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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 16.12.2019

Pronounced on: 13.03.2020

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O.M.P. (COMM) 225/2017

PRASAR BHARATI

..... Petitioner

Through

Mr. Rajeev Sharma, Mr. T. Rajat
Krishna and Mr. Saket Chandra,
Advocates.

versus

STRACON INDIA LTD. & ANR.

..... Respondents

Through

Mr. Ashish Dholakia, Mr. Anish
Dayal and Mr. Siddharth Vaid,
Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Present petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act') challenging an Award dated 26.12.2016 passed by the Arbitral Tribunal whereby Claim No. 2 of the respondents herein has been allowed. The Arbitrator has awarded USD 5,509,259 to the respondents along with interest *pendente lite* @ 18% p.a. from 19.10.2005 till the date of the Award. Cost of Rs.35,50,000/- has also been awarded. Award is also challenged with respect to rejection of all the Counter Claims of the petitioner.

2. Brief and necessary facts to decide the challenge in the present petition are that the petitioner herein is a Government Corporation and

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has Broadcasting rights in India. On 25.09.1999, a Broadcast License Agreement was entered into between Board of Control for Cricket in India (hereinafter referred to as 'BCCI') and the petitioner whereby the petitioner was granted exclusive and full rights and licenses to telecast Cricketing Events worldwide comprising of International Matches (Test Matches and One Day International) and Domestic Matches played in India. The Agreement was for a period of five years with effect from 01.10.1999. Petitioner was also given full rights to assign or sub-license the programming to any Broadcasting Company to ensure maximum coverage of the matches.

3. Pursuant to the BCCI Agreement, the petitioner invited bids for marketing of the cricketing events in India and abroad. The bid of the respondents was accepted and the petitioner issued a Letter of Acceptance on 04.02.2000.

4. Vide an Agreement dated 19.02.2000 (hereinafter referred to as 'Agreement'), respondents acquired from the petitioner sole and exclusive global marketing rights, including radio rights for all Territories outside India (except radio rights in U.K. and internet rights) in respect of the 'Cricketing Events' to be conducted by BCCI in India. The term of the Agreement was from 01.01.2000 to 30.09.2004.

5. The total consideration for these rights to be paid by the respondents to the petitioner was USD 43.75 Million, payable as set out under Clause 9 of the Agreement. 5% of the total consideration was paid on 15.02.2000 in terms of Clause 9 and the remaining sum had to be paid in five installments. Respondents were required to submit an

unconditional Bank Guarantee for a value of 15% of the total consideration on or before 23.02.2004.

6. It is the case of the petitioner that BCCI had granted rights to the petitioner in respect of International cricketing events to be played in India between 01.10.1999 and 30.09.2004. It is further averred by the petitioner that when the Agreement was signed between the petitioner and the respondents on 19.02.2000, 20 days of Cricket had already been played in November-December, 1999 by way of India-New Zealand Cricket Series. Thus, the petitioner was only obliged to provide 115 days of cricket to the respondents under the Agreement.

7. Petitioner further avers that while the obligation was only to provide 115 days during the five cricket seasons, the petitioner in fact provided 128 days. Notwithstanding that more than the requisite number of days had been provided, respondents raised false claims to the effect that only 7 series had been provided out of the 9 series under the Agreement. Respondents also made a false claim that there was a shortfall of 17 cricketing days.

8. Disputes arose between the parties regarding the provision of series mentioned in Annexure 'A' of the Agreement dated 19.02.2000 as well as the number of cricketing days under Clause 4(b) of the Agreement. It was the claim of the respondents that as against the 9 cricketing events agreed between the parties, petitioner only provided 7 series. The series between India and Pakistan, originally scheduled for February/March, 2004 stood cancelled and Series between India and Australia, originally scheduled in September, 2004 commenced in October, 2004 i.e. after the expiry of the term of the Agreement.

