

Basic Tele Services Ltd. Vs. Union of India and anr.

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Court : Delhi

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Judge : Mohd. Shamim, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 80

Appeal No. : I.A.No. 11070/96 In Suit No. 2686 of 1996.

Appellant : Basic Tele Services Ltd.

Respondent : Union of India and anr.

Advocate for Def. : Mr. R.N Trivedi, Additional Solicitor General, ; Mr. Rakesh Tikku, ;

Advocate for Pet/Ap. : Mr. Mukul Rohatgi, Sr. Advocate,; Ms. Pallavi Shroff and;

Judgement :

ORDER

Mohd. Shamim, J.

1.The plaintiff through the above application want this court to issue a direction to defendant No. 2 herein not to make payment to defendant No. 1 under the bank

guarantee No. 796/372/95 dated June 22, 1995 for Rs. 50 crores.

2. Brief facts which led to the presentation of the aforementioned application are as under : that the plaintiff herein submitted an offer in response to tender enquiry No. 314-7/94-PHC dated June 22, 1995 on January 1, 1996 along with an earnest money bank guarantee in the sum of Rs. 50 crores vide bank guarantee No. 796/372/95 through Deutsche Bank for the Provision of telephone services on license for the service area of Tamil Nadu. The guarantee period of the said bank guarantee was extended from time to time on the request of defendant No. 1. The bid of the plaintiff for telecom circle of Tamil Nadu was found to be the highest. Accordingly defendant No. 1 by their letter dated March 13, 1996 issued a letter of intent to the plaintiff for award of license to provide telephone services on non exclusive basis in Tamil Nadu Telecom Territorial circle and ask the plaintiff to convey their unconditional and unique vocal acceptance of the letter of intent and to furnish performance bank guarantee and financial bank guarantee in the requisite amount on the prescribed form. The said letter of intent dated March 30, 1996 issued by the defendant was not accompanied by a draft license agreement and draft interconnect agreement which was a mandatory requirement as per the terms and conditions of the tender document. The Plaintiff through their letter dated March 29, 1996 informed defendant No. 1 their inability to furnish the performance and financial bank guarantee, in the absence of the draft license agreement, and interconnect agreement as the same were to be defined by the said document. In the above circumstances the Plaintiff requested defendant No. 1 to extend the time to submit the letter of acceptance. Defendant No. 1 extended the date for acceptance of the letter of intent by four weeks through their letter dated April 11, 1996. Defendant No. 1 subsequently through their letter dated July 1, 1996 furnished to the plaintiff the draft of the license and the inter connect agreements and called upon the plaintiff to convey their unequivocal and unconditional acceptance of the same by their letter dated July 17, 1996. On receipt of the draft inter connect and license agreement the plaintiff undertook a detailed study of the said documents. After having studied the said documents the plaintiff vide their letter dated July 19, 1996 intimated defendant No.1 that there were several issues which arose from the said agreements and the same were to be negotiated and mutually resolved and a date for signing of the agreement

