

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.12.2020

CORAM

THE HONOURABLE MRS. JUSTICE PUSHPA SATHYANARAYANA

W.P.No.15042 of 2020

(heard through VC)

M/s. Sun TV Network Ltd,
Represented by its Authorised Signatory,
Mr.M.Jyothibasu,
Murasoli Maran Towers,
No.73, MRC Nagar Main Road,
MRC Nagar, Chennai - 28 ... Petitioner

Vs

1.Union of India,
Represented by the Secretary,
Ministry of Information and Broadcasting,
Government of India,
Shastri Bhawan,
New Delhi - 110 001.

2.The Deputy Director (FM),
Ministry of Information and Broadcasting,
Government of India,
FM Cell, Shastri Bhawan,
New Delhi - 110 001.

... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Mandamus, directing the respondents to refund the One Time Entry Fee (OTEF), a sum of Rs.53,38,83,479/- (Rupees fifty three crores thirty eight lakhs, eighty three thousand four hundred and seventy nine only) made by the petitioner on 12.07.2019 by way of RTGS transaction with UTR Number CIUBR52017071200304386 to the respondent with interest from 12.07.2017 till the date of realization.

For Petitioner : Mr.AR.L.Sundaresan, SC
for Ms.M.Sneha

For Respondents : Mr.R.Sankara Narayanan, A.S.G.I,
Assisted by
Mr.Srinivasamurthy, CGSC
* * *

O R D E R

The petitioner has sought for a Writ of Mandamus, directing the respondents to refund the One Time Entry Fee (OTEF), a sum of Rs.53,38,83,479/- (Rupees fifty three crores thirty eight lakhs, eighty three thousand four hundred and seventy nine only) made by the petitioner on 12.07.2019 (Originally, the petitioner has made the payment on 12.07.2017, but in the prayer, it has been wrongly mentioned as 12.07.2019) by way of RTGS transaction with UTR Number CIUBR52017071200304386 to the respondents with interest from 12.07.2017 till the date of realization.

2. The petitioner is a Public Limited Company incorporated in the year 1985. It is a leading Company which offers 33 television channels in multiple languages and was one of the India's first regional satellite television channels. In the first half of 2003, the petitioner had launched Tamil FM radio stations in the cities of Chennai, Coimbatore and Tirunelveli under the brand name "Suryan FM". The petitioner also has been obtaining requisite licence under different phases under the Indian Telegraph Act, 1985 for operation of the FM radio broadcasting stations. Thus, the petitioner migrated from Phase-I to Phase-II, which was notified in the year 2005 by the respondents. The petitioner was also granted permission under Permission Agreement dated 04.09.2006 valid for a period of 10 years (i.e) upto 31.03.2015.

3. While so, on 01.01.2015, the respondents requested all private FM Broadcasters to migrate to Phase-III policy and allowed the new entrants to provide information along with supporting documents. The petitioner-Company, by its letter dated 02.01.2015, applied for the same by furnishing all the details to the respondents as required. The respondents, on 16.01.2015, requested the broadcasters to submit the details of the shareholders. The said details were also submitted by the petitioner. All the conditions imposed by the respondents were fulfilled by the petitioner on 06.03.2015 and sent to the respondents. The respondents also had decided to provisionally extend the licence period of the petitioner's channels at Chennai, Coimbatore and Tirunelveli on conditions as prescribed in migration Grant of Permission agreement under Phase-II for a period of 6 months or FM Phase-III, whichever is earlier, subject to formal undertaking to pay the non-refundable One Time Migration Fees and a Bank Guarantee for

amount of Rs.4,29,45,000/-, Rs.2,35,55,000/- and Rs.44,10,000/- valid upto 30.09.2015. The petitioner had also furnished the requisite Bank Guarantee and undertaking to the respondents on 30.03.2015 and awaited the licence to be extended. But, the petitioner Company's licence was not extended. Hence, a reminder was sent on 02.04.2015 to the respondents, for which, there was no response. Again a representation and a reminder on 10.04.2015 and 16.04.2015 respectively were sent in vain.

