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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: January 25, 2017

Date of decision: March 17, 2017

OMP 39/2008

MODI ENTERTAINMENT PVT. LTD

..... Petitioner

Through: Mr. Sudhanshu Batra, Senior Advocate
with Ms. Mallika Joshi and Mr. Amit Agarwal,
Advocates.

versus

PRASAR BHARATI

..... Respondent

Through: Mr. Rajeev Sharma with
Ms. Radhalakshmi, Mr. Rajat Krishna and
Mr. Pratishth Kaushal, Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

17.03.2017

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Background facts

1. This petition by Modi Entertainment Pvt. Ltd. ('MEN') under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenges the majority Award dated 20th October, 2007 of the Arbitral Tribunal ('AT') in the disputes between MEN and the Respondent, Prasar Bharati ('PB') arising out of a Distribution Agreement ('DA') dated 6th July, 2000 entered into between MEN and PB in terms of which MEN was appointed as the sole and exclusive distributor of PB for distributing two digitally encrypted satellite channels, viz., DD Sports and DD News throughout the territories

of India, Nepal, Sri Lanka and Bangladesh.

2. In terms of the DA, MEN was to re-license the distribution and exhibition of the aforesaid two channels through affiliates (cable operators, hotels, institutions and individual homes.) The DA was for a period of five years i.e., up to 30th September, 2005 with a renewal clause. The liability of MEN to share the revenue generated was to commence from 15th September, 2000.

3. According to MEN, it entered into the DA with PB owing to the commercial potential of distributing DD News and DD Sports as “an exclusive bouquet of encrypted channels”. It is stated that DD Sports Channel only seasonal and the demand depended on the popularity of the sporting events being telecasted. Demand for news was expected to be constant. It is further stated that at the time of entering into the DA, PB assured MEN that it would make the contents of DD Sports attractive by promoting and telecasting important sports events. A programming line-up of both international and domestic events, was set out in Annexure-I to the DA.

4. Clause 2 (i) of the DA stated that all programmes set out in Annexure-I would be in an encrypted mode. BCCI test matches were to be shown exclusively on DD Sports. One Day International (‘ODI’) matches would be simulcast on DD Sports in an encrypted mode. Further, PB would be entitled to telecast the Test Matches live for two hours and highlights on DD-1.

5. Clause 2 (ii) of the DA stated that the DD News-24 hour encrypted News Channel would be delivered free to the subscribers. In sum, the

understanding was that the programme set out in Annexure-I would be shown exclusively on DD Sports except for test matches which could be shown live for two hours on DD-1.

6. The subscription price and the revenue projections were set out in Annexure-II to the DA. Clause 6 dealt with Distribution Fee which was to be shared between the MEN and PB in the ratio of 25%:75% respectively up to the minimum projected level of revenue generated. Clause 5 read with Clause 6 set out the basic financial understanding and agreed expectations of the minimum number of subscribers (in millions) that would be achieved through the distribution of DD Sports together with DD News and that the minimum revenue generated would be shared on the basis of the agreed unit price to be charged from the affiliates for DD Sports.

7. In terms of Annexure-II to the DA, in the first year at a unit price of Rs. 5.50 applied to 5 million viewers, the minimum expected subscriber revenue was expected to be Rs. 288.75 million, which was to be shared between PB and MEN in the ratio of 75:25. Thus, MEN's share was expected to be Rs. 72.15 million (25%) whereas the share of PB was expected to be Rs. 216.56 million (75%). The projections for the second year were that MEN's share would be Rs. 106.31 million and that of PB would be Rs. 318.94 million. The projections for the other three years were likewise provided in Annexure-II.

8. In terms of Clause 6 (b) of the DA, it was provided that beyond the projected level of revenue, the revenue sharing between the parties would be in the ratio of 65% in favour of PB and 35% in favour of MEN.

9. Clause 7 of the DA stated that MEN would secure the Minimum Guarantee Amount by way of a revolving BG which would be equal to three months' of the projected minimum guaranteed revenue for that particular year. Under Clause 7.2, the subscription revenue collected by MEN was to be remitted to PB on monthly basis latest by the 30th of the next month after deducting its share of revenue. In terms of Clause 7.3, the final account of the revenue payable to PB by MEN would be settled within one month of completion of the quarter. The deficit payment would be made further to PB within one month of the settlement of accounts failing which PB would be entitled to invoke the BG to appropriate the deficit amount.

10. Both channels i.e., DD News and DD Sports were to be provided in a digitally encrypted mode. For this, the use of decoders was essential. Under Clause 8, PB was to procure the necessary software and hardware required for encrypting the channels. Clause 9 (a) envisaged both parties mutually identifying the type of technology and financing arrangements for procuring decoders and also working out the scheme to provide decoders to the affiliates. Under Clauses 9 (b) and 11, MEN was responsible for warehousing, forwarding and distributing decoders to each affiliate and to collect payments as per the agreed plan. Under Clause 12 (a), PB was to ensure timely supply of decoders as per the sales requirement and usage of a secured encryption system.

