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

Reserved on: February 21, 2017.

Date of decision: April 17, 2017

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O.M.P. 426/2008

PRASAR BHARATI

....Petitioner

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

versus

STARCON INDIA LIMITED & ANR.

...Respondents

Through: Mr. Anish Dayal with Mr. Siddharth Vaid, Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

17.04.2017

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1. Prasar Bharati ('PB') has, in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act'), challenged an Award dated 28th April 2008 passed by the sole Arbitrator in the disputes between the Petitioner and the Respondent No.1 Starcon India Limited ('SIL') and M/s. Transworld International Inc. ('TWI') Respondent No.2 arising out of an agreement dated 19th February 2000 entered into between the parties as well as a letter dated 18th February 2000 which, according to the Respondents formed part of the said agreement.

2. PB i.e. the Broadcasting Corporation of India is a statutory body

incorporated under an Act of Parliament. PB was split into Doordarshan and Akashwani for television and radio services respectively.

Background facts

3. The background to the present petition is that in order to fully exploit the broadcasting rights and to gain maximum viewership of the cricketing events, including all international matches organised by it in India, the Board of Control of Cricket in India ('BCCI') entered into a broadcasting licence agreement ('BLA') dated 25th September 1999 with PB. Under the said agreement, PB was inter alia granted exclusive rights for production and broadcasting of cricketing events conducted by BCCI in the territory of India for the period 1st January 2000 to 30th September 2004. PB, therefore, acquired the whole bundle/package of rights which included television, radio, internet and multimedia rights. PB then decided to split the bundle of rights, it had acquired into various separate distinct and mutually exclusive components and invited bids from various parties for the said rights.

4. The Respondents submitted their bid for exclusive global marketing rights and other rights. By letter dated 4th February 2000, PB communicated to Respondent No. 1 the acceptance of its bid for "global marketing including radio rights for all territories outside Union of India (with exception of radio rights outside UK) hereinafter 'rights' in respect of cricketing events conducted by BCCI in India for the period starting from 1st January 2000 to 30th September 2004." The details of the cricketing events in respect of which the rights were granted to Respondent No.1 were set out in Annexure-1 to Part I of the tender. The price at which the aforementioned rights were

awarded to Respondent No.1 which was the 'Minimum Assured Revenue' was 43.75 million US dollars (USD). The letter set out the schedule for making of the payment of the aforementioned sum. If there were going to be additional One Day International ('ODI') or Test Matches within the contract period the net revenue in excess of the instalment of Minimum Assured Revenue ('MAR') would be shared in the ratio of 50:50.

5. Respondent No.1 was to furnish to PB on or before 15th February 2000 "an unconditional and irrevocable bank guarantee for 15% of the total bid amount converted into Indian rupees at the exchange rate prevailing on the date of furnishing of the bank guarantee and which was to be valid till 31st December 2004." By another letter dated 18th February 2000, PB informed Respondent No.1 that it had been decided to offer Respondent No.1 "rights for the internet on a non-exclusive basis concurrent with the agreement for the multimedia rights." This was subject to the conditions stipulated in the letter. One of which was that PB "has exclusive and complete rights for licensing the internet rights to an unlimited number of users." It is further stated that the licensees of the internet rights shall be directed to approach the Respondents for getting the multimedia rights for use on the internet on such fees as may be prescribed by the Respondents. The additional revenue generated through such licensing of multimedia rights to the internet licensee/sub-licensee was to be shared by PB and Respondent No.1 in the ratio of 50:50. This is to be over and above the MAR "as per the agreement entered into with you by the Prasar Bharati."

6. The aforementioned arrangements were besides the official website which

would be developed and operated by TWI/Starcon for Prasar Bharati without any financial or other liability to Prasar Bharati.” The website would contain the Doordarshan logo at the home page, PB's identity along with Starcon/TWI nominated identity in the URL/homepage.” The website was to be promoted both by Doordarshan and TWI/Starcon across the broadcast footprint by way of mentioning website address only on Live TV signal of the matches as official DD website. This was, however, not to preclude PB from developing and operating other cricket websites within the rights not licensed by PB to the Respondents. On the said letter itself there was an endorsement dated 19th February 2000 for and on behalf of Respondents 1 and 2 by way of acceptance.

Agreement dated 19th February 2000

7. This was followed by an agreement entered into between PB and the two Respondents on 19th February 2000. In terms of the said agreement, the Respondents were awarded the exclusive worldwide television rights (except India) worldwide multimedia rights and the right to develop, maintain and host the official Doordarshan cricket website. According to the Respondents a collective reading of the latter agreement dated 18th February 2000 and the agreement dated 19th February 2000 granted the following rights to the Respondents:

“(a) Exclusive rights for marketing live/delayed television signal for all territories outside the Union of India for all forms of television, including terrestrial broadcast, pay per view, cable and satellite (free to air and subscription) [As per Clause 3.1 of the Agreement dated 19.02.2000]

(b) Exclusive rights for marketing radio rights for all forms of radio signals outside the territories of Union of India excluding the territory of the United Kingdom. [As per Clause 3.2 of the Agreement dated 19.02.2000].

(c) Rights of marketing clippings and highlights of the matches in all territories including India. [As per clause 3.3 of the Agreement dated 19.02.2000].

(d) All other multi-media rights during the term including but not limited to in-flight, home video, laser disk etc. However, internet rights are excluded from the Agreement and are being retained by Prasar Bharati. [As per Clause 3.4 of the Agreement dated 19.02.2000].

(e) Direct Broadcast by Satellite Television (encrypted or free to air). [As per Clause 3.5 of the Agreement dated 19.02.2000].

