*   IN THE HIGH COURT OF DELHI AT NEW DELHI

%   Judgment delivered on: 26.07.2015

\+   WP(C) No. 6891/2015 & CM No.12620/2015

DIGITAL RADIO (MUMBAI) BROADCASTING LTD & ANOTHER … Petitioners

versus

UNION OF INDIA … Respondent

<u>Advocates who appeared in this case:</u>

For the Petitioners	:	Mr Kapil Sibal, Sr Advocate with Mr Mahesh Agarwal, Ms Shally Bhasin, Mr Paras Anand, Mr Lakshneesh Kamath and Ms Ayushi Chadha
For the Respondent	:	Mr Tushar Mehta, ASG with Mr Sanjeev Narula and Ms Neha Rashmi alongwith Mr Puneet Kansal, Joint Secretary and Mr Yogender Trihan, Deputy Director, Ministry of Information & Broadcasting.

AND

+   WP(C) No. 6892/2015 & CM No.12623/2015

DIGITAL RADIO (DELHI) BROADCASTING LTD & ANOTHER … Petitioners

versus

UNION OF INDIA … Respondent

<u>Advocates who appeared in this case:</u>

For the Petitioners	:	Dr Abhishek Manu Singhvi, Sr Advocate with Mr Mahesh Agarwal, Ms Shally Bhasin, Mr Paras Anand, Mr Lakshneesh Kamath and Ms Ayushi Chadha

For the Respondent : Mr Tushar Mehta, ASG with Mr Sanjeev Narula and Ms Neha Rashmi alongwith Mr Puneet Kansal, Joint Secretary and Mr Yogender Trihan, Deputy Director, Ministry of Information & Broadcasting.

CORAM:
HON'BLE MR. JUSTICE BADAR DURREZ AHMED
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED

1. These writ petitions raise identical issues and are, therefore, being considered together. The facts in both the petitions are virtually the same with some minor differences. We shall refer to the facts in WPC 6891/2015 [Digital Radio (Mumbai) Broadcasting Limited & Anr v. Union of India] in which the petitioner no.1 has been and is currently running the Red FM 93.5 channel for Mumbai [under Phases I and II]. In the other petition (WPC 6892/2015) [Digital Radio (Delhi) Broadcasting Limited & Anr v. Union of India] the petitioner no.1 has been and is currently running the Red FM 93.5 channel for Delhi [under Phases I and II]. The said FM channels are entertainment channels, *inter alia*, broadcasting songs.

2. Although other prayers have been made, the petitioners essentially seek the issuance of a writ of certiorari or such other writ, order or direction quashing the decision dated 15.07.2015 (in both petitions) denying security clearance to the petitioner no.1 and rejecting the application for pre-qualification for the e-auction of the first batch of private FM Radio

Channels (Phase – III). The impugned letter dated 15.07.2015 in respect of the Mumbai company is reproduced hereinbelow (the letter dated 15.07.2015 in respect of the Delhi company is identical):-

"No.N-38014/10/2015-FM/594
Government of India
Ministry of Information and Broadcasting
(FM Cell)
Shastri Bhavan, New Delhi
Dated the 15th July, 2015

To
Mr. Rohit Lal,
Vice President,
M/s Digital Radio (Mumbai) Broadcasting Ltd,
D 45, Sector 2, Gautam Budh Nagar,
Noida-201301

Subject: Application for e-Auction of 135 Private FM Radio Channels in First Batch (Phase-III)-regarding.

Sir,

The undersigned is directed to refer to M/s Digital Radio (Mumbai) Broadcasting Ltd's application dated 25.03.2015, received by this office on 27.03.2015 at 02.47 PM, on the subject cited above and to state as follows:

Whereas, the Government issued a Notice Inviting Applications (NIA) on March 2, 2015, for pre-qualification for e-auction of first Batch of Private FM Radio Phase-III channels, wherein the last date for receipt of applications was prescribed as 5 P.M. on 27.03.2015;

Whereas, clause 3.8 of the NIA stipulates that "The Company a well as all Directors on the Board shall be security cleared. Ministry shall take security clearance of the company as well its Directors from relevant Government Authorities. The information to be provided by prospective bidders for security clearance along with the Application is given at ***Annexure 10.****8. The company shall take prior permission of the Government before effecting any change in the Board of Directors".*