4. While so, the first respondent invited applications for participation in e-auction process for allocation of new FM Radio channels in the first batch of FM Radio Phase-III, vide its Notice Inviting Application (NIA) No.N-38014/6/2013-FM dated 02.03.2015. The petitioner submitted its application along with all supporting and requisite processing fees and details. The Ownership Compliance Certificate was also submitted on 16.04.2015 with respect to new frequency channel for Chennai. As the respondents did not short list the petitioner in the pre-qualified bidder list for e-auction process, W.P.No.11477 of 2015 was filed seeking a direction to the respondents to provisionally extend the petitioner's licence for six months or till migration to Phase-III policy, whichever is earlier.

5. In the meanwhile, the second respondent, on 15.07.2015, published the list of pre-qualified bidders for the first batch of private FM Radio Phase-III channels. Surprisingly, the petitioner-Company's name was not there in the list. Hence, W.P.No.21810 of 2015 was filed seeking to quash the said list. The above said Writ Petition was allowed, quashing the impugned order therein on 14.06.2016 and permitting the petitioner to participate in the e-auction process. Thus, the petitioner-Company was entitled to move to Phase-III policy. This Court also further directed the respondents 1 and 2 to announce the names of the successful bidders subject to the conditions. Accordingly, the first respondent issued a letter dated 11.07.2017, declaring the petitioner as the successful bidder under the e-auction of first batch of private FM Radio Channels and directed the petitioner to pay 25% of the bid deposit amount by 26.07.2017. Accordingly, the petitioner remitted the bid amount of Rs.53,38,83,479/- on 12.07.2017, by way of RTGS and submitted the particulars of the same to the second respondent. Pursuant to the same, a letter of intent (LOI) was also issued by the respondents on 20.07.2017 directing the petitioner herein to comply with the requisite conditions of eligibility within 6 months for signing the Grant of Permission Agreement (GOPA). The petitioner had also submitted all the necessary applications, details, fees, etc., complying with all the conditions well in advance.

6. The petitioner also had made an application on 21.07.2017 to the Wireless Planning and Co-ordination Wing (WPC) of the Ministry of Communication and Information Technology for Standing Advisory Committee for Frequency Allocation (SACFA) clearance. The petitioner also sent a reminder letter on 28.09.2017 for SACFA clearance to WPC. WPC had also cleared SACFA on 02.02.2018. Immediately, the petitioner submitted all the necessary documents to the respondents for entering into GOPA including Bank Guarantees, Copy of the Agreement signed with Prasara Bharati for permission to use its necessary infrastructure facilities and Broadcast Engineering Consultants India Limited (BECIL) to provide management services for building, installing, commissioning and completing the common transmission infrastructure by incurring an expenditure of more than Rs.27 crores. Despite the same, the respondents failed to execute the GOPA agreement. Reminders were sent by the petitioner to the respondents on 05.04.2018, 07.06.2018 and on various dates till 07.08.2019. As there was no response, the petitioner had sent a letter dated 26.09.2019 requesting the respondents to refund the One Time Entry Fees (OTEF) amount of Rs.53.38 crores along with appropriate interest from 12.07.2017. The petitioner have also been sending reminders to the respondents for re-fund of the said amount. The petitioner has specifically mentioned in their letters that the inordinate delay in execution of GOPA had altered the business plans of the petitioner and jeopardized their viability of running an FM Station and sought for re-fund of the money paid as OTEF with interest. Since there is no response, the above Writ Petition has been filed.

7. The respondents had filed the counter affidavit resisting the Writ Petition contending inter-alia as follows:-

The respondents have stated that the Ministry of Home Affairs, vide OM dated 19.04.2017, granted security clearance to the petitioner and its directors with respect to core issues of National security, sharing the following inputs with the Ministry of Information and Broadcasting for consideration, namely,

(a) CBI had filed a case in C.C.No.1 of 2014 under Section 120 B IPC r/w Sections 7,12 and 13 (2) r/w 13(i)(d) of Prevention of Corruption Act against two of the Directors of the petitioner-Company, M/s.South Asia FM Limited (SAFL) and M/s.SUN Direct TV. Pvt.Ltd (SDTPL) in Aircel-Maxis case. Special CBI Court in 2G Spectrum Cases and other related charges discharged the above Companies only on 02.02.2017.