(f) Two way television and multi-media (any form) rights (except all internet rights which have been retained by Prasar Bharati). [As per Clause 3.6 of the Agreement dated 19.02.2000].

(g) All other broadcast media including non-theatrical exhibition and closed circuit transmission rights and Video-on-Demand. [As per Clause 3.7 of the Agreement dated 19.02.2000].

(h) The right to develop and operate the official Doordarshan cricket website. The Respondent was obliged to include the official website address in all full frame graphics during the live coverage and telecast of the matches, not less than once per half hour. [As per Clause 7.5 of Agreement dated 19.02.2000 and Clause 3 of the letter dated 18th February, 2000].

(i) Non-exclusive internet rights. [As per letter dated 18th February 2000 and the formal licence to the Claimants dated

22nd June 2000 (annexure4)].”

8. It must be mentioned here that Clause 15 of the agreement dated 19th February 2000 contained an arbitration clause.

Alleged breaches by PB

9. The case of the Respondents was that despite having fully performed their part of the contract, PB continued to be in breach of its obligations thereunder. One was regarding the non-display of the official DD address on the live telecast of matches. The loss suffered by the Respondents as a result of the breach was assessed by them to be at least 4.5 million USD. It was submitted that without prejudice to the said claim for the loss suffered, since PB had not in fact delivered the right for which the Respondents had paid, the Respondents were entitled to reimbursement of the amount paid for the said multimedia rights which was 4.465 million USD. This formed the subject matter of Claim No.1.

10. The second breach complained of was regarding the spill over of Doordarshan's signal beyond the territory of India and breach of exclusive rights granted to the Respondents for the overseas territories. The loss purportedly suffered was to the tune of 3.10 million USD, the reimbursement of which was sought under Claim No.2 by the Respondents.

11. The third breach was regarding multimedia rights granted to Rediff.com for carrying streaming audio commentary for cricket matches during India-Australia Series 2001 despite the fact that the exclusive rights in that regard had in fact been granted to the Respondents. The loss on this count was

estimated by the Respondent to be at least 500,000 USD and this formed the subject matter of Claim No.3. The Respondents also sought reimbursement to the tune of 0.39 million USD as “pro-rated cost of diminished value of the radio rights for three series.” This was the subject matter of Claim No.3.

12. The fourth breach alleged by the Respondent was the distribution of decoders by the Petitioner through the Modi Entertainment Network (‘MEN’) in territories outside India in order to receive the Doordarshan telecast in contravention of the exclusive rights granted to the Respondents for the overseas territories. The loss suffered in this score was estimated at 101 million USD and this formed the subject matter of Claim No.4.

Arbitration proceedings

13. By a letter dated 30th April 2001, the Respondents invoked the aforementioned arbitration clause and sent a legal demand notice to PB. Subsequently a formal notice dated 29th August 2001 for arbitration was sent. PB on its part sent a notice dated 6th September 2001 to the Respondents seeking payment of 9.84 million USD by 30th September 2001. By a separate letter dated 17th September 2001, PB rejected the claims of the Respondents.

14. In a petition filed by the Respondents under Section 11 of the Act, the High Court by order dated 11th February 2002 appointed a former Chief Justice of India as sole Arbitrator to adjudicate upon the disputes between the parties. The said learned Arbitrator continued till early 2003 when he resigned on account of his appointment as Chairman of the National Human Rights Commission. He was succeeded by another former Chief Justice of

India as sole Arbitrator who entered upon reference on 7th July 2003.

15. During this time on behalf of the Petitioner Mr. L. D. Mandloi the then Deputy Director General (Sports), Doordarshan was examined as a sole witness. On behalf of the Respondents, three witnesses viz., Mr. Sidharth Ray, Mr. Jeremy Cole and Ms. Ambika Srivastava were examined. The cross-examination of all the witnesses concluded on 8th December 2004 and the matter was listed for final arguments.

16. On 26th October 2005, the learned Arbitrator could not continue on account of health reasons. The parties then approached the High Court for him to be substituted. This was done by an order dated 10th November 2005 passed by the High Court. Another former Judge of the Supreme Court was appointed as a sole Arbitrator who then proceeded to pass the final Award dated 28th April 2008.

17. It must be mentioned at the outset that the following issues were framed for determination by the learned Arbitrator:

“(1).Whether the respondent has acted in breach of the agreement dated 19.2.2000 executed between the parties?

(2) Whether the claimants are entitled to their claims as detailed in various clauses of para 25 of the Claim Petition?

(3) Do claims 1 & 3 not fall within the arbitration agreement dated 19.2.2000?

(4) What amount, if any, are the claimants entitled to?

(5) Is interest payable on the amount found payable to the claimants or on any part of it, and if so, at what rate and from

which date?

(6) In what manner are the costs to be appropriated?

(7) Relief.”

The impugned Award

18. The said issues were answered as under by the learned Arbitrator in the final Award:

"(1) Whether the respondent has acted in breach of the agreement dated 19.2.2000 executed between the parties? - Yes.

(2) Whether the claimants are entitled to their claims as detailed in, various clauses of para 25 of the Claim Petition? -

(i) Respondent has not committed breach of the Agreement pertaining to overspill of signals in the Middle East.

(ii) Respondent has committed breach of the agreement regarding non-display of URL but there is no evidence as regards damages, if any, suffered by the claimants.

(iii) Claimant is entitled to loss of value of the rights suffered by the claimants on account of selling the radio rights to rediff.com which is Rs.17 lacs.

(iv) Loss suffered by the claimants on account of value of the rights which could not be sold or exploited in Sri Lanka Bangladesh, Nepal is US\$ 791,700/-.

