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**Radio Today Broadcasting Ltd. and ors. Vs. Ministry of Information and Broadcasting and anr.**

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**SooperKanoon Citation : [sooperkanoon.com/715295](http://sooperkanoon.com/715295)**

**Court : Delhi**

**Decided On : Dec-20-2007**

**Reported in : 2007(2)CTLJ505(Del); 146(2008)DLT712; 2008(100)DRJ684**

**Judge : A.K. Sikri and; Vipin Sanghi, JJ.**

**Acts : Companies Act - Sections 58A and 58A(8); Companies Rules, 1979**

**Appeal No. : WP (C) No. 9266 of 2007**

**Appellant : Radio Today Broadcasting Ltd. and ors.**

**Respondent : Ministry of Information and Broadcasting and anr.**

**Advocate for Def. : P.P. Malhotra, ASG and ; Rajeeve Mehra, ; Digit Saikia,**

**Advocate for Pet/Ap. : A.M. Singhvi and; Rajiv Nayar, Sr. Advs.,; Rahul Pratap**

**Disposition : Petition dismissed**

**Judgement :**

**A.K. Sikri, J.**

1. The petitioner No. 1 company (hereinafter referred to as the 'petitioner') is a wholly owned subsidiary of the petitioner No. 2, which is one of its major

shareholders and the other major shareholder being TV Today Network Group. Both the petitioner No. 2 and TV Today Network own the 'India Today' magazine and the twenty four hours news channel 'Aaj Tak' respectively.

2. The respondent Union of India, through the Ministry of Information and Broadcasting, had introduced its policy vide Notification dated 13.7.2005 regarding expansion of FM Radio Broadcasting through private agencies. The objective of such policy was to attract private agencies to supplement and complement the efforts of All India Radio by operationalising radio stations that provide programmes with local content and relevance, improve the quality of fidelity in reception and generation, encouraging local talent and generating employment. The process of inviting tenders by way of such a bidding was divided into two phases. In the year 2005, 337 channels were put on bid, out of which 280 channels were successfully bid for. After scrutiny, letter of intent was issued for operationalization of 245 channels. The Government decided to invite bids for remaining vacant channels. For this purpose, tender document for inviting bids for these channels was issued on 8.6.2007. The petitioner, who was successful in obtaining license to operate 7 radio stations for a period of 10 years in the first instance, submitted its bid/application form on 21/23.7.2007 responding to the aforesaid Notice Inviting Tenders. Many others also submitted their bids. After scrutiny of the applications, the respondent No. 1 has come out with the list of final bidders on their official website eligible to furnish their technical bid for the bidding for vacant channel of FM Radio Broadcasting Phase-II. This list was displayed on 30.11.2007 and the name of the petitioner does not figure in this list. The petitioner, feeling surprised at this exclusion, addressed letter dated 3.12.2007 trying to find out the reason thereof. Vide letter of even date, the respondents have informed the petitioner that on the basis of the Net Worth Certificate submitted and on the perusal of the balance sheet, it is found that the petitioner is not eligible to participate in the financial bidding process in terms of the tender document.

3. We may note at this stage itself that the bidding process is in two stages, namely, Stage-I and Stage-II. In Stage-I, applications were invited from interested parties and they were required to submit the details of their eligibility as per the formats specified in Appendix A and B to the tender document along with a

demand draft of Rs. 15,000/-. The interested parties/applicants were required to meet the eligibility criteria as specified in Section 2 of the said document. Only those who fulfill this criteria (to be known as 'qualified interested parties') were to be invited to participate in Stage-II of the bidding process. According to the respondents, the petitioner has not been able to meet the eligibility criteria as per Section 2 of the tender document.