should be fixed only after the resolution of the said issues. Defendant No.1 vide their letter dated July 23, 1996 communicated to the plaintiff their inability to extend the date. However, they agreed to mutually discuss the above issues and a meeting in connection therewith was held on July 25, 1996. The plaintiff vide their letter dated July 26, 1996 submitted an initial list of comments on the draft license and inter connect agreements. Defendant No.1 through their letter dated July 30,1996 extended the date for acceptance of the letter of intent up to September 12,1996. The plaintiff also accordingly extended the validity of the bid and the validity of the bank guarantee up to October 31, 1996. Defendant No. 1 through their memorandum dated September 7, 1996 revised the draft of the license and inter connect agreements and sent the same to the plaintiff and called upon them to intimate the date and time of the signing of said agreements. However even the revised drafts received by the plaintiff did not address all the issues raised by the plaintiff. Hence a request was made to the defendant for time to study the revised license and inter connect agreement. The said request was acceded to and the date for acceptance was extended up to October 18, 1996 addressed to defendant No.1 was further informed that there were quite a good number of deviations in the revised draft agreements and the same were as such in the nature of counter offer to the plaintiff and the same were not in accordance with the tender documents or the clarifications issued thereunder. The plaintiff vide their communication dated October 18, 1996 enclosed a chart showing substantial deviations in the draft license and inter connect agreements from the tender documents and the clarifications issued thereunder. Defendant No. 1, however, instead of resolving the said issues raised by the plaintiff in regard to the draft license and inter connect agreements by their letter dated October 19, 1996 addressed to defendant No. 2 invoked the bank guarantee. The plaintiff in view of the above requested defendant No. 2 through letter dated October 30, 1996 not to make payment under the laid guarantee as the invocation was inter alias contrary to the terms of the guarantee itself. The said letter of invocation dated October 19, 1996 is patently bad in law and liable to be set aside. The impugned bank guarantee is a conditional guarantee which can be invoked only in the circumstances provided therein. Neither the draft license nor the inter connect agreements were furnished with the letter of intent as required to be done in terms of the tender documents

and were furnished only on July 1, 1996. These drafts contained several deviations from the tender documents and the clarifications. The Plaintiff have at no stage declined to sign the relevant documents. They have repeatedly requested defendant No. 1 to settle various outstanding issues so as to enable them to proceed further in the matter. Clause 3 of the guarantee deed requires that the letter of invocation should clearly state the breach on the part of the plaintiff which has occasioned the invocation of the bank guarantee. The impugned letter of invocation does not specify the reason why the guarantee has been invoked by defendant No. 1. The bidder i.e., the plaintiff herein were entitled to decline to accept the license agreement if it contained substantial changes from the tender documents or if the same was in the nature of counter offer by defendant No. 1 without forfeiting the bank guarantee as per the clarification issued to question No. 3 under Clause 11 and clarification issued in reply to question No. 1 under clause 12. It has thus been prayed that a direction be issued to defendant No. 2 not to make payment under the bank guarantee in question.

3. Defendant No. 1 have opposed the application, inter alia, on the following grounds : that the suit is liable to be dismissed for want of a legal notice under Section 80 of the Code of Civil Procedure. It is wrong and false that the draft agreement and the inter connect agreement contained any deviations. In fact, essentially and substantially, they are in line with the tender conditions. The issues raised by the plaintiff in their letter dated September 18, 1996 addressed to the defendant were totally outside the tender conditions. Hence, there was absolutely no reason, whatsoever, as to why the same should have been considered and dealt with. It is absolutely false and preposterous that there was any counter offer from defendant No. 1 to the plaintiff so as to enable the plaintiff to reject the agreement without forfeiture of the earnest money bank guarantee. Furthermore, the plaintiff have clearly admitted in their plaint that they were inclined to go ahead with the project. Hence, it was not open for the plaintiff now to allege that there were deviations. The plaintiff have failed to give acceptance of the letter of intent for Tamil Nadu circle and have also failed to submit the performance bank guarantee and the financial bank guarantee as required by the defendant. Hence the defendant were compelled to invoke the bank guarantee. It is incorrect and wrong that clause 3 of the bank guarantee required that the reasons for invocation

should be stated. It is sufficient enough to invoke the bank guarantee if there was a breach on the part of the plaintiff. The offer for award of license to the plaintiff as contained in the letter of intent issued is as per the bid made by the plaintiff against the said tender and it is in no way a counter offer. The question of counter offer would arise only in those cases where defendant No. 1 were changing any of the parameters as contained in the bid of the plaintiff. The application is thus false and frivolous. It is liable to be dismissed.

4. Defendant No. 2 have not filed any reply to the above application. However, they have supported the case of the plaintiff through an affidavit sworn by Shri Anil Malhotra, Manager of the bank.

