

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

Judgment Reserved on: March 23, 2016

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Judgment Delivered on: April 05, 2016

+ **FAO(OS) 369/2015**

NIMBUS COMMUNICATIONS LTD.

..... Appellant

Represented by: Mr.Arvind Nigam, Sr.Advocate
instructed by Mr.Amol Chitale,
Advocate with Mr.Shubham Jaiswal
and Mr.Nirnimesh Dube, Advocates

versus

PRASAR BHARTI & ANR.

..... Respondents

Represented by: Mr.Rajeev Sharma, Advocate with
Mr.Sahil Bhalaik, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. The Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007 (hereinafter referred to as the said Act) was deemed to have come into force with effect from November 11, 2005, as per Sub-Section (3) of Section 1 of the said Act. As per sub-Section (1) of Section 3 of the Act, no content rights owner or holder and no television or radio broadcasting service provider could carry a live television broadcast on any cable or Direct-to-Home network or radio commentary broadcasting in India of sporting events of national importance, unless it simultaneously shared the live broadcasting signal, without its advertisements, with Prasar Bharati to enable Prasar Bharati 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. As per sub-Section (2) of Section 3, the terms and conditions under sub-Section (1) of Section 3 were to provide that the advertisement revenue sharing between the content rights owner or holder and 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.

2. In exercise of the power conferred by Section 7 of the Act, the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Rules 2007 were promulgated. Rule 4 thereof required a sealed bid procedure to be adopted inter-se the rights owner or holder and Prasar Bharati concerning marketing of commercial time generated by the re-transmission on the Prasar Bharati's channel. Needless to state the higher bidder was entitled to undertake the marketing of commercial time. The bid amount was the minimum guaranteed amount. The party obtaining the marketing rights was to give a bank guarantee to the other party for an amount equal to the other party's share of guaranteed revenue. The said party was to receive all payments from third parties which was to be deposited in a designated escrow account. The said party was obliged to submit to the other party accounts of revenue earnings, duly audited by a chartered accountant, and with 75 days of the sporting event coming to an end was to pay the minimum guaranteed amount along with, if payable, further sum; depending upon the revenue generated.

3. Nimbus Communications Ltd.(hereinafter referred to as Nimbus India) is a company registered in India under the Companies Act, 1956. Nimbus Sports International PTE Ltd. Singapore (hereinafter referred to as the Nimbus Singapore) is a company registered as per laws in Singapore.

4. Whereas Nimbus India was the highest bidder for the India-Australia

Cricket Series including a T-20 match played on October 20, 2007 as also India-England Series 2008, Nimbus Singapore was the highest bidder for the India-Bangladesh Series 2007, the India-Bangladesh-Pakistan Series 2008 and the India-Sri Lanka Series 2009. Prasar Bharati was the highest bidder for only one series, being India-Pakistan Cricket Series 2007 wherein the other bidder was Nimbus India. Thus, Prasar Bharati became the accounting party only pertaining to one series and that too to Nimbus India.

5. Whereas Prasar Bharati abided by the terms of the bid, which had to be in terms of Rule 4 of the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Rules, 2007, and furnished a bank guarantee equivalent to the bid amount to Nimbus India, Nimbus Singapore and Nimbus India failed to apply with said obligation. Further, whereas Prasar Bharati duly executed a contract concerning the India-Pakistan 2007 Cricket Series with Nimbus India, which had an arbitration clause, Nimbus India and Nimbus Singapore neither gave bank guarantees nor executed any contract and the result was the jural relationship between the parties concerning said sporting event being in terms of the Act and the Rules framed thereunder; sans any arbitration clause. For facility of reference, we put in a tabular form the six sports events referred to in paragraph 4 above. They would be as under:-