4. Section 2, inter alia, specifies financial eligibility and fixes the Net Worth at Rs. 10 crores for All Categories of Cities in all Regions, under which category the petitioner submitted its bid. The dispute is on the calculation of this Net Worth. The petitioner in its application had submitted the necessary documents regarding its Net Worth. In calculating this Net Worth, the petitioner had included the One Time Entry Fee (for short, 'OTEF') period by it in respect of licenses granted to it in the 1st Phase in its assets, treating the same as intangible assets. The respondents have taken the stand that this OTEF cannot be included in the book value of assets. There is no dispute that if this OTEF is to be included as an asset while calculating the book value of assets, Net Worth of the petitioner would exceed Rs. 10 crores. On the other hand, if this OTEF is to be excluded, the Net Worth of the petitioner falls below Rs. 10 crores. therefore, the entire dispute revolves around this issue, namely, whether the OTEF paid by the petitioner for securing the earlier licenses in Phase I is to be included while calculating the Net Worth. Before we mention the contentions of both the parties on this pivotal issue, it would be apposite to take note of certain clauses in the tender documents which will have impact on this aspect of the matter.

5. Section 242 deals with financial eligibility prescribing minimum Net Worth and a note thereto is appended describing as to what Net Worth would mean. It reads as under:

2.4.2 The financial eligibility of each applicant company shall be assessed on the basis of the following criteria:

Minimum Net Worth required for one Channel per City in each region:

D category Cities Rs. 50 lakhs  
C category Cities Rs. 1 Crore  
B category Cities Rs. 2 Crore  
A category Cities Rs. 3 Crore  
A+ category Cities Rs. 3 Crore  
All categories of Cities in all regions Rs. 10 Crore  
[Note: 'Net worth' means the excess of the book value of assets (other than fictitious assets) of an enterprise over its liabilities. It would be calculated as sum of the paid up equity and free reserves minus accumulated losses, if any, in the company.]

6. As per Section 244, the applicant was supposed to furnish annual reports and audited final accounts for the last three years or from the date of incorporation, whichever is later, along with its net worth as on 31.3.2007 or any date subsequent thereto up to the date of submission of the bid, certified by the statutory auditors, to support its claim of financial competence. Section 28, under the head 'Evaluation Process', mentions the eligibility criteria for evaluating Stage-I applications and reads as under:

#### 2.8.1 Evaluation of Stage I (Eligibility Criteria)

The applications submitted by the applicants through bid pack for Stage I will be evaluated on the basis of the eligibility conditions specified above. Incomplete applications or applications without all relevant prescribed documents, more specifically (i) bio-data of Directors in prescribed format; (ii) Net Worth certificate in prescribed format; and (iii) Clause-by-clause compliance, shall be summarily rejected and the bid pack for stage I returned through registered post, after forfeiting the processing fee. In case there is still time for submission of applications, fresh application may be filed in accordance with the terms and conditions of the Tender document. The Ministry of I and B will undertake the process of evaluation on the basis of documents submitted by the applicant companies, in consultation with other Ministries, wherever required. The Ministry of I and B will inform each applicant of the result of such evaluation, and the reasons thereof, in writing through registered post. In the event of being pre-qualified, the Government of India shall also intimate details of other relevant documents such as the drafts of the proposed Letters of Intent/Grant of Permission Agreements/Lease Agreements with Prasar Bharti/Service Agreements with BECIL etc. that each QIP may need to take into account to

finalize its Financial Bid for each city.

7. Appendix A to these documents set out the format in which application for Stage-I (pre-qualification bid for FM Radio Broadcasting Phase-II) is to be filled. Column 9 thereof, which requires the particulars of Net Worth of the applicant company to be given, is as follows:

9. Net Worth of the Applicant Company as on 31st March 2007.

(Please enclose certificate from Statutory Auditor, as per Appendix G)

Rs. \_\_\_\_\_ Lakhs

As per this column, statutory auditor is required to give the certificate as per Appendix - G. Appendix - G prescribes the following format:

We have audited the Books of Accounts of \_\_\_\_\_ for the financial year/period ended month-day-year 2007 and certify that the 'Net Worth' of M/s. \_\_\_\_\_ the Applicant Company as on \_\_\_\_ 2007 is Rupees \_\_\_\_\_ lacs (rupees in words lacs). We further certify that the Net Worth of the Applicant Company is computed as follows:

S. Particulars Amount in Rupees-Lacs  
No.1. Book value of assets  
2. Book Value of fictitious and intangible assets  
3. Liabilities other than owner's funds  
4. Net Worth {1-(2+3)}  
Place/Date Statutory Auditors

Note:

## NET WORTH

The excess of the book value of assets (other than fictitious and intangible assets of an enterprise over its liabilities. This is also referred to as Net assets or shareholder's funds

## BOOK VALUE OF ASSETS

The amount at which an item appears in the books of account or financial statement. It does not refer to any particular basis on which the amount is

determined. Eg. Cost, replacement value etc.

## Fictitious Assets

Items grouped under the assets in a balance sheet which has no real value (eg. The debit balance of the profit and loss account)

## LIABILITIES

The financial obligation of an enterprise other than owner's funds.

8. We may delineate at this stage as to why the dispute about inclusion or exclusion of OTEF has arisen. In the note appended to Section 242, it is mentioned that Net Worth means the excess of the book value of the assets (other than the fictitious assets) of an enterprise over its liabilities. Net Worth, thus, means book value of assets minus liabilities. Question is as to what is to be included while calculating book value of assets. As per the petitioner, in view of the aforesaid definition, only fictitious assets are to be excluded and this definition does not exclude intangible assets. OTEF being an intangible asset, the petitioner has right to include the same while calculating book value of assets.

On the other hand, submission of the respondents is that the note cannot be read in isolation and the entire document is to be read as a whole. They point out that the petitioner knew very well the format in which the application was to be given. In Column 9 of the application form it is specifically mentioned that Net Worth certificate is to be given as per Appendix G. Reading of Appendix G would make it abundantly clear that book value of fictitious and intangible assets is to be excluded. therefore, OTEF could not have been included at all in the book value of assets.

9. To find out the purpose of the provision relating to Net Worth in the tender documents, we may have to first know the nature of OTEF and what is the accounting method while dealing with the OTEF.

10. The tender documents begin with definitions and OTEF is defined in the following manner:

One Time Entry Fee shall mean and refer to the one time fee offered by each of the bidders to the tender documents.

Definition of 'Reserved OTEF' is also provided to mean and refer to 25% of the highest successful valid financial bid for each city. One may have to also refer to Section 3 of the tender documents which deals with 'Conditions for Permission for Operating FM Radio Broadcasting Service by Private Agencies'. Section 31 is about 'Fees and Duration'. For our purpose, Clause 3.1.1 and 3.1.3 would be relevant and, therefore, we extract hereunder these two clauses:

3.1.1 The Permission Holder shall be liable to pay an Annual Fee to the Government of India charged @ 4% of Gross Revenue for each year of @ 10% of the Reserve OTEF limit for the concerned city, whichever is higher. Annual Fee shall be paid on quarterly basis in four equal Installments. For this purpose, four quarters shall be tri-monthly periods ending 30th June, 30th September, 31st December and 31st March respectively.

xx xx xx3.1.3 The first year from the date of signing the Grant of Permission Agreement shall be reckoned as the commissioning period. The first year's fee shall become payable with effect from the date of operationalization of the Channel or expiry of one year from the date of signing the Grant of Permission Agreement, whichever is earlier. The Permission Holder shall be required to initially pay within 15 days of the commissioning period the first advance quarterly installment on the basis of the Reserve OTEF formula and thereafter within 15 days of each subsequent quarter till the end of the financial year.