Whereas, M/s Digital Radio (Mumbai) Broadcasting Ltd's, vide page no.**302** of their application dt. 25.03.2015 for e-Auction of 135 Private FM Radio Channels in First Batch (Phase-III), has furnished list of its Subsidiary Companies, Holding Companies, Inter Connected Companies and Companies having same management i.e M/s SUN TV Network Ltd., M/s South Asia FM Ltd., M/s Udaya FM Private Ltd., M/s Digital Radio (Delhi) Broadcasting Ltd., M/s Digital Radio (Kolkata) Broadcasting Ltd., M/s Metro Digital Networks (Hyderabad) Pvt Ltd., M/s Optimum Media Services Pvt. Ltd., M/s KAL Radio.

Whereas Ministry of Home Affairs has denied security clearance to M/s Digital Radio (Mumbai) Broadcasting Ltd for the following reasons:

M/s Digital Radio(Mumbai) Broadcasting Ltd. is a part of Sun Group owned by Maran family. The security clearance is denied on the basis of the following inputs against Shri Dayanidhi Maran, Shri Kalanithi Maran and Sun TV:-

i. Prosecution of Shri Dayanidhi Maran and Shri Kalanithi Maran in Aircel-Maxis case by CBI with the allegation of receipt of Rs.549.96 cr. as illegal gratification and other related charges.

ii. The Enforcement Directorate has charged Shri Dayanidhi Maran and Shri Kalanithi Maran under the PMLA on the allegation of laundering and an amount of Rs.5.5 billion in the Aircel-Maxis matter.

iii. The CBI has charged Shri Dayanidhi Maran for setting up 300 illegal telephone lines at the residence of Shri Kalanithi Maran to facilitate Sun TV services, thereby gaining an illegal pecuniary advantage of Rs. 443 cr.

MHA has stated that the aforementioned economic offences are of serious nature adversely impinging upon economic integrity of the country.

2. In view of the denial of Security Clearance, the application of M/s Digital Radio (Mumbai) Broadcasting Ltd is rejected as it has failed to comply with the requirements of clause 3.8 of the NIA.

3. As per clause 5.2.4.5 of the NIA "*The EMD will be returned following failure to pre-qualify, or following the end of the Auctions and after meeting all the necessary obligations under the Auction Rules, as applicable*". Therefore the EMD amounting to Rs.19,00,00,000/- submitted by M/s Digital Radio (Mumbai) Broadcasting Ltd through Bank Guarangee No.0003615PBG005467 dt. 20.03.2015 issued by Citi Union Bank Ltd., Mandaveli, Chennai is returned herewith in original.
Encl: As above.

Yours faithfully,
Sd/-
Ygendra Trihan
Deputy Director (FM)"

3. Before we set out the submissions of the parties in respect of the impugned letter dated 15.07.2015, we need to mention certain background facts. In the year 2000, the respondent had called for bids in respect of FM channels. The Mumbai company (as also to the Delhi company) submitted bids which were accepted and the initial license under the Phase-I policy was granted to the Mumbai company (as also the Delhi company). The Red FM 93.5 channels for Mumbai/Delhi became operational in 2002/2003. In July 2005 the respondent came out with the policy for Phase-II in which an option was provided to existing broadcasters to migrate to the Phase-II regime. The Mumbai and Delhi companies opted for migration and have been operating the said channels since September 2005 under Phase-II. On 31.03.2015, the Phase-II license was extended by the respondent for a further period of six (6) months (with effect from 01.04.2015) or till migration to FM Phase – III (whichever was earlier).

4. Earlier, on 25.07.2011, the respondent had notified the "Policy Guidelines on Expansion of FM Radio Broadcasting Services through Private Agencies (Phase-III)". Paragraph 2 of the said Policy Guidelines prescribed the eligibility criteria, which, to the extent relevant, is as under:-

"**2. <u>Eligibility Criteria:</u>**

> 2.1 Only Companies registered in India under the Companies Act, 1956 shall be eligible for bidding and obtaining permission for FM Radio channels as per the provisions of these Guidelines.
>
> 2.2 Disqualifications: The following types of companies shall not be eligible to apply:-
>
> (a) Companies not incorporated in India.
> (b) Any company controlled by a person convicted of an offence involving moral turpitude or money laundering/drug trafficking, terrorist activities or declared as insolvent or applied for being declared insolvent;
>
> xxxx xxxx xxxx xxxx"

Paragraph 2.7 (under the heading "Managerial Competence") of the said Policy Guidelines is also relevant:

> "2.7 The company as well as all Directors on the Board shall be security cleared. The company shall take prior permission of the Government before effecting any change in the Board of Directors."