5. Learned counsel for the plaintiff Mr. Mukul Rohatgi, Senior Advocate, has contended that the impugned bank guarantee dated June 22, 1995 furnished by the plaintiff in favor of defendant No. 1 was a conditional one. Hence, the same could have been invoked as per the terms and conditions of the said bank guarantee i.e., the same could have been invoked on the occurrence of certain events mentioned therein. Defendant No. 1, however, for the best reasons known to them have miserably failed to show the existence of the said conditions preceding the invocation of the said bank guarantee. Hence the invocation is bad in law and defendant No. 2 were justified in declining the encashment of the same. It has further been urged for and on behalf of the plaintiff that there is no concluded contract in between the parties inasmuch as the parties were simply at the stage of negotiations. The other limb of the argument advanced by the learned counsel for the plaintiff is that there were material deviations in between the conditions as set out in the draft license agreement and the conditions which were enumerated in the tender documents. Hence the plaintiff were entitled to decline to accept the letter of intent without forfeiture of their earnest money. The alleged acceptance of the bid of the plaintiff vide letter of intent dated March 13, 1996 was in the nature of counter offer which the plaintiff could have refused to accept.

6. Learned counsel for the defendant No. 1, Mr. Trivedi, Additional Solicitor General, on the other hand, has urged that the defendant were under no obligations to show any condition before invoking the bank guarantee. The plaintiff

herein, according to Mr. Trivedi, failed to execute the contract form though their bid was accepted by defendant No. 1. They also failed to furnish the performance bank guarantee and financial bank guarantee. The reasons for the invocation and the bank guarantee find a mention in the record of defendant No. 1 though the same were not specified in the letter dated October 19, 1996 invoking the bank guarantee. Hence defendant No. 1 were fully justified in invoking the bank guarantee. Admittedly a letter of intent was issued to the plaintiff on March 13, 1996 which is tantamount to acceptance of the bid as per the tender conditions itself. Thus the plaintiff were under an obligation on the acceptance of their bid to execute the contract form and to furnish the performance bank guarantee and the financial bank guarantee. Their failure to do the needful resulted in invocation of the bank guarantee by the defendant.

7. Since we are concerned with the construction of the terms of the bank guarantee it would be just and proper to examining the said terms and conditions before proceeding any further in the matter. They are as under :

'(1) If the bidder withdraws its bid during the period of bid validity specified by Authority, or

(2) If the bidder having been notified of the acceptance of its bid by the Authority during the period of the bid validity.

(a) Fails or refuses to execute the contract form if required ; or

(b) Fails or refuses to furnish the performance Bank Guarantees and/or Financial Bank Guarantees in accordance with the Instructions to Bidders :

(3) We undertake to pay to the Authority, an amount not exceeding Rs. 50,00,00,000/- upon receipt of its first written demand without any demur if the Authority note that the amount claimed by is due to or owing to the occurrence of one or both of the two conditions, specifying the occurred conditions or conditions.'

8. It is fully manifest from the terms and conditions of the impugned bank guarantee alluded to above that the same could have been invoked only under certain conditions and circumstances which find a mention therein. It can be safely

concluded from above that the impugned bank guarantee is a conditional one. Even the learned Additional Solicitor General has during the course of arguments not urged to the contrary. On the other hand, their defense is that the bank guarantee was invoked on account of the failure of the plaintiff to fulfill condition No. 2 i.e., to execute the contract form on acceptance of their bid by defendant No. 1 and their subsequent failure to furnish performance bank guarantee and financial bank guarantee.

9. Now the question in view of the above which comes to the tip of the tongue is as to whether the defendant are correct in their submission

10. Admittedly the plaintiff herein never withdrew their bid during the period of the bid validity. In fact the same was extended on the request of defendant No. 1 from time to time. The last extension was up to November 30, 1996 as is manifest from the letter dated September 27, 1996 written by the plaintiff to the defendant and the letter dated October 18, 1996 addressed by the plaintiff to the Member (Production), Department of Telecommunication, Sanchar Bhawan, New Delhi. Thus Condition No. 1 was not available to defendant No. 1 and the same was as such not relied upon by them.