11. It is explained that an encrypted channel is beamed or aired in a scrambled format. It requires a decoder to receive and decrypt the signal before the channel is sent to the subscriber through the cable. Each

broadcaster uses a customised technology or Conditional Access System ('CAS') specific to the channel for encrypting the channel. The same decoder or equipment cannot be used for encryption or decryption of channels beamed by two different broadcasters. This has to be contrasted with 'Free to Air' channels where a signal is received without decoders. Without encryption, a broadcaster cannot control or monitor the viewership of a channel and recover subscription charges from cable operators/subscribers of the channel. The question of recovering subscription or controlling the value of 'Free to Air' channels does not arise.

12. It is in the above background that Clauses 11 and 12 of the DA set out the responsibilities/activities of MEN and PB respectively. In terms of Clause 18 (b), any variation in the Agreement would require to be reduced into writing and signed by the authorised representatives of each of the parties. Clause 18 (d) was a 'No Waiver Clause' and Clause 19 was the arbitration clause.

13. The key points of the DA, therefore, were that two channels i.e., DD News and DD Sports were to be encrypted for distribution solely and exclusively by MEN. There would be timely supply of decoders as per sales requirement and usage. The responsibility for this was that of PB. There was an expectation of a minimum subscriber revenue as detailed in Annexure-II which was to be shared in the ratio of 75:25 between PB and MEN respectively. Beyond the projected subscriber base, the revenue sharing would be in the ratio of 65:35. MEN's expectation was that since the two channels would complement each other, they would help in maintaining the

subscriber base during period when there were no popular sporting events to attract the viewers. Further, the demand for news is perennial and at the given time there was no 24-hour news channel in India. Therefore, even though DD News was to be delivered free to the subscribers, it was the 'driver channel' which would help sustaining DD Sports during the lean period i.e., the period with no major sporting events.

Breach of the DA

14. One of the principal breaches of the DA as identified by MEN was PB's failure to provide DD News in an encrypted format. This, according to MEN, had an adverse impact on achieving the minimum revenue projections and resulted in heavy losses to MEN. It is stated by MEN that in a meeting held on 22nd November 2000, PB for the first time acknowledged that it had no intention of providing DD News in an encrypted form. This is of course denied by PB.

15. According to PB, the channels had to be encrypted with effect from 15th September 2000 which was the starting point for revenue sharing. According to PB, much prior to 15th September, 2000, it was realised that it was not possible for PB to provide DD News in an encrypted form. According to PB, MEN was informed about this. According to PB, MEN decided to procure 7,000 decoders for DD Sports "based upon its own calculations." PB's case is that from the very first month, MEN started defaulting in making payments in terms of Clauses 6 and 7 of the Agreement. By the end of the first quarter ending on 31st December 2000, MEN was in arrears of Rs. 1,44,24,207.

16. It is further alleged by PB that MEN dishonestly and fraudulently misappropriated the amounts collected by it as subscription revenue from the subscribers and did not pay PB's 75% share thereof. It is stated that time and again, MEN was called upon to clear the arrears of revenue but it failed to do so and continued being in default for the months of July, August and September 2000 despite PB's share of collection during these months working out to Rs. 3.77 crores. This resulted in PB issuing a letter dated 22nd October, 2001 to Hong Kong and Shanghai Banking Corporation which had issued the BG.

17. At this stage, it requires to be noticed that the specific case of MEN is that certain minutes of meeting ('MoM') held on 22nd November, 2000 were drawn up followed by the said MoM being sent to PB by MEN with a covering letter dated 24th November, 2000. The receipt of both the MoM and the said letter is denied by PB.

18. On 5th February, 2001, MEN wrote to PB stating that the payment of its share for the period from 15th September, 2000 to 31st December, 2000 would be made after the projected subscriber base was re-worked. Reference was made to the meetings it had with Ms. Omita Paul, Additional Director General of Doordarshan and Mr. R.R. Shah, CEO of PB. On 12th February, 2001, when Mr. Anil Baijal became the CEO of Doordarshan, MEN addressed another letter to him enclosing the MoM held on 22nd November, 2000. A letter was also addressed to Ms. Paul on 19th March, 2001.

19. Further letters were addressed on 19th March, 2001 by MEN to PB to which there was no reply. In response to the letter dated 11th April, 2001

written by MEN to PB, PB asked MEN by the letter dated 16th April, 2001 to coordinate with the Sports Wing of the Directorate and get the issue concerning rearrangement of the value under the DA settled at the earliest so as the balance dues, if any, could be realised.

20. On 8th October, 2001, MEN wrote a letter to PB raising several issues *inter alia* that it had invested a huge sum of Rs. 16 crores and imported 7,000 decoders but after doing so, it was shocked to be informed in September 2000 that PB would not be providing DD News in an encrypted format. MEN invoked Clause 19 (a) of the Agreement calling upon PB to hold negotiations resolving the outstanding issues. MEN stated that it was keen and desirous of continuing the relationship and performing its obligations under the Agreement to distribute DD Sports provided by PB.

