case of petitioners that ?Letters of Intent? enclosing draft license agreement and Consortium

agreement, issued by Union of India stipulate conditions which substantially vary from the terms of the tender documents. Petitioners contend that the agreement/contract between the parties was to conform to the terms and stipulations contained in the tender documents. This was even the legitimate expectation of the petitioners. Petitioners claim that the 'Letters of Intent' and the 'draft agreements' as issued by the respondents, partake the nature of a counter offer and the petitioners were not obliged to accept the same. respondent Union of India, it is claimed, in response to the several representations received, agreed to correct only some of the material deviations, while not redressing several other significant grievances of the petitioners.

3. Petitioners by their respective writ petitions seek a declaration that respondents are not entitled to forfeit the Earnest Money Deposit (EMD) and 50% of reserved license fee received in advance. A mandamus is also sought directing the respondents to bring the proposed license agreement in conformity with tender conditions, failing which to refund the EMD and the 50% reserved license fee.

4. Having noted the basic contentions and questions arising for consideration, the individual facts of the writ petitions insofar as they are relevant for purposes of decision of the writ petitions, are being noticed:

A. CW 6485/2000 New Media Broadcasting Pvt. Ltd. and Anr v. Union of India.

Petitioner No. 1 had submitted its bid in response to the tender No. 212/2/99-B(D) issued in October, 1999. A corrigendum dated 31st October, 1999 to the tender was issued by the respondent-Union of India, for FM Broadcasting through Private Operators. Petitioner No. 2 is a shareholder of petitioner No. 1. Petitioner paid earnest money deposit of Rs. 18.5 lacs (Rupees eighteen lacs and fifty thousand only) and 50% of the license fee for participating in the auction process, after being short-listed. Petitioner No. 1 paid a sum of Rs. 7 (seven) crores towards 50% of the reserved license fee. The tenders had been invited for 108 stations spread over 40 cities. The bid for each station required separate application and earnest money deposit. Petitioner No. 1 was the successful bidder in 28 stations. Letters of respondent dated 2nd/3rd August 2007 forwarding the draft of license Agreement and Consortium agreement stipulated that if the requisite agreements were not executed and bank guarantee not furnished, there shall be forfeiture of EMD and license fee deposit and a ban on participation in future tenders for any FM license. Petitioner found the license agreement to be different from the terms set out in the tender conditions. Petitioner vide its letter of 4th October, 2000, pointed out and set out in detail all the deviations and departures from the condition of tender documents. It was pointed out that the draft license agreement in several critical aspects was beyond the scope of tender and imposed a number of restrictions and obligations on the licensee that were not envisaged in the tender. Respondent vide its letter dated 5th October, 2000, gave clarifications regarding Licensing Agreement and Consortium Agreement in respect of FM Broadcasting licenses. Petitioner

reiterated its request on 10th October, 2000. A representation was also sent to the Minister of Information & Broadcasting on 11th October, 2003. Other bidders also met the Minister. Petitioner submits that he was neither informed nor invited for the meeting. Respondent considered the terms labelled as deviations by the petitioner and agreed to make amends for some, while insisting to retain the others.

B. C.W. 6588/2000 Hind Broadcasting Co. Pvt. Ltd. and Ors. v. Union of India.

Petitioner Nos. 1 and 2 companies submitted their bids together with the EMD and 50 per cent reserved license fee in response to the Tender Document No. 212/2/99-B(D) for granting licenses for private FM Broadcasting Services in 40 cities/station. The Letters of Intent Nos.206/5/2000-FM Bangalore, 206/8/2000-FM Calcutta, 206/10/2000-FM Chennai, 206/14/2000-FM Delhi and 206/20/2000-FM Jalandhar were issued by the respondent to petitioner Nos.1 and 2 on 2nd and 8th August, 2000 respectively. Letters of Intent required execution of the license agreement within 75 days and furnishing of bank guarantee. Failure to furnish the bank guarantee or execution of license agreement was to result in forfeiture of the advance license fee deposited by the petitioners. Revocation of bank guarantee was to entail debarring from applying for any FM Radio Station license in future. The Radio group of which the petitioner companies are also members, made representations to the respondent-Ministry of Information and Broadcasting, bringing to the latter's attention, the deviations and departures in the draft license agreement from the conditions of the tender document. Petitioners claim that uncertainty was created by the respondent by withdrawal of some of the Letters of Intent. Respondent had sought information and confirmation with regard to the companies, which Mr. Avtar Singh Lit, was representing. Further representations were made by the petitioners and the Radio Group. Respondent vide its letter of 9th October, 2000, addressed some of the concerns but several material deviations were not redressed. Petitioners requested the respondent to refund the EMD as well as 50 per cent of the license fee already deposited by them. Respondent vide its letter dated 12th October, 2000 and 13th October, 2000 gave the revised draft of license agreement and also extended the date for submission of bank guarantee and signing of the license agreement till 30th October, 2000. Respondent gave its formal reply to the representation vide letter dated 18th October, 2000, intimating that the revised license agreement had been drafted taking note of the concerns expressed by the petitioners and the time for execution of license agreement and bank guarantee has been extended up to 30th October, 2000. Petitioners again protested against the issue of license agreement as question of grant of compensation and the issue of debarring/blacklisting had been left unattended. Petitioners also explained that Mr. Avtar Singh Lit, who was an expert had been asked to share his knowledge and experience. He was neither a Director nor shareholder of the petitioner company. Petitioners vide their letter dated 27th October, 2000 sought a confirmation that prior to the signing of the license agreement and submission of bank guarantee, there would be no impediment or

