(2015) 02 SC CK 0152

In the Supreme Court Of India

Case No : C.A. Nos. 2306, 2307, 2308, 2309, 5193, 5202 and 4530 of 2010

Union of India APPELLANT

Vs

Vertex Broadcasting Co. (P) Ltd. and Others RESPONDENT

Date of Decision : 12-02-2015

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2015) 7 SCALE 102

Hon'ble Judges : Ranjan Gogoi, J;Pinaki Chandra Ghose, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

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 willful default on the part of the licensees to act in terms of the offers made by them. 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.

2. 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.

3. 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.

4. 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:

5. 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 he 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 does 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.

6. 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 LOFs 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.

7. 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.

8. 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.

9. 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 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.

10. 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. 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.