Sr. No.	Series	Marketed by
i.	India - Bangladesh, 2007	Nimbus India
ii.	India - Australia, 2007 including T-20 Match	Nimbus Singapore
iii.	India - Pakistan, 2007	Prasar Bharati
iv.	India - England, 2008	Nimbus Singapore
v.	India -Bangladesh-Pakistan, 2008	Nimbus India
vi.	India - Sri Lanka, 2009	Nimbus India

6. Since the interim award, challenge whereto by Nimbus India has failed before the learned Single Judge, concerns the dispute only pertaining to India-Australia, 2007 Cricket Series including a T-20 Match played on October 20, 2007, the India-England 2008 Series, India-Sri Lanka 2009 Series and India-Bangladesh-Pakistan 2008 Series, in respect of which series, as noted above, for two Nimbus India was the higher bidder and for two Nimbus Singapore was the higher bidder, we note in a tabular form the bid amount, Prasar Bharati's entitlement of 25% of the bid amount as the minimum guaranteed revenue, the net revenue claimed to be generated by Nimbus India and Nimbus Singapore and 25% thereof, with amount due to Prasar Bharati being 25% of the minimum bid amount subject to increase if revenue generated was in excess. The tabular statement would read as under:-

Series	Bid of Nimbus Singapore/Nimbus India	Entitlement of Prasar Bharati as per Bid (25 %) of	Net Revenue Earned as per Nimbus Singapore/Nimbus India	25% of Net Revenue Earned	Amount due to Prasar Bharati as per the figures provided by Nimbus Singapore/Nimbus India
(A)	(B)	(C)	(D)	(E)	(F)
India Australia 2007 (NC)	384000000	96000000	301,722,477	75430619.00	96000000

India England 2008 (NC)	22050000	54825000	132176437	33044109.25	54825000
India Sri Lanka 2009 (NS)	70200000	17550000	206769688	51692422.00	51692422
India- Bangla- Pak 2008 (NS)	101000000	25250000	91251122	22812780.50	25250000
Total	57,72,50,000	19,36,25,000	731,919,724	18,29,79,930.80	22,77,67,422

7. It is apparent that for three series, the minimum guaranteed amount is payable and for the fourth, since of the own admission made by Nimbus Singapore the revenue earned was in excess of the minimum guaranteed, the amount payable to Prasar Bharati would obviously be the higher of the two.

8. We simply highlight that the admitted position would be that a sum of ₹22,77,67,422/- would admittedly be payable to Prasar Bharati.

9. Pertaining to the India-Pakistan Series 2007, the bid by Prasar Bharati was ₹81.25 crores, of which 75% had to be paid to Nimbus India and this would translate to ₹60,93,75,000/- (Rupees Sixty Crores Ninety Three Lacs and Seventy Five Thousand only). Admittedly Prasar Bharati paid said amount to Nimbus India and as per Prasar Bharati the revenue which it generated from this series was ₹83,10,74,358/- and 75% thereof would be ₹62,33,05,768/-. Thus, qua this series only ₹1,39,30,768/- further are payable by Prasar Bharati to Nimbus India.

10. The position therefore would be that if no further dispute was raised, Nimbus India and Nimbus Singapore would be liable to pay to Prasar Bharati ₹22,77,67,422/- less ₹1,39,30,768/-.

11. Nimbus India and Nimbus Singapore did not pay any money to Prasar Bharati and on May 16, 2009 raised the issues as under:-

- (i) That a sum of ₹1,32,99,139/- was due to Nimbus India from Prasar Bharati for the India-England Series, 2006.
- (ii) That for the India-Pakistan Series, an amount of ₹21,19,81,626/- was due from Prasar Bharati to Nimbus India.
- (iii) That a sum of ₹13,53,75,000/- was payable to Prasar Bharati for the India-Australia 2007 Series and the India-England 2008 Series.
- (iv) That Nimbus India had made an adjustment as a result whereof Prasar Bharati's claim in sum of ₹13,53,75,000/- had been adjusted against Nimbus India's claim of ₹21,19,81,626/- thereby leaving a net balance of in sum of ₹7,66,06,626/- payable to it.
- (v) That Prasar Bharati was entitled to ₹2,52,50,000/- and ₹1,75,50,000/- from Nimbus Singapore for the India-Pakistan-Bangladesh and India-Sri Lanka Series and it owed ₹15,37,500/- to Nimbus Singapore for the India Bangladesh Series 2007. Thus the net amount payable to Nimbus Singapore is ₹4,12,62,500/-.
- (vi) That Nimbus India had procured from Nimbus Singapore the mandate to adjust the said amount against ₹7,66,06,626/- owned by Prasar Bharati.