9. Subsequent to the negotiations having failed, respondents invoked the Arbitration Clause and also filed a petition in this Court under Section 9 of the Act being O.M.P. No. 375/2003. Apprehending that Prasar Bharti would not provide the last two series out of nine series mentioned in the Annexure 'A' to the Agreement, respondents had filed a petition under Section 9 of the Act seeking interim protection. Court by an order dated 26.09.2003 permitted the respondents to deposit USD 6.56 million, which was a balance payment from the total amount of USD 9.84 Million payable to Prasar Bharti for all the nine series under the Agreement. In the said order dated 26.09.2003, Court had noted the stand of the learned ASG that in the event of failure of Prasar Bharti to comply with Clause 4(b) of the Agreement, it shall refund the amount to the respondents within three months from the date of expiry of the Agreement. The order also refers to Clause 9.4.2 of the Agreement which provided for pro-rata reduction of the consideration, if less International matches from what was agreed upon, were played.

10. Thereafter, the arbitration proceedings started, which ended with an Award on 31.08.2004, holding that the disputes raised by the respondents were premature and should be settled at the stage of final accounting. According to the respondents, since the disputes were not settled, it filed another petition being O.M.P. 438/2004 to secure USD 2.18 Million payable by the respondents to Prasar Bharti, as last instalment. In compliance of order dated 31.11.2004, the amount was deposited in the Court. Prasar Bharti however invoked the Bank Guarantee under the Agreement, in December 2004. On I.A. bearing No.8713/2004 being filed by the respondents, vide order dated OMP(COMM) 225/2017

21.02.2005, Court ordered that USD 6.56 Million deposited by the respondents be released to them and USD 2.18 Million be released to Prasar Bharti, along with accrued interest in addition to USD 6.56 Million already realized through Bank Guarantees.

11. Vide the same order, Justice B.N. Kirpal (Retd.) was appointed as the Sole Arbitrator to adjudicate the disputes between the parties. However, on account of personal difficulties, the learned Arbitrator withdrew from the proceedings and by order dated 20.2.2006 the Court appointed the learned Arbitrator who has passed the Award assailed in the present petition.

12. Respondents filed their Statement of Claim and 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*
- (C) Interest in terms of Para 32 of the Statement of Claim, which is as under:-*

"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."

13. Petitioner herein was the respondent and raised the following counter claims, apart from filing a Statement of Defence:-

(i) pass an award in favour of the Respondent for US \$ 1.4765 million by way of compensation for the loss caused on account of the delayed payment of US \$ 6.56 million, along with further interest on the above amount of US \$1.4765 million @ 18% per annum from January 1, 2005 till date of realization.

(ii) direct the claimants to render complete accounts of their earnings from the sale/marketing of highlights/clippings of BCCI matches within India and direct the claimants to pay Rs. 3 crores to the respondent or such higher amount as may be found due on rendition of accounts, along with interest @18% per annum.

(iii) direct the claimants to render complete accounts of their earnings from audio/ video streaming of BCCI matches on the site dd.now.com or any other site and revenue earned from any other website /portal I Internet Service Provider to whom the claimants allowed access to the match footage whether for down linking or streaming and award a sum of US\$ 17 million or such higher amount as may be found due on rendition of accounts along with interest@ 18% per annum.

OR

In the alternative direct the claimants to pay a sum of Rs. 1 crore .

(@Rs. 25,00,000/- per year) towards the licence fee for the nonexclusive

Internet rights for four years, along with interest @ 18% per annum from the date each payment became due.

(iv) direct the claimants to render accounts of the revenue earned by them from the additional days of cricket provided to them and to pay US\$ 4.9456 million for the 13 additional days of cricket or such higher amount as may be found due on rendition of accounts along with interest @18% per annum from the date the said amount was earned.

OR

In the alternative direct the claimants to pay at least US\$ 4.18 million for the 11 additional days of cricket or such higher amount as may be found due on rendition of

accounts, along with interest@18% per annum from the date the said amount was earned.

(v) award costs of the proceedings to the respondent and pass such other order as deemed fit in the circumstances of the case.

14. The Arbitral Tribunal allowed Claim No. 2 of the respondents along with interest @ 18% per annum from 19.10.2015 till the date of the Award and rejected the counter claims of the petitioner. Operative part of the Award is as under :-

1. Claimant (Stracon India Ltd. & Trans World International Inc.) is entitled to US \$ 5,509,259 million equivalent to INR Rs.37,32,79,843/- from the Prasara Bharati, the Respondent.

2. Claimant will be entitled interest pendente-lite @ 18% per annum on the amount of US \$ 5,509,259 million (equivalent to INR Rs.37,32,79,843/-) from 19.10.2005 till the date of Award.