(b) The Enforcement Directorate (ED) had filed a case, vide C.C.No.1 of 2016 under Section 45, 3 and 4 of PMLA with charges against the Directors on the allegation of money laundering in Aircel-Maxis matter. There, again, Special CBI

Court in 2G Spectrum Cases, New Delhi, on 02.02.2017, discharged the accused.

(c) The CBI charged the Directors for setting up around 300 illegal telephone lines at the residence of Kalanithi Maran to facilitate SUN TV Services, gaining an illegal pecuniary advantage. The Court in Chennai had taken cognizance and issued summons for appearance of all the accused.

(d) The Income Tax Office had filed a case in C.C.No.103/4 and 104/4 of 2015 under Sections 276B, 278B, 279 (1) and 278E of IT Act, 1961 against Kalanithi Maran for delayed payment of Income Tax with respect to Spicejet Limited, when he was its Chairman and the cases, which are pending with the Additional Chief Metropolitan Magistrate, Tis Hazari Court, New Delhi, are stayed by the Delhi High Court.

8. It is further stated that the result of auction for channel awarded to M/s.Sun TV was notified on 11.07.2017 in terms of Judgment of this Court dated 14.06.2016. Subsequently, LOI was issued on 20.07.2017. It is further contended in the counter affidavit that regarding re-fund of NOTEF (Non-Refundable One Time Entry Fees), it is stated that it is a non-refundable One Time Entry Fees. Hence, it is not-refundable. The respondents also referred to Clause 4.1 of the Policy guidelines for expansion of FM Radio broadcasting through private agencies (Phase-III) published on 25.07.2017, which states as follows:-

"4.1 Permission for the channels shall be granted on the basis of Non-refundable One-Time Entry Fees (NOTEF) i.e. Successful Bid amount arrived at through as ascending e-auction process on the lines followed by Department of Telecommunications in the auction of 3G and BWA spectrum, mutatis-mutandis, as per the details to be notified separately".

Therefore, the demand of the petitioner for refund of NOTEF is not supported by the provisions of the Phase-III Policy Guidelines.

9. The respondents further contended that there is no provision in Phase-III Policy guidelines to allow the refund of NOTEF and in case the petitioner decides to surrender their LOI, then the NOTEF amount furnished by them will be forfeited, as the claim of refund is inadmissible under the Phase-III Policy Guidelines.

10. The further contention of the respondents is that once GOPA is signed, the same will be valid for 15 years. So,

there will be no impact on licence conditions as apprehended by the petitioner and thus, the licensee will get to utilize full 15 year permission period under Phase-III policy.

11. A reply affidavit is also filed by the petitioner in response to the averments in the counter affidavit filed by the respondents. So far as the forfeiture of NOTEF is concerned, it is stated that the petitioner had not committed any default and had complied with all the requirements. It is the respondents, who had failed to execute GOPA. Therefore, the question of refusing to refund the NOTEF will not arise, as per the Notice Inviting Application(NTA). As there was an unexplained delay of 3 years, in spite of various repeated reminders, requesting them to execute GOPA on the side of the respondents, the respondents cannot be allowed to take advantage of their own mistake. Even presuming that GOPA is signed in future, it would be difficult for the petitioner to run FM Station, as already other players have pitched in.

12. Heard Mr.AR.L.Sundaresan, learned Senior Counsel for Ms.M.Sneha and Mr.R.Sankara Narayanan, learned Additional Solicitor General of India, assisted by Mr.Srinivasamurthy, learned Central Government Standing Counsel appearing on behalf of the respondents and perused the materials available on record.

13. The admitted facts are:

(i) The petitioner had emerged as a successful bidder in the e-auction conducted by the respondents for the new FM Channel under Phase-III Policy.