12. Obviously a dispute arose. As noted above, only one agreement was executed concerning the Indo-Pak Series 2007 and thus Nimbus India invoked the arbitration agreement and nominated their arbitrator. Prasar Bharati nominated its arbitrator and the two nominated the third. The Arbitral Tribunal came into existence.

13. The nature of the claim by Nimbus India, as would be evident from hereinabove had the element of adjustments inter-se Nimbus India and

Prasar Bharati as also Nimbus Singapore and Prasar Bharati. The Arbitral Tribunal therefore rightly advised the parties to enter into an arbitration agreement referring the disputes concerning the cricket series referred to paragraph 4 above and thus on August 31, 2011 an arbitration agreement was entered into between Prasar Bharati as one party and Nimbus India and Nimbus Singapore as the second party. The arbitration agreement clearly contemplates that the subject matter of the dispute referred to the arbitration would be:-

S.No.	Event
1.	India Bangladesh Series, 2007
2.	India Australia Cricket Series, 2007 including T-20 Match
3.	India Pakistan Cricket Series, 2007
4.	India, Bangladesh & Pakistan Series, 2008
5.	India England Series, 2008
6.	India Sri Lanka Series, 2009

14. Prasar Bharati filed a statement of claim praying therein that the opposite party be directed to render a complete statement of account concerning the series where marketing rights were taken by it on account of it being the higher bidder. Prasar Bharati highlighted breach of the Rules by not opening an escrow account in which the revenue realized was credited and from which payments to be made to third parties were made. Prasar Bharati highlighted that Rules were breached inasmuch as an audited statement from a Chartered Accountant was not furnished. Prasar Bharati claimed the minimum guaranteed amount with the higher sum payable for the India-Sri Lanka 2009 Series inasmuch as Nimbus Singapore had admitted generating higher revenue above the minimum guaranteed. To put

it pithily Prasar Bharati claimed ₹22,77,67,422/- being the admitted amount payable with a plea that if on rendition of accounts a higher amount became payable the same be awarded in its favour. Interest on the outstanding amounts from the date they became payable till date of payment were also claimed.

15. In the reply cum counter claim filed by Nimbus India, it contended that the bid for the India-Pakistan 2007 Series contemplated 30000 seconds Inside Life Commercial Time and 7500 seconds in Fourth Umpire and this time was relatable to the minimum guaranteed sum payable by Prasar Bharati. It alleged that as a matter of fact Prasar Bharati had utilized 41237 seconds Inside Life Commercial Time and 12812 seconds in Fourth Umpire and therefore pleaded that Prasar Bharati had earned extra revenue, and for which it demanded ₹19,86,82,487/- on said account. Needless to state while admitting extra seconds utilized for which extra revenue could be generated Prasar Bharati claimed that as a matter of fact extra revenue generated was as indicated in para 9 above.

16. Pursuant to the directions of the Tribunal revenue generations statements was filed by the parties. The revenue generation statements filed by Nimbus India and Nimbus Singapore contained an admission of liability towards Prasar Bharati.

17. On July 17, 2013, Prasar Bharati filed an application under Section 17 of the Arbitration & Conciliation Act, 1996 for an order directing Nimbus India to secure the amount in dispute. On September 13, 2013, Prasar Bharati filed an application for an interim award. Immediately, Nimbus India filed an application to amend its reply and counter claim. The proposed amendment seeks to embrace an alleged dispute concerning India-

England Series 2006, in respect of which we simply highlight that the arbitration agreement between the parties does not encompass said series and prima-facie any claim concerning the same would be barred by limitation.