21. In response to the above letter on 2nd November 2001, PB appointed a three-member Committee for the purposes of negotiating with MEN. Negotiations were held on 9th November, 2001 but the issues could not be resolved. By letter dated 15th November, 2001, PB proposed to refer the unresolved issues to arbitration and nominated its Arbitrator. Ultimately, a three-member Arbitral Tribunal ('AT') was constituted.

Claims and counter-claims before the AT

22. Before the AT, MEN filed its statement of claim in which *inter alia* it claimed compensation for loss of its share of revenue amounting to Rs. 10,54,43,000 together with interest @ 18% per annum; Rs. 5,58,64,768 with interest at 18% on account of the PB's obligation to secure and provide decoders; for a sum of Rs. 10,20,18,336 being the remaining amount

payable as on 31st December, 2002 on account of procuring the decoders; Rs. 5 crores towards loss of reputation; Rs. 4,45,71,850 being 50% of the total cost of fixed assets; manpower costs incurred by MEN to create the infrastructure to deal with the two channels to be agreed to be provided by PB; costs and expenses incurred and interest on all the amounts and costs of arbitration proceedings.

23. During the pendency of the arbitration, PB on 6th May, 2003 issued a notice to MEN terminating the Agreement on the expiry on 45 days in terms of Clause 16 of the Agreement. This led to MEN amending its statement of claim to challenge the validity of the termination. The amended prayers *inter alia* were as under:

(A) Rs. 16.16 Crores towards losses for the pre-termination period which is on the basis of 25% sharing of total revenues, after deducting the actual aggregate billings from the projected revenue according to Annexure II to the DA.

(B) Rs. 6.15 Crores towards outstanding on subscription revenue still remaining un-recovered as on 31st March 2004.

(C) Rs. 15.01 Crores towards losses for the post-termination period which is on the basis of 25% sharing of total revenues. (In this case there however, there is no actual aggregate billings generated.)

(D) Rs. 15.01 Crores towards loss incurred with regard to the procurement and supply of decoders, interest paid to HSBC Bank, and interest computed on MEN's contribution towards part cost of acquisition.

(E) Rs. 50.00 Crores towards loss of goodwill and reputation of MEN in the market place and its business due to non-provision of DD News and unjust termination of the DA.

(F) Rs. 0.37 Crores towards damages caused due to termination of the DA towards three months of notice period payable to the employees of MEN and towards termination of nine leased premises of MEN. Additionally the cost being incurred by MEN towards recurring expenses being incurred towards manpower and associated establishment and infrastructure costs, given MEN's inability to legally terminate the workforce of 93 employees.

24. Apart from its defence to the claim, PB preferred a counter-claim in the sum of Rs. 1,26,49,01,291 on the above account together with interest @ 18% per annum and a further sum of Rs. 15 crores towards loss of revenue on account of the breaches committed by MEN.

Issues before the AT

25. On the basis of the pleadings, the following issues were framed by the AT on 20th August, 2005:

“1(a) Whether MEN is entitled to damages from Prasar Bharati for the failure of Prasar Bharati to deliver to MEN for distribution an encrypted DD News Channel as provided in the agreement dated 6-7-2000?

(b) Whether MEN is disentitled to any claim for such damages on grounds of waiver, acquiescence or the like, as alleged by PB?

(2) Whether PB has committed any breach of its obligation under the above agreement to deliver to MEN exclusive rights of distribution of an encrypted DD Sports Channel and, if so, in what respects?

(3) Whether there was any breach of the above agreement by PB in regard to its other obligations towards MEN in relation to the above encrypted DD Sports Channel on all or any of the

grounds alleged by MEN in its Exhibit A-24?

(4) Whether there was any breach by PB of its obligations under the agreement in regard to the provision of decoders to MEN and whether MEN is entitled to claim from PB reimbursement of the price of the decoders or any other compensation for alleged failure of PB to perform its obligations under the agreement in this regard?

(5) Were there any breach of the agreement by MEN as alleged by PB and was PB justified in terminating the above agreement prematurely on any of the grounds urged by it?

(6) To what extent are the claims and counter-claims of the parties acceptable?

(7) To what other relief(s), if any, are the parties entitled?"

26. On behalf of MEN, Mr. Ranjeev Kapoor (CW-1) and Mr. Prabhu (CW-2) were examined. On behalf of PB, Mr. Mandloi was examined as RW-1.

The Majority Award

27. The majority Award noted that although the aforementioned issues were framed, arguments were addressed 'topic wise'. The conclusions of the majority were as under:

(i) In terms of the scheme worked out by the parties pursuant to Clause 12 (a) of the DA, MEN had to procure the decoders with the aid of a loan obtained from a bank and PB was to furnish a BG for the amount loaned. PB, admittedly, failed to furnish the BG. However, there was no evidence to show what loss was suffered by MEN on account of such failure by PB. Consequently, the claim of MEN on account of decoders was rejected.