3. Claimant is entitled to cost amounting to Rs.35,50,000/-.

4. All the four claims made by the Prasara Bharati as Counter Claim are declined.

15. The contention of the learned counsel for the petitioner is that the Tribunal has rendered patently incorrect findings by holding that the Agreement between the petitioner and BCCI was a stand alone Agreement having nothing to do with the Agreement between the petitioner and the respondents. This is contrary to the specific terms of the Agreement dated 19.02.2000. The Agreement dated 19.02.2000 made specific mention of the BCCI Agreement and stipulated that the respondents would abide by it. For understanding the nature of the rights

granted under the 19.02.2000 Agreement, one had to necessarily look into the BCCI Agreement. This contention has now been upheld by a Co-ordinate Bench in an earlier judgment concerning a challenge to part of the same Award, by the respondents.

16. It is argued that the Tribunal has also erred in coming to a finding that the petitioner had to provide 135 days, but provided only 118 days and is thus liable to pay the claimed amount to the respondents. BCCI Agreement laid down that a 'cricketing season' is the period from 01st October of the year upto 30th September of the next year and Clause 4(b) of the 19.02.2000 Agreement provided that the petitioner would provide 27 days of cricket in each season. The contract was executed on 19.02.2000, i.e. in the middle of the season, yet the Tribunal applied the test to a full season instead of a part season, in the first year. The Tribunal has thus re-written the contract between the parties. The finding would have been correct if Clause 4(b) provided that the cricketing events shall comprise of 12 months or a part thereof. The Tribunal overlooked the fact that when the contract was entered into, 20 days of cricket had been played in October-November 1999 and had been marketed by the respondents under a separate agreement.

17. It is next contended that the Tribunal has further erred in holding that 10 days of cricket provided to the respondents comprised of India-Australia-New Zealand Triangular Series in October 2003 and the said series was not a part of the Schedule appended to the Agreement and had to be ignored to calculate the number of cricketing days. It is submitted that the respondents had themselves admitted that the 10 days of cricket covered by the Triangular series were a part of the Agreement and were

provided to them. The Tribunal has, therefore, ignored these vital admissions in their rejoinder to the Statement of Defence which is as under :-

“The alleged India-Australia-New Zealand Triangular Series was not a separate series as being contended by the Respondent, but was in fact a part of the India-New Zealand Series already provided for in the schedule and was in continuation of the India-New Zealand matches”

The same admission was reiterated in the rejoinder in paras 35 and 36. The respondents’ witness also admitted that the Triangular series was a part of the Agreement in its evidence by way of affidavit.

18. It is argued by Mr. Sharma, on behalf of the petitioner, that the petitioner had to provide only those cricketing events which were provided to it by the BCCI. This is clear by a reading of the Agreement dated 19.02.2000, relevant portions of which read as under :

"By a Broadcasting Licence Agreement dated 25th September, 199 made by and between BCCI and Prasar Bharati (hereinafter "BCCI"), Prasar Bharati had obtained exclusive and full rights for the production and broadcasting of the Cricketing Events starting from 1st January, 2000 to 30th September, 2004 (hereinafter 'Term') conducted by BCCI in the territory of Union of India upon the terms and conditions contained therein.

Pursuant to the BCCI Agreement, Prasar Bharati invited bids (hereinafter the "Bid") for the marketing of airtime in India and abroad of the Cricketing Events on the terms and conditions contained therein and the same is annexed hereto as Annexure-A.

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.

10. Sub-licence Period:

Subject to the provisions hereof and during the Term TWI-Stracon shall be entitled to sub-licence the Rights granted hereunder. Prasar Bharati will take up with BCCI that in case a series has started within the contracted period and is spilling beyond the terminal date i.e. 30th September, 2004, BCCI will extend the Doordarshan-Contract period to enable it to cover the full series. In case the benefit is provided by BCCI to Doordarshan, corresponding benefit will be passed on by Doordarshan to TWIStracon.

19.1 Compliance with BCCI Agreement:

TWI-Stracon has been notified of the terms and conditions of the BCCI Agreement and TWI-Stracon hereby undertakes and covenants that it shall not commit or cause to be committed, directly or indirectly, any breach of the terms of the BCCI Agreement so far as they relate to the exercise of the Rights by TWI-Stracon.