11. It is not disputed that the aforesaid definition and conditions were also applicable in respect of the earlier tender/contract of Phase I in respect of which the petitioner had paid the OTEF. Thus, apart from OTEF, the permission holder is to pay Annual Fee as well. This OTEF is normally non-refundable. The OTEF which is included by the petitioner in his application while calculating the book value of assets in computing Net Worth was the amount paid by the petitioner under the first agreement wherein the petitioner was given license to operate certain channels. Agreement dated 8.12.2006 was signed for this purpose. Clause 8 of this Agreement provides one contingency wherein part of the OTEF would be

refundable. This para is as under:

## 8. Cross Media ownership

8.1 If during the currency of the Permission period, government policy on cross-media ownership is announced, the Permission holder shall be obliged to conform to such guidelines as may be prescribed in the said policy, within a period of six months from the date of such notification, failing which it shall be treated as non-complaint of Grant of Permission Agreement, and liable for punitive action. Provided however, that in case the Permission Holder is not in a position to comply with cross media restrictions for bonafide reasons to the satisfaction of the Grantor, the Permission Holder would be given an option of furnishing one month's exit notice and the entry fee for the remaining period, to be calculated on pro rata basis, shall be refunded to the Permission Holder.

Otherwise, Clause 3.12.4, which is under the head 'Penalties', stipulates that this OTEF is to be forfeited in the event of revocation of permission. We reproduce this clause as well:

3.12.4 In the event of revocation of Permission, the Permission holder will lose the One Time Non-Refundable Entry Fee. The Government shall not be responsible for any investment towards the operationalization of the Channel, not limited to capital and operating expenditure, in case of imposition of any penalty referred above.

12. Thus, this OTEF is non-refundable. As per Clause 8 of the Agreement dated 8.12.2006, part of this can be refunded only if during the currency of the permission period, Government policy of 'Cross Media ownership' is announced and the permission holder is not in a position to comply with the cross media restrictions for bona fide reasons to the satisfaction of the grantor. Reliance on this clause to contend that the OTEF is to be treated as refundable is totally unfounded.

13. 'Intangible Asset' is defined by the Institute of Chartered Accounts of India in its AS-26 issued in the year 2002 in the following manner:

An intangible asset is an identifiable non-monetary asset, without physical substance, held for use in the production or supply of goods or services, for rental to others, or for administrative purposes.

The Accounting Standards Board had formulated a guidance note and issued on 16.8.1983 containing definitions of certain accounting terms as per which 'Intangible Asset' is defined as- 'an asset which does not have a physical identity e.g. goodwill, patents, copyright etc.' This document defines 'Fictitious Asset' as follows:

'Item grouped under assets in a balance sheet which has no real value (e.g. the debit balance of the profit and loss account).' We may also take note of the definition of the word 'Asset', 'Monetary Asset' and 'Non-Monetary Asset', which will have some bearing in understanding the concept of OTEF. The same are as under:

An asset is a resource:

- (a) controlled by an enterprise as a result of past events; and
- (b) from which future economic benefits are expected to flow to the enterprise.

Monetary Assets are money held and assets to be received in fixed or determinable amounts of money.

Non-monetary assets are assets other than monetary assets.

Since the Permission Holder gets license to run a channel after payment of OTEF for specified period, the OTEF can at the most be described as intangible asset as the Permission Holder would be able to exploit the license or the permission for generating future economic benefits from the said permission to operate a channel. However, it cannot ever be termed as monetary asset and it is not the money held by the Permission Holder nor is the money which it could receive, much less, in fixed or determinable form. The permission is incapable of being encashed/liquidated like an asset.

14. In view of the aforesaid nature of the OTEF, it cannot be said that this was the money in the hands of the petitioner as on 31.3.2007. We are making this comment in view of the argument of Dr. A.M. Singhvi, learned senior counsel for the petitioner, to the effect that after making this payment of OTEF and signing the agreement dated 8.12.2006 the petitioner was given one year time to operationalise the channel. The period of permission of one year was to be reckoned from the date of operationalization or one year from the date of signing of the agreement, whichever is earlier. He, thus, submitted that when admittedly one year had not expired from 8.12.2006 and channel was not operationalised by 31.3.2007, OTEF was still money in the hands of the petitioner. This is clearly a misconceived argument as once OTEF is paid on signing of the agreement, insofar as the petitioner is concerned, he was out of pocket and in no eventuality he could get this money back, except as per Clause 8 of the agreement which does not come to the rescue of the petitioner, as mentioned above.