(ii) There was a breach of agreement on part of PB in not providing the encrypted DD News. However, it was not possible to quantify the precise loss suffered by MEN on account of the said violation. Consequently, the *ad hoc* determination which was just and reasonable in the circumstances of the case had to be made. The majority was inclined to put the figure of loss at 15% of the amount payable by MEN by way of minimum guarantee.

(iii) The allegations of non-payment of revenue contained in the termination notice dated 16th May, 2003 issued by PB were fully made out and this warranted and justified the termination of the DA. Consequently, the claim for post-termination losses had to fail. Although Rs. 24.91 crores was paid to PB, during some of the months during the period of 2 years and 10 months “not even a pie was paid” by MEN to PB.

(iv) In terms of Clause 2 (i) of the agreement, the expression ‘all programmes’ occurring therein included ‘BCCA cricket events’ and that expression referred to and included both, the BCCA’s test matches and the ODIs referred to in the next sentence. Thus, the exclusivity applied to all sports programmes mentioned as Annexure – I to the Agreement which was required to be telecasted in an encrypted mode on DD Sports.

(v) As regards the simulcasting, the following violations of its obligations by PB were made out:

“(i) The simulcast of ‘hockey match between India and Poland’ and the ‘boxing/wrestling matches’ in which India participated. (Of course, it is not clear, how many boxing/wrestling matches in which India participated were so simulcast).

(ii) The ATP tournament matches, which are said to have been simulcast on DD Metro. (Here again, the number of matches so simulcast is not clarified besides the fact that even according to the claimant these matches had no national significance).

(iii) Three international events (at page 68 of volume 6) and the non-cricket domestic events (shown at page 67 of volume 6) as explained hereinbefore.”

(vi) The loss suffered by MEN in that regard was assessed at 25% of the total amount of minimum guarantee payable by MEN under the DA.

(vii) MEN failed to make out a case that PB had not complied with its contractual obligation in respect of cross channel promotion or programming line-up.

(viii) Not having paid the amounts due under the Agreement i.e., the minimum guaranteed revenue, MEN could hardly be heard to ask for damages or post-termination losses.

(ix) PB failed to prove the correctness of the National Readership Studies Council in support of its claims for share in the revenue purportedly received by MEN.

28. The majority Award, accordingly, granted to PB Rs.90,20,50,000 (being the amount due as per the minimum guarantee amount under Clause 7.2. read with Clause 7.3 of the DA) minus the loss suffered by MEN on account of the failure by PB for not providing encrypted DD News and on account of the simulcasting which worked out to Rs. 36,08,20,000. This was to be further recued by Rs. 24,91,00,000 already paid by MEN to PB. Thus, a sum

of Rs.29,21,30,000 was payable by MEN to PB. The said sum was to carry *pendente lite* interest @ 9% per annum with effect from 16th September, 2003 (the date of termination of the DA) till the date of the Award i.e., 15th October, 2007. The sum of Rs. 29,21,30,000 was also to carry out interest @ 12% per annum from 15th April, 2008 till the date of payment. The parties were directed to bear their own costs.

The dissenting Award

29. In the dissenting Award, the third member of the AT formulated three questions for consideration as under:

- (i) Whether the non-encryption of 'DD News' by 'PB' amounts to breach of contract? If so, with what effect?
- (ii) Whether the PB agreed or gave an understanding to the MEN that the Agreement/values under the Agreement would be revised as a consequence of the Non-encryption of DD News?
- (iii) When and at what point of time the PB communicated to the MEN that it would not encrypt the DD News?"

30. The dissenting Award proceeded to answer the said questions as under:

- (i) There was a deliberate breach of the DA by PB in not providing to MEN the encrypted DD News.
- (ii) It was proved that when PB took a decision not to encrypt DD News, it gave MEN to understand that the DA would be re-worked and the values therein in the shape of minimum guarantee figures would be rearranged.

(iii) There was overwhelming evidence on the record to show that the decoders had not only been ordered before September 2000 but were dispatched from UK to MEN during the period from 25th August, 2000 to 14th September, 2000.

(iv) PB has not come out with an exact date on which it took a decision regarding non-encryption of DD News. The statement by MEN in the letter dated 8th October, 2001 to PB to the effect that it invested Rs. 16 crores and imported 7,000 decoders and was shocked to be informed in September 2000 that PB would not be providing DD News in encrypted format. The fact that the 7,000 decoders were purchased before MEN was informed of PB's decision not to provide DD News in an encrypted format could not be disputed. Both parties kept working the DA despite the alleged breaches.

(v) PB failed to provide the DD News Channel in encrypted mode; the non-encryption of DD News by PB was a breach of the DA; PB gave MEN to understand that the values under the DA would be revised as a consequence of non-encryption of DD News. It failed to fulfil this undertaking.

(vi) PB informed MEN that it would not encrypt the DD News only after the MEN had spent huge amount of Rs.16 crores on the purchase and import of decoders. There was no waiver by MEN of the breach of DA by PB.

