

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: September 27, 2013

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Judgment Delivered on: October 03, 2013

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W.P.(C) 3611/2013

ESPN SOFTWARE INDIA PVT. LTD.

..... Petitioner

Represented by: Mr.Sudhir Chandra Agarwala,
Sr.Advocate instructed by
Mr.Saikrishna Rajagopal, Mr.Gopal
Jain, Mr.Sidharth Chopra, Ms.Sneha
Jain, Ms.Savni Dutt, Advocates

versus

PRASAR BHARTI & ANR.

..... Respondent

Represented by: Mr.Paras Kuhad, ASG assisted by
Mr.Rajeev Sharma, Mr.Uddyam
Mukherjee, Mr.Sahil Bhalik,
Ms.Phaguni N.Lal, Advocates for R-1
Mr.Ruchir Mishra, Advocate with
Mr.Sanjiv Saxena, Mr.Mukesh
Tiwari, Mr.Ramneek Mishra,
Advocates for R-2

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

PRADEEP NANDRAJOG, J.

1. Petitioner, ESPN Software India Pvt. Ltd. claims to be the sole and the exclusive distributor of some sports channels in India which inter-alia include ESPN, STAR Sports, Star Sports 2 and STAR Cricket. It is claimed by it that said channels telecast sporting events such as ICC Cricket, BCCI Cricket, Formula 1, Barclays Premier League Football, ICC Cricket World

Cup and Wimbledon.

2. Stating that organizers of sporting events incur huge expenses in organizing sporting events and recoup the revenue spent, through advertisements and sale of rights related to the event; the scope of the writ petition is said to be limited to television broadcasting rights.

3. Claiming to have acquired the broadcasting rights for the Indian Territory from International Cricket Council to broadcast cricket events organized by International Cricket Council, the petitioner states that it receives the feed from the organizer of the event which becomes the broadcast when the live signal is uploaded and downloaded and using the spectrum permitted to be used by the Government of India it reaches the consumer through the television set.

4. The issue concerns the legal obligation of the petitioner to share the live broadcasting signal with the first respondent: Prasar Bharti Broadcasting Corporation of India, a statutory corporation constituted under the Prasar Bharti (Broadcasting Corporation of India) Act, 1990.

5. The petitioner principally seeks a declaration that its obligation to share live broadcast signals of sporting events of national importance with respondent No.1 is discharged by it sharing the live broadcast signal as per the feed made available to it by the organizer of the sporting event; with such commercial advertisements inserted by the organizer of the sporting event who is the principal '*content right owner*' of the broadcast. The petitioner seeks a declaration that Rule 5 of the Sports Broadcast Signals (Mandatory Sharing with Prasar Bharti) Rules, 2007 is violative of Section 3 of the Sports Broadcast Signals (Mandatory Sharing with Prasar Bharti) Act, 2007 and ultra-vires Article 14 of the Constitution of India.

6. The factual backdrop leading to filing of the instant writ petition is that the mandate of Section 3 of Sports Broadcast Signals (Mandatory Sharing with Prasar Bharti) Act, 2007 obliges the petitioner to simultaneously share the live broadcast signal of sporting events of national importance which it intends to broadcast in India; and since the language of the Section was a subject matter of legal debate at the bar between learned senior counsel who appeared for the petitioner and the first respondent, we note the same. It reads as under:-

“3. Mandatory sharing of certain sports broadcasting signals-

(1) No content rights owner or holder and no television or radio broadcasting service provider shall carry a live television broadcast on any cable or Direct-to-Home network or radio commentary broadcast in India of sporting events of national importance, unless it simultaneously shares the live broadcasting signal, without its advertisements, with the Prasar Bharati to enable them to re-transmit the same on its terrestrial networks and Direct-to-Home networks in such manner and on such terms and conditions as may be specified.

(2) The terms and conditions under sub-section (1) shall also provide that the advertisement revenue sharing between the content rights owner or holder and the Prasar Bharati shall be in the ratio of not less than 75:25 in case of television coverage and 50:50 in case of radio coverage.

(3) The Central Government may specify a percentage of the revenue received by the Prasar Bharati under sub-section (2), which shall be utilised by the Prasar Bharati for broadcasting other sporting events.”