11. This brings us to the second condition which is alleged to have been committed breach of . The said condition as is manifest from the guarantee deed itself would be available to the defendant only when they succeed in showing that there was a concluded contract or an unequivocal acceptance of the bid by the defendant. The first letter in this connection which was addressed by defendant No. 1 to the plaintiff is dated March 13, 1996. It was through the said letter that defendant No. 1 apprised the plaintiff of the fact that the Director General, Telecommunication, was pleased to issue letter of intent for award of a license to provide telephone services on non exclusive basis in the Tamil Nadu Circle as mentioned in Annexure 1 as per the details of license deed, payment schedules, performance bank guarantee and financial bank guarantee. The award of license was to be governed by terms and conditions stipulated in the tender documents. Detailed terms and conditions were to be enumerated in the license agreement and inter connect agreement. Copies of the said documents were to made

available within a short span of time. The plaintiff through the said letter were required to forward their unequivocal and unconditional acceptance of the letter of intent, duly signed by the authorized signatory so as to reach the Department of Telecommunication by April 10, 1996 along with the documents which find a mention in para 3 of the said letter. It was further required through the said letter that in case the letter of acceptance along with the necessary documents was not received by the stipulated date i.e., April 10, 1996 the letter of intent was to be treated as withdrawn.

12. It is fully evident from above that the letter of intent was not accompanied by the license agreement and inter connect agreement. The copies of the said documents were to be made available within a short span of time. Furthermore, the plaintiff were required to give their un-conditional acceptance of the said letter of intent by April 10, 1996 i.e., near about within a month from the date of issue of the said letter i.e., March 13, 1996. Thus it cannot be said by any stretch of imagination that the bid of the plaintiff was accepted without any strings attached thereto.

13. Learned counsel for the plaintiff is right in his submission that it was in the nature of a counter offer which was to be accepted by the plaintiff. Moreover, admittedly the letter of intent dated March 13, 1996 was not issued along with the license agreement and inter connect agreement. It was one of the tender conditions as is manifest from question No. 2 of clause 12 which is in the following words :-

'Q. It would be appropriate if a draft license copy with all terms and conditions are provided to the bidder at this stage or at least prior to the issue of letter of intent.'

In reply to the said query it was stated that the draft license agreement will be given to the selected bidders along with the letter of intent.

14. Defendant No. 1 thus committed the breach of the said condition inasmuch as they did not provide the plaintiff with a copy of the draft license and inter connect agreement along with the letter of intent. Admittedly the letter of intent. Admittedly the letter of intent did not contain all the terms and conditions which were to be

followed by a bidder while executing the contract. Hence, the plaintiff were in complete darkness with regard to the terms and conditions of the contract at the time the letter of intent was issued. Consequently, how could they have accepted the letter of intent? The said fact was, this court feels, known even to the defendant at the time of the issue of the letter of intent and that is why nearabout a month's time was provided to the plaintiff to accept the letter of intent.

15. There was no concluded contract is also manifest from quite a good number of letters placed on the file of the court which were exchanged in between the parties during the course of the negotiations which were going on. The plaintiff were being requested through letters after letters to extend the bid validity and bank guarantee from time to time. The defendant in this connection wrote a number of letters to the plaintiff requesting therein to extend the bid validity and bank guarantee. In this connection reference can be made to letters dated June 5, 1996 from the Government of India, Ministry of Communication, to the plaintiff, letters dated June 14, 1996, August 9, 1996 and September 12, 1996. The plaintiff, on the other hand, have also been requesting to make them available the draft license agreement and inter connect agreement at the earliest so that they may have sufficient time to study and discuss the drafts with the defendant. In this connection the learned counsel for the plaintiff has led me through the letters dated March 29, 1996, April 10, 1996 and May 8, 1996 written by the plaintiff to the defendant. Their request for supply of the said draft license agreement and inter connect agreement was acceded to only on July 1, 1996 as is manifest from the letter of the said date where through the plaintiff were supplied the copies of draft license agreement and inter connect agreement and were requested to give their unconditional and unequivocal acceptance of the letter of intent by July 31, 1996. Surprisingly enough the final copies of draft license agreement and the inter connect agreement were supplied to the plaintiff only on September 7, 1996, as is clear from a letter of the said date. The plaintiff were requested through the said letter to let the defendant know the convenient time and date for signing of the agreements. The last letter on the record written by defendant No. 1 to the plaintiff with regard to the signing of the agreement is dated October 17, 1996 where through the plaintiff were requested to convey their unequivocal and unconditional acceptance of the letter of intent. The plaintiff replied to the said letter through their