(vii) The conduct of MEN in continuing with the DA after it was informed about the non-encryption of DD News, did not amount to waiver. PB was entirely to blame in this regard.

(viii) PB did not fulfil its joint obligation in making financial arrangement for the purchase of the decoders so much so that PB even failed to give the BG to support the financial arrangement made by MEN to purchase the decoders.

(ix) PB erroneously interpreted Clause 2 (i) of the Agreement and continued simulcasting all the important sports events throughout the operation of the DA. PB killed exclusivity, which is engrained in clause 2(i) of the DA.

(x) PB failed to provide promotional material and make such material available to MEN in advance. PB did not carry any cross-channel promotions by developing marketing plan for promotion of DD Sports at PB's other channels. The programme in English for the channels as required under the DA was not provided by PB.

(xi) The revocation notice by PB was based on extraneous considerations, and as such was unjustified and illegal.

Submissions on behalf of MEN

31. Mr. Sudhanshu Batra, learned Senior counsel for MEN, made the following submissions:

(i) The impugned Award by the majority was contrary to the provisions of the Indian Contract Act, 1872 ('IC Act'). It overlooked the crucial aspects of the DA and was, therefore, was inconsistent with Section 28 (3) of the Act.

(ii) Despite returning a positive finding that PB had failed to furnish the BG for the loan amount availed by MEN for procuring the decoders, MEN's

claim was denied on the erroneous ground that MEN had not claimed any loss on that basis. Paras 26 and 27 of the claim which stated that MEN was entitled to be indemnified against any loss it might have suffered due to recovery made from it by the seller or the financier were referred to. The minority Award correctly pointed out that no reason was furnished by PB to MEN for not providing the BG.

(iii) The conclusion of the majority that the provision of an encrypted news channel was “more in the nature of a bonus” was in the teeth of the DA in terms of which both DD News and DD Sports were to be provided in an encrypted format. Where the DA itself was clear and unambiguous, the majority virtually re-wrote it with the above finding. This was impermissible in law. Reference was made to Clause 18 (b) of the DA which mandated that it could not be changed or modified unless the change was reduced to writing and signed by the parties. Reliance was placed on the decision in *Satyanarayana Construction Company v. Union of India & Ors. (2011) 15 SCC 101*.

(iv) Merely because the viewership of DD News was scanty, PB’s obligation to provide it in an encrypted format could not be dispensed with. After finding PB to be in breach of the said obligation, the majority arbitrarily and unreasonably awarded only 15% of the amount payable by way of minimum guarantee as compensation for such breach. There was no rational basis for such reduction of the compensation amount.

(v) The conclusion of the majority that the termination of the DA was valid overlooked the breaches committed by PB which were noticed by the

majority itself. This was also contrary to Section 51 of the ICA in terms of which a party need not perform its promise under a contract of reciprocal promise if the other party was not ready and willing to perform its promise. Since PB was not ready and willing to provide DD News in an encrypted format, it was not obligatory for MEN to pay PB the agreed revenue.

(vi) Reference was made to the reply of PB to MEN's application under Section 17 of the Act where PB admitted that in view of the Cable Television Networks (Regulation) Amendment Act, 2002 it was not possible for PB to continue the arrangement between PB and MEN in terms of the DA after 15th July, 2003. The amendment mandated that all sports channels should be made free to air with effect from that date. Nevertheless, PB continued to accept its share of actual collection of revenue and offered to resolve the disputes by negotiations.

(vii) PB never attempted to terminate the DA despite MEN's defaults prior to 2003. The reason for termination was, therefore, not the breaches committed by MEN but the change in the law. The resolutions dated 7th/8th May 2003 of PB making DD Sports free to air in view of the change in law were referred to.

(viii) On the issue of simulcasting, the finding of the majority that it was unlikely that in an organisation like PB, "anyone would have resorted to a deliberate violation of the agreement" was inexplicable particularly after finding PB to be in breach of the DA. The consequent assessment of loss at 25% of minimum guarantee was again based entirely on conjectures and surmises. Reference was made to the minority Award on this issue.

(ix) The finding of the majority that PB had not failed to comply with its contractual obligation in respect of cross channel programmes and marketing to the effect that “there could not have been a deliberate breach on the part of Prasar Bharti” was also entirely unsupported by evidence. The majority did not even deal with the issue of programming line up / schedule required to be provided by PB in terms of Clause 12 (c) of the DA at least 15 days prior to each calendar month. On the other hand, the minority Award dealt with the relevant clauses, pleadings and the cross-examination of PB’s witness which supported the contention that PB failed in supplying DD Sports and in providing any programme schedule to MEN. It was accordingly submitted that the impugned majority Award was contrary to the public policy of India.

Submissions on behalf of PB

32. Mr. Rajeev Sharma, learned counsel appearing for the PB, submitted as under:

(i) It was made clear by PB to MEN even prior to the commencement of the agreement on 15th September, 2000 that the DA was unworkable. Reference was made to the statement in the letter dated 8th October, 2001 of MEN that “MEN was shocked to be informed in September 2000 that Prasar Bharti would not be providing DD News in encrypted format.” Nevertheless, MEN continued with the DA as it was aware that what was in fact to be provided was only DD Sports in an encrypted format.