18. Arguments were heard by the Arbitral Tribunal on the application filed by Prasar Bharati for an interim award on November 11, 2013. After counsel for Prasar Bharati concluded submissions, time was sought by learned counsel for Nimbus India to reply and the matter was adjourned to February 03, 2014.

19. On February 03, 2014 Nimbus India moved an application before the Arbitral Tribunal for direction that Prasar Bharati should give inspection of record concerning India-Pakistan Series, 2007. As was expected from a statutory corporation established and owned by the State, Prasar Bharati conceded to give inspection because it had nothing to hide. Nimbus India raised a dispute on March 08, 2014 alleging that complete inspection was not given. It filed another application praying that Prasar Bharati be directed to give full inspection.

20. On May 02, 2014 the Arbitral Tribunal heard arguments on the applications filed by Prasar Bharati under Section 17 of the Arbitration and Conciliation Act, 1996 i.e. to secure the sum claimed by Prasar Bharati as also to pass an interim award. By a split verdict, two Arbitrators passed an order dated May 06, 2015 directing Nimbus India to furnish bank guarantee in favour of Prasar Bharati in sum of ₹20 crores. The minority Arbitrator held that this was not the stage to pass any interim order because counter claim by Nimbus India had to be adjudicated and thus primacy could not be

given to the fact that Nimbus India, which claimed to have taken over the rights of Nimbus Singapore, owned over ₹22 crores to Prasara Bharati.

21. The order dated May 06, 2014 was challenged by Nimbus India vide A.A.No.15/2014 in this Court in which notice was issued. Vide order dated August 26, 2014 this Court clarified that there was no stay in the arbitration proceedings. No interim order was passed staying the order dated May 06, 2014. Accordingly, the application for interim award filed by Prasara Bharati was heard by the Tribunal on September 12, 2014. It heard learned counsel for both parties and passed an order on September 16, 2014, and as before a split verdict came.

22. This is precursor to the order dated September 16, 2014, which had all the features of an interim award and as would be noted hereinafter was treated as an interim award because the condition for the order not to become an interim award was not complied with by Nimbus India. The majority held that amounts due to Prasara Bharati were admitted and the amounts claimed by Nimbus India required an adjudication. The defence was one of adjustment and validity thereof had yet to be established at the trial. The direction was that if within the given time sum of ₹22,77,67,422/- was not deposited an interim award shall follow automatically and since compliance was not made, on December 11, 2014 a formal order was passed declaring that an interim award had come into effect on the date when order dated September 16, 2014 was not complied with. Issue of interest was left open, to be decided at the final stage.

23. The amount as directed to be deposited vide order dated September 16, 2014 was not deposited. The order dated September 16, 2014 was challenged by Nimbus India by way of AA No.30/2014. By an order dated

October 31, 2014 passed in the said proceedings, the learned Single Judge directed Nimbus India to file an affidavit regarding its unencumbered assets in India. The affidavit was never filed.

24. On December 11, 2014 the Arbitral Tribunal clarified that on account of the failure of Nimbus India to deposit the amount as per order dated September 16, 2014, the interim award stood passed automatically.

25. Challenge to the interim award has failed before the learned Single Judge. OMP No.60/2015 filed by Nimbus India has been dismissed by the learned Single Judge vide impugned order dated April 06, 2015.

26. Arguing the appeal, Sh.Arvind Nigam learned senior counsel for the appellant urged that the interim award is liable to be set aside on account of:-

- (a) The interim award does not contain reasons.
- (b) It is in the nature of default award for non-compliance with the orders passed on the application under Section 17.
- (c) The Tribunal did not address itself to the plea of equitable set off raised by Nimbus India.
- (d) Nimbus India's application for inspection was still pending.
- (e) The Tribunal did not adjudicate the issue of limitation.