letter dated October 18, 1996 wherein they brought to the notice of the defendant that there were certain deviations from the tender documents and clarifications. In view of the substantial deviations from the tender documents and the clarifications the drafts forwarded to them on September 7, 1996 were really in the nature of a counter offer. It can be safely concluded from the correspondence exchanged in between the parties alluded to above that negotiations with regard to signing of the agreements were going on in between the parties till October 18, 1996.

16. I am thus of the view that there was no concluded contract in between the parties. There were offers and counter offers. Time was being sought for discussions to thrash out the difference and there was in fact no ad idem on any point. There was no acceptance on the part of the plaintiff to the counter made by the defendant.

17. A case very much akin to the case in hand came up for hearing before a Single Judge of this court as reported in Union of India Vs . M/s. Uttam Singh Dugal & Co. (Pvt.) Ltd., : AIR1972 Delhi110 , who on being faced with a similar situation held (para 10) '... In my opinion, this letter, called letter of acceptance, is only a counter-offer and it cannot reasonably be construed to be acceptance of an offer. Cl. 20 of the letter of the respondent-contractor accompanying the tender Exhibit R.1 kept the tender open only for a period of three months. The original tender, therefore, lapsed by sheer passage of time and over and above that, the additions, subtractions and modifications of the terms of the original tender effected during the course of more than seventeen months changed it beyond shape and the letter of acceptance itself mentions a large number of conditions and provides that in the event of discrepancy, the terms of the letter of acceptance will prevail over the terms of the tender. This letter of acceptance also does not make any reference to any previously agreed term or condition or any correspondence on the subject, and it is impossible to visualise that the officer accepting the tender had any other agreement or offer of acceptance of the parties in view ... The ultimate portion of the letter, therefore, properly required the respondent - contractor to complete the formal agreement which was being prepared on the basis of the tender and the letter of acceptance'

14.... 'As a matter of law, when there is variance between the offer and acceptance even in respect of any material term, acceptance cannot be said to be absolute and unqualified and the same will not result in the formation of a legal contract.'

18. The learned Judge in support of the above opinion relied upon the observations of Lord Parker in *Von Hatzfeldt-Wilden-burg v. Alexander* (1912) 1 Ch D 284, which reads as under : 'It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties it is question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. The fact that the reference to the more formal documents is in words which according to their natural construction import a condition is generally if not invariably conclusive against the reference being treated as the expression of a mere desire. '

19. The above view was also given vent to by their Lordships of the Hon'ble Supreme Court in a recent judgment as reported in *Rickmers Verwaltung GmbH Vs . Indian Oil Corporation Ltd.* : AIR 1999 SC504 'An agreement, even if not signed by the parties, can be spelt out from correspondence exchanged between the parties. It is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence, it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreemet had come into existence between them through correspondence. The court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the

correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement upon all material term, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence.'