(ii) The DA read as a whole casts no obligation on PB to procure the decoders. This was a case set up by MEN contrary to the express terms of

the DA.

(iii) The finding in the dissenting Award was also to the effect that the procurement of the decoders was to be made by MEN and only the BG had to be provided by PB.

(iv) Reference was made to the letter dated 6th May, 2003 written by PB terminating the DA which listed out the defaults committed by MEN in making payment of PB's share of the subscription amount collected by MEN. The total amount withheld or misappropriated out of the total collection up to 31st December, 2002 worked out to more than Rs. 13 crores. Thus, there was no satisfactory explanation by MEN for this admitted breach. MEN was even at that stage not under any misapprehension regarding the inability of PB to provide it DD News in an encrypted format.

(v) Reference was also made to the statements by MEN in the counter to PB's application filed under Section 17 of the Act where, admittedly, a balance of Rs. 22.04 crores was stated to be owing to PB. The order passed by the AT on 2nd July, 2003 on this application noted that MEN had withheld monies payable to PB to the extent of Rs. 8.19 crores. The AT had noted in that order that MEN had collected from its subscribers "amounts over and above what it was authorised to collect" (to the extent of Rs. 4.95 / 4.50 per subscriber per month) which it claimed need not be made over to PB. This was overlooked in the minority Award. Despite the above direction, no payment was made by MEN to PB. The minority Award only went by the newspaper reports and not by the evidence on record.

(vi) As regards the issue of the loss suffered by MEN, it was pointed out that there was no proof placed on record in this regard and, therefore, the majority had to determine a reasonable figure. This could not be a ground for interference with the impugned Award.

(vii) Even as regards the compensation for the period after termination of the DA, no evidence was placed on record to justify any amount being granted in that regard.

(viii) On the issue of simulcasting, it was submitted that once it was clear to MEN that DD News would not be provided in an encrypted format, MEN had the option of terminating the DA. However, having chosen to continue with it, MEN could not refuse to pay PB its share of the revenue collected.

(ix) Referring to Section 39 of the ICA, it was submitted that there was a clear breach by MEN which disentitled it to any relief. It was submitted that it was MEN's refusal to comply with its obligation that entitled PB under Section 39 of the ICA to not provide DD News in an encrypted format to MEN. The decisions in *Nannier & Anr. v. N.M. Rayulu Iyer, Nagasami Iyer & Co. AIR 1926 Mad 778*, *Burn and Co. Limited v. His Highness Thakur Sahib Sree Lukhdhirji of Morvi State AIR 1925 PC 188* and *NKN Ramier and Brothers v. S.S. Ramudu Ayyar & Anr. AIR 1933 Mad 176* were relied upon.

(x) The concurring opinion of the second member of the AT constituting the majority again held that MEN had failed to show loss on account of failure by PB to provide a BG or that PB had to compensate MEN for the cost of

the decoders. In the absence of any evidence produced by MEN, the Award of compensation by the majority to the extent granted was entirely justified.

(xi) Reference was made to the statement in MEN's letter dated 22nd January, 2001 to PB acknowledging the decision of PB not to encrypt DD News and purported reduction to the tune of 18.18% from the projected revenue targets of MEN, referring to the implicit agreement that the payments would be made on the basis of actual revenues collected and the enclosure to the said affidavit giving the statement of the actual revenue shared. In terms thereof, it was plain that payments were not made every month. The cross-examination of MEN's witness containing an admission to this effect was referred to.

(xii) Relying on the decision in *Associate Builders v. Delhi Development Authority (2015) 3 SCC 49*, it was submitted that no grounds were made out under Section 34 of the Act for interference with the Award. The view taken by the majority was a plausible one and could not be said to be perverse.

Failure to supply DD News in encrypted format

33. The first issue that requires to be considered by the Court is the failure by PB to supply DD News in an encrypted format. It is plain from the reading of the pleadings as well as the depositions of the witnesses that what was offered to MEN was a package deal where two encrypted channels would be provided i.e., DD Sports and DD News. Subscription was for DD Sports. However, as explained by MEN, and as rightly noted in the minority Award, the viability of the offer as a business proposition depended as much on MEN getting DD News in an encrypted format as it got DD Sports. The

projections of revenue collections were on this basis.

34. Before the AT, an entirely different case was sought to be set up by PB to the effect that both parties knew even to begin with that it was not possible for PB to provide DD News in an encrypted format. It must be recalled that the DA itself was to commence from 1st September, 2000 while it was formally entered into around two months earlier. Under Clause 18 of the DA, it was made clear that there could be no change to the DA except in writing and signed by the both parties. There was no Supplementary Agreement between the parties incorporating any changes in the DA. On this, both the majority and the minority Award are *ad idem*.