7. Having acquired the rights from International Cricket Council to

broadcast in India sporting events organized by the Council, the petitioner informed the respondent No.1 on March 07, 2013, that it would be sharing the live signals with respondent No.1 of cricket matches organized by International Cricket Council. By a follow up letter dated March 14, 2013, the petitioner informed the respondent No.1 that the live signals it would be sharing would contain *added features comprising of commercial elements*; which letters were responded to by the respondent No.1 on April 06, 2013 informing that the obligation of the petitioner, as a right holder in the content broadcast live, had to be clean without any commercials.

8. Petitioner informed the respondent No.1 that its obligation under the law was to share the live broadcast signal as it was received by it from the copyright owner of the broadcast i.e. the sporting event organizer; and since the feed received by it contain certain advertisements by the organizer of the sporting event, the petitioner's obligation were limited to share the signal as it is and that the petitioner had no control over the live signals received.

9. In a nut shell the petitioner argued with the respondent No.1 that it had no control over the live signals received from the site from the organizer of the event and that the expression '*its advertisements*' in Section 3 of Sports Broadcast Signals (Mandatory Sharing with Prasar Bharti) Act, 2007 referred to the advertisements of the broadcaster in India and not the advertisements of the event owner. The petitioner further argued with respondent No.1 that any removal of any insertion in the broadcast signal at the instance of the event organizer would be a breach of petitioner's contractual obligations with the event organizer; and lastly argued that the demand of respondent No.1 that a clean feed be provided to it would be an act impossible of being performed by the petitioner.

10. The stalemate continued and this compelled petitioner to seek legal redressal by way of the above captioned writ petition.

11. Sports Broadcast Signals (Mandatory Sharing with Prasar Bharti) Act, 2007 was enacted by the Parliament to provide access to the largest number of listeners and viewers, on a free to air basis, of sporting events of national importance through mandatory sharing of sports broadcast signals with Prasar Bharti and for matters connected therewith or incidental thereto. Section 2(1)(a) of the Act defines ‘*broadcaster*’ to mean any person who provides a content broadcast service and includes a broadcast network service provider when he manages and operates his own television or radio channel service. Section 2(1)(b) of the Act defines ‘*broadcast*’, inter-alia, to mean assembling and programming any form of communication content, like signs, signals, pictures and images placed either in the electronic form or electro-magnetic waves on specified frequencies and transmitted through space or cables to make it continuously available on the carrier waves, or continuously be streamed in digital data form on the computer network so as to be accessible to single or multiple users through receiving devices. Section 2(1)(h) defines ‘*content*’ to mean any sound, text, data, picture, audio-visual representation, signal or intelligence of any nature or any combination thereof which is capable of being created, processed, stored, retrieved or communicated electronically.

12. We have already noted in paragraph 6 above Section 3 of the Sports Broadcast Signals (Mandatory Sharing with Prasar Bharti) Act, 2007; and analyzing the syntax of sub-Section 1 thereof, we find that it casts an obligation-in a negative language used: *no content right owner.....*; on the content rights owner or the holder to share simultaneously the live broadcast

signal of a sporting event of national importance broadcast in India with Prasar Bharti without '*its advertisements*' so as to enable Prasar Bharti to re-transmit the same on its terrestrial networks and Direct-to-Home networks, in such manner and on such terms and conditions as may be specified.

13. Sub-Section 2 and sub-Section 3 of Section 3 lay down the boundaries of the terms and conditions referred to in sub-Section 1 of Section 3 i.e. the percentage of advertisement revenue sharing between the contents right owner or holder and Prasar Bharti.

14. Since spectrum is used in broadcasting services, and as held by the Supreme Court in the decision reported as (1995) 2 SCC 161 Secretary Ministry of Information & Broadcasting Vs. Cricket Association of India, the air waves or frequencies are public property and thus their use can be controlled and regulated by a public authority, in the interest of the public, and to prevent the invasion of the public right thus the petitioner did not dispute the sovereign right of the State to control and regulate the use of the air waves or frequencies in a manner consistent with public interest; one of which could be to allow broadcast at nominal fee but sharing the revenue generated through advertisements during broadcast.