other acts detrimental to the licensee company after the execution of the agreement and submission of bank guarantee. Petitioners offered to furnish bank guarantee within a week from the receipt of such confirmation. Petitioners also took up the plea that the respondent was not entitled under the terms and conditions, to forfeit the EMD and advanced license fee on ground of delay and failure to furnish bank guarantee. Respondent in its reply of 27th October, 2000, remonstrated the petitioners and asked them to act as per the Letter of Intent. Petitioners did not furnish the bank guarantee nor did they execute the revised draft license agreement. Petitioner further submits that the respondent did not issue the clarification and assurance with regard to the license terms as demanded.

C. CW 6589/2000 Dream Radio (I) Pvt. Ltd. and Ors. v. Union of India.

Petitioners 1 to 4 submitted their bid on 10.11.99 in response to the tender document No. 212/2/99-B(D), for purpose of granting licenses for Private FM Broadcasting Services in 40 cities. Petitioner No. 1-Company's bid was found eligible and Letters of Intent bearing No. 206/14/2000-FM Delhi and 206/26/2000-FM (Mumbai) were issued on 2nd August, 2000. Petitioner No. 2-Company's bid was found eligible for Bangalore and letter bearing No. 206/5/2000-FM (Bangalore) was issued to the petitioner No. 2. Petitioner No. 3 was found eligible for Calcutta and Letter of Intent No. 206/8/2000-FM (Calcutta) was issued. Petitioner No. 4 was found eligible for Pune and Letter of Intent No. 206/31/2000-FM(Pune) dated 3rd August, 2000 was issued. Petitioners deposited the earnest money deposit (EMD) and 50% of the reserved license fee as advance for participation in the auction process. The Radio Group of which the petitioner Companies were members, vide its letter dated 31st October, 2000, addressed to the Ministry of Information and Broadcasting, set out the various deviations and departures in the draft license agreement from the terms in tender documents. This was followed by further representations and reminders. The respondents vide their letter of 9th October, 2000 responded to the representations made by the petitioners and others. The petitioners case is that the respondent while dealing with certain issues of material deviations favorably, did not address several other issues. After several representations and a meeting held by the respondents, the respondent forwarded a revised draft license agreement and also extended the last date for submission of Bank Guarantee till 30th October, 2000. Petitioners had also clarified that Shri Avtar Singh Lit was neither a shareholder or Director of the petitioners and his involvement with the Radio Group was on account of being an expert in radio industry, having experience in broadcasting in various countries. Petitioner also vide their letter dated 23rd October and 27th October, 2000, requested the respondent to issue a clarification and confirmation that "no impediment or acts detrimental shall follow on the execution of the license agreement by the petitioners". The clarification and assurance was sought on account of withdrawal of the Letter of Intent issued to Jaipuria Group without assigning reasons. Petitioners justified non-submission of the bank guarantee and non execution of the license

agreement by 30th October, 2000 in view of the material variations from the stated tender conditions and the non-issuance of the clarifications regarding continuity of license Petitioners, in these circumstances, seek a writ of mandamus directing the respondent to refund the 50% reserved license fee and the Earnest Money Deposit.

D. C.W. No. 6804/2000 Vertex Broadcasting Co. (Pvt.) Ltd. v. Union of India.

Petitioner was the successful bidder in Tender Document No. 212/2/99-B(D) for the grant of licenses for private FM broadcasting service in 40 cities. Petitioner was found successful for 6 stations, namely, Calcutta, Indore, Bhopal, Vishakhapatnam, Chennai and Hyderabad. The radio group of which the petitioner company was a member as also the petitioner itself, made representations to the respondent to rectify the deviations and departure in the draft license agreement and to bring it in conformity with the tender terms. Respondent while addressing some of the concerns, modified the revised license agreement vide its letter of 12th October, 2000. Respondent also required the petitioner to execute the bank guarantee by 30th October, 2000 along with the revised license agreement. Petitioner requested the respondent to address the basic issue of deviation without prejudice to its rights and contentions. Petitioner furnished the bank guarantee for 4 stations, namely, Bhopal, Calcutta, Indore and Vishakhapatnam. Petitioner did not furnish the bank guarantees in respect of 2 stations, namely, Hyderabad and Chennai. Petitioner decided not to go ahead with the contract in view of the changes sought to be imposed by the Ministry. Petitioner challenges the contemplated forfeiture of the money deposited towards EMD and 50 per cent of the reserved license fee in respect of Hyderabad and Chennai stations.