(3) Do Claims 1 & 3 not fall within the arbitration agreement dated 19.2.2000? -

Claims 1 and 3 do fall within the arbitration agreement dated 19.2.2000.

(4) What amount, if any, are the claimants entitled to?

As stated in answer to issue No.2 above.

(5) Is interest payable on the amount found payable to the claimants or on any part of it, and if so, at what rate and from which date?

Interest is payable on the amount found so due @ 12% per annum from 30.9.2004, the date of the expiry of the agreement dated 19.2.2000 till the date of the award.

(6) In what manner are the costs to be appropriated?

Rs. 5 lacs payable to the claimants being limited to the share of fee paid by the claimants for 20 hearings as the claimants have succeeded in their claim partially.

(7) Relief.-

Claimants are entitled to Rs.3,33,68,000/- being damages/loss of profit with interest amounting to Rs. 1,43,48,240/- and Rs. 5,00,000/- totalling to Rs. 4,82,16,240/-."

19. The learned Arbitrator further directed as under:

"67. Accordingly I give my award in favour of the Claimant and against the Respondent Prasar Bharti for Rs.3,33,68,000/- being the amount to which the claimants are entitled with interest at the rate of 12% per annum from 30.9.2004 till the date of award amounting to Rs.1,43,48,240/- thus totalling Rs.4,77,16,240/- with cost amounting to Rs.5,00,000/-.

68. Claimant shall further be entitled to interest @ 12% per annum on the amount of Rs.3,33,68,000/- from the date of the Award till payment. No interest from the date of award would however, be payable if the amount awarded is paid within three months."

Submissions on behalf of PB

20. Mr. Rajeev Sharma, learned counsel appearing for the Petitioner submitted as under:

(i) The dispute under Claim No.1 pertained to internet rates which were subject matter of the agreement dated 18th February 2000. It did not pertain to the agreement dated 19th February 2000 which concerned multimedia rights. There was no arbitration clause in the agreement dated 18th February 2000. Hence this dispute was not arbitrable.

(ii) Clause 7.5 of the agreement dated 18th February 2000 did not specify that the URL had to be displayed by the Petitioner. A joint reading of the various clauses of the agreement dated 19th February 2000 showed that the URL had to be displayed by the Respondents. In fact the URL could have been inserted by the Respondents as well just as they were inserting advertisements in the feed. Para 3 of the letter dated 18th February 2000 made it clear that the responsibility for inserting the URL was that of the Respondents.

(iii) The Respondents had set up a fictitious agreement with Sports.com and no such deduction as claimed was made by Sports.com.

(iv) Since the URL was for the benefit of PB since it was that of the official website of PB, the non-display could not have caused any loss as such to the Respondents. The documents filed by the Respondents showed that the website was being maintained by the sub-contractors. Therefore, the allegation that the Respondents lost an opportunity to licence the package of

the website multimedia rights for four years was incorrect. The Respondents had made substantial earning from the exploitation of such rights and, therefore, the claim for losses in that regard was untenable. In any event, the Respondents could not produce proof of the actual loss. They withheld the figures of earning and of the various contracts entered into by them pursuant to the agreement dated 19th February 2000 and an adverse inference has to be drawn against the Respondents.

(v) Between 11th December 2000 and 29th November 2001 an injunction granted by the Delhi High Court against the display of the URL was in force. This amounted to a *force majeure* situation for which PB could not be held liable. The URL was in fact displayed during the earlier and subsequent periods. Reliance is placed on the decision in ***Food Corporation of India v. Surana Commercial Co. 2003 (8) SCC 636*** where it was held that where the original agreement and the supplementary agreement were different the said agreements had to be treated as independent contracts.

(vi) The finding of the learned Arbitrator that Claim No.3 fell within the arbitration clause was also contrary to the contract between the parties. The said claim was traceable to Clause 2.3 of the agreement dated 18th February 2000 which did not contain an arbitration clause. The express language of Clauses 3.4 and 3.6 of the agreement dated 19th February 2000 specifically excluded internet right whereas Claim No.3 reiterated to audio streaming on the internet. The dispute was, therefore, covered by Clause 2(iii) of the agreement dated 18th February 2000.

(vii) Further CW-3, a witness on behalf of the Respondents stated in answer

to Clause No. 47 that the right to carry audio streaming on the internet was an internet right. It could not, therefore, be said that the claim arose from the Clauses 3.4 and 3.6 of the agreement dated 19th February 2000 which excluded internet rights. Thus the findings recorded by the learned Arbitrator were contrary to the agreement between the parties. Further there was a document tendered and accepted as CW-1/R-4 which an earlier agreement excluded between the parties in October 2000 which provided that the internet rights would include live streaming of video, audio and text recording. For some reasons, the learned Arbitrator did not refer to the said document which was a material document.

(viii) Mr. Sharma also questioned the basic premise of the conclusion of the learned Arbitrator in respect of Claim No.3 that caused audio streaming was available on the internet, the value of the radio rights was destroyed. It is submitted that the theory that the internet became a substitute for commentary on the radio is too far-fetched and baseless.

(ix) Mr. Sharma also questioned the quantification of damages under Claim No. 3 and submitted that it was based on no evidence whatsoever. The damages awarded were contrary to the terms contained in Clause 2(iv) of the agreement dated 18th February 2000 which provided that the revenue was to be shared in equal proportion between the parties. The learned Arbitrator having taken Rs.2.42 lakhs as the revenue for one month erred in awarding the whole amount to the Respondents. In any event, the Award was not based on the proof of actual loss.

