

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 31.05.2017

+ **O.M.P. (COMM) 233/2017**

STRACON INDIA LTD & ANR.

..... Petitioners

Versus

PRASAR BHARTI

..... Respondent

Advocates who appeared in this case:

For the Petitioners : Mr Anish Dayal and Mr Siddharth Vaid.

For the Respondent : Mr Rajeev Sharma.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') *inter alia* seeking to partially set aside the arbitral award dated 26.12.2016 (hereafter 'the impugned award') to the extent that the claim of the petitioners for refund of US\$ 9.72 million as pro-rata reduction of consideration paid for the non-availability of two out of nine cricket series (Claim no. 1) was not accepted.

2. The Board of Control for Cricket in India (hereafter 'BCCI') entered into an agreement dated 25.09.1999 (hereafter 'the BCCI Agreement') granting exclusive and full rights and licence to Prasara Bharti to telecast cricketing events worldwide comprising of domestic and international matches played in India and conducted by BCCI for a period of five years with effect from 01.10.1999. Prasara Bharti was also conferred full rights to assign or sub-let/sub-license programming to any Indian or international

broadcasting company to ensure maximum coverage of the cricket matches.

3. Pursuant to the BCCI Agreement, Prasar Bharti invited bids for the marketing of airtime in India and abroad of the Cricketing Events. The bid of the petitioners was accepted and Prasar Bharti issued a letter of acceptance dated 04.02.2000. Thereafter, parties entered into an agreement dated 19.02.2000 (hereafter 'the Agreement') whereby the petitioners were accorded the sole and exclusive global marketing rights including radio rights for all territories outside India (except radio rights in the United Kingdom and internet rights) in respect of the Cricketing Events to be conducted by BCCI in the country. Thus, in terms of the Agreement, the petitioners acquired the bundle of rights for a total consideration of US\$ 43.75 million.

4. Five percent (5%) of the total consideration was paid on 15.02.2000 and the remaining sum had to be paid in five instalments as set out under Clause 9 of the Agreement. In terms of the Agreement, the petitioners were required to submit an unconditional and irrevocable bank guarantee for a value of 15% of the total consideration as agreed, on or before 23.02.2004. The Agreement was to remain valid upto 30.09.2004 commencing from the date when the aforesaid bank guarantee was furnished, that is, 01.01.2000.

5. The Agreement stipulated that Prasar Bharti would deliver Cricketing Events conducted by BCCI in India during the term (that is, 01.01.2000 to 30.09.2004) of the Agreement. In terms of Clause 4(b) of the Agreement, Cricketing Events would comprise of a minimum of twenty seven days of international cricket in each cricket season to be telecast live

and the same number of highlights for at least an hour each for each day of the matches.

6. Disputes arose between the parties in regard to the non-delivery of the Cricketing Events as indicated in Annexure A to the Agreement. The petitioners claimed that out of the nine cricket series as agreed, Prasar Bharti only provided seven. The series between India and Pakistan, originally scheduled for February/March 2004 stood cancelled (later scheduled for March/April 2005) and the series between India and Australia, originally scheduled to commence in September 2004 later commenced in October 2004, that is, after the expiry of the term of the Agreement. In addition, the petitioners also claimed compensation with respect to the shortfall of 17 cricketing days from the contracted minimum, in 3 out of 5 cricketing seasons between September 2000 to September 2004.

7. A series of communication were exchanged between the parties for restructuring of the payment schedule. As the negotiations failed, petitioners invoked the arbitration clause. Meanwhile, the petitioners also moved this Court under Section 9 of the Act (OMP 375/2003) for protection against the payment of US\$ 6.56 million out of the total balance consideration of US\$ 9.84 million payable on 30.09.2003. By an order dated 26.09.2003, the petitioners were directed to deposit US\$ 6.56 million in this court. The arbitration proceedings resulted in an award dated 31.08.2004 wherein Justice B N Kirpal (Retd.), as the sole arbitrator, held the claims to be pre-mature. He held that the claims could be settled at the stage of final accounting. The arbitrator further directed the release of the amount lying with the court in favour of Prasar Bharti.