Developments during course of proceedings ? Second phase of policy of FM Broadcasting Service through Private Agencies ? Disposal of a similar Writ Petition No. 6791/2000 and intervention application.

5. Mr. Kapil Sibal and Mr. Rajiv Nayyar, learned senior Advocates with Mr. Shyam Moorjani on behalf of the petitioner in New Media Broadcasting (Pvt.) Ltd. WPC. No. 6485/2000, Mr. C.S. Vaidyanathan, Senior Advocate with Ms. Ritu Bhalla and Ms. Ruchi Mahajan in Hind Broadcasting Co. (Pvt.) Ltd. WPC. No. 6588/2000, Mr. C.S. Vaidyanathan and Mr. Rajiv Nayyar, Senior Advocates with Ms. Ruchi Mahajan in Dream Radio India (Pvt.) Ltd. WPC.6589/2000 and Mr. Sudhir Makkar in Vertex Broadcasting Co. (Pvt). Ltd. WPC. 6804/2000 have been heard at length over extended period of time. Mr. Harish Salve, Senior Advocate and former Solicitor General of India with Mr. Rajiv Sharma, Advocate have also been heard on behalf of Union of India, in opposition. Written submissions and additional written submissions were also filed by the petitioner and respondent. An amendment application, seeking the requisite declaration with a view to avoid technical objection of relief having not been sought, was also filed subsequently and were taken on record.

6. During the course of hearings, attempts were also made for negotiating a settlement and one of the parties which had originally filed Writ Petition No. 6791/2000, accepted the clarifications offered by the respondent in the letter dated 29.11.2000, addressed to M/s Hind Broadcasting Company Ltd. which were extended to be applicable to it. Its petition was disposed of vide order dated 18.12.2000. There is no dispute with regard to the documents filed by the petitioners and the respondent which were taken on record with the consent of the parties and it was accepted that the matter could be disposed of on the basis of the documents produced and the submissions filed by the parties on record, without Union of India formally filing a counter affidavit. Since facts were not in dispute, legal submissions had been placed on record. As noted earlier, respondent had raised objection on the maintainability of the writ petition, claiming that petitioners, if they wish to pursue the case, had to be relegated to their civil remedy. Petitioners in April, 2004, had moved an application bearing No. 3378/2004 to rely on the judgment of the Supreme Court passed in ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd and Ors. reported at Judgment Today 2003 (10) S C 300 , in support of the pleas raised by them that a writ petition was maintainable. Union of India placed reliance on National Highway Authority of India Vs. Ganga Enterprises and Another, .

7. Upon hearing the parties at length, judgment in the matters was reserved. However, subsequently, the respondents announced on 13.7.2005, their policy on expansion of FM Radio Broadcasting Service through Private Agencies (Phase-II). Show cause notices dated 29.9.2005 were issued to petitioners seeking Explanation as to why the Letters of Intent issued to them be not revoked. Government decided to waive the condition of blacklisting for defaulting LOI/ license holders of Phase-I, provided the Letters of Intent are revoked and the petitioners exercise their option to participate in Phase-II and are eligible as per the prescribed eligibility criteria of Phase-II.

The petitioners in WP(C) No. 6588/2000 and 6589/2000 moved C.M. No. 14052/2005 & CM No. 14051/2005 respectively praying inter alia for stay of operation of the show cause notice. They sought free and fair participation in the second phase of bidding without being prejudiced against, on account of action taken by the respondents in forfeiting the EMD and advance of reserved license fee deposited, which had already been challenged by the petitioners before this Court, as also the proposed revocation of the Letters of Intent.

Respondents Union of India in its response to the applications, submitting inter alia that with a view to encourage maximum participation in Phase II, it was decided that the Letters of Intent issued to Phase I defaulters shall be revoked and such of them who accept the revocation and are otherwise eligible and opt to participate in Phase II shall be permitted to do so and to that extent the condition of blacklisting shall stand waived. It was submitted that such revocation shall be without prejudice to the rights and contentions of the parties in the pending litigation. Petitioners in view of the averments in reply and

submissions made by the counsel, did not press the said applications, which stands disposed of.

It may also be noticed that one M/s. Network (India) Ltd. moved is No. 7373/2001 in CWP No. 6589/2000 seeking impleadment on the ground that it had reviewed the license Agreement and furnished Bank Guarantee as required by the respondent. In case any relief was granted to the petitioner, the same may prejudice the applicant who was similarly placed. It was ordered that the application would be decided along with the writ petition.