35. The stand of PB that much prior to the import of decoders MEN was informed by PB that DD News would not be provided by it in encrypted format has not been made good by PB by producing any credible evidence. Much has been made of one sentence in the letter dated 8th October, 2001 where it was stated that after MEN had invested a huge amount of Rs. 16 crores and imported the 7,000 decoders, it was shocked to be informed in September 2000 that Prasar Bharati would not be providing DD News in an encrypted format. While, at the highest, it could be said that MEN got the first indication of the impending breach of contract by PB on a crucial aspect in September 2000, it by no means can be read as an acceptance by MEN of such breach. In any event, when the letter is read as a whole and not in parts, it is plain that if it has to be relied upon, then the fact that MEN had by then invested Rs. 16 crores in procuring 7,000 decoders 'before September 2000' has to be accepted.

36. What is strange is that while MEN contends that this was the trigger for further negotiations between the parties including the meeting of 22nd November, 2000, PB denies the MoM that was enclosed with MEN's letter dated 24th November, 2000 to PB.

37. The majority does not render any categorical findings on this aspect. The minority Award, on the other hand, notes that while PB denies the contents of the MoM, it did not deny that such a meeting in fact took place. As rightly noted in the minority Award, after the letter dated 24th November, 2000 enclosing such minutes which recorded the decision to amend the DA “in respect to the numbers, boxes, price and revenue or a separate contract is to be entered”, there were a large number of other letters sent by MEN to PB requesting it to re-work the DA. The fact of receipt of those letters and the fact that PB did not reply to them remained undisputed before the AT. This was indeed an important factor which appears to have been completely overlooked by the majority.

38. The minority Award holds that:

“In the light of the pleadings and from the evidence and correspondence on the record it is overwhelmingly proved that when PB took the decision not to encrypt the DD News it gave a positive understanding to the MEN that the Agreement would be reworked and the values thereunder in the shape of minimum guarantee figures would be rearranged.”

39. The majority Award, however, gives no clear finding on this aspect except by noting that “there is a controversy about the very existence and correctness of the contents of” MEN’s letter dated 22nd November 2000.

Without giving any clear finding on this aspect, the majority appears to have gone straight to the question of “the quantum of loss suffered by the claimant on account of DD News not being provided in encrypted form.”

40. The specific issue framed by the AT in relation to DD News was whether MEN was entitled to damages from PB for the failure of PB to deliver to MEN for distribution an encrypted DD News channel as provided in the DA dated 6th July, 2000 and whether MEN was disentitled to any claim for such damages on grounds of waiver or acquiescence.

41. On this issue, while there is a very categorical finding by the minority Award in para 51 that “PB throughout kept the understanding of “revising the Agreement” alive and by doing so violated the Agreement with impunity.” There is no categorical finding on Issue 1 (a) or 1 (b) by the majority Award.

42. What emanates from the above discussion is that both the minority and the majority Awards are clear that a breach of contract was committed by PB in not providing MEN the encrypted DD News channel. What also is clear is that there was no acquiescence or waiver of such breach by MEN. There is a categorical finding in the minority Award that PB led MEN to believe that it was going to re-work the terms and revise the DA while, on the other hand, “without investing any money into the Agreement, it (PB) kept on pocketing the share of the revenue, which was actually the money collected.” The majority while giving no finding on this aspect only states that it is not possible “to quantify the precise loss suffered by the claimant on account of the said violation.”

43. There is merit in the contention of MEN that in coming to the above conclusion regarding the true purport of Clause 4 (a) of the DA, the majority Award does in effect re-write an important aspect of the DA regarding the obligation of PB to supply DD News in an encrypted format to MEN. It is the dilution of this obligation by the majority that has led it to reduce the compensation to just 15% of the amount payable by MEN by way of minimum guarantee.

44. Therefore, there are two serious flaws here – One is the majority violating Section 28 (3) of the Act by travelling beyond the terms of the DA; and the second is the violation of Section 31 (3) of the Act inasmuch as no reason whatsoever was offered by the majority in reducing the compensation to merely 15% of the minimum guaranteed amount.

45. To the Court, it appears that the minority Award in this aspect is clear and consistent with the provisions of the agreement. The fact was that PB informed MEN that it would not provide DD News in encrypted form only after MEN spent Rs. 16 crores on the import of 7,000 decoders. This categorical finding in the minority Award is consistent with the evidence on record.

46. In para 115, the minority Award proceeds to determine the ‘net decoder compensation’ to be awarded to MEN. This appears to be a plausible basis since those decoders were completely rendered useless as far as MEN was concerned. They were imported only pursuant to the DA entered into with PB. Thus, while the minority Award explains clearly the basis for working out the compensation, the majority Award fails to do so.

47. In view of the above two fatal clauses in the majority Award, the Court has no hesitation in holding this portion of the majority Award to be contrary to the fundamental policy of India. The Court, therefore, sets aside the majority Award insofar as it awards MEN only 15% of the minimum guarantee amount.

48. Since PB has not challenged the majority Award to the above effect, the said amount has in any way to be paid by PB to MEN. For recovery of the balance amount, it will be open to MEN to go in for a fresh arbitration.