15. Having determined the character of OTEF which is treated as intangible asset, the next step is to consider as to whether, in view of definition of Net Worth contained in the Agreement, this intangible asset is to be included in the Book Value of Assets. The respective stands in this behalf have already been taken note of above.

16. Dr. Singhvi relied upon the note appended to Section 242 of the tender documents and submitted that while defining Net Worth only fictitious assets are to be excluded and there is no mention about the intangible assets. His submission was that if Appendix G was contrary to the said definition, it is the definition contained in the note which alone could be looked into. He further submitted that even if there was some doubt and two interpretations to the definition of Net Worth were possible, one which favors the applicant was to be given credence and the respondent could not take advantage of the faulty drafting of the agreement. He submitted that this was the sound principle of interpretation which had to be followed.

17. Mr. P.P. Malhotra, learned Addl. Solicitor General, on the other hand, argued that the entire document had to be read as a whole to find the meaning and

purport of the word 'Net Worth' and when the petitioner knew that the certificate was to be given in a specific format provided in Appendix-G, which excluded intangible assets in unambiguous and explicit terms, the petitioner could not feign ignorance. He also submitted that all other applicants understood this concept. The petitioner, while bidding in the Phase-I process, had also understood the meaning of Net Worth correctly.

18. After considering the respective submissions, we tend to agree with the argument advanced by the learned ASG.

19. As already pointed out above, the tenderers are told to submit their application for Stage-I in the prescribed form which is mentioned in Appendix A. This Appendix contains Column 9 wherein Net Worth is to be stated. It specifically provides that certificate which is required to be given by the statutory auditor in support of Net Worth has to be as per Appendix-G. Appendix-G gives the manner in which Net Worth is to be calculated which is 'Book Value of Assets reduced/deducted by (a) book value of fictitious and intangible assets as well as (b) liabilities other than owner' funds. Statutory auditor who was, therefore, to give the certificate of Net Worth knew fully well that while calculating the Net Worth not only the book value of fictitious assets but intangible assets was also to be deducted.

20. No doubt, in the 'Note' appended to para 2.4.2 the words 'Intangible Assets' are not specifically mentioned. However, that would not make any difference in view of the fact that statutory auditors/applicants were informed of the methodology of calculation of the Net Worth in Appendix-G and it was only in that format in Column 9 of the application Net Worth was to be stated. Entire document is to be read to arrive at the meaning of Net Worth {See? Bishwanath Prasad Singh v. Rajendra Prasad : AIR 2006 SC2965 }.

21. That apart, even the reading of the entire text of the 'Note' would lead to same conclusion. We reproduce this note in entirety once again : [Note: 'Net worth' means the excess of the book value of assets (other than fictitious assets) of an enterprise over its liabilities. It would be calculated as sum of the paid up equity and free reserves minus accumulated losses, if any, in the company.]

This 'Note' specifically states that Net Worth is to be calculated as sum of the paid up equity and free reserves minus accumulated losses, if any, in the company. The purpose of adding this line in the 'Note' is obvious, namely, to know the liquidity of the applicant. A particular applicant may already be the holder of number of existing licenses and may have paid OTEF against those licenses. However, the very purpose of stipulating minimum Net Worth as a condition is to ensure that after permission is granted, the permission holder has sufficient funds in liquid form to make the channel operationalised by spending necessary amount. This itself justifies exclusion of intangible assets. We may, for this purpose, refer to Appendix 11 to the Companies Act which provides for Companies (Application for Extension of Time or Exemption under Sub-section (8) of Section 58A) Rules, 1979. Note-1 thereof also deals with computation of Net Worth and specifically provides for exclusion of intangible assets. Section 58A of the Companies Act deals with public deposit and provides that deposits are not to be invited without issuing an advertisement. Sub-section (8) under which the aforesaid rules are made stipulates that in certain circumstances the Central Government may grant extension of time to a company or class of companies from this provision. For this purpose, an application is to be made to the Central Government, inter alia, disclosing the Net Worth. Before the Central Government considers grant of extension of time or exemption under Sub-section (8) of Section 58A of the Companies Act, it considers the Net Worth of the company and while considering that, intangible assets are not to be taken into consideration, as the obvious purpose is to know the liquidity of the company, namely, whether it would be able to refund the deposits. This statutory rule, therefore, also provides guidance to interpret the clause relating to Net Worth contained in tender documents in the instant case.