8. Parties were fully heard and had filed written submissions together with case law relied on. Matter was listed for directions on 20.12.2007 when the parties stated that they had nothing further to add to the submissions already filed.

Maintainability of Writ Petitions

The basic objection sought to be raised by the respondents to the maintainability of the writ petitions was on the ground that the transactions were essentially in the realm of contract for the enforcement of which writ jurisdiction was not available. Respondents had pleaded and urged that the disputes being of a civil nature and in the realm of the contract, petitioners should be relegated to the civil remedy of seeking relief in suits. The petitioners had countered the same urging that even if it was assumed that the transaction was in the realm of contract, the actions of the respondents were alleged to be arbitrary, capricious and unreasonable and hence, amenable to writ jurisdiction and open to judicial review as permissible at law. Reliance was placed on Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, held as follows:

Even though the rights of the citizens are in the nature of contractual rights, the manner, method, and the mode of the decision of entering or not entering into a contract are subject to judicial review on the touchstone of relevance and reasonableness, fairplay, natural justice, equality and non discrimination in the type of transactions and nature of dealings as in the present case.

9. Again in Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others, which challenged the constitutional validity of a notice of re-entry upon forfeiture of lease issued by the Land and Development office, the Supreme Court held that such writ petitions were maintainable. The relevant extract is quoted hereinbelow:

27. The Court in Pratap Singh case observed that the constitution enshrines and guarantees the rule of law and the power of the High Court under Article 226 (which is equally true of Article 32) is designed to ensure that each and every authority in the State, including the Government acts bona fide and within the limits of its powers and that when a court is satisfied that there is an abuse or misuse of power and that its jurisdiction is invoked, it is incumbent on the Court to afford justice to the individual. The Court further observed that in such an event the fact that the authority concerned denies the charge of mala fide or

asserts the absence of oblique motives, or of its having taken into consideration improper or irrelevant matter, does not preclude the Court from inquiring into the truth of the allegations made against the authority and affording appropriate relief to the party aggrieved by such illegality or abuse of power in the event of allegations being made out....

10. In *ABL International and Anr. v. Export Credit Guarantee Corporation of India* reported in JT 2003 10 300, the Supreme Court held that on a balanced consideration of the case law precedents of the Apex Court it is clear that there is no absolute rule that in all cases involving disputed questions of fact, the parties should be relegated to a civil suit, if they have moved the Court by way of an Article 226 petition.

Unlike the private parties, the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. This factor alone is sufficient to import atleast the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent challenge is made on the ground of violation of article 14 by alleging that the impugned act is arbitrary, unfair, or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligations to comply with the basic requirements of Article 14. To this extent the obligation is of a public character invariable in every case irrespective of their being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in its action.

In view of the foregoing judicial pronouncements, it was urged that the consideration of the petitioners' case in writ jurisdiction cannot be excluded simply on the grounds that the transaction had its genesis in contract or falls within the realm of contract. I am in agreement with the aforesaid submission of the petitioners that consideration of their case cannot be excluded merely on the ground that the transaction was in the realm of contract. Petitioners are entitled to have the matter considered in the writ jurisdiction to see whether the acts of the State complained of, even though contractual, were not arbitrary, unfair or unreasonable. Based on the above, the consideration of the petitioners' case in

writ jurisdiction cannot be excluded. However, it would have to be seen whether the present petitions are held amenable to exercise of judicial review under Article 226 of the Constitution of India or not, on merits, within the limited parameters of judicial review.

Petitioners' submissions on merits ? Re. forfeiture of EMD and Reserved license Fee

11. Let me briefly recapitulate the submissions made. The first submission was that in the absence of a forfeiture clause in the tender documents, the respondent could not forfeit or retain the amount deposited by way of 50% of the advance license fee. Apart from the stipulated earnest money deposit, the amount equivalent to 50% of the reserved license fee had been deposited by the petitioners prior to participating in the auction. Mr. Sibal argued that in the absence of any forfeiture clause in the tender conditions and of any notice to prospective bidder, the advance license fee deposited could not be forfeited as it partakes the character of a penalty being imposed without any forfeiture clause. Mr. Sibal submitted candidly that as far as the earnest money deposit was concerned, there was a forfeiture clause and forfeiture would have normally been permissible in terms thereof. However, in the instant case, even the earnest money deposit could not be forfeited because the respondent had unilaterally sought to change the terms and conditions governing the tender by introducing onerous conditions in the Letter of Intent, license agreement as well as Consortium agreement while purporting to accept the bid of the respondent. These have resulted in a counter offer being made by the respondent which the petitioners were not obliged to accept.