(ii) The petitioner had filed necessary documents and remitted the charges including OTEF towards grant of licence.

(iii) The respondents had not executed GOPA for want of opinion from High Law Officers in the Country.

(iv) The alleged order of Security Clearance against the petitioner-Company was quashed by this Court on 14.06.2016 in W.P.No.21810 to 21815 of 2015 and W.P.No.11476 and 11477 of 2015.

14. Therefore, the issue, which has to be determined in the present petition is as to whether the petitioner would be entitled for re-fund of money paid as OTEF with interest?.

15. It is an admitted fact that the petitioner had fulfilled the conditions stipulated by the respondents. Therefore, whether the reason for non-singing of GOPA, would be justifiable by the respondents, in spite of passage of 3 years. The reasons stated by the respondents in the counter

affidavit are unsustainable for the reason that the very same contentions raised by the respondents in W.P.No11477 of 2015 are negatived by this Court. The said Writ Petition was filed by the petitioner questioning the refusal by the respondents to short list the petitioner in the e-auction process under Phase-III. The very same grounds raised here in this Writ Petition were agitated in the earlier matter also. The Court had already analysed threadbare and rejected those reasons assigned by the respondents. The relevant paragraphs are extracted hereunder:-

"35. Admittedly, in none of the above mentioned cases, the petitioners were convicted. Even according to the respondents, the above referred cases are still pending. It was submitted before this court that the prosecution had filed charge sheet in Aircel-Maxis case, however, the charges are yet to be framed. In the telephone line case, even the investigation is not yet been completed. In the case under the Prevention of Money Laundering Act, in which First Information Report was registered in the year 2011, charge sheet was filed in the year 2014 and the charges are yet to be framed. In the impugned order, the second respondent has stated the above mentioned economic offences are of serious nature, adversely impinging upon economic integrity of the country. So far as economic integrity is concerned, this expression has not been defined anywhere in the Notice Inviting Applications. This expression has been mentioned for the first time in the impugned order and sought to be explained in the counter filed by the respondents.

...

38. Admittedly, during the operation of the petitioners' FM Radio stations, the petitioners have not received any adverse notice with regard to its operation and the petitioner companies are carrying on business strictly in accordance with law."

Hence, assigning the very same reasons for non-execution of GOPA is un-acceptable.

16. Admittedly, the above said order passed by this Court earlier had attained finality and the respondents cannot be permitted to agitate an issue, which has already been raised and negatived by this Court. In the light of the above, the reasons assigned for non-execution of GOPA are

irrational and arbitrary and the same are rejected.

17. So far as the allegation that there is a case filed by the Income Tax Department for delayed payment of Income Tax is concerned, the same is also liable to be rejected, as the High Court of Delhi has already stayed the proceedings. As it has already been held in W.P.No.11477 of 2015 that it is a well settled position of law that the accused is presumed to be innocent, unless the guilt is proved beyond reasonable doubt/beyond all probabilities, the said presumption operates in favour of the said accused. If the alleged offences are not proved, the order of security clearance would result in the petitioner-Company being punished even before the trial, which would greatly prejudice the petitioner. Even in paragraph 7 (iv) of the Counter Affidavit, it is specifically stated that Kalanithi Maran is not the Principal Officer of Spicejet Limited. The discharge application of Mr.Kalanithi Maran is pending before the trial Court at Tis Hazari, New Delhi.

18. The next contention that the petitioner will not be at a loss, since Phase-III licence will be valid for 15 years from the date of operation of Channel, is also unacceptable, as the respondents have averred that once the opinion is obtained from the Ministry of Law and Justice, the final decision regarding signing of GOPA will be taken. This aspect was also considered in the earlier order passed by this Court, wherein, it was observed that the opinion was sought for from the Attorney General of India, who himself, has opined that pendency of criminal case alone does not bar grant of security clearance. Thus, as the opinion has already been obtained, the said ground is unavailable to the respondents.