15. Thus, at the outset we highlight that the vires of Section 3 of the Sports Broadcast Signals (Mandatory Sharing with Prasar Bharti) Act, 2007 has not been challenged by the writ petitioner in the instant writ petition; requiring us to proceed ahead by treating that Section 3 is intra-vires the Constitution of India.

16. Since the vires of Rule 5 of the Sports Broadcast Signals (Mandatory Sharing with Prasar Bharti) Rules, 2007 is questioned by the petitioner, we proceed to note the same, but before that, would be obliged to note the

definition of ‘*content rights owner or holder*’ as per the Rules. It means ‘*a person for the time being having or holding the broadcast rights in respect of a sporting event of national importance within the territory of India.*’

Rule 5 reads as under:-

“5.Responsibility of a television or radio channel broadcasting the sporting event-

If the television or radio broadcasting service provider is different from the content rights owner or holder, it shall be its duty to ensure that adequate arrangements for compliance with the provisions of the Act and the rules are made, at the time of acquisition of the rights from the content rights owner or holder.”

17. The contours of the arguments advanced by learned senior counsel for the petitioner were the same as they were argued with Prasar Bharti when the parties exchanged letters on the subject, and as noted by us in paragraph 9 above.

18. Before dealing with the submissions urged we need to highlight that we have been unable to identify any specific ground pleaded in the writ petition on the reasoning whereof petitioner seeks a declaration that Rule 5 of the Sports Broadcast Signals (Mandatory Sharing with Prasar Bharti) Rules, 2007. However, during oral submissions it was urged that inasmuch as the Rule casts an obligation on the holder of the content rights or a broadcast service provider to ensure adequate arrangements for compliance with the provisions of the Act; the obligation to share the live broadcast signal without its advertisements would infringe Section 3 of the Act inasmuch as reference to the words ‘*its advertisement*’ in sub-Section 1 of Section 3 would not include the advertisements inserted in the feed by the event organizer.

19. We fail to understand as to in what manner, and by what process of reasoning, Rule 5 is violative of Section 3, for the reason the Rule in question simply obliges the content right owner or the holder or a broadcast service provider to ensure compliance with the provisions of the Act. Now, even if Rule 5 was not to exist, it would be the duty of everybody concerned with television broadcast to comply with the provisions of the Sports Broadcast Signals (Mandatory Sharing with Prasar Bharti) Act, 2007. Thus, the Rule makes explicit, by putting it in writing, what even otherwise would exist in law.

20. The mixed metaphor of the argument of the petitioner, on being filtered by us, to bring clarity to the argument, was that the expression '*its advertisements*' in sub-Section 1 of Section 3 referred to the advertisements of the broadcaster and excluded the advertisements of the event owner. So read, the argument would proceed to reason further that the obligation under Rule 5 would be met if the broadcaster in India did not insert its advertisements in the broadcast while sharing the same simultaneously with Prasar Bharti. The terminus ad quem of the argument was that if Rule 5 was read as casting an obligation on the broadcaster in India to share the broadcast without the advertisements of the event organizer, the Rule would be ultra-vires Section 3(1) of the Act.

21. Thus, essentially our job is to interpret sub-Section 1 of Section 3 of the Act to find the legislative intent.

22. Sh.Sudhir Chandra, learned senior counsel for the petitioner vehemently urged that our endeavour to ascertain the meaning of the legislative provision in question must be assisted by the reasoning of the Supreme Court in the decision reported as (1966) 3 SCR 557 State of M.P.

& Ors. Vs. Vishnu Prasad Sharma & Ors., a decision concerning the Land Acquisition Act, 1894; an expropriatory Act. The Act was held liable to be interpreted in a manner which put the least burden on the expropriated owner. The parallel drawn was that the Sports Broadcast Signals (Mandatory Sharing with Prasar Bharti) Act, 2007 was an expropriatory legislation inasmuch as it compulsorily extracted a revenue from the broadcaster.

23. The argument overlooks the fact that there is no compulsory appropriation of anybody's property in the instant case. The Sports Broadcast Signals (Mandatory Sharing with Prasar Bharti) Act, 2007 is not an expropriatory legislation.