Validity of termination of the DA

49. Coming to the issue of termination of the DA, the majority held that since MEN defaulted in making payments in accordance with the DA, the termination of the DA was justified. The reply filed by PB to the application filed by MEN under Section 17 of the Act before the AT is significant. The amendment to the Cable Television Networks (Regulation) Amendment Act, 2002 came into force only from 15th July, 2003. However, as rightly pointed out by MEN, the real trigger for termination was the above change and not any failure by MEN to make payments. The minority Award correctly noted that the differences between the parties on the question of revising the DA to incorporate the change regarding the encrypted DD channels being provided to MEN remained unresolved. This is what led to the reference of the disputes to arbitration. The differences did not stem from any failure by MEN to make payments of the minimum guaranteed revenues. The fact remains that termination occurred during the pendency of the arbitration proceedings.

50. The minutes of the meeting of PB held on 7/8th May, 2003 in fact showed that the revocation was in fact triggered on account of PB's decision to make DD Sports free to air. It was also noted that the averments by MEN regarding a news item which appeared in 'Economic Times' on 20th August, 2002 in this regard was not denied by PB. To the same effect is an admission by PB in its reply to the Section 17 application which categorically stated that in view of the amendment to the Cable Television Networks (Regulation) Amendment Act, 2002 and the Notification, it was obligatory for PB to broadcast its DD Sports on a 'free to air' basis.

51. The Court finds that the majority Award has overlooked all the above important pieces of evidence and gone only by the aspect of the failure by MEN to make payments in terms thereof. The Court is unable to sustain the impugned majority Award on this aspect as well.

Simulcasting

52. On the issue of simulcasting, both the majority Award and the minority Award have accepted the interpretation by MEN of Clause 2 of the DA. Further, there is unanimity that the expression 'BCCI Cricket Events' includes both, the Test Matches as well as the ODIs. Both the Awards have in fact accepted MEN's case that there was simulcasting of the hockey match, two tournament matches and three international events apart from separate non-cricket domestic events.

53. It is not necessary to discuss the evidence in great detail. Suffice it to note that PB proceeded to undertake simulcasting on its erroneous interpretation of the above clause 2 (i) of the DA. Significantly, Para 93 (A)

of the minority Award refers to the additions made in the majority Award on the aspect of simulcasting which was clarified in the minority Award. What the minority Award has correctly pointed out is that when PB was indulging in simulcasting with impunity, it would have been highly arbitrary “to place the onus on the claimant to prove that there were instances of simulcasting.” Likewise, measuring the extent of damage on the basis of number of simulcasting events by “throwing the onus on the claimant was held by the minority to be “arbitrary and uncalled for.”

54. The Court finds that the majority Award, despite accepting the fact that PB acted in breach of the DA by indulging in simulcasting, has sought to minimise the losses by adopting an arbitrary figure of “25% of the total amount of minimum guarantee payable under the agreement’. This part of the majority Award is again unsupported by reasons. There is admission in the majority Award that any assessment of the losses “is bound to be an estimate.” With the legal basis for the losses estimated being non-existent, the Court is unable to sustain the majority Award to the extent it limits the losses suffered by MEN to just 25% of the total amount of minimum guaranteed.

55. On the other hand, in the minority Award in Para 116, the basis of the reasonable compensation for the post terminal period has been worked out as Rs. 9,67,28,190. This was worked out on the basis of the affidavit of evidence filed by PB which showed Rs. 50,59,62,838 as the total collection of MEN for 34 months from September 2003 – July 2003. MEN’s average monthly share was worked out as Rs. 37,20,315/- which was then multiplied

by 26 months. The Court finds this figure to be acceptable as it is based on some rational criteria and supported by the evidence filed by PB.

56. On the last issue concerning the promotional marketing, while the majority Award was of the view that MEN failed to make out any case that PB failed to comply with its contractual obligation in respect of 'cross channel promotion of programming lineup', the minority Award took the view that PB failed to provide promotional material or to carry any cross channel promotion by developing marketing plans for promotion of DD Sports at PB's other channels. However, no specific loss has been computed on this aspect even in the minority Award other than what has been worked out in Para 116 which has been referred to hereinbefore.

57. As regards the counter-claim of PB, the majority Award cannot for the reasons explained hereinbefore be sustained.

Conclusion

58. For the aforesaid reasons, the Court finds that the impugned majority Award is opposed to the fundamental policy of India insofar as limiting of losses of MEN as a result of failure by PB to provide the encrypted DD news channels and indulging in simulcasting is concerned. The majority Award to that extent cannot be sustained in law and is hereby set aside. The allowing of the counter-claim of PB in the majority Award is also hereby set aside. The amounts awarded to MEN by the minority Award are upheld. The said amounts shall be paid by PB to MEN within eight weeks.

59. The petition is allowed in the above terms with costs of Rs. 50,000/- to

be paid by PB to MEN within a period of 4 weeks from today.

S. MURALIDHAR, J

MARCH 17, 2017

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