20. A perusal of the letter dated October 19, 1996 addressed to the Manager, Deutsche Bank, Tolstoy Marg, New Delhi, whether through the bank guarantee was invoked reveals that there was no reference therein with regard to the existence of any of the conditions which were mandatorily to be shown before the invocation of the bank guarantee. The defendant for the best reasons known to them have simply contented themselves by stating therein that it has been ordered by the authority that the impugned bank guarantee bearing No. 796/372/95 dated June 22, 1995 be forfeited and the amount secured there under be remitted through a crossed account payee demand draft to the Pay and Accounts Officer, Department of Telecommunication, Delhi. The learned Additional Solicitor General, Mr. Trivedi, while animadverting on the said point has argued that the defendant were not required to mention therein existence of the conditions which find a mention in the bank guarantee. It was sufficient enough for the defendant if they were satisfied that the said conditions were in existence and in fact such a satisfaction was recorded in the relevant documents of the department. The learned Additional Solicitor General in this connection has referred to certain notes of the department which have given out the reasons for invoking the bank guarantee. The reasons mentioned there are the same which were put forward during the course of arguments. I am sorry I am unable to agree with the contention of the learned Additional Solicitor General.

21. I have already observed above that the impugned bank guarantee was a conditional one and the same could have been invoked only in those discerning few cases where the said conditions existed i.e., the bidder withdrew the bid during the period of the bid validity and the bidder having been notified of the acceptance of the bid by the authority during the period of the bid validity, failed to execute the contract. The other condition was when a party failed to furnish a

performance bank guarantee and a financial bank guarantee. The defendant as observed above have miserably failed to show the existence of any one of the said conditions mentioned in the impugned bank guarantee. Hence they were not justified in invoking the bank guarantee at the time when they did so.

22. The recital of the terms and conditions in a bank guarantee has got a definite meaning and purpose behind it. It is neither a mere formality nor a surplusage to be flung to the winds. If it lays down that a bank guarantee can be invoked only when it is shown that certain conditions and circumstances are in existence then it can be invoked only when the said conditions are shown. In case the said conditions/events are not shown to have occurred the bank would be justified in refusing the encashment.

23. I am fortified in my above view by the observations of the Hon'ble Supreme Court as reported in *Larsen & Turbo Limited Vs . Maharashtra State Electricity Board & Others*, : AIR 1996 SC334 '... The appellant wrote to the first respondent on 21.2.1994 that the plant was completed and so all bank guarantees have served their contractual requirements. On a persual of the relevant clauses in the contract, executed between the appellant and the first respondent and the communication of the first respondent dated 10.6.1994, it is fairly clear that the stipulations or conditions mentioned as per clauses 70.2, 70.3 and 70.4 have been successfully fulfilled and the plant was admittedly taken over by the first respondent. The guarantee given by the Citi bank, N.A. dated 10.5.1989 appearing in Vol.II at pp. 122 to 126 will ensure only till successful completion of the trial operations and the plant is taken over. That event having ensured, the invocation of the guarantee given by the Citi bank dated 10.5.1985 in the sum of Rs. 2.72 crores is not encashable on its terms and in order to prevent irretrievable injustice, an injunction as prayed for, to Respondents 1 to 4 deserves to be issued on that score. The court below was in error in not doing so. We hereby restrain Respondents 1 and 4 from invoking the bank guarantee aforesaid. '

24. The above view was also given vent to by a learned Single Judge of this court as reported in *Ansal Properties & Industries Ltd. Vs . Union of India & Ors.* : 54(1994)DLT307 . To the same effect are the observations of another learned

Single Judge of this Court as reported in Ansal Properties & Industries (P) Ltd. Vs . Engineering Projects (India) Ltd. : AIR1998 Delhi176 .

25. I am also tempted here to reproduce a few lines from the enthralling commentary by 'Chitty on Contracts', Vol. 2, 27th Edition, Chap. 33-386, 'Construction of terms of credit'. The insistence upon strict compliance is continually reiterated. In English, Scottish and Australian Bank v. Bank of South Africa, Bailhache J. remarked : ' It is elementary to say that a person who ships in reliance on a letter of credit must do so in exact compliance with its terms. It is also elementary to say that a bank is not bound or indeed entitled to honor drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in strict accord with credit as opened.'