12. Mr. Sibal next submitted that under the tender conditions, the applicant petitioners submitted a demand draft for the earnest money deposit and further deposited 50% of the reserved license fee for the first year. The deposit of 50% was an amount measured with reference to the reserved license fee to allow the bidder to participate in the auction. The said deposit was not the part of the license fee. The license fee was payable within 10 days of the Wireless Planning and Coordination Wing intimating that the operational license was ready to be issued. The said stage had not been reached at all. It was only after the bidder accepted the terms and conditions of the Letter of Intent and executed the license agreement that he was entitled to apply for obtaining the wireless operational license. In other words, the stage of payment of license fee had not arisen. Further, since the respondent had introduced in the Letter of Intent, terms and conditions which were at variance with the tender document, petitioners stood absolved from proceeding further in the matter. Petitioners were thus entitled to withdraw the bid offer in respect of the various stations. Mr. Sibal further urged that the Letter of Intent, being in the nature of counter offer, petitioners were entitled to a declaration that forfeiture or retention of the amount of deposit of reserved license fee as well as the forfeiture of earnest money was illegal. He relied on the following authorities:

1. Moolji Jaitha & Co. v. Seth Kirodimal reported at 1961 Ker 21
2. Raghunandan Reddy v. State of Hyderabad reported at 1963 AP110
3. Somasundaram Pillai Vs. The Provincial Government of Madras,
4. HFCL Bezed Telecom Ltd. v. Union of India reported at 1997 (69) DLT 317
5. M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others,

13. Referring to Clause 8(f), providing for forfeiture of the amount deposited, he urged that by the said provision in the tender document, forfeiture was provided for, but at a stage different from the one at which the respondent was seeking to forfeit. This was a stage where under Clause 10, an operational license was to be granted to the applicant. A bank guarantee had to be furnished for the license period and the requisite application moved to the Wireless Planning and Coordination Wing of the Ministry of Telecommunication. Infrastructure and other broadcast facilities were required to be completed within 12 months from the date of frequency allocation. This stage had not been arrived, since there was no agreement on the terms and conditions of the license agreement. Accordingly, petitioners were not obliged to execute a guarantee. Accordingly, it was urged that Clause 8(f) would have no application. Similarly, clause 10(d) provided for forfeiture of the first year's license fee upon termination, that stage would also arise only after the execution of the bank guarantee and the operational license and frequency allocation being in place. He, Therefore, submitted that neither the forfeiture of the earnest money under Clause 10 nor the forfeiture of the deposit for participation in the auction under Clause 8(f) and the forfeiture of the license fee under Clause 10 (d) could be invoked.

14. Petitioners assailed the decision of the Government as reflected in its letter of 23rd March, 2000 as being unwarranted under the terms and conditions of the tender. The said forfeiture was contemplated by the respondent under Clause 10(d) and 12(3) of the tender document, which do not relate to the forfeiture of the amount equivalent to 50% of the reserved license fee. Any decision to forfeit the deposit even under Clause 8(d) would be outside the terms of the contract. He submitted that once the Court comes to the conclusion that power to exercise forfeiture of the deposit does not owe its genesis to any terms of the tender then such a writ petition challenging the said decision was maintainable as the forfeiture would be without authority of law and arbitrary.

15. It was urged that the Union had acted in an arbitrary and unilateral manner. Respondent in its communication dated 2nd and 3rd August, 2000, stipulated in para 3 that in the event the petitioners did not furnish the bank guarantee or enter into a license agreement that deposit would stand forfeited. Such a unilateral term does not emanate from any terms and conditions of the tender and as such was liable to be struck down under Article 226 of the Constitution of India. The subsequent communication between the petitioners the radio group

and the respondent demonstrates that parties were at variance with the terms of the license agreement, since these were not in conformity with the original terms and conditions. This correspondence reveals that the respondent was negotiating with the numerous bidders. However, as far as the applicant/petitioners were concerned, the applicant/petitioners made a representation on 4th October, 2004, which was replied to by the respondent on 5th October, 2004 and the applicant/petitioner thereafter sought to withdraw from the tender proceeding and sought refund. No negotiations were held with the petitioner (New Media Broadcasting).

16. Mr. Sibal submitted that there was no concluded agreement between the parties. In the absence of a concluded contract, there was no question of enforcement of the concluded contract and as such the writ petition was maintainable. He places reliance on *Bhim Sain Vs. Union of India*, , *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, , *Union of India Vs. Uttam Singh Dugal and Co. (Pvt.) Ltd.*, , *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, . He submitted that before a concluded contract was entered into, the writ petition was maintainable challenging the executive authority of the Government in imposing conditions. He submitted that petitioner was also entitled to seek refund under Article 226 of the Constitution of India and Courts have held that the respondent could not withhold money without authority of law. He placed reliance on *Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others*, , *Salonah Tea Co. Ltd. and Others Vs. Superintendent of Taxes, Nowgong and Others*, .