(x) Further it is pointed out that the award of damages was granted for a

period even prior to the alleged breach. It is submitted that by entering into the agreement dated 26th March 2001, PB had not committed breach. The agreement was entered into between the parties on 19th February 2000 and by 20th March 2001 one year had already gone by. In para 54 of the impugned Award, the learned Arbitrator himself noted that the Respondents had not adduced any evidence in regard to their attempts to licence the rights and their failure to do so. Therefore, the award of damages was clearly contrary to the fundamental policy of the Indian law which required damages to be given only on proof of actual loss.

(xi) The Respondents failed to produce records of sale of radio rights prior and subsequent to the alleged breach. The amount of Rs.1 crore mentioned in para 54 of the impugned Award was the internet licence fee payable by the Respondents and not receivable by them.

(xii) Mr. Sharma submitted that the expression 'multimedia and internet rights' was already spelt out clearly in the contract and, therefore, there was no need to travel beyond the said documents to understand its meaning. It is submitted that the finding recorded for Claim No.3 was based on no material, was conjectural and contrary to law.

(xiii) As regards Claim No.4, it is submitted that there was no provision in the agreement dated 19th February 2000 which was brought on account of the separate agreement that PB had with the MEN. That agreement only pertained to distribution of two encrypted channels namely DD Sports and DD channel. On the contrary, the agreement dated 19th February 2000 entered into between the Respondents gave the Respondents multimedia

rights in certain cricketing events.

(xiv) In any event no loss was caused to the Respondents by the distribution of the decoders in terms of the agreement between MEN and PB. It was not as if the distribution of the decoders made signals available in Nepal, Bangladesh and Sri Lanka. There was an eventuality of overspill of the signals since admittedly a substantial overspill of the signals were freely receivable in Nepal, Bangladesh, Sri Lanka etc. Thus the submission that the distribution of decoders caused immense loss to the Respondents was untenable.

(xv) The documents produced by the Respondents themselves showed that the rights for the entirety of Asia stood sold to Pacific Century Convergence India Ltd. ('PCCIL'). The MoU dated 15th September 2000 recorded that the BCCI was the owner of the rights in respect of cricket matches organised by BCCI "for the entire area of Asia." Therefore, the case of the Respondents that they could not sell the rights for the aforementioned territories was clearly false. PCCIL was neither a subsidiary nor a licensee of Respondent No.1. CW-1 as well as CW-2 claimed ignorance of the incorporation of PCCI. The award of damages for the territory of Nepal was based on no evidence.

(xvi) During the arbitration, no offer for Nepal was produced and this in fact demonstrated the falsity of the case of the Respondents. The letter dated 26th March 2001 on the basis of which damages to the tune of US\$ 500,000 was awarded did not bear the name and address of the addressee. The document was not even proved in the arbitration proceedings. In any event the letter

dated 12th June 2000 cannot be justified for the award of damages since at that time the agreement with MEN was not in existence. Even after the MoU dated 15th September 2001 is taken as an offer document it is significant that one year after the distribution of decoders by MEN since the distribution of decoders could have had no impact on the offer.

(xvii) The award of Rs. 3.3 crores as damages was based on unproved documents. The period for which the damages were awarded was in excess of the period of breach. CW-1 did state that the channel had been encrypted with effect from 15th November 2000 and de-encrypted with effect from 15th July 2003 after termination of the MEN's agreement in June 2003. He was not cross-examined on this aspect and yet the learned Arbitrator proceeded on the assumption that the agreement had continued up to 30th September 2004.

(xviii) There was no material on record which could demonstrate that the population of Nepal, Bangladesh and Sri Lanka is one-sixth that of India. In any event this was totally irrelevant for determining damages to be paid by the Petitioner to the Respondents. The learned Arbitrator proceeded on the assumption that 1/6th of the revenue receivable by PB under the agreement with MEN should be payable to the Respondents. The agreement with MEN was for the distribution of DD Sports and DD News Channels throughout the year for a four year term whereas the agreement with the claimant was for 27 days of cricket in a year. How could a year-long agreement be the basis for determining of damages for 27 days of cricket? The Award was conjectural and based on no evidence.

Submissions on behalf of the Respondents

21. In reply to the above submissions, Mr. Anish Dayal, learned counsel appearing for the Respondents submitted as under:

(i) The scope of interference by this Court with an Award in exercise of its powers under Section 34 of the Act is extremely limited. Unless the Award is shown to be perverse or shocking to the judicial conscience it ought not to be interfered with. It was not possible for the Court to re-appreciate the evidence and interfere with the Award only because a different view is possible of the same evidence. Relying on the decision in ***Associate Builders v. DDA (2015) 3 SCC 49*** and ***NHAI v. ITD Cementation (2015) 14 SCC 21*** it was submitted that even in the matter of interpretation of the contract the learned Arbitrator's view was final unless it was so improbable so as to render it perverse.

(ii) On merits it is submitted that the learned Arbitrator has comprehensively dealt with each of the issues raised on behalf of PB in the present petition. The factual findings have not been shown to be perverse or contrary to the record.

(iii) It is submitted that the agreement dated 18th February 2000 was "concurrent" with the main agreement dated 19th February 2000. Clause 7.5 of the agreement dated 19th February 2000 finds a reflection in the letter dated 18th February 2000 showing concurrency and overlap. At least one of the two witnesses of PB accepted that the two agreements were not independent of each other and that the agreement dated 18th February 2000

would not have been effected in the absence of the agreement dated 19th February 2000. It is submitted that there was a subsequent letter dated 22nd February 2000, which was referred to by the learned Arbitrator, and which mentioned that the letter dated 18th February 2000 as a side letter to the agreement dated 19th February 2000.