19. The enjoyment of the licence in future for the continuous period of 15 years is also based only on the opinion of the Ministry of Law and Justice. Therefore, this Court also cannot lose sight of the fact that being a commercial venture, the petitioner had already incurred heavy loss towards investment and infrastructure and the inordinate delay has already caused heavy loss altering the entire business plan of the petitioner, which is a reason for the petitioner to withdraw their application.

20. Finally, it is contended that there is no provision of law to allow the refund of OTEF under the Phase-III policy guidelines. The inordinate delay on the part of the respondents in granting the licence has frustrated the business of the petitioner. It is not the case of the respondents either that the petitioner had applied late or did not furnish the required documents on time. Admittedly, the petitioner had complied with all the conditions imposed by the respondents well within time and it is the respondents, who

had delayed the execution of GOPA, jeopardising the viability of running a FM Station. Hence, the petitioner cannot be penalised for the same.

21. In view of the above, this Court is of the opinion that the petitioner has made out a case for issuance of mandamus by establishing their legal rights, as it had complied with all terms and conditions stipulated by the respondents. Thus, the action of the respondents, having a duty under the letter of intent to execute GOPA and having failed to do the same, had constrained the petitioner to withdraw from the proceedings. The violation on the part of the respondents has infringed the legal right of the petitioner. The non-execution of the GOPA by the respondents for more than 3 years has seriously prejudiced the interest of the petitioner. As the petitioner had satisfied the requirements of issuance of mandamus, the petitioner has to succeed. The sum of Rs.53,38,83,479/- was retained by the respondents in captive for the past 3 years causing loss to the petitioner. Besides the petitioner had also made the infrastructure ready for the said purpose, which is also now defeated.

22. As held supra, the petitioner has got prejudiced due to the act of the respondents, for which, the petitioner has to be appropriately compensated. Hence, this Court is of the opinion that the petitioner is entitled to refund of the amount with interest. The principles relating to interest in the event of unlawful retention of money by the Government authorities is well illustrated in Union of India - Vs- Tata Chemical Limited reported in 2014 (6) SCC 335. Paragraphs 37 and 38 are extracted hereunder:-

"37. A "tax refund" is a refund of taxes when the tax liability is less than the tax paid. As per the old section an assessee was entitled for payment of interest on the amount of taxes refunded pursuant to an order passed under the Act, including the order passed in an appeal. In the present fact scenario, the deductor/assessee had paid taxes pursuant to a special order passed by the assessing officer/Income Tax Officer. In the appeal filed against the said order the assessee has succeeded and a direction is issued by the appellate authority to refund the tax paid. The amount paid by the resident/deductor was retained by the Government till a direction was issued by the appellate authority to refund the same. When the said amount is refunded it should

carry interest in the matter of course. As held by the Courts while awarding interest, it is a kind of compensation of use and retention of the money collected unauthorisedly by the Department. When the collection is illegal, there is corresponding obligation on the Revenue to refund such amount with interest inasmuch as they have retained and enjoyed the money deposited. Even the Department has understood the object behind insertion of Section 244-A, as that, an assessee is entitled to payment of interest for money remaining with the Government which would be refunded. There is no reason to restrict the same to an assessee only without extending the similar benefit to a resident/deductor who has deducted tax at source and deposited the same before remitting the amount payable to a non-resident/foreign company.

38. Providing for payment of interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method now statutorily adopted by fiscal legislation to ensure that the aforesaid amount of tax which has been duly paid in prescribed time and provisions in that behalf form part of the recovery machinery provided in a taxing statute. Refund due and payable to the assessee is debt-owed and payable by the Revenue. The Government, there-being no express statutory provision for payment of interest on the refund of excess amount/tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductors lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. Whenever money has been received by a party which ex ae quo et bono ought to be refunded, the right to interest follows, as a matter of course."