5. On 21.01.2015 the respondent had issued the "Information Memorandum" [hereinafter referred to as "the IM"] in respect of "E-Auction of First Batch of Private FM Radio Phase-III Channels". On 24.02.2015, the respondent issued a circular setting out the time line for existing permission holders to exercise their option for migrating to Phase-III. Both the petitioner companies exercised this option. On 02.03.2015, the respondent issued the "Notice Inviting Applications No.N-38014/6/2013-FM" (hereinafter referred to as "the NIA") in respect of the "E-Auction of

First Batch of Private FM Radio Phase-III Channels". The relevant clauses of the NIA are set out below:-

"**<u>III Eligibility Criteria</u>**

3.1 Eligibility

3.1.1 Only Companies registered in India under the Companies Act, 2013 or under the previous Companies Act, 1965 shall be eligible for bidding and obtaining permission for FM Radio channels as per the provisions mentioned hereunder.

3.2 Disqualifications

3.2.1 The following types of companies shall not be eligible to apply:-

a) Companies not incorporated in India.

b) Any company controlled by a person convicted of an offence involving moral turpitude or money laundering/drug trafficking, terrorist activities or declared as insolvent or applied for being declared insolvent;

xxxx xxxx xxxx xxxx xxxx

3.8 Security Clearance

The company as well as all Directors on the Board shall be security cleared. Ministry shall take security clearance of the company as well as its Directors from relevant Government Authorities. The information to be provided by prospective bidders for security clearance along with the Application is given at **Annexure 10.8**. The company shall take prior permission of the

> Government before effecting any change in the Board of Directors."

6. On 25.03.2015, the Mumbai company submitted its application for pre-qualification for the said e-auction and submitted the requisite details and documents for security clearance in terms of Annexure 10.8 of the NIA (as required under clause 3.8). A similar application was submitted by the Delhi company. Both the applications were rejected by the impugned identical letters dated 15.07.2015. The petitioners, being aggrieved by the fact that they have been denied security clearance and that their applications for pre-qualification have been rejected, are before us by way of these writ petitions.

7. Mr Kapil Sibal, senior advocate, appearing for the Mumbai company submitted that the security clearance has been denied on the alleged basis of inputs against Shri Dayanidhi Maran, Shri Kalanithi Maran and Sun TV. The alleged inputs were (i) Prosecution of Shri Dayanidhi Maran and Shri Kalanithi Maran in the "Aircel-Maxis case" by CBI; (ii) Charge levelled by the Enforcement Directorate (ED) against the said two individuals under the Prevention of Money Laundering Act (PMLA) in the "Aircel-Maxis"case; and (iii) Charge levelled by CBI against Shri Dayanidhi Maran for allegedly setting up 300 illegal telephone lines at the residence of Shri Kalanithi Maran to allegedly facilitate Sun TV services and thereby allegedly gaining pecuniary advantage of Rs 443 cr. In this backdrop, Mr Sibal submitted that clause 3.8 of the NIA must be read alongwith clause

3.2.1(b). He submitted that clause 3.2.1(b) stipulates a disqualification for a company if it is 'controlled' by a person 'convicted' of an offence involving, *inter alia*, money laundering or terrorist activities. But, clause 3.8 speaks only of 'the company' and its 'Directors on the Board'. It does not use the expression 'controlled by a person'. He further submitted that in respect of the so-called inputs in respect of the Marans, nobody has been convicted as yet. In fact, the charges have not been framed by any court in any of the said three cases. And, it is only in the CBI case in the "Aircel-Maxis" matter that a charge-sheet has been filed. The other two cases are still under investigation. So, the question of disqualification under clause 3.2.1(b) does not arise. Insofar as clause 3.8 is concerned, it was submitted by Mr Sibal that it only speaks of "the company" and its "directors", which expressions do not cover either Shri Dayanidhi Maran or Shri Kalanithi Maran or Sun TV.