(iv) Claim No. 3 arose out of the breach of the exclusive multimedia rights given to the Respondent under Clauses 3.4 and 3.6 of the agreement dated 19th February 2000. Thus the Claims 1 and 3 were indeed arbitrable.

(v) As regards Claim No.4, it is submitted that the learned Arbitrator referred to the public notice given by PB and held that it was “completely determinative of the fact that the audio streaming right was a multimedia right for which the Respondents had to be approached by a potential licensee and did not form part of the internet rights.” Further various letters addressed to PB by the Respondents as regards the rediff.com were not responded to by PB.

(vi) It is denied that Rs.4.5 lakhs being the value of the deal between PB and the rediff.com for licensing of audio streaming was used by the learned Arbitrator as a benchmark for the minimum potential value that this right could have. The loss was calculated initially on the basis of the minimum benchmark. The fact that there was agreement was sufficient to determine that there was a breach committed by PB. The letters by the Respondents relating to various offers from neighbouring countries were merely indicative of the failed opportunities of the Respondents.

(vii) The method of quantification of the damages under Claim No. 4 was on the basis of the potential values as projected by the Respondents and taking Nepal as 1/6th that of Bangladesh. A comparison of two separate methods of calculation, one based on PB's documents and the other on the basis of the Respondents' documents explains how the Arbitrator arrived at the calculation. There was nothing improbable in the said determination.

Scope of the powers under Section 34 of the Act

22. Before commencing the examination of the above submissions, it is necessary to recapitulate the legal position regarding the scope of the Court's powers of judicial review of an arbitral Award under Section 34 of the Act.

In *Associate Builders v. Delhi Development Authority* (*supra*), the Supreme Court summarised what constituted the fundamental policy of Indian law. In that process, it extracted certain passages from the earlier decision in *ONGC Ltd. v. Western Geco International Ltd.* 2014 (9) SCC 263. In para 40 of that judgment, it was observed as under:

“40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.”

23. A reference was also made in *Associate Builders v. Delhi Development*

Authority (supra) to the decisions in ***Kuldeep Singh v. Commissioner of Police (1999) 2 SCC 10*** and ***P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594***, where it was reiterated that the Court does not sit in appeal over the Award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. It was reiterated that the Award could be challenged only on the grounds mentioned under Section 34(2) of the Act. *Inter alia* it was observed that “an Arbitral Tribunal must decide in accordance with the terms of the contract, but if any arbitrator construes a term of the contract in an unreasonable manner, it will not mean that the Award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.” It was further reiterated that “once it is found that the arbitrator's approach is not arbitrary or capricious, then he is the last word on facts.” The Supreme Court also reiterated that “an award can be said to be against justice only when it shocks the conscience of the Court.” The Court observed that it is settled law that where a finding is based on no evidence, and the AT takes into account something irrelevant to the decision which it arrives at, or ignores vital evidence in arriving at its decision, such decision would be termed as perverse.

24. In ***Associate Builders v. Delhi Development Authority (supra)***, the Supreme Court has emphasised that on questions of fact, the view of the learned Arbitrator would be final. The following observations in the said decision are relevant:

“It must clearly be understood that when a court is applying the

“public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrator’s approach is not arbitrary or capricious, then he is the last word on facts. ”

25. In *NHAI v. ITD Cementation India Limited* (*supra*) it was observed as under:

“25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair minded or reasonable person could do.”

Arbitrability of disputes

26. One of the first questions to be addressed was whether the dispute pertaining to internet rights was an arbitrable dispute. As noted by the learned Arbitrator there are in fact two agreements-one dated 18th February 2000 and the other dated 19th February 2000. The case of the Respondents was that both these documents constituted one agreement.

27. The learned Arbitrator has undertaken a detailed analysis of both the letters dated 18th February 2000 and the agreement dated 19th February 2000. Reference in particular has been made to Clause 7.5 of the agreement dated 19th February 2000 which talks of the official Doordarshan/TWI-

Starcon website URL address which would be included in all full frame graphics for the coverage of the matches. In fact the agreement dated 19th February 2000 was not meant to deal with internet rights at all. It is strange how the said clause has been inserted. The letter dated 18th February 2000 appears to have been drawn up more or less simultaneously with the letter dated 19th February 2000. The acceptance of the letter dated 18th February 2000 by the Respondents by appending their signature on 19th February 2000 is significant.

28. Mr. Mandloi did answer the Arbitrator's question as to the effect that the 19th February 2000 agreement had on the agreement dated 18th February 2000 effective. That answer clearly indicated that both these documents were to be read in continuation. The interpretation placed by the learned Arbitrator on a collective reading of both documents cannot be said to be so improbable as to render it impossible for any reasonable person to arrive at the same conclusion. It has been reasoned out by the learned Arbitrator that the letter dated 18th February 2000 is supplementary to the agreement dated 19th February 2000 and that the said letter "has no meaning or relevance on its own and its plain reading suggest that it was concurrent with the 19.2.2000 letter/agreement."

29. Further Clauses 3.4 and 3.6 have made reference to all other multimedia rights. Whole of Clause 3 is significant in this regard and reads as under:

"3. RIGHTS

The rights (hereinafter called "the Rights") granted by Prasar Bharti to TWI-Stracon hereunder are as follows:-

3.1 . Exclusive rights for marketing live/delayed television

signals for all territories outside the Union of India for all forms of television including terrestrial broadcast, pay per view, cable and satellite (free to air and subscription).

3.2 Exclusive rights for marketing radio rights for all forms of radio signals outside the territories of Union of India excluding the territories of the United Kingdom.