Submissions on behalf of the petitioners in WP(C) No. 6588/2000 by Mr. C.S. Vaidyanathan, Sr. Advocate

17. Mr. C.S. Vaidyanathan, Senior Advocate, with Ms. Ritu Bhalla and Ms. Ruchi Mahajan, Advocates, apart from adopting the aforesaid submissions of Mr. Kapil Sibal sought to additionally urge that the present tender document had been issued by the respondent in exercise of statutory power u/s 4 of the Indian Telegraph Act, 1885, to grant a license involving the use of air waves, which were public property. The present case, it was urged, was not a case of a contract simplicitor. A preliminary objection sought to be raised by the respondent that writ petition was not maintainable since petitioners were seeking to enforce contractual rights and should be relegated to a civil Court was not sustainable as noted earlier in para 8 of the Judgment. Additionally, it has to be noted that the dispute emanated out of and has its origin and was inextricably linked with the exercise of statutory powers under the Indian Telegraph Act, of granting licenses. Accordingly, it involved the exercise of statutory powers and the respondent could not, Therefore, display any arbitrariness. The tender document itself had the heading, 'Licensing for Private FM Services.', referring to clause 6(1)(d) of the tender document, which provided that the license was to be governed by the Indian Telegraph Act, further Clause 8 of the draft license agreement also made the license subject to the provisions of the Indian

Telegraph Act. It would, Therefore, to be seen that it was a case where the respondent in pursuance to the powers u/s 4 of the Indian Telegraph Act, the power to broadcast by granting license was sought to be exercised. The tender was set up to maintain operations for carrying out free to air broadcast through the medium of radio. It was thus not a case where simply goods were being purchased or sold as a pure commercial transaction. Hence, while the right, power and authority of the respondent to grant licenses to private bodies could not be questioned, the said power and privilege being vested by a statute, it was incumbent that while exercising the power to grant license, the procedure adopted for such grant was fair, reasonable, rationale and in conformity with the conditions, which in the present case are the terms and conditions of license as enshrined in the tender document. Mr. Vaidyanathan, Therefore, submitted that the action of the respondent in introducing in the Letter of Intent, conditions of forfeiture of reserved license fee and upon failure, to blacklist from all future tenders and introduction of material alteration in the license agreement from the conditions on license as laid down in the tender document were not permissible. Petitioners had tendered their bid on the legitimate expectation that the license agreement would be in conformity with the conditions of license laid down in the tender document. This expectation was totally belied. Not only this, unreasonable conditions, which would be hit by *Wednesbury's* principles, were sought to be introduced.

18. It was also urged that there was no concluded agreement between the parties as the license agreement did not comply with the mandatory requirement of Article 299 of the Constitution of India. Mr. Vaidyanathan further urged that apart from non-compliance with Article 299, there was no concluded contract between the parties, as they were not at *ad idem*. Hence objection of the respondent of the writ petition not being maintainable, had no merit.

19. The Letter of Intent dated 2nd August, 2000 and 3rd August, 2000 as also the draft license agreement were stated to be in the nature of counter offer. There being no consensus or *ad idem*, as regards the counter offer, there was no offer or contract in existence and petition under Article 226 was maintainable. Reliance was placed on *UP Rajkiya Nigam Ltd. v. Indure Pvt. Ltd. and Ors.* reported at 1996 SC 1373 and on the *Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others*, to urge that the Court had ample powers under Article 226 to render justice in the case of arbitrary exercise of power even when the relationship arose out of a contractual relationship such as this.

20. Lastly, Mr. Vaidyanathan submitted that the bid of the petitioner had lapsed by efflux of time. The bid was valid for a period of 180 days from the date of opening of the bids. Bids were opened in accordance with the Clause 16 of the tender document on 19th November, 1999, 24th November, 1999 and 29th November, 2000 for various centres. He submitted that the bid of the petitioners had lapsed on 29th May, 2000. The provisional Letter of Intent failed to meet the requirements of the contents of the Letter of Intent and could not be regarded as

valid acceptance. It was further urged that participation in the auction in March, 2000 could not result in an automatic renewal of the bid as the bid had to be in accordance with Clauses 13 and 14 of the tender document and participation in the auction cannot result in extending the validity in terms of Clause 17. Petitioners, Therefore, prayed that they were entitled to a declaration that forfeiture and retention of the advance reserved license fee as well as earnest money deposit was illegal and respondent be directed to refund the same. Mr. Sudhir Makkar, Advocate, on behalf of the petitioner in WPC. No. 6804/2000 adopted the submissions made by Mr. Kapil Sibal and Mr. C.S. Vaidyanathan, Senior Advocates for his petition as the same applied squarely to the facts of the said petition.