19. It is further argued that the Agreement clearly provided that the petitioner would provide 27 days of International cricket in each cricketing season to the respondents. The Agreement did not specify any minimum number of matches to be provided, since the petitioner was not

the host of 'Cricketing Events', but was only a Broadcaster. It is also argued that it was well known to the respondents that the petitioner would only provide 115 days of cricket as the 20 days of cricket had already been provided by BCCI prior to the Agreement dated 19.02.2000.

20. Learned counsel further argues that Clause 4 of the Agreement dated 19.02.2000 provided a proposed Schedule of Domestic and International Matches as Annexure 'A' to the Agreement and also that any change in Schedule or timings would not entitle the respondents to make any claim for damages. A conjoint reading of various terms of the Agreement would indicate that a list of proposed series to be played as provided by the BCCI was annexed to the Agreement. It was a 'tentative' list, subject to change. As an illustration, it is submitted that one of the series set out in the proposed list, was the India-Sri Lanka Series which was to be played in October-November 2000 but was called off and substituted by India-Zimbabwe series. This was provided to the respondents and accepted by them, without demur. Similarly, the Triangular series was played in October 2003, though not mentioned in the tentative schedule and the same was marketed by the respondents, in territories outside India.

21. It is argued that the Tribunal has erred in holding that there was a shortfall of 17 days of cricket under Clause 4(b) of the Agreement since the petitioner had provided 118 days as against the requirement of 135 days. Petitioner argues that the said finding is based on an erroneous understanding of the Agreement that 27 days of cricket were to be provided in each season, over 5 seasons. In fact, the petitioner was

obliged only to provide 115 days but it actually provided 128 days, which was thus in excess of what was required to be provided.

22. Per contra, learned counsel for the respondents submits that Clause 4(b) of the Contract between the parties provided that the Cricketing Events shall comprise minimum 27 days of International cricket in each cricket season. It is admitted between the parties that the term of the contract was from 01.01.2000 to 30.09.2004 and thus over a period of 5 seasons, petitioner was obliged to provide 135 days of cricket to the respondents.

23. It is next submitted by the counsel for the respondents that the petitioner is making a misconceived argument that the petitioner was liable to provide only proportionate number of days of cricket in the first season as the contract was signed on 19.02.2000 and thus the first season was only a part season. Thus, the cricket season according to the petitioner would comprise of 223 days only and not 365 days. It is argued that neither was this the case set up by the petitioner before the Arbitrator nor has it been pleaded as a ground in the present petition. It is thus impermissible for the petitioner to even raise such a ground in the present petition for the first time. Reliance is placed on the judgment in the case of *Union of India vs. Susaka Pvt. Ltd.* 2018 (2) SCC 182, *Organizing Committee, Commonwealth Games vs. PICO Deepali Overlays Consortium* 2016 (157) DRJ 122 and *Thonikkudam Bhagwati Mills vs. Reena Ravindra Khona* 2007 SCC OnLine Bombay 448 for the proposition that Court under Section 34 of the Act cannot be called upon to decide a matter afresh beyond the grounds set up before the Arbitral Tribunal.

24. In any case, it is argued by the respondents that the said submission of the petitioner is totally untenable. The BCCI Agreement clearly stated that if less than 27 days were provided in any one cricket season, the same could be made up in the subsequent year(s) as is evident from reading of Clause 12.1. It is further submitted that in the order passed by a Co-ordinate Bench of this Court in OMP (COMM) No.233/2017 where the respondents had challenged the Award, it has been held that Cricketing events have to be ascertained on cumulative basis and not on annual basis. Thus, merely because one season had a shorter duration due to the signing of the contract in February 2000, it did not take away the obligation of the petitioner to provide cumulative cricketing days i.e. 135 days. Further Clause 4(b) of the Contract specifies that 'minimum 27 days' would be provided in each season and thus 27 days of cricket is not the ceiling limit. Learned counsel further argues that it is the petitioner's own case that it provided 128 days of cricket over the term of the contract as opposed to its so called commitment to provide 115 days. By its own narration, the petitioner in some seasons provided more days of cricket than 27 while in some less than 27. Thus, the number of days in any one season was immaterial and what was significant was the cumulative number of days, over the entire term of the contract.