27. An adjudication has to have three necessary elements, namely: a hearing; recording of conclusion based on material available; and reasons in support of the conclusions.

28. In our opinion all three elements are satisfied in the instant case. It is not a case where Nimbus India was not given a hearing.

29. In so far as the recording of conclusion based on evidence is concerned, we find a definite conclusion recorded by the Arbitral Tribunal

in its order dated May 06, 2014, to the effect that the material on record and the letters of Nimbus India and Nimbus Singapore themselves establish the claim of Prasar Bharati that the amount of ₹22,77,67,422/- was due to it. Before recording the said conclusion, the Tribunal had set out the respective stands of the parties. The order spanning 6 pages records the respective submissions in the first three pages, a brief capturing the important letters containing the admissions followed by the conclusion.

30. We highlight once again that Nimbus India and Nimbus Singapore admitted their liability to pay ₹22,77,67,422/- and were claiming a right to adjust an amount, which as we would be highlighting hereinafter is an unascertained amount and in respect of which Nimbus India's plea of equitable set off is ex-facie untenable.

31. To invoke the doctrine of equitable set off, the cross demands should arise from the same transaction or should be so connected that they can be looked upon as part of the same transaction.

32. Admittedly, in this case, there were four different series and it cannot be said that cross demands arise out of the same transaction. The said demands were not so connected that they could be looked upon as part of one transaction. Further, the accounting between Prasar Bharati was independent with Nimbus Singapore and with Nimbus India. The claim of Nimbus India was that Nimbus Singapore had assigned the debts and the claims to it and thus with respect to the transactions between Prasar Bharati and Nimbus Singapore vis-a-vis those between Prasar Bharati and Nimbus India the question of inter-se equitable set off would inherently not arise. Further, Nimbus India could not raise for purposes of its counter claim any

issue concerning India-England 2006 Series because the transaction between the said parties was not a subject matter of the arbitration proceedings.

33. The fact that for the India-Pakistan 2007 Series the dealings were between Prasar Bharati and Nimbus India and for two other series the dealings were between Prasar Bharati and Nimbus Singapore shows that the dealings were not arising from the same transaction or connected therewith.

34. The series were spread over from 2007 to 2009. They were not series in continuation. Separate bid arrangements were made for each series. Therefore, it cannot by any stretch of reasoning, except a convulsed reasoning, be said to be a case of dealings arising out of or connected with the same transaction.

35. Just because Nimbus India in its letter dated May 16, 2009 sought to make adjustments by clubbing together all the series would not make them so inter-connected.

36. The order in question notes the contention of Nimbus India as also three judgments cited. The order highlights that whereas claim of Prasar Bharati was admitted without demur, the counter claim had yet to be established and warranted recording of evidence.

37. Set off is like a cross suit or cross action. It is well settled that even a counter claim can be ordered to be tried by way of a separate suit. Its hearing can also be deferred. Pendency of a counter claim does not bar the Tribunal from making an interim award to the extent of admissions as was held in the decision dated February 08, 2008 in FAO (OS) No.507/2007 Numero Uno International Ltd. Vs. Prasar Bharati. These are matters of discretion. The Arbitral Tribunal exercised the discretion based on the facts and circumstances of the case and gave cogent reasons for that.

38. In the counter claim an amount of ₹19,86,82,487/- has been claimed. How it is calculated is not stated with clarity. A sum of ₹21,19,81,626/- has been claimed as per particulars annexed, but we find no particulars being annexed. A sum of ₹3,53,44,126/- is claimed as per the particulars annexed, and we find no particulars being annexed and thus one is left scratching ones brain to fathom the basis of the said amount.

39. As regards the plea that till inspection was completed the interim award should not have been pronounced, we find that the Tribunal has considered said aspect and has recorded reasons as to why passing of an interim award should not be deferred pending inspection. The Tribunal has clearly recorded that the issue of inspection related only to the counter claim which had yet to be established. We note that the counter claim raised by Nimbus India itself records that evidence would be required to be led to establish the counter claim.