'33-387 Technical defenses. If a tender of documents does not strictly comply with the requirements of the commercial credit, the banker is entitled to reject it. It does not matter whether the discrepancy is significant or minute. The rule that de minimis non curat lex does not apply in commercial credit transaction.'

26. Learned counsel for the Plaintiff Mr. Rohatgi has contended that the plaintiff herein are entitled to decline to accept the letter of intent/license even otherwise because the terms and conditions have been changed in the license agreement and inter connect agreement from the original terms and conditions which find a mention in the original tender, without forfeiting the earnest money. The learned counsel in support of his argument has led me through the clarifications as given out in the tender. He has in this connection drawn my attention to Clause 12 of the clarifications. One of the questions which was put by the bidders as per clause 12 was in the following words : ' Will the selected bidders have the right to decaling to accept the license under the terms specified by the Govt. if they have changed from the original tender without forfeiting the Earnest Money ?' The answer to the above query was in the affirmative, i.e. in case there was a substantial change.

27. It has thus been urged for and on behalf of the plaintiff that there were substantial changes in the terms and conditions of the draft license agreement and the inter connect agreement from the terms which were originally set out in the tender document. The learned counsel has in this connection placed on record a

chart showing crucial deviations which were likely to affect the interests of the plaintiff. He has pointed out as many as 14 changes of vital importance to the interests of the plaintiff. However, I would like to refer to only two or three very vital changes. The original Clause 16.9 at page 20 of the tender documents was in the following words :

'Telecom Authority reserves the right to modify these conditions or incorporate new conditions considered necessary in the interest of national security.' The said clause as per license agreement given to the plaintiff on September 7, 1996 was changed to the following: ' The licensor reserves the right to modify at any time the terms and conditions of the license covered under Schedules A, B and C annexed hereto, if in the opinion of the licensor it is necessary or expedient to do so in the interests of general public or for the proper conduct of telegraphs or on security consideration.'

28. It is manifest from above that initially the clause provided a change in the terms & conditions in the interest of national security. However, the said clause was modified and amended so as to enable the defendant to amend and modify the said clause in the interest of general public or for the proper conduct of telegraphs or on security considerations. There is a world of difference between the two clauses i.e., the clause as it originally stood in the tender document and the clause as modified and amended as per the license agreement given to the plaintiff on September 7, 1996.

29. There was no provision with regard to imposition of penalty in case of default of any of the terms and conditions stipulated in the license agreement. However, the term with regard to penalty was incorporated in clause 12 at page 4. Thus there was a substantial deviation from the original terms and conditions inasmuch as there was no provision for imposition of penalty in case of default of any of the terms and conditions stipulated in the license agreement or inter connect agreement but the same was introduced as per the license agreement given to the plaintiff on September 7, 1996.

30. Furthermore, the learned counsel has argued that there was no provision in the terms and conditions as set up in the original tender with regard to the fact that

the licensor's decision shall be final on all matters relating to the agreement and application of the terms and conditions therein. There was no such provision earlier. However, this was added as per clause 12 of the license agreement supplied to the plaintiff. This is very vital change inasmuch as it forfeits the right of the plaintiff to approach the Civil Courts.

31. In view of the above substantial changes the plaintiff were entitled to decline to accept the license without entailing the forfeiture of their earnest money which was furnished in the form of a bank guarantee.

32. The above view was given vent to by a learned Single Judge of this Court as reported in HFCL BEZEQ Telecom Limited v. Union of India & Ors. 69 (1997) DLT 317. The facts of the said case are *pari materia* the facts of the present case. Hence the observations in the said case, *pari passu*, can be made applicable to the case in hand. It was observed : '... The question is whether the first defendant issued the Letter of Intent, as agreed, during the currency of the bid validity period. In the tender document and in particular, in the clarifications issued by the first defendant, the first defendant had agreed that draft License agreement will be issued along with the Letter of Intent. Admittedly, that was not done. I have extracted the relevant portion from the written statement that till 1.7.1996 the first defendant could not get the Draft License Agreement and Draft Interconnect Agreement from the Ministry of Law. There-fore, the first defendant did not act up to the terms of the tender document in providing the license Agreement along with Letter of intent. This is not a mere formality. Because as per the clarifications issued by the first defendant it was still open to the bidder to consider the terms of the License Agreement and the Interconnect Agreement and resile out of the bargain if they are contrary to the terms of the tender document'