25. Learned counsel next contends that the argument of the petitioner that it was obliged to provide only 115 days cricket because the first season began in October 1999 and India-New Zealand Series had been played with 20 days of cricket in October-November 1999 itself is misconceived. It is submitted that the bids were invited for the period starting from 01.01.2000 and not from 01.10.1999. It did not mention the

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India-New Zealand 1999 Series in the list appended thereto for the matches which were to be played over the entire term. On the contrary, Annexure 'A' of the contract showed India-South Africa, February-March 2000 Series as the first series covered thereunder. It was not mentioned that the 20 days of the 1999 Series would be reduced for counting the total days of cricket in 5 seasons. The bidders naturally priced their bids on the terms mentioned in the Tender and the list appended thereto. The argument that the respondents had knowledge of the 1999 Series is of no consequence as the Tender could have been awarded to any party who may not have had personal knowledge of the said series. Bidders have to bid on the basis of the terms of the Tender and not on personal knowledge. Moreover the 1999 series was subject matter of a separate Tender issued in October 1999 and it can hardly be said in matters of Tenders that personal knowledge of the bidder would govern its terms and conditions.

26. It is further argued that the contract between the parties was a multi-million dollar commercial Agreement and if the petitioner intended to deduct the 20 days of cricket of 1999 series, it was obliged to have so stated in the Tender itself. Being a commercial contract, terms are to be construed as per their plain meaning as held in *Nabha Power Ltd. vs Punjab State Power Corporation Ltd.* 2018 (11) SCC 508. It is also contended that the contract was signed on 19.02.2000 but its commencement was ante-dated to 01.01.2000. If the intention was to include the 1999 series as a part of the contract then nothing prevented the petitioner from ante-dating the contract to commence from 01.10.1999. This clearly shows that the parties consciously chose to

make the contract effective only from 01.01.2000 and any cricket played earlier was not to be counted for computing 135 days over 5 seasons. It is also argued that throughout the 5 seasons, the petitioner did not issue any communication or corrigendum stating that it was obliged to provide only 115 days or that it would provide only 7 days of cricket in Season-1. It was only when the disputes arose between the parties that the petitioner for the first time raised the contention in arbitration that it was required to provide only 115 days of cricket.

27. Learned counsel for the respondents next contends that no doubt the Stracon Agreement flows from the BCCI Agreement, however, the terms of the two contracts are totally different. As an illustration, the BCCI Agreement does not specify the cricketing events or international matches that would be covered. However, the Stracon Agreement specifies the matches that would be covered thereunder and the 1999 Series do not form a part thereof. In this sense, the two contracts are standalone and not back to back.

28. It is next argued that Clause 4(a) of the Agreement stipulates the number of 'cricketing events' to be provided, while Clause 4(b) stipulates the number of cricket days. Respondents had made separate claims on account of shortfall in both. The Arbitral Tribunal has held that the obligation under 4(a) is subsumed in the obligation under 4(b) and this interpretation has been upheld by a Co-ordinate Bench of this Court vide its judgment dated 31.05.2017 passed in OMP (COMM) No.233/2017. Clause 4(a) makes reference to Annexure 'A' which in turn makes no reference to India-Australia-New Zealand 2003 ODI Series. The Arbitrator has rightly held that the said Triangular series was accordingly
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not to be counted for computing the days of cricket to be provided by the petitioner. In doing so, the Arbitrator has given meaning and effect to Clause 4(a) read with Annexure 'A'. This is a plausible view and should not be interfered by this Court under Section 34 of the Act. It is also argued that it is significant to note that BCCI Agreement specifically provided for Bilateral, Triangular and Quadrangular matches but the Stracon Agreement was restricted only to bilateral series and did not envisage the Triangular series. In fact it was the petitioner's own case before the Arbitrator that the Triangular series of 2003 was different from the India-New Zealand Series of October-November 2003.

29. Learned counsel for the respondents further contends that it did not infact derive any meaningful commercial benefit by telecasting the Triangular 2003 ODI Series. After acquiring the rights from the petitioner, respondents sold the same to its sub-licensees. Respondents could not commercially exploit the Triangular series in the manner they would have, if the ten days of cricket played therein had been fully sold and marketed as independent ten days of cricket. It is also argued that the Arbitrator having taken a plausible view on the interpretation of the terms of the contract, this Court would not in its judicial review interfere with the said interpretation, as held by the Supreme Court in *Associate Builders vs. DDA 2015 (3) SCC 49*.