40. It is well settled that in the case of breach of contract, pecuniary liability arises only after adjudication. Prior to that, there is no liability and no obligation to pay. In the decision reported as AIR 1954 Bom 423 *Iron & Hardware vs. Firm Shamlal & Bros.* it was held that a party considering itself entitled to a certain amount cannot unilaterally appropriate it. It has to make a claim in a court of law and till such time the claim is adjudicated and found to be tenable, it remains only a claim.

41. In contending that the interim award was an award based on default on non-compliance of the order under Section 17 of the Arbitration and Conciliation Act, 1996, we find that Nimbus India is taking advantage of indulgence granted to it by the Tribunal on two prior occasions. The applications under Section 17 and the application for passing an interim

award were heard together. In the order dated May 06, 2014 the Tribunal has recorded in categorical terms that it was a fit case to pass an interim award, but for the time being was granting an opportunity to Nimbus India to furnish a bank guarantee. Subsequently, the application was further heard. The Tribunal again recorded that it was a fit case to pass an interim award but made a direction to Nimbus India to deposit the amount. In the said order it was recorded that if the direction is not complied with, an interim award would follow. Therefore, the interim award is based on the finding that Nimbus India had made decisive admissions. Those admissions have not been denied even when the appeal was heard. The Tribunal also recorded that the counter claim was yet to be established. In doing so, the Tribunal only followed the law laid down by this Court in the decision in Numero Uno's case (supra).

42. The judgment of the Supreme Court in the decision reported as (2000) 7 SCC 120 Uttam Singh Duggal Co. Ltd. vs. United Bank of India Ltd & Ors. lays down that the scope of Order 12 Rule 6 of the Code of Civil Procedure should not be unduly narrowed down. A decree on admissions is to be passed if it is impossible for the party making the admission to succeed in the face thereof. In this case the admissions made are judicial admissions which cannot even be retracted.

43. On the subject of limitation we note:-

- i. The dealings between the parties took place from 2007 to 2009.
- ii. The purported adjustment was conveyed by letter dated May 16, 2009. The letter by itself contains admission of liability.
- iii. In view of the decision dated December 11, 2009 by a learned Single Judge of the High Court of Judicature at Madras in OA No.1078/2008

Gammon India Vs. Sankaranarayana Construction (Bangalore) an attempt to adjust/set off is by itself an admission/acknowledgement for extending limitation. We note that appeal against said decision was dismissed by a Division Bench against which Petition seeking Special Leave to Appeal (C) No.12891/2012 was dismissed in limine by the Supreme Court on May 08, 2012.

iv. The explanation to Section 18 of the Limitation Act, 1963 provides that an acknowledgment can be coupled with a refusal to pay or claim for set-off.

v. The objection regarding limitation appears not have been pressed before the Arbitral Tribunal and that is the reason why the orders do not deal with said aspect.

vi. The set off was claimed on May 16, 2009. The arbitration agreement between the parties is dated August 31, 2011. There is no scope to argue that the claim was barred by limitation.

44. We must frown upon the attitude of Nimbus India and Nimbus Singapore who are in utter breach of their respective obligations to secure the amounts by furnishing bank guarantees and to execute formal agreements. The two did not furnish the bank guarantee or deposit the amount directed by the Arbitral Tribunal nor complied with similar directions passed in the appeal. Whereas Nimbus Singapore has no asset in India, the assets of Nimbus India also appear to be nil. That is the reason why order dated October 31, 2014 passed by the learned Single Judge in AA No.30/2014 requiring Nimbus India to file an affidavit detailing its assets located in India was not complied with.

45. The appeal is accordingly dismissed imposing cost in sum of

₹50,000/- against Nimbus India and in favour of Prasar Bharati.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

APRIL 05, 2016
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