21. In response, Mr. Harish Salve, learned Senior Advocate on behalf of the respondent submitted that resort to Article 226 of the Constitution of India was not available, where the rights sought to be adjudicated were in the realm of contractual rights. The obligation of the state in the field of contract were not subject to judicial review. Mr. Salve further urged that since no formal contract had been signed, petitioners contention that writ petition was maintainable was equally misconceived. The deposit of money as per the petitioner's own assertion was for the award of contract and the rights of the parties were, Therefore, to be governed by the law of contract, which included issues, such as, existence of a concluded contract and if not, the refund of any payments made in anticipation of a contract. These were matters, which would be governed by law of contract and adjudication of those was not permissible in proceedings under Article 226. The questions sought to be raised were required to be properly adjudicated in the civil forum. It has already been noted that consideration in writ jurisdiction cannot simply be excluded on the ground that the dispute has its genesis in contract if the action of the State or the authority is otherwise found to be arbitrary, unconscionable and unfair or hit by Wednesbury's principles.

22. Mr. Salve urged that the process of judicial review was confined to the decision making process and not the decision itself. Petitioners were seeking a declaration that the decision of the respondent to refuse to return their monies was illegal. The challenge was not to the legality of the decision on account of some flaw in the decision making process but to the substantive decision itself. The decision of the respondent when it had entered the commercial field to do or abstain from doing any particular act could not be said to be open to judicial review in this manner. He submitted that petitioners, if they seek a refund of their monies, should adopt civil proceedings. A declaration that the decision of the respondent to retain monies in its possession, deposited by the bidder in anticipation of award of contract, would not lie under Article 226 of the Constitution of India. He placed reliance on *Haji Sk. Subhan Vs. Madhorao*, , and *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, .

23. Without prejudice to the preliminary objection on maintainability of the petition, the respondents submitted that the petition is liable to fail on merits

also. With respect to the contention that in the absence of a forfeiture clause, the decision of the Government "to forfeit" the money is illegal, it was submitted that the contention is misconceived. There was neither any statute nor a clause under the tender conditions, which entitled the petitioners to claim refund of their monies. It was contended that where money is received from successful tenderer, who later refuses to sign a formal contract, it is the Government that decides whether or not to retain the said funds, in the same manner as a private party to a contract (Including a proposed contract) in similar circumstances.

24. It was further submitted that the right of the government to retain such funds in order to reimburse itself for a wrongful loss caused by the refusal of the petitioner to sign the final agreements, cannot be termed arbitrary. The right to forfeit such funds is not required to be spelt out in the conditions of the tender. On the contrary, if there had been an indefeasible right to recover such money, it would have been expressly mentioned in the terms of contract. It is a common contractual practice that where a contracting party receives money from a person desirous of entering into a contract and thereafter no contract is entered into, then in the absence of any specific right in the depositor to claim refund, the recipient of the funds would be perfectly entitled to retain the funds to reimburse himself for any loss or damage that he may suffer. No specific power, statutory or otherwise, or a specific stipulation in the contract documents is necessary for this purpose. I find considerable merit in the above.

25. Respondents further contended that in fact the only right sought to be asserted by the petitioners is in the realm of a contractual right to refund of money paid under a contract, which they have chosen to abandon. The Government is within its right to retain the money and reimburse itself for damages. Disputes pertaining to such a set off can only be raised in a suit and not in a writ petition. I am in agreement with the above submissions. The transactions denuded of its statutory flavour and on its core and crux being considered, it would be seen that it is one where essentially, refund of monies paid under a contemplated contract is sought in the absence of a provision for its refund. It cannot, thus, be said, prima facie, that retention of such monies by the Union with a view to reimburse itself for any damage or loss suffered or that it may suffer, would be illegal and for which, statutory remedy can be availed of.

26. On merits, the respondents contended that upon participation in the auction and accepting the final bid, a concluded contract of the matters referred to in the condition of offer came into being between the Government and the writ petitioners. In other cases where there was no auction, the bids were duly accepted by the Government and concluded contracts came into being. In the instant case, as per the terms and conditions of the tender/bid, the Letter of Intent was required to detail the requirements to be fulfilled by the successful applicants. There was also a residuary power with the Government to modify the terms of the license in the interest of general public or for the proper conduct of broadcasting or for security considerations and reasons. Union of India was,

Therefore, well within its right and the contract itself envisaged specifications of the detail by the Government. Accordingly, the further details which were communicated by the Government, after considering the representations made by the petitioner, are compatible with the general nature of the transaction and based upon or arising from the general terms and conditions. Therefore, any refusal to furnish bank guarantee and sign final terms would be a clear breach of contract. Respondents urged that petitioners who are thus guilty of breach of contract and/or in any event of inequity, cannot be entitled to claim any relief under Article 226 of the Constitution of India.

27. With respect to the contention that one of the results of acceptance of such bids would have been the issuance of licenses u/s 4 of the Telegraph Act, 1885, the respondents contended that assuming without conceding that airways are public property, there is no embargo in law in the Union parting with public property for a consideration. Airways are public property just like forests, in which the Union of India deals, including by way of grant of leases & licenses for consideration. In such a situation, even where the contracts have a statutory flavor, the basic principle of law governing contracts and civil remedies are available to the Union of India against parties committing breach of the obligations.