8. Thereafter, the petitioners again approached this court under Section 9 of the Act (OMP 438/2004) to protect the amounts in dispute. This court, by an order dated 30.11.2004 directed that US\$2.18 million be deposited in this court.

9. Meanwhile, on 24.12.2004, Prasara Bharti invoked the bank guarantees furnished by the petitioners. This led the petitioners to file an application I.A. 8713/2004 (in OMP 438/2004) for orders restraining Prasara Bharti from encashing the bank guarantees. By an order dated 21.02.2005, the amount of US\$ 2.18 million with accrued interest was directed to be released to Prasara Bharti. Further, the petitioners were allowed to withdraw US\$ 3.93 million along with accrued interest and ₹11,61,03,750/- with accrued interest was released to Canara Bank. By the same order, Justice B N Kirpal (Retd.) was appointed as the sole arbitrator to adjudicate the disputes between the parties. On account of personal difficulties, Justice B N Kirpal (Retd.) withdrew from the arbitration proceedings and by an order dated 20.02.2006, this court appointed Justice D P Wadhwa (Retd.) in his place.

10. Before the arbitral tribunal, the petitioners raised the following claims:-

“(A) Pass appropriate orders and directions to the Respondent to pay an amount of US\$ 9,722,222 to the Claimants; and

(B) Pass appropriate orders and directions to the Respondent to pay an amount of US \$ 5,509,259 to the Claimants; and

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"32. The Claimants are entitled to a payment of said amounts from the Respondent along with interest from the time that the same have been paid out by the Claimants at the rate of 18% per annum, or as the Ld. Sole Arbitrator may decide under Section 31 (7) of the Arbitration Act 1996."

11. The petitioners premised their claim (Claim no.1) for US\$ 9,722,222 on the basis that Prasara Bharti had agreed to provide nine cricket series but had only provided seven and, therefore, the petitioners claimed that they were entitled to a pro-rata reduction in the consideration as agreed. In terms of the Agreement, the consideration payable was agreed at US\$ 43.75 million which would work out to be US\$ 4.86 million per series. The second claim of the petitioners (Claim no.2) for a sum of US\$ 5,509,259 was also for reduction in the consideration payable as, according to the petitioners, Prasara Bharti had agreed to provide a minimum of 27 days of International Cricket in each cricketing season and there was a shortfall of 17 days.

12. The petitioners state that Prasara Bharti was obliged to provide a minimum of 135 days of international cricket for the consideration of US\$ 43.75 million in the Agreement which worked out to US\$ 32,40,740 per day and US\$ 5,509,529 for 17 days.

13. The arbitral tribunal considered the aforesaid claims and concluded that the petitioners were entitled to reduction for consideration payable under the Agreement on a pro-rata basis as there was a shortfall in the cricketing events provided to the petitioners. The question that remained to be addressed was as to how the quantum of such reduction in consideration was to be computed.

14. The arbitral tribunal noted that Claim no.1 was premised on the basis that the entire consideration of US\$ 43.75 million was for nine cricket series while Claim no.2 was premised on the basis that the entire consideration was based on Prasar Bharti providing 135 days of international cricket. The arbitral tribunal was of the view that if the entire consideration was held to be applicable for nine cricket series then there could be no question for the entire consideration being ascribed to the number of days of international cricket as claimed by the petitioners (claimants therein) for computing Claim no.2.

15. After considering the above, the arbitral tribunal held that the obligation to provide a minimum of 27 days of international cricket in each cricketing season as contemplated under Clause 4(b) of the Agreement also subsumed the commitment for providing Cricketing Events as contemplated under Clause 4(a) of the Agreement. He interpreted the Agreement and held that the word "series" was a misnomer and Prasar Bharti was required to provide either the minimum number of days of matches or number of days of international cricket. Accordingly, the arbitral tribunal assessed the reduction of consideration under the Agreement on a pro-rata basis, with reference to the shortfall in the minimum number of days of international cricket. The arbitral tribunal accepted that there was a shortfall of 17 days and thus, awarded a sum of US\$ 5,509,259 in favour of the petitioners (claimants therein) $[(US\$ 43.75 \text{ million} \div 135) \times 17]$.