8. Mr Sibal further submitted that there is no allegation against the Mumbai company that it has indulged in any activity which could be considered to be a security concern even in the so-called "economic integrity" sense. There is also no allegation against any of the directors of the of the Mumbai company. And, neither of the two abovenamed persons (i.e., the Marans) are directors or shareholders in the Mumbai company. He submitted that Shri Kalanithi Maran had an indirect interest in the Mumbai company to the extent of 21.6% but that, in any event, was not the controlling interest which was with the Rao-Reddy group (approx. 51%). He further submitted that there was no allegation whatsoever against the Rao-

Reddy group which held the controlling interest in the Mumbai company. He submitted that in the context of article 19(2) of the Constitution of India, restrictions on the ground of 'national security' could be imposed on article 19(1)(a) rights by the legislature but, that, too, would have to meet the test of reasonableness. Therefore, executive action under the purported ground of security or 'economic integrity of the nation' would also have to be tested on the anvil of reasonableness. He submitted that the action on the part of the respondent in denying security clearance to the petitioner companies on the alleged basis of allegations against the Marans does not pass the test of reasonableness.

9. Dr Singhvi, senior advocate, appearing for the Delhi company supplemented Mr Sibal's arguments. He submitted that the word 'control' is not there in clause 3.8. But, the very next clause (i.e., 3.9) deals with management control and stipulates that the 'largest Indian shareholder' as defined in clause 3.6 exercises management control over the applicant company. He submitted that the shareholding and control is also specifically dealt with in clause 3.6. The point that Dr Singhvi was making was that in the same document (the NIA) the expression 'control' has been used wherever the respondent wanted to use it specifically. Thus, when it is absent in clause 3.8, we cannot read it into that clause. He submitted that the security clearance must be of the company and its directors and not of some other persons.

10. Dr Singhvi further submitted that denial of security clearance is like a 'badge of dishonour' with serious penal consequences even beyond the present auction. In such a scenario, security clearance cannot be denied to the petitioners only on the basis of some tenuous implication. He also submitted that the expression 'the company' used in clause 3.8 has reference to the independent and distinct personality of the petitioner company and not to the holder of an indirect interest in the company. In this connection Dr Singhvi submitted that it is true that in certain situations the corporate veil can be pierced to reveal its true identity but, that is permissible when the corporate entity itself is used as a vehicle for violation of law or as a façade to escape the rigours of law and the control in such a situation must be in the hands of the wrongdoers. He relied upon ***Electronics Corpn. of India Ltd. v. Secy., Revenue Deptt., Govt. of A.P.:*** ***(1999) 4 SCC 458*** (at page 464):-

> "15. A clear distinction must be drawn between a company and its shareholder, even though that shareholder may be only one and that the Central or a State Government. In the eye of the law, a company registered under the Companies Act is a distinct legal entity other than the legal entity or entities that hold its shares.
>
> xxxx xxxxxx xxxxxx xxxxx
>
> 17. In *Rustom Cavasjee Cooper* v. *Union of India* [(1970) 1 SCC 248] it was held: (SCC p. 273, para 11)
>
>> "*11.* A company registered under the Companies Act is a legal person, separate and distinct from its individual members. Property of the Company is

> not the property of the shareholders. A shareholder has merely an interest in the Company arising under its Articles of Association, measured by a sum of money for the purpose of liability, and by a share in the distributed profit."

> 18. In *Heavy Engineering Mazdoor Union* v. *State of Bihar* [(1969) 1 SCC 765] this Court held that an incorporated company has a separate existence and the law recognises it as a juristic person, separate and distinct from its members."

Dr Singhvi also placed reliance on the following passages from ***<u>Balwant Rai Saluja v. Air India Ltd.:</u> (2014) 9 SCC 407*** **:-**

> "70. The doctrine of "piercing the corporate veil" stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders with its own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation. The starting point of this doctrine was discussed in the celebrated case of *Salomon* v. *Salomon & Co. Ltd.* [1897 AC 22 : (1895-99) All ER Rep 33 (HL)] Lord Halsbury LC, negating the applicability of this doctrine to the facts of the case, stated that: (AC pp. 30 & 31)
>
> > "[a company] must be treated like any other independent person with its rights and liabilities [legally] appropriate to itself … whatever may

> have been the ideas or schemes of those who brought it into existence."

Most of the cases subsequent to *Salomon case* [1897 AC 22 : (1895-99) All ER Rep 33 (HL)] , attributed the doctrine of piercing the veil to the fact that the company was a "sham" or a "façade". However, there was yet to be any clarity on applicability of the said doctrine.