28. It appears that the petitioners are seeking to resile from their offer as they have doubts about the economic feasibility and viability of the same. It bears emphasis that not a single factor has been pointed out by the petitioners which would show that after the submission of the bid/contract of auction, there has been any material variation in any of the conditions. In fact, an unconditional offer was made by the Union that if there was any objection, the Union would consider the same.

As regards the clause imposing an embargo on assignability of the license, it was indicated that the Union was willing to consider any proposal for assignment for bona fide raising of finances and in principle there was no objection to tripartite agreements at the appropriate time similar to those executed in the telecom sector.

As regards the clause regarding forfeiture of assets without any compensation, it was clarified by Union that the take over of assets was only a temporary takeover in the event of national emergency or war etc.

29. Countering the contention that the bid expired on lapse of 180 days, it was submitted that auction was admittedly conducted within a period of 180 days. The respective licensees gave unconditional letters agreeing to pay the license fee. These letters were not subject to any further limitation of time.

Rebutting the contention based on Article 299 of Constitution of India it was submitted that existence of a written contract is not necessary for claim of damages. Offer stood accepted in a manner known to law, refusal to sign the formal contract would be no defense. Having considered the several objections

sought to be raised by the petitioners on the basis of which it is claimed that the Letters of Intent and draft license Agreements were materially at variance with tender conditions resulting in a counter offer. I am unable to accept the same for the reasons as briefly noted above and as set out in respondent's contentions. The respondents redressed the genuine concerns and were willing to consider any objections.

The Union had also satisfactorily explained its willingness to consider assignment for raising of finances and indicated its consent for tripartite agreements. It appears that various objections sought to be raised are merely a ruse to get out of an uncomfortable situation where the parties have found their offers and bids financially and economically not viable. In the case of Vertex Broadcasting Co. (Pvt.) Ltd. WP(C). No. 6804/2000, petitioner was the successful bidder in six stations. They submitted the bank guarantee in respect of four stations but chose not to furnish the same with regard to the bid in respect of stations, namely, Hyderabad and Chennai. The bid amount of these two stations was Rs. 330 lacs and Rs. 772.5 lacs respectively while the bid amounts in respect of other four stations were in the range of Rs. 50 ? 100 lacs. The petitioners cannot be permitted even in equity to invoke and claim the reliefs under Article 226 of Constitution of India.

30. The main plank of the petitioners' contention is that in the absence of a forfeiture clause, the Government's action to forfeit the EMD and the advance reserved license fee is illegal. This plea cannot be upheld as the Government is entitled to retain these funds inter alia to reimburse itself for a wrongful loss caused by the refusal of the Petitioners to sign the final agreement. As Mr. Sibal had submitted candidly that as far as the earnest money deposit was concerned, there was a forfeiture clause and forfeiture was permissible in terms thereof the issue remains with respect to the forfeiture of the advance reserve license fee received. It is again an accepted position that the contract clearly envisaged specification of further details by the Government. Government cannot be placed in a position worst to that of private parties in contract. Government is entitled to retain the fund to reimburse itself for the damage suffered by reason of the petitioners resiling from their position. Such an action cannot be termed as illegal, arbitrary or capricious.

31. The contention that the Letter of Intent was a counter offer cannot be sustained. As already stated contract clearly envisaged specification of further details by the Government. The alleged changes in the terms of tender cannot be termed as material. It was within the power of the Government to provide for such changes, which was admittedly done after considering the representations of the bidders. Also the submission that there was no concluded contract would also fail. Petitioner's refusal to sign the contract although their offer stood accepted would only mean that the formal contract was not drawn up. The existence of a written contract is not necessary for claiming damages. The plea that the 180 day period of the validity of the bid has expired can also not be

sustained. Auction was conducted within 180 days. At the end of the auction it is the respective licensees who gave unconditional letters agreeing to pay the license fee. After issuing these letters it was not open to the petitioners to contend that their obligation to pay license fee under bid document would stand defeated at the expiry of the original period of 180 days.

Accordingly after considering the facts and circumstances of the cases and the submissions made I am of the considered view that the respondents action in forfeiting the EMD and retaining reserved license fee cannot be termed arbitrary, unconscionable or illegal. The Government was well within its rights to give further detailed specifications or make additions or alterations while giving the draft of the license Agreements as long as the same does not militate or negate the basic and material terms of the tender conditions. In view of the aforesaid discussions, in my view, petitioners have failed to make out a case for judicial review in the exercise of writ jurisdiction in their favor. In view of the dismissal of the writ petition, C.M. No. 7373/2001 in WP(C) No. 6589/2000 for impleadment moved by M/s. Entertainment Network (India) Ltd., has become infructuous. The same is dismissed.

Writ petition Nos. WP(C) No. 6485/2000, WP(C) No. 6588/2000, WP(C) No. 6589/2000 & WP(C) No. 6804/2000 stand dismissed. All the applications in the writ Petitions also stand disposed of.