3.3 Rights of marketing clippings and highlights of the matches in all territories.

3.4 All other multi-media rights during the term including but not limited to in-flight, home video, laser disk etc. However, internet rights are excluded and are being retained by Prasar Bharti

3.5 Direct Broadcast by Satellite Television (encrypted or free to air).

3.6 Two way television and multi-media (any form) rights (except all internet rights which have been retained by Prasar Bharti).

3.7 All other broadcast media including non-theatrical exhibition and closed circuit transmission rights and Video-on-Demand.”

30. Then there is Clause 7.5 which spells out the obligation of the Petitioner carrying the website URL address.

31. The Court concurs with the finding of the learned Arbitrator that if the contention of the Petitioner was that the letter dated 18th February 2000 had no connection with the agreement dated 19th February 2000 was accepted it would render Clauses 7.5, 3.4 and 3.6 of the agreement dated 19th February 2000 pass through.

32. The above analysis of the clauses of both the letters dated 18th February 2000 and the agreement dated 19th February 2000 by the learned Arbitrator is certainly a plausible view to take and the Court finds no reason to interfere with the above analysis under Section 34 of the Act.

Claim 3

33. Now turning to the merits of the claims, it must be noticed at the outset that while the learned Arbitrator disagreed with PB as regards the arbitrability of Claim No. 1 he did not award any amount under Claim No.1 as he came to the conclusion that the Respondents had not adduced any proof regarding damages. This part of the Award has not been challenged by the Respondents.

34. Likewise as regards Claim No.2, the learned Arbitrator disagreed that there was any breach by the Petitioner as regards the overspill of signals. Further it was found that “what loss claimant suffered ultimately has not been made known by any concrete evidence.” Consequently, Claim No. 2 was also rejected.

35. Therefore on merits the challenge in the present petition is to the award of Claim Nos. 3 and 4 by the learned Arbitrator. To recapitulate, Claim No.3 pertained to the multimedia rights which according to the Arbitrator related to Clauses 3.4 and 3.6 of the agreement dated 19th February 2000. He disagreed with PB that the rights given to rediff.com were not multimedia rights and he agreed with the Respondents that they had been deprived of an opportunity of earning revenue. Despite holding that the Respondents had

not adduced any evidence regarding their attempts to licence the rights he awarded Rs.17 lakhs by way of damages by taking the amount of Rs.4.25 lakhs as the amount that could have been earned for one year.

36. It must be noticed at this stage that even before beginning to discuss the merits of the claims, the learned Arbitrator made certain general observations in para 22 of the Award as follows:

“...Nothing has been brought on record to show the state of affairs from the filing of the claims up to the time the agreement expired. Both the claimants are the limited companies and must be keeping books of accounts in the regular course of their business. Two types of claims have been made in respect of each of the four breaches mentioned in the statement of claim. One is the alleged actual loss *suffered* during the period prior to filing of the claim petition and second, which is in the alternative, for a breach of obligation which the claimants themselves quantified? How these figures have been arrived at midstream of the agreement is not clear. In support of the second type of claim it would appear that the claimants have examined Ms. Ambika Srivastava as an expert witness. Apart from her statement, claimants have not shown if their estimate of the value of loss was ever reflected in their books of accounts or ever brought to the notice of the respondent Prasar Bharti at any time earlier to filing of the claim petition or ever referred to in any of the correspondence exchanged between the parties. In the absence of any concrete facts, it is difficult to accept the proposition of the estimated value of the rights, e.g. multimedia rights. As regards the first part of the claim for loss during the working of the agreement and the resultant loss/profit after the conclusion of the agreement it would perhaps be more appropriate to refer to the following statement in the statement of claim relating to breach regarding non-display of official Doordarshan Cricket website on the live telecast of the matches:

The Claimants' sub-contractors/agents/partners who have been

involved in the operation, development of the website have also been repeatedly threatening to claim monies from the Claimants on account of the lack of promotion of the website and further claims/losses may be imminent. The Claimants therefore fully reserve their right under law to add, amend or consolidate their claim on account of losses incurred and damages resulting on account of the breach by the Respondent"

23. Claimants have not sought to amend their claim after conclusion of the agreement."

37. The above observation is significant because the running theme of the Award is the lack of evidence adduced by the Respondents to substantiate their claims for damages. The learned Arbitrator further observed in para 26 as under:

"26. Claimants have not indicated/stated what would have been the profit, which would have been reasonably foreseeable at the time the agreement was entered. Losses suffered on account of alleged lost opportunities have not been proved with any degree of certainty."

38. When it came to the specific claims, the position was no better. The Court takes up in seriatim Claim Nos. 3 and 4 in order to examine whether the approach of the learned Arbitrator attracted any of the grounds on invalidation spelt out under Section 34 of the Act.

39. On the merits of the breach complained of under Claim No.3, the learned Arbitrator observed that the stand of PB that the rights given to rediff.com under the agreement dated 21st March 2001 were not multimedia rights does not appear to be correct. The expert witness Ms. Ambika Srivastava made the following statement specific to the rights that were given to rediff.com where inter alia she stated:

“The marketing of audio rights to rediff.com clearly comes under delivery of multimedia rights. Given that audio streaming on the internet cuts across geographical segments, this would have resulted in erosion of the audio rights in the international territories too, considering that it was available free of cost.”

40. Ms. Ambika Srivastava was cross-examined but was unable to be persuaded to change her view. The relevant portion of the cross-examination reads as under:

“Question 46: I put it to you that right to carry streaming of audio and video is a internet right?

Ans. In my knowledge audio streaming can be done not just through the internet but through other medias as well.