71. In recent times, the law has been crystallised around the six principles formulated by Munby, J. in *Ben Hashem* v. *Ali Shayif* [*Ben Hashem* v. *Ali Shayif*, 2008 EWHC 2380 (Fam)] . The six principles, as found at paras 159-64 of the case are as follows:

> (*i*) Ownership and control of a company were not enough to justify piercing the corporate veil;
>
> (*ii*) The court cannot pierce the corporate veil, even in the absence of third-party interests in the company, merely because it is thought to be necessary in the interests of justice;
>
> (*iii*) The corporate veil can be pierced only if there is some impropriety;
>
> (*iv*) The impropriety in question must be linked to the use of the company structure to avoid or conceal liability;
>
> (*v*) To justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrongdoing; and

> (*vi*) The company may be a "façade" even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The court would, however, pierce the corporate veil only so far as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done.
>
> xxxx xxxx xxxx xxxx

73. The position of law regarding this principle in India has been enumerated in various decisions. A Constitution Bench of this Court in *LIC* v. *Escorts Ltd.* [(1986) 1 SCC 264] , while discussing the doctrine of corporate veil, held that: (SCC pp. 335-36, para 90)

> "*90.* … Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc."

> 74. Thus, on relying upon the aforesaid decisions, the doctrine of piercing the veil allows the court to disregard the separate legal personality of a company and impose liability upon the persons exercising real control over the said company. However, this principle has been and should be applied in a restrictive manner, that is, only in scenarios wherein it is evident that the company was a mere camouflage or sham deliberately created by the persons exercising control over the said company for the purpose of avoiding liability. The intent of piercing the veil must be such that would seek to remedy a wrong done by the persons controlling the company. The application would thus depend upon the peculiar facts and circumstances of each case."

11. It was also submitted by Dr Singhvi that clause 3.8 has high penal consequences not limited to the subject auction. Denial of security clearance has the effect of the company being damned. Consequently the interpretation to be placed on clause 3.8 must also be strict and not liberal. As such, he submitted, when the word used was 'company', there was no question of bringing in shareholders or indirect interests within the meaning of 'company'. Dr Singhvi referred to the Supreme Court decision in ***W. H. King v. Republic of India & Anr.:*** ***[1952] SCR 418*** where it was held as under:

> "As the Statue creates an offence and imposes a penalty of fine and imprisonment, the words of the section must be constructed in favour of the subject. We are not concerned so much with what might possibly have been intended as with what has been actually said in and by the language employed."

Dr Singhvi submitted that if the terms of clause 3.8 of the NIA were unclear then an interpretation against the respondent would, in any event, have to be adopted. Reliance was placed on the principle of *verba chartarum forties accipiuntur contra proferentem* on the strength of the decision in ***Assistant General Manager, State Bank of India & Others v. Radhey Shyam Pandey:* 2015 (3) SCALE 39** to the following effect:

> "35. In ***Bank of India and Another V. K. Mohandas and Others***[(2009) 5 SCC 313], the Court referred to Regulation 28 of the Employees' Pension Regulations 1995, which had provided superannuation pension and Regulation 29 provided pension on voluntary retirement. After referring to series of decisions, the Court held thus:
>
> > '31. It is also a well-recognised principle of construction of a contract that it must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each clause should be interpreted so as to bring them into harmony with the other provisions if that interpretation does no violence to the meaning of which they are naturally susceptible. (*North Eastern Railway Co.* v. *Lord Hastings14*)
> >
> > 32. The fundamental position is that it is the banks who were responsible for formulation of the terms in the contractual Scheme that the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension Regulations, 1995, and, therefore, they bear the risk of lack of clarity, if any. It is a well-

> known principle of construction of a contract that if the terms applied by one party are unclear, an interpretation against that party is preferred (*verba chartarum forties accipiuntur contra proferentem*)'."

12. Mr Tushar Mehta, Additional Solicitor General of India, submitted that clause 3.8 was not a statutory provision but a term or condition of an auction. According to him, the respondent had the right to prescribe conditions for the auction. He further submitted that the government has the right to deal with bidders/participants fulfilling certain criteria. Moreover, clause 3.8 is based upon the Policy Guidelines and that courts have always been restrained in interfering with issues touching upon policies of the government. In any event, he submitted, the condition of security clearance stipulated in clause 3.8 of the NIA is neither irrational nor arbitrary.