23. The power of Writ Court under Article 226 of the Constitution of India in imposing interest upon due amount in cases involving commercial transactions was considered by the Hon'ble Supreme Court in ABL International Ltd -vs- Export Credit Corporation Limited reported in 2005 (10) SCC 495, wherein, in paragraphs 6,7 and 8, it is stated as follows:-

"6. We are clear that the direction is clearly to settle the claim with interest at 12% p.a. on the amount which is ultimately found to be payable to the applicants in terms of the policy of insurance. It is not possible to contend that the High Court intended to grant interest only for a limited period. In the absence of any such direction, it appears quite patent that the respondent Insurance Company is liable to pay interest @ 12% from the date of the claim till the date of payment.

7. So far as Section 34 of the Code of Civil Procedure is concerned, we cannot lose sight of the fact that the Court in the instant case was exercising jurisdiction under Article 226 of the Constitution and, therefore, strictly speaking Section 34 will not apply. In any event, the court is entitled to award a higher rate of interest for the period subsequent to the date of decree keeping in view the nature of the transaction, and in this case admittedly the transaction is of a commercial nature. We will accept the explanation of the respondents that they have not wilfully defaulted in making the payment since they acted on the basis of legal advice. But that, however, does not absolve them of the liability under the judgment and order of this Court to pay to the applicants interest payable thereunder. The mere fact that the respondent in a contempt petition has some explanation to offer, does not absolve him of the liability under the Contempt of Courts Act. In this case it appears to us that the direction of this Court and that of learned Single Judge, were quite clear and did not permit of any other interpretation. However, we do not wish to go into that question.

8. We, therefore, direct the respondent Corporation to pay the interest to the applicants as directed by order of the learned Single Judge. We clarify that the applicants are entitled to payment of interest on the

amount of the claim settled @ 12% p.a. from the date of the claim till the date of payment. We direct that this payment be made within a period of 8 weeks from today."

24. Similarly, the principles of levy of interest in Commercial transactions was considered in Clariant International Limited -vs- SEBI reported in 2004 (8)SCC 524, wherein, in paragraphs 30, 31 and 35, it is held as follows:-

"30. Interest can be awarded in terms of an agreement or statutory provisions. It can also be awarded by reason of usage or trade having the force of law or on equitable considerations. Interest cannot be awarded by way of damages except in cases where money due is wrongfully withheld and there are equitable grounds therefor, for which a written demand is mandatory.

31. In absence of any agreement or statutory provision or a mercantile usage, interest payable can be only at the market rate. Such interest is payable upon establishment of totality of circumstances justifying exercise of such equitable jurisdiction. (See Municipal Corpn. of Delhi v. Sushila Devi [(1999) 4 SCC 317] , SCC para 16.)

35. When a benchmark is fixed by a statute, the question as to whether a discretion has been judicially or properly exercised or not will have to be determined in the context of the facts of the particular case. (See Secy., Irrigation Deptt. v. G.C. Roy [(1992) 1 SCC 508] .) When a benchmark is fixed or the court grants interest at the agreed rate, it may not be necessary to give reasons but where interest is granted at a higher or lesser rate, some reasons are required to be assigned.

25. On consideration of the above mentioned dicta and applying the principles to the facts of the instant case, it can be easily held that the respondents have deliberately

withheld the OTEF without executing GOPA, despite the demand from the petitioner and made the petitioner wait endlessly. Therefore, it would be appropriate to grant interest @ 12% per annum of the above mentioned OTEF from the date of payment made by the petitioner till the date of realization.

26. In the result, the Writ Petition is allowed and the respondents are directed to pay the said OTEF amount of Rs.53,38,83,479/- along with interest @ 12% per annum to the petitioner within a period of 12 weeks from the date of receipt of a copy of this order. No costs.

Sd/-

Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

srn

To

- 1 The Secretary,
Union of India,
Ministry of Information and Broadcasting,
Government of India,
Shastri Bhawan,
New Delhi - 110 001.
- 2.The Deputy Director (FM),
Ministry of Information and Broadcasting,
Government of India,
FM Cell, Shastri Bhawan,
New Delhi - 110 001.

+1cc to M/s.K.Srinivasa Murthy, Advocate SR.42724

+1cc to M/s.M.Sneha, Advocate SR.42975

W.P.No.15042 of 2020

GP(CO)

CB(02/02/2021)

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