Question 47: I put it to you that to carry audio streaming on the internet is an internet right?

Ans. I think you may be correct.”

41. Although learned counsel for PB urged before the learned Arbitrator that the above answers made it clear that carrying on audio streaming on internet is an internet right, the learned Arbitrator observed, and rightly, that the public notice given by PB stated that if licence holder of an internet right desires to have audio streaming then he would have to approach the Respondents for multimedia rights. In fact the relevant portion of the public notice in this regard reads as under:

“If the licence-holder further desires to have live/delayed streaming audio/video after obtaining the internet rights from Prasar Bharti, he would then have to approach the rights-holder for multi-media rights to get the streaming rights from the multi-media rights holder.”

42. It was for this reason that the learned Arbitrator held that “the agreement entered into by Prasar Bharati with rediff.com is clearly in breach of rights granted by the claimant.”

Estimate of loss

43. The difficulty was in estimating the alleged loss suffered by the Respondents as a result of the breach. To the question that the valuation of 5,00,000 USD as the loss suffered is conjectural, Mr. S. Ray the witness for the Respondents stated that the figure of 3 million USD was his ‘estimate as expert’. While PB failed to produce its agreement with rediff.com, the learned Arbitrator wondered why in terms of the said agreement PB agreed to charge Rs.4.25 lakhs from rediff.com whereas the public notice fixed the annual fee as Rs.25 lakhs. Then the learned Arbitrator acknowledged that “it remains difficult job to ascertain the loss occurred to the claimants on account of the agreement between Prasar Bharti and rediff.com.” It was also observed by the learned Arbitrator that “merely by stating that their rights have been jeopardized altogether claimants have not brought on record any evidence in support of that. The evidence would have been in the shape of their attempts to license of multimedia rights to internet licensees/sub-licensees and their failure to do so. There is no index to calculate the value of multimedia rights sold to internet licensees/sub-licensees. Moreover, the claimants were to get annual fee not exceeding Rs. 1 crore per annum for all users of internet rights as may be prescribed by Prasar Bharti. Prasar Bharti has not prescribed any such fee. If for one year share of multimedia rights could be 4.25 lakhs, for 4 years it would be Rs. 17 lakhs, to which amount

claimants would be entitled to.”

44. To the Court it appears that the learned Arbitrator has adopted the easy route of surmises and conjectures despite all the above observations making it abundantly clear that there was no credible evidence to go by. It was wrongly observed in the above paragraph that the sum of Rs.1 crore was to be received by the Respondents. That in fact was the internet licence fee that had to be paid by the Respondents. Therefore, that was not any reasonable yardstick to go by. The next factor which seems to have been completely overlooked is that the agreement with rediff.com was only for one year from 21st March 2001. The Respondents failed to adduce any evidence as regards their licence to rights and their failure to do so. In that view of the matter, projecting a figure of Rs.4.25 lakhs for four years was plainly erroneous and not supported by any evidence whatsoever. While the finding about PB being in breach of its obligations under the agreement by granting rediff.com audio streaming rights for one year cannot be said to be contrary to the evidence on record, the determination of Rs.17 lakhs as the loss suffered by the Respondents which has to be compensated was wholly unsupported by any evidence whatsoever. Consequently, this part of the impugned Award based on surmises and conjectures and not on evidence which could be considered to be credible, is opposed to the fundamental policy of Indian law and cannot be sustained.

Claim 4

45. Turning to Claim No.4 awarding the exclusivity of the rights to mark television broadcasts for all territories outside India, the question was whether by the agreement dated 16th July 2000 appointing MEN as the sole

and exclusive distributor and promoter for DD Sports channel and thereby distributing television signal decoders which could allow viewership in Sri Lanka, Bangladesh and Nepal to receive an encrypted DD Sports channel or any deliberate breach committed by the Petitioner. The learned Arbitrator analysed the agreement dated 6th July 2000 entered into between the Petitioner and MEN. The learned Arbitrator found that the BCCI organised international cricket events having been given the prime position. It was then concluded that “to enter into such an agreement covering the countries of Sri Lanka, Bangla Desh and Nepal for which exclusive TV rights vested with the claimants, was itself a wrongful act on the part of the Prasar Bharti.” The agreement did value the rights of the claimants.

46. Whatsoever PB earned from this agreement would lawfully belong to the claimants. The case of PB is that prior to 15th September 2000 the signals of the DD Sports channel were transmitted in a coded format. Prior thereto the said channel was free to air. There was a substantial overspill of signals. It was noted that the channels were freely available in Nepal Bangladesh and Sri Lanka. This inevitability of overspill was accepted by the learned Arbitrator in dealing with Claim No.3. Thus it was not as if that the decoders submitted to MEN made available the signals in Nepal, Bangladesh and Sri Lanka. As a result of the encryption only the free availability of signals got restricted.

47. However, the Court is not satisfied of the bonafides of the action of PB in entering into such an agreement with MEN and distributing the decoders which would enable the receipt of encrypted DD Sports channel in Nepal,

Bangladesh and Sri Lanka etc., when in fact the exclusive television rights for those territories were granted to the Respondents. Therefore, as regards the commission of breach of the agreement by PB is concerned, the finding of the learned Arbitrator cannot be said to be erroneous. It was a view supported by the evidence brought on record.