13. It was further submitted by Mr Mehta that Policy Guidelines were made public in 2011, the IM was released in January 2015 and the NIA was issued in March 2015. All these documents, which were within the knowledge of the petitioners, contained the condition of security clearance yet, the petitioners participated in the auction process and applied for pre-qualification for the e-auction. Mr Mehta submitted that the petitioners having accepted the conditions outlined in the NIA and having participated in the process cannot challenge clause 3.8 of the NIA.

14. Mr Mehta submitted that e-auction pertained to an extremely important public asset – airwaves. Radio waves which include the FM bands need to be closely watched and regulated by the government to ensure that there is no threat to the security and integrity of the nation. In this backdrop when the government has decided that a particular person or company should not be given access to airwaves because of security concerns, the court ought not to interfere with such a decision. He submitted that the court does not sit in appeal over such a decision and the scope of judicial review is also extremely limited. In the context of the present petitions, it was submitted that the Ministry of Home Affairs was fully competent to take a decision on the issue of security clearance. The three points mentioned in the impugned letter of 15.07.2015 have not been disputed by the petitioners. In other words, it is an accepted position that the CBI has charge-sheeted Shri Dayanidhi Maran and Shri Kalanithi Maran in the Aircel-Maxis case; that the ED has levelled charges under the PMLA against the said two individuals; and that the CBI is investigating the case against them with respect to the alleged 300 illegal telephone lines. In these circumstances and the connection between the petitioner companies and the said two individuals, the government has, in keeping with the Policy Guidelines and the conditions stipulated in the NIA, taken a decision to deny security clearance to the petitioner companies.

15. With regard to the government's policy on security clearance, Mr Mehta submitted that the process of grant of clearance is not unguided, and is governed by policy. In terms of the policy, security clearance is sought

from the concerned officials of Ministry of Home Affairs who are the experts in the field and are entrusted with the security of the nation. The Ministry of Home Affairs has kept the threshold for security clearance to entities/individuals at the level of prosecution and not of conviction for serious offences like corruption, money laundering, financial frauds etc., because of clear threats to national security emanating therefrom. This is embedded in clause 3.8 of the NIA which is distinct from the disqualification criteria specified in clause 3.2.1(b) which requires a conviction. So, while a company may not be disqualified under clause 3.2.1(b), it may still not qualify for the e-auction on account of the fact that it does not get a security clearance.

16. It was next contended by Mr Mehta that judicial review may be permitted only if the decision is mala fide. Since, no malafides or victimization has been pleaded by the petitioners, no case for judicial review is made out. Reliance is placed on a decision of a division bench of this court in ***Bycell Telecommunications India v. Union of India*** (LPA 673/2010 decided on 09.12.2011) wherein it was held:

> "7. We have not only perused the files containing the intelligence inputs but also the minutes of the meetings of the FIPB. We affirm the findings of the learned Single Judge that neither any case for mala fides or victimization is pleaded or made out, nor is any found to be borne out from the files. The FIPB itself has evaluated the various inputs received from the Security Agencies and has on the basis thereof objectively reached a conclusion that the clearance earlier given to the appellants needs to be revoked. Once

the Agencies of the Government having expertise and vested with the powers to take decision in such matters have reached a conclusion that it is risky to open the telecommunication channels of the country to a certain set of foreigners and such conclusion is found to have been reached on the basis of material available on record, it is not for this Court to in the exercise of its powers of judicial review, sit in appeal over such decision."

Reliance was also placed on a decision of the Bombay High Court in ***Narangs International Hotels v. Ramesh Narang:*** ***2011 (113) BOMLR 2335*** in which it was observed as under:

> "31. We cannot transgress the limits of writ jurisdiction by sitting in judgment over the actions of Intelligence Agencies. These agencies manned by experts, who are in the best are position to judge the security interests. Ultimately, sensitive and vital installations have to be safeguarded and protected from entry of persons who are considered to be undesirable and a security risk.
>
> Precisely, such are the inputs in the reports which have been received and if the Bureau has acted upon the AJN 17-OS-WP(L) 1105.11J same, then, we cannot sit in judgment over their decision. The writ Court does not possess any expertise in such cases. The Court cannot indulge in guess work and hold that the inputs do not endanger the security of the Airport nor public interest demand that the ground handling operations of the petitioner be prohibited. These are matters which are better left to the authorities in charge of security of the vital installations as they are in-charge of laying down standards and norms for protecting and safeguarding them. They act in public

interest and when no malafides are alleged, their actions ought not to be interfered."