16. Mr Dayal, learned counsel for the petitioners, had contended that the conclusion of the arbitral tribunal is plainly contrary to the plain language of Clause 4(a) read with Clause 9 of the Agreement. He contended that the

expression "Matches" was defined in terms of Clause 4(a) and, therefore, the arbitral tribunal had to calculate the reduction in consideration on the basis of shortfall in the number of cricket series agreed to be provided by Prasar Bharti.

17. It is plainly apparent that the impugned award turned on the interpretation of Clauses 4 and 9 of the Agreement. It is well settled that the question as to interpretation of an agreement falls squarely within the jurisdiction of the arbitral tribunal and notwithstanding that such interpretation is erroneous, the same would be binding on the parties.

18. The Supreme Court in the case of *Mcdermott International Inc. v. Burn Standard Co. Ltd. & Ors.*: (2006) 11 SCC 181 had held as under:-

“112The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See *Pure Helium India (P) Ltd. v. ONGC* and *D.D. Sharma v. Union of India*).

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

19. In a recent decision in the case of ***Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49***, the Supreme Court had reiterated the above principle in the following words:-

“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 arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

20. The legislative policy of non-interference in arbitration matters finds statutory expression in Section 5 of the Act which expressly mandates that "*no judicial authority shall intervene except where so provided in this Part*". Thus, an arbitral award can only be set aside if any of the grounds as set out in Section 34(2) of the Act is established. It is now well settled that the court would not interfere with an arbitral award if the view taken by the arbitral tribunal is a plausible one.

21. In ***Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.:*** (2009) 10 SCC 63, the Supreme Court had observed as under:-

“....an error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by courts as such error is not an error on the face of the award”.

22. The Court further held that “*If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award*”.

23. In *Sumitomo Heavy Industries Limited v. Oil and Natural Gas Corporation Limited*: (2010) 11 SCC 296, the Supreme Court held as under:-

“.....The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn.* the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately 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 agreement. If he does so, the decision of the umpire has to be accepted as final and binding.”

24. In *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*: (2012) 5 SCC 306, the Supreme Court held as under:-

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.”

25. Bearing the above principles in mind, this court is now required to examine whether the interpretation of the arbitral tribunal is perverse and plainly contrary to the Agreement between the parties.

26. The recitals of the Agreement clearly indicate that the Agreement was entered into in the backdrop of the earlier agreement entered into between Prasara Bharti and BCCI (the BCCI Agreement). In terms of the BCCI Agreement, Prasara Bharti had secured exclusive and full rights for production and broadcasting of Cricketing Events from 01.01.2000 to 30.09.2004 (which was referred to in the Agreement as the "Term"). Prasara Bharti had invited bids for exclusive marketing of the said commercial rights for territories outside India. The petitioners had submitted a bid for the said rights, which was accepted by Prasara Bharti. It is important to bear in mind that Prasara Bharti was not conducting any Cricketing Events but had entered into the Agreement only to monetise part of the rights (mainly overseas rights) so acquired under the BCCI Agreement.

27. Clause 12 of the BCCI Agreement, which provided for the consideration payable by Prasara Bharti to BCCI is relevant. The material sub-clauses of Clause 12 are set out below:-

“12.1 The above lumpsum is based on the minimum of 27 days of international cricket involving member countries of ICC amongst nine last Match playing member countries and two OPIs status countries guaranteed by BCCI as mentioned in Clause 3 above. In the event of more than 27 days cricket being provided by BCCI, there will be no increase in the said lumpsum consideration amount. It is, however, expressly agreed that in the event of less than 27 days of international cricket being provided by BCCI in each cricketing season year, Prasara Bharati will be entitled to pro-rata reduction in the said consideration amount by way of deduction from the unpaid instalments or refund of the amount received by BCCI. However this deducted

amount shall be restored to BCCI if the number of cricketing days fell short of minimum 27 days in the previous year are made up in the next year. For this purpose accounting will be done each year.

12.2. In the last year i.e., 2003-04 final accounting will be done and in case 135 days@ 27 days per year) of International Cricket including 35 ODIs has been made available by BCCI during the 5 year period, the shall not make any claims for any days in excess of 135 days of international Cricket which would included 35 ODIs.”