30. Learned counsel for the petitioner has also made arguments on the rejection of its Counter Claims by the Arbitrator. Learned counsel for the petitioner submits that the Arbitrator erred in rejecting counter claim no.1 of the petitioner on the grounds that it had not proved the loss which occurred allegedly due to delayed payment of USD 6.56 Million by the

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respondents. Admittedly, the amount was payable by the respondents on or before 30.09.2003 but was actually paid on 24.12.2004. The fact that the withholding was wrong was established in the Award passed by Justice B.N.Kirpal, Sole Arbitrator on 31.08.2004 in a separate round of litigation. When the petitioner was deprived of this huge sum of money, for over 15 months, no further proof of loss was required.

31. Learned counsel for the petitioner assails the rejection of counter claim no.2 as being clearly contrary to law and the contract between the parties. The petitioner's counter claim no.2 pertained to the respondents telecasting highlights and clippings within India which according to the petitioner violated the terms of the contract and the claim was thus for rendition of accounts. It is argued that despite the rights having been granted to the respondents for territories outside India, the respondents marketed the highlights and clippings within the territory of India. Reliance is placed on Clause 3.3 of the Contract. It is submitted that the Arbitrator has erred in holding that the petitioner herein having raised the issue chose not to pursue the same in as much as it did not appoint the Arbitrator to adjudicate the disputes raised as far back as in 2003 and cannot be raised at a belated stage. It is submitted that the learned Single Judge in proceedings under Section 9 of the Act being OMP NO. 357/2002 had held that conduct of the respondents herein was contrary to the contract and had enjoined them from marketing the highlights and the clippings. In an appeal preferred by Respondent herein, Division Bench had noticed that the Petitioner had not yet invoked arbitration, yet the Arbitrator has wrongly held that the petitioner did not seek a reference to arbitration. Learned counsel for the petitioner draws the attention of

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this Court to para 27 of the counter claim filed by the petitioner wherein the petitioner had categorically stated that it had written several letters to the respondents pointing out that clause 7 of the Agreement between the BCCI and the petitioner read with 19.1 of the Agreement between the respondents and the petitioner clearly prohibited the respondents from marketing or distributing clippings and highlights of the matches in Indian territory. Attention is also drawn to para 33 where it was specifically stated that the petitioner had vide notice dated 19.05.2003 invoked the arbitration and this fact is not even noticed by the Arbitrator.

32. Counter Claim No. 3 of the petitioner was on account of alleged unauthorized streaming of the audio/video of the BCCI Cricketing events on the internet by the respondents. The petitioner had sought a balance payment of Rs. 25 Lacs per year for a period of four years towards the streaming of the matches. Petitioner contends that the cause of action for preferring the counter claim arose during the course of India - West Indies series played in October 2002 when it was noticed that the respondents had granted the streaming rights to third parties. It is submitted that the Arbitrator has erred in rejecting the counter claim on the ground that the said dispute was not raised during the first round of arbitration and was barred by constructive *res judicata* as well as by Limitation. It is submitted that the first proceedings commenced in the year 2001 when the petitioner was not even aware of the breach. It is further submitted that the Arbitrator has erred in rejecting even the alternative claim of payment of license fee of Rs. 25 Lacs per year for the balance four years. There is no reasoning for the said rejection and the Award deserves to be set aside.

33. Learned counsel for the petitioner contends that the rejection of the counter claim No. 4 which related to the additional days of cricket provided by the petitioner, is also a patent illegality. The claim was founded under two heads, (i) to the effect that as against 115 days, petitioner had provided 128 days of cricket and was therefore, entitled to 50% of the revenue earned of the additional days in terms of clause 9.4 of the Contract. The alternate prayer was that a sixth One Day International match was provided by the petitioner during the India-England series 2002 which was originally for five ODIs. The Contract was for all BCCI matches to be played in India during the term and thus matches provided by BCCI to the petitioner upto 30.09.2004 were included in the Agreement where as the Arbitrator has assumed that the 10 days provided during India-New Zealand-Australia series was not under the Agreement.

34. Learned counsel for the petitioner has relied upon the judgment of the House of Lords in *Investors compensation Scheme Ltd. V. West Bromwich Building Society (1998) 1 ALLER 98 (HL)* for the proposition that the law excludes from the background the previous negotiation of the parties and their declaration of the subjective intent. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all background knowledge which would have been available in a situation in which they were at the time of the Contract. If a detailed semantic analysis of the words in a commercial contract leads to a conclusion that flouts business commonsense it must be made to yield to business common sense.