17. On the aspect of interpretation of clause 3.8 of the NIA, Mr Mehta submitted that it cannot be given a narrow or restrictive meaning. A narrow interpretation of the word "Company" as used in Clause 3.8 would run foul to the object sought to be achieved. According to Mr Mehta, the expression "company and its directors" as used in Clause 3.8 of the NIA, necessarily requires the respondent to go into the question of ascertaining the ultimate ownership, control and management of the company, the identity of promoters, shareholders and subsidiaries, associated and inter-connected companies of the applicants. It was submitted that clause 3.8 by itself required the piercing of the corporate veil. A reference was made to the Supreme Court decision in ***Delhi Development Authority v. Skipper Construction Company:*** ***(1996)4 SCC 622*** wherein it was held :-

> "28. The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned."

18. In the context of piercing the corporate veil, it was submitted by Mr Mehta that the ultimate ownership and control over the petitioner companies was of the Maran family. From the details provided in the Annexure 10.8 referred to in Clause 3.8 of the NIA and the counter-affidavit, the

shareholding pattern of the Mumbai company and its holding company, is as under:-

(a) The shareholding of the Mumbai company is as under:

Optimum Media Services Pvt. Ltd. 100%

(b) The shareholding of Optimum Media Services Pvt. Ltd is as under:

Metro Digital Network (Hyderabad) Pvt. Ltd 70.10%

South Asia FM Ltd 28.56%

Ms Usha Reddy 0.67%

AV Telecast Services 0.67%

(c.1) The shareholding of Metro Digital Network (Hyderabad) Pvt. Ltd is as under:

Donakanti Arjun Rao 5%

Nookla Usha Reddy 66%

South Asia FM Ltd 29%

(c.2) The shareholding of South Asia FM Ltd is as under:

South Asia Multimedia 20%

Sun TV Network Ltd 59%

Others 21%

(d) The shareholding of Sun TV Network Ltd is as under:

Kalanithi Maran 75%

Others	25%

So, through the above shareholding pattern of the various companies, Shri Kalanithi Maran indirectly controls 21.6% of the shares of the Mumbai company. He similarly indirectly controls 21.6% of the shares of the Delhi company. Based on this, Mr Mehta submitted that as serious charges/allegations exist against Shri Kalanithi Maran in the CBI and ED cases pertaining to illegal gratification and money laundering, there was nothing wrong in declining security clearance to the petitioner companies.

19. Let us clear some ground with regard to the scope of challenge and the amplitude of our consideration in these writ petitions. We are not adjudicating on the validity of clause 3.8. Although prayers have been made seeking the quashing of clause 3.8, the main thrust of the arguments of Mr Sibal and Dr Singhvi was on the interpretation of clause 3.8 and whether the same has been applied correctly or not. In any event, since the petitioners have participated in the auction process, they cannot now challenge clause 3.8. So, to be clear, we are not examining the validity or otherwise of clause 3.8 of the NIA.

20. We also make it clear that we are not touching upon the policy of requiring a security clearance. We are, as rightly pointed out by Mr Mehta, not sitting in appeal over the decision of the respondent as to the security angle assessment insofar as Shri Dayanidhi Maran or Shri Kalanithi Maran are concerned. We are also not called upon to comment upon, nor have we,

as to whether the allegations/charges against the said two individuals and Sun TV are well founded or unfounded. Those would be decided in criminal proceedings.

21. So, the limited extent of judicial review is whether the security assessment in respect of Shri Dayanidhi Maran and Shri Kalanithi Maran is germane to the requirements of security clearance prescribed in clause 3.8 of the NIA. Clause 3.8 stipulates the requirement of a security clearance of the "company" as well as all its "Directors on the Board". Now, on a plain reading, this would imply that the company which has applied must be security cleared. Not only the corporate entity, which is distinct and separate in law, but also its Directors as individuals, distinct from the corporate entity, have to be security cleared. At the same time, the clause does not, on a plain reading, extend to shareholders of the applicant company.