28. It is apparent from the above that BCCI had committed to provide a minimum of 27 days of international cricket in each cricketing season year. Cricketing year was defined as commencing from 1st October and ending on 30th September of the next calendar year.

29. The arbitral tribunal had held that the BCCI Agreement and the Agreement (between Prasar Bharti and the petitioners) were standalone agreements and the rights and obligations of the parties would be determined on the basis of the contract entered into between the parties (the Agreement) and not the BCCI Agreement. There is no quarrel with the above finding. However, it was necessary to refer to the BCCI Agreement to understand the product in question; that is the rights that were available with Prasar Bharti, part of which formed the subject matter of transaction between the parties.

30. In terms of the Clause 2 of the Agreement, Prasar Bharti granted sole and exclusive global marketing rights including radio rights for all territories outside Union of India (with the exception of radio rights within the United Kingdom and also internet rights) in respect of Cricketing Events conducted by BCCI in India during the term of the Agreement.

31. Clauses 4 and 9 are relevant and are quoted below:-

“4. CRICKETING EVENTS:

For the purposes hereof, Cricketing Events shall mean and include the following:-

- (a) The Cricketing Events comprise all Domestic & International Matches played in India conducted by the BCCI during the term, and a list and proposed schedule of both the Domestic and International Matches ("the Matches") is annexed as Annexure A. Any change in schedules/timings of the Matches will not entitle TWI-STRACON for any claim for damages against Prasar Bharati.
- (b) The Cricketing Events, as being provided by Prasar Bharati, shall comprise of minimum twenty seven (27) days of international cricket in each cricket season that would be telecast live and the same number of highlights of at least one hour each for each day of the matches.

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9. CONSIDERATION

9.1 In consideration for the grant of the Rights, TWI-/STRACON shall pay to Prasar Bharati, the amount (hereafter "Consideration") of Forty Three Million Seven Hundred & Fifty Thousand US Dollars. Payable in Dollars, this consideration shall be payable subject to the provisions of Clause 9.4 and 9.5 hereof. The consideration shall be payable by TWI-STRACON in the following instalments:

- (a) 5% of the Consideration on 15.2.2000 (receipt of which is hereby acknowledged by PRASAR BHARATI).
- (b) The remaining balance amount of 90% of the consideration shall be paid in four equal annual

instalments each being 22.5% of the consideration as follows:

On or before 30 th September 2000	22.5%
On or before 30 th September 2001	22.5%
On or before 30 th September 2002	22.5%
On or before 30 th September 2003	22.5%

- (c) The balance 5% of the Consideration shall be paid to PRASAR BHARATI before 30th November 2004, following settlement of the final accounts to be carried out before 31st March 2004.

9.2 The final accounts for each year will be settled before 31st March of each year of the Term, inter alia, taking into account the revenue generated through any extra or additional matches.

9.3 If more or less International matches than specified in Annexure I are played during the term, the following shall apply:

9.4.1 If more international Matches are played, and coverage of such International match is delivered as stipulated in this Agreement, then TWI-STRACON will pay PRASAR BHARATI 50% of the net income from such additional matches. For these purposes "net income" shall mean sales income actually received by TWI-STRACON, after deduction of any applicable withholding tax and there will be a final reconciliation of amounts owing at the end of the term, as referred to in clause 9.2 above.

9.4.2 If less International Matches are played or coverage of the international matches stipulated in this agreement is not delivered, then the consideration for the Rights will be reduced on a pro rata basis.

9.5 All taxes / levies / charges/ duties whatsoever relating to or arising out of the payment of the Consideration or the share of Net Revenue as aforesaid, by TWI-STRACON

to Prasar Bharati shall be totally on the account of and shall be solely borne by TWI-STRACON.”