22. We, therefore, are of the opinion that the petitioner could not have included OTEF while calculating its Net Worth and this component was to be specifically excluded being intangible asset.

23. The legal principles for the purpose of scrutiny of such tender documents are very well settled as can be seen from a number of decisions of the Supreme Court. Our purpose will be served in referring to much celebrated judgment of the

Apex Court in *Tata Cellular v. Union of India* : AIR 1996 SC11 . In respect of the requirements which must be satisfied to constitute a valid tender, the Supreme Court laid down the following parameters therein:

A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated, the following are the requisites of a valid tender:

1. It must be unconditional.
2. Must be made at the proper place.
3. Must conform to the terms of obligation.
4. Must be made at the proper time.
5. Must be made in the proper form.
6. The persons by whom the tender is made must be able and willing to perform his obligations.
7. There must be reasonable opportunity for inspection.
8. Tender must be made to the proper person.
9. It must be of full amount.

24. A tender being an offer, it has to conform to the terms of the application and has to be in the proper form. Specific form is provided in the instant case and the tender of the petitioner did not conform to the said form. The Court in this very judgment elaborated the principles of judicial review that would apply to the exercise of contractual duties by the Government bodies in order to prevent arbitrariness or favoritism. The Court stated that there were inherent limitations in the exercise of the power of judicial review by pointing out that judicial review is concerned with reviewing not the merits of the decision but the decision making process itself. The Court could interfere only if any of the following is satisfied:

1. Whether a decision-making authority exceeded its powers?

2. committed an error of law;
3. committed a breach of the rules of natural justice;
4. reached a decision which no reasonable Tribunal would have reached; or
5. abused its powers.

25. Following observations in this context are apt to quote:

Therefore, it is not for the court to determine whether particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

- (i) Illegality: This means the decision-maker must understand correctly the law that regulates the decision-making power and must give effect to it.
- (ii) Irrationality, namely, Wednesbury unreasonableness.
- (iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time.

xx xx xx The principles deductible relating to scope of judicial review of administrative decisions and exercise of contractual powers by government bodies are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own

decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

26. Applying the aforesaid principles, we have no option but to hold that the decision of the respondent in rejecting the application of the petitioner does not suffer from any infirmity. Consequently, we dismiss this writ petition in liming.

27. Before parting, we may mention the submission of Dr. Singhvi based on Section 244 of the Tender documents, which is in the following terms:

2.4.4 The applicant company shall furnish annual reports and audited final accounts for the last three years, or from the date of incorporation, whichever is later, till 31st March, 2007, along with its net worth as on 31st March, 2007 or any date subsequent thereto up to the date of submission of the bid, certified by the statutory auditors, to support its claim of financial competence.

His submission was that as per the aforesaid Section option is given to the applicant to make application stating Net Worth either as on 31.3.2007 or any date subsequent thereto up to the date of submission of the bid. Since last date of submission of the bid was extended to 29.12.2007, submission was that the petitioner can make another bid by showing Net Worth as on the date of bid which

is specification complaint. Needless to mention, since the last date of submission of bid is 29.12.2007 and as per Section 244 Net Worth as on the date of submission of the bid can also be projected, it would be open to the petitioner to make another bid and if the petitioner is satisfied that its minimum Net Worth is as per Section 242, the same would be appropriately considered by the respondents.

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