48. The difficulty as regards Claim No.4 is not so much as the finding of breach by PB but the consequential determination of the alleged loss suffered by the Respondents as a result thereof. It is here that the learned Arbitrator appears to have again indulged in an entire exercise of surmises and conjectures. In this regard, the following observations in para 64 of the impugned Award became significant. In the first place, the learned Arbitrator considered it to be “reasonable to assume” that the agreement with MEN “worked its full tenure” up to 30th September 2004. The learned Arbitrator went by the projected revenue in Annexure II to the said agreement with MEN as Rs.2080.50 lakhs. The learned Arbitrator then proceeded in the following manner:

“This will be for whole of India and Sri Lanka, Bangla Desh and Nepal. Population of these countries is almost 1/6th of that of India. Earning of both Prasar Bharti and MEN from the agreement with- MEN for these countries would therefore be 1/6th of Rs.2080.50 lakhs and would come to approximately Rs.3.46 crores. First I was drawing the idea that claimants would be entitled to the earnings made by Prasar Bharti under the agreement with MEN. But then why should claimants should have been paid for the earnings of MEN. Thus the total earning under the agreement of Prasar Bharti with MEN would rightfully belong to the claimants and this amount is Rs.3.46 crores.”

49. The Court is unable to understand the true purport of the last three sentences. First, the learned Arbitrator appears to have proceeded on the basis that the Respondents would be entitled to all the earnings of the Petitioner under the agreement with MEN. The sentence “But then why should claimants should have been paid for the earnings of MEN” does not appear to logically flow from ending that has been discussed before the said sentence. The sentence that follows “Thus the total earning under the agreement of Prasar Bharti with MEN would rightfully belong to the claimants” also does not flow from what has been discussed earlier in the said paragraph.

Damages on surmises

50. It is not understood how merely on the basis of population it could be presumed that $1/6^{\text{th}}$ of the total projected revenue would be that of India. The logic gets even more curious in the next paragraph when the learned Arbitrator observed as under:

“65. Since I have adopted the principle of population in respect of the countries, the population of Nepal is $1/6^{\text{th}}$ of that of Bangla Desh. It could well be equal to that of Sri Lanka. It is a bit surprising when the complainant say that population of Nepal is same as Bangla Desh. Since the value of TV rights for Bangla Desh in MOU aforesaid, is given as US\$250,000.00, I will take $1/6^{\text{th}}$ of figure for Nepal which would come to US\$ 41.7 thousand if I total all these figures of Bangla Desh (US\$ 250,000.00), Sri Lanka (US\$500,000.00) and Nepal (US\$ 41.7 thousand), it would be US\$ 791.700 thousand. In terms of Indian rupees the exchange rate would be as on the date of the award. If I take exchange rate of 1 US\$ = Rs.40/-, in terms of Indian rupees US\$ 791700 would be equal to Rs.3,16,68,000/- quite similar to the earnings under the agreement dated 6.7.2000 between Prasar Bharti and MEN. I would therefore,

accept loss suffered by the claimants on account of this agreement between Prasar Bharti and MEN as US\$791700.”

51. The entire discussion in this regard appears to be again based on surmises and conjectures where the learned Arbitrator has simply linked up the population figures with the possible earnings as a result giving away all broadcast rights on television. How this could be even a rational yardstick is unable to be understood.

52. There are no answers from the Respondents to the point urged by PB that the stand of the Respondents about being unable to sell rights for the territories of Nepal, Bangladesh and Sri Lanka stood falsified by the MoU dated 15th September 2001 entered into by the Respondents with PCCIL in terms of which the rights for the entirety of Asia stood sold to PCCIL. As wrongly presumed by the learned Arbitrator, PCCIL was not a subsidiary or licensee of Respondent No.1. When CW-1 was asked about PCCI he claimed not to know anything about it. Likewise, CW-2 also denied any knowledge of PCCIL. Therefore, the observation of the learned Arbitrator that PCCIL was a subsidiary/licensee of Respondent No.1 was based on no evidence at all. The long and short of it was that no evidence was placed by the Respondents to show that they were unable to sell the rights for Nepal, Bangladesh or Sri Lanka. It is not possible to accept the approach of the learned Arbitrator in linking up the population figures with the possible earnings as a result of television broadcast rights for these territories.

53. Reference was also made to a letter dated 12th June 2000, which as pointed out by learned counsel for the Petitioner, appears to be doubtful.

There was no rational basis for the Award of a substantial sum of Rs.3.3 crores as damages. This part of the Award is based on no evidence and cannot, therefore, be sustained in law. It is opposed to the fundamental policy of Indian law thus attracting invalidation under Section 34(2)(b)(ii) of the Act.

Conclusion

54. The net result of the above discussion is that the impugned Award dated 28th April 2008 is upheld to the extent that it finds the Petitioner in breach of the agreement dated 19th February 2000 regarding non-display of URL and in breach of the exclusivity clause regarding territories outside of India by entering into the agreement dated 6th July 2000 with MEN. However, the impugned Award to the extent it awards the Respondents Rs.17 lakhs towards loss suffered as a result of non-display of URL and 791700 USD on account of the territorial rights which could not be sold or exploited in Sri Lanka, Bangladesh or Nepal is hereby set aside. Therefore, the question of paying any interest on the said sums is also hereby set aside. As far as apportionment of costs is concerned, the Respondents having fact succeeded partially with that part of the Award is not interfered with.

55. As a result the impugned Award to the extent it entitled the Respondents to Rs.3,16,68,000 from Petitioner together with interest @ 12% per annum from 30th September 2004 till the date of Award and further interest @ 12% per annum on the said sum till the date of payment are hereby set aside. The Award to the extent it grants the Respondents costs of Rs.5 lakhs limited to the share of fee paid by them for 20 hearings is left undisturbed.

56. The petition is disposed of in the above terms but in the circumstances with no order as to costs.

S. MURALIDHAR, J

APRIL 17, 2017

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