24. Air waves and spectrums are used while broadcasting events through a television network. The air waves and spectrum are public property held in trust by the Government for the benefit of public good. He who uses the spectrum or the air waves, has to pay for the use thereof and the mode of payment could be either a license fee charged, a bid at an auction or a revenue sharing of the gains made as a result of the broadcast; the last being akin to a joint venture where the owner of the spectrum or the air waves joins hand with the owner of the broadcast, be it the content owner or the holder.

25. The Rules of interpretation require an aid to interpretation to be resorted to if the words or phrases in a statute admit of more than one meaning. If they do not, for the meaning being plain, the Rule spoken of by Humpty Dumpty to Alice has to be used: '*I mean what I say. No more no less.*'

26. The expression '*unless it simultaneously shares the live broadcasting*

signal, without its advertisements, with the Prasar Bharti....’ with reference to the two words ‘*its advertisements*’ in the phrase, admits of the phrase having only one meaning and not admitting two. The only one meaning is that the live broadcast signals have to be without any advertisements for the reason the rules of English grammar guide us that the subject of (the single sentence) sub-Section 1 of Section 3, is ‘*the content right owner or holder or radio broadcasting service provider*’ and the three words ‘*without its advertisements*’ are a sub-clause constituting a *condition* and since the three words immediately follow the words ‘*live broadcasting signal*’ they have to be, plainly read, as a condition concerning the live broadcast signal and not the content right owner or holder or radio broadcasting service provider; meaning thereby, whosoever airs a live television broadcast of sporting events of national importance must share the same without any advertisements inserted with Prasar Bharti.

27. We need not discuss the effect of the petitioner having no control over the live signals and the effect of the legislative provision i.e. Section 3(1), casting an obligation upon the petitioner which is impossible of being performed by the petitioner or obliges the petitioner to violate its contractual obligations with the copyright owner of the broadcast, for the reason the same would relate to the vires of Section 3(1) of the Act; and we highlight once again that the vires of Section 3(1) of the Act has not been challenged.

28. In the absence of the vires of Section 3(1) being challenged, we would not be interested in being labelled as voyagers, which we would if we proceed on a voyage to discuss whether Section 3(1) is violative of the Constitution of India. It is trite that where it is alleged that a legislation violates the Constitution of India, the specific Article of the Constitution

violated has to be made known followed by the reason on which it is argued that the violation has taken place. It was urged that a legislative provision which casts an unreasonable burden fouls Article 14. But the argument was with reference to the vires of Rule 5, albeit interlacing the same with Section 3(1). If vires of the Section was to be questioned it had to be preceded by specific averments in the writ petition, for the reason the respondents would be entitled to rebut the same. Indeed, learned senior counsel for the respondent had urged that any challenge to the reasonableness of the provision had to be considered with reference to the fact that spectrum/air waves of which the State was a custodian of the public right was being used and the Government could set down any condition or a term for the use thereof, which could include a revenue sharing formula. Learned senior counsel for the respondent had submitted that what cannot be done directly cannot be permitted to be done indirectly and highlighted that if what the petitioner was pleaded was accepted, a stratagem of contrivance could be adopted by event organizers by inserting advertisements in the live feed and thereby appropriating the revenue in the foreign shores, leaving nothing to be gained by way of advertisement revenue in India. Learned counsel urged that municipal laws have to be obeyed and if anybody imports into India, even a broadcast signal, compliance with the domestic municipal law had to be made. For example if the law in India mandates that on a product put up for sale in the market a maximum retail price has to be displayed, if the product is manufactured abroad and is imported into India for sale in the market, the importer has to ensure that the maximum retail price is displayed in the manner the law in India warrants. But since the vires of Section 3 has not been questioned, we leave the matter at that.

29. For the reasons above we find no merit in the writ petition which we dismiss but without any order as to costs since we find that the issue raised has arisen for the first time before a Court of record and there is no judicial precedent; we give the benefit of a bona fide belief and reason leading to an opinion in the mind of the petitioner that it had an arguable case. Imposing costs has not to be automatic for the reason, imposition of cost merely as a result of failure could be a deterrent to bona fide litigants who may have a good case, but would feel threatened that if they lose they would be burdened with costs.

(PRADEEP NANDRAJOG)
JUDGE

CHIEF JUSTICE

OCTOBER 03, 2013
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