32. It is apparent from the above that there is no mention of any obligation to provide any series as claimed by the petitioners. In terms of Clause 4(a), Prasar Bharti was obliged to provide Cricketing Events, which were defined to comprise of all domestic and international matches played in India and conducted by BCCI during the term of the Agreement. The list of Matches and proposed schedule was annexed to the Agreement as Annexure A, which is set out below:-

Feb 2000 to Mar 2000	India v. South Africa
Oct 2000 to Nov 2000	India v. Sri Lanka
Feb 2000 to Mar 2001	India v. Australia
Dec 2001 to Jan 2002	India v. England
Feb 2002 to Mar 2002	India v. Zimbabwe
Oct 2002 to Nov 2002	India v. West Indies
Oct 2003 to Nov 2003	India v. New Zealand
Feb 2004 to Mar 2004	India v. Pakistan
Sep 2004 to Oct 2004	India v. Australia

33. In terms of Clause 4(b), it was agreed that the Cricketing Events shall comprise of a minimum of 27 days of international cricket in which cricketing season. It is apparent from the above that the expression "Cricketing Events" would comprise of all domestic and international matches (as specified in Clause 4(a)) played in India and conducted by

BCCI. Such cricketing events would comprise of minimum of 27 days of international cricket (in terms of Clause 4(b)).

34. The term "Cricketing Events" denotes "Domestic and International Matches" and thus it is clear that Prasar Bharti had agreed to provide matches comprising of at least 27 days of international cricket matches in each cricketing season.

35. In terms of Clause 9.3, if more or less international matches were played during the term, the provisions that followed (that is, Clauses 9.4.1 and 9.4.2) would apply. It is relevant to note that Clause 9.3 refers to international matches played during the term, therefore, the question whether more international matches or less international matches were played would have to be considered with reference to the term of the Agreement which comprised of five cricketing seasons. And, the question whether more or less cricket matches were played would have to be ascertained on a cumulative basis and not on an annual basis.

36. As stated above, the expression "Domestic and International Matches" has been used to define the expression "Cricketing Events" and thus, Clause 9.4.2 could be understood to mean that if the Cricketing Events do not take place or the coverage of the international matches is not delivered then the consideration would be reduced on a pro-rata basis.

37. As noted above, the arbitral tribunal had come to the conclusion that *"the word 'series' is misnomer as it has either to be no. of days of matches or no. of days of international cricket"*. It is apparent that the arbitral tribunal was of the view that the reduction in the consideration as contemplated under Clause 9.4.2 would have to be considered in reference

to the shortfall in providing Cricketing Events as committed under Clause 4(b) of the Agreement; that is, a shortfall in providing an aggregate of 135 days of international cricket during the term. The arbitral tribunal concluded that the shortfall in the number of days of international cricket would also encompass the shortfall in holding of the Cricketing Events as contemplated under Clause 4(a). This view cannot by any stretch be held to be perverse or patently illegal even if it is accepted that an alternate view as contended by the petitioners is possible.

38. The word "series" has not been mentioned in the Agreement and the only terms used are "International Matches", "Cricketing Events" and "Domestic and International Matches". Annexure A to the Agreement provides for Cricketing Events. However, Clause 4(a) also indicates that such events were only '*proposed*' cricketing events. It is also not disputed that the said list of events was altered as the India v Sri Lanka matches were replaced by India v Zimbabwe matches.

39. The arbitral tribunal had also noted that the duration of cricket matches was variable; whilst the duration of one-day international match is only a single day, the duration of test matches would be more than three days. The duration of series would also depend on the number of test matches and one day matches.

40. Considering the above, the arbitral tribunal interpreted the provision of Clause 9.4.2 of the Agreement to stipulate reduction in the consideration agreed in reference to the minimum number of days of international cricket and not "series" as claimed by the petitioners.

41. The scope of “Cricketing Events” to be provided to the petitioners is defined in Clause 4 and the language of sub-clauses of Clause 4 of the Agreement clearly indicates that the assurance of minimum number of Cricketing Events is stipulated in Clause 4(b) and not Clause 4(a).

42. The arbitral tribunal had considered the above and interpreted the Agreement to stipulate pro-rata reduction in consideration with reference to the minimum number of days of international cricket. This being a plausible view, no interference with the impugned award is warranted.

43. The petition is, accordingly, dismissed. All pending applications are also disposed of.

44. The parties are left to bear their own costs.

MAY 31, 2017
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VIBHU BAKHRU, J