33. I am also tempted here to cite a few lines from a judgment delivered by the Supreme Court as reported in Delhi Science Forum & Others Vs . Union of India & Anr., : [1996]2SCR767 , the Hon'ble Supreme Court laid down the guidelines as to under what circumstances administrative decision of the Government or of the statutory authority of the Government can be challenged. It was observed: '... Many administrative decisions including decisions relating to awarding of contracts

are vested in a statutory authority or a body constituted under an administrative order. Any decision taken by such authority or a body can be questioned primarily on the grounds : (i) decision has been taken in bad faith ; (ii) decision is based on irrational or irrelevant considerations ; (iii) decision has been taken without following the prescribed procedure which is imperative in nature. While exercising the power of judicial review even in respect of contracts entered on behalf of the Government or authority, Which can be held to be state within meaning of Article 12 of the Constitution courts have to address while examining the grievance of any petitioner as to whether the decision has been vitiated on one ground or the other. It is well settled that the onus to demonstrate that such decision has been vitiated because of adopting a procedure not sanctioned by law, or because of bad faith or taking into consideration factors which are irrelevant, is on the person who questions the validity thereof ...'.

34. Thus a duty has been cast on the shoulders of the Union of India to act in accordance with law and not to deviate and depart from the procedure prescribed which is imperative in nature . This is what has not been done in the instant case. The defendant did not act in accordance with the procedure prescribed and deviated from it. Hence the same cannot be prima facie sustained.

35. It has next been contended by the learned Additional Solicitor General that the defendant herein are Union of India and as such no suit is maintainable against the Union of India unless the defendant have been served with a notice under Section 80 of the Code of Civil Procedure. He has in this connection led me through Section 80 of the Code of Civil Procedure which provides 'No suit shall be instituted against the Government (including the Government of the State of Jammu and Kashmir) or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of -

'(a)

(b) '.

36. It is thus manifest from above that two months notice under Section 80 of the Code of Civil Procedure is a must before the institution of a suit against the Government of India. However, a suit to obtain an urgent or immediate relief can be instituted against the Government of India with the leave of the Court without serving the notice as required by Section 80(1). The provisions of Section 80(2) are quite clear on this point. Thus the only thing to be seen herein is as to whether the provisions of Section 80(1) were complied with or not. Learned counsel for the plaintiff in this connection has drawn my attention to the order dated October 31, 1996 on interim application No. 11071/96. A perusal of the same reveals that the plaintiff moved an application for institution of the suit without service of the notice. The said permission was granted. However, a notice was ordered to be issued to the Union of India before granting the relief i.e., injunction, as the same was mandatory. Thus it does not lie in the mouth of the defendant now to say that the suit is bad for want of notice under Section 80 of the Code of Civil Procedure.

37. In the above circumstances I am of the view that the plaintiff have shown a prima facie case in their favour. In case the injunction is not issued in that eventuality the bank guarantee which was furnished by the plaintiff by way of earnest money in favor of defendant No. 1 would be encashed. The plaintiff would suffer irreparable loss and injury inasmuch as they would be deprived of their hard earned money without any justification and for no fault of their own. On the other hand, in case an injunction is granted it would be simply tantamount to delay in encashing the bank guarantee if the defendant ultimately succeed. In any case the plaintiff by the institution of the present suit have raised a substantial question which needs investigation and during the course of investigation it would be desirable to direct the parties to maintain the status quo.

38. In the above circumstances the application is allowed. Defendant No. 2 are hereby restrained from making any payment to defendant No. 1 under the bank guarantee No. 796/372/95 dated June 22, 1995 for Rs. 50 crores.