22. Mr Mehta had argued that if the shareholders are not roped in then it would amount to ascribing a very narrow meaning to clause 3.8 of the NIA which would defeat the very purpose of having a security clearance particularly in this very sensitive field of radio waves. We are afraid, we cannot agree with this submission. Dr Singhvi was right in submitting that the clause has serious ramifications extending far beyond the present e-auction. If security clearance were to be denied to a company, as has happened in the two cases before us, that would a blot on that company – a

badge of dishonour – as Dr Singhvi put it. When such serious penal conequences are to follow then the provisions of clause 3.8 would require a strict interpretation and if there were any doubt, an interpretation against the maker of the clause would have to be adopted. The latter situation does not arise in the present case as there is no doubt that the plain and simple meaning of clause 3.8 has reference only to the company and its directors. There is no mention of its shareholders.

23. Wherever the respondent wanted to bring in a shareholder or refer to the concept of control over the company it has done so specifically as would be evident from clauses 3.2.1(b), 3.6 and 3.9 as pointed out earlier in this judgment. It therefore follows that there is no explicit reference to shareholders of the company in clause 3.8 of the NIA. But, this does not mean that the respondent is prevented from looking behind the corporate identity of the applicant company.

24. That would take us to the argument raised by the respondent that the corporate veil can be pierced to find who in fact is running or controlling the company. In the recent decision of the Supreme Court in ***Balwant Rai Saluja*** *(supra)* the concept of piercing the corporate veil was considered in detail and after examining several decisions including those of courts in England it was concluded that the doctrine of piercing the veil allows the court to disregard the separate legal personality of a company and impose liability upon the persons exercising real control over the said company. But, the Supreme Court cautioned that this principle has been and should be

applied in a restrictive manner, that is, only in scenarios wherein it is evident that the company was a mere camouflage or sham deliberately created by the persons exercising control over the said company for the purpose of avoiding liability. It was also held that the intent of piercing the veil must be such that would seek to remedy a wrong done by the persons controlling the company and, therefore, the application of the doctrine would depend upon the peculiar facts and circumstances of each case.

25. There is no allegation that the petitioner companies were created as a camouflage to shield the persons exercising control over them from any liability. There is also no allegation that the petitioner companies themselves have indulged in any activities which could raise security concerns. In fact, both the petitioner companies have been operating their licenses under Phases I and II since 2002/2003. Even when the cases against the Marans were registered in 2011, the petitioner companies have continued to operate their respective radio channels without any objection concerning security issues. As pointed out by Mr Sibal, both these companies got extensions of their licenses by six months as recently as on 31.03.2015. Even then, no security concerns were raised in respect of the two companies.

26. The Supreme Court, in ***Saluja*** *(supra)*, held that the purpose or intent behind piercing the corporate veil must be such that would seek to remedy a wrong done by the "persons controlling the company". As per the counter

affidavit filed on behalf of the respondent, Shri Dayanidhi Maran and/or Shri Kalanithi Maran do not hold any shares in the two petitioner companies. Though it is stated that Shri Kalanithi Maran has an indirect interest in the shareholding of the two companies to the extent of 21.6%. It is not alleged that Shri Dayanidhi Maran has any interest (direct or indirect) in the shares (ownership) of the two petitioner companies. None of these two individuals is a director in the petitioner companies. In fact, as per the shareholding pattern indicated in Annexure 10.8 of the petitioners applications as also the counter affidavit submitted on behalf of the respondent, the interest of the Rao-Reddy group in the petitioner companies is to the extent of 51.11% in each company. Clearly, though Shri Kalanithi Maran may have an indirect interest in the shareholding of the two companies to the extent of 21.6% (in each), the controlling interest vests with the Rao-Reddy group against whom there are no allegations. As such, the pre-conditions for piercing the corporate veil are not satisfied.

27. We also note that the petitioner companies themselves have not been alleged to be vehicles of any transgression of law. They have been functioning since 2002 / 2003 without there being any allegation regarding their functioning resulting in any security concerns.

28. In these circumstances, we quash the impugned decision communicated by the letters dated 15.07.2015 denying security clearance to the petitioner companies. The said petitioner companies shall be entitled to participate in the e-auction subject to other conditions being fulfilled. The

writ petitions are allowed in terms of prayer (c) to the aforesaid extent. The parties shall bear their own costs.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

July 26, 2015
HJ/dutt