35. Responding to the arguments of the petitioner on the counter claims, learned counsel for the respondents submits that the respondents

had filed a petition under Section 9 of the Act in this Court and to show its bonafides had deposited the entire sum of USD 6.56 Millions on 26.09.2003 before the due date of payment being 30.09.2003. Matter was referred to arbitration but the Arbitrator held that the claim of the respondents was premature and if the last two series did not take place, the accounts could be reconciled later. Pursuant thereto, petitioner moved an application for release of the deposited amount. Notice was issued. Respondents deposited a further sum towards the next installment in the Court. Without waiting for the matter to be heard, petitioner invoked the Performance Bank Guarantee and recovered the sum of USD 6.56 Millions on 24.12.2004. In view of this, the Court vide order dated 21.02.2005, permitted the respondents to receive back the said money with interest accrued thereon. In view of Order XXI Rule 1(1)(iv) read with Order XXIV Rules 1 and 3 CPC no interest is payable on money deposited in Court. Reliance is placed on ***Gurpreet Singh vs. Union of India (2006) 8 SCC 457***. Further, this claim was neither made before the first Arbitrator nor in the Court in OMP 375/2003 and is merely an afterthought. In any event, it is argued that the Arbitrator has found that there was a shortfall in the number of cricket days and therefore, no money is payable to the petitioner under Counter Claim No. 1.

36. With respect to counter claim No. 2, respondents argue that clauses 3.3 and 5.1 of the Contract entitled the respondents to market highlights and clippings in India. Anyhow, this claim had been abandoned by the petitioner. A lengthy section 9 petition was filed which also became a subject matter of an appeal, but at no stage, any step was taken to seek appointment of an Arbitrator or raise the said claim. The alleged notice
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of invocation dated 19.05.2003 was never received by the respondent and this was the clear stand of the respondent through the Arbitration Proceedings. In any case, assuming the notice was issued, the petitioner took no steps to pursue the arbitration even thereafter and raised the counter claim, 3 years later. It is also argued that the counter claim was also time barred as per petitioner's own case that the cause of action arose in October 2002.

37. Insofar as Counter Claim No. 3 is concerned, stand of the respondents is that in the first arbitration between the parties, violation of clauses 3.4 and 3.6 of the Agreement dated 19.02.2000 and the payment of Rs. 25 lacs was directly an issue, as the counter claim allegedly arose out of these clauses. The issues were comprehensively decided in the Award. Nothing prevented the petitioner from contending therein that the respondents had no internet rights or had failed to pay the fee and/or to seek payment of the balance outstanding amount of Rs. 25 lacs. Thus, the counter claim is clearly barred by constructive res judicata. Even otherwise the Arbitrator as a matter of finding of fact found that there was no violation of the aforesaid two clauses and this has been confirmed by a Coordinate Bench of this Court. The multimedia rights include the right to stream the content and the same had been given to the respondents. The Arbitrator has rightly rejected the Counter Claim on the ground that in the first arbitration, petitioner has itself taken the plea that disputes qua internet rights were not arbitrable.

38. Learned counsel for the respondents relies on the following judgments *Bhanu Kumar Jain v Archana Kumar (2005) 1 SCC 787*,

Thonikkudam Bhagwati Mills v Reena Ravindra Khona (2007) SCC OnLine Bom 448.

39. I have heard learned counsels for the parties and examined their rival submissions.

40. The undisputed facts are that an Agreement dated 25.09.1999 was entered into between Prasar Bharti and BCCI whereby BCCI had awarded rights and licenses to Prasar Bharti in respect of telecast of events i.e. all International Cricketing Events (Test Matches and One Day Internationals) as well as Domestic Matches to be conducted by BCCI during 1999-2004. The Broadcasting rights were with respect to five year cricket season starting from 1.10.1999 and ending on 30.09.2004, each cricketing year being from 1st October of the year to 30th September of the next calendar year. Prasar Bharti in turn agreed to pay to BCCI a consideration at an approximate amount of Rs. 46 Crores. As per Clause 12.1 of the Agreement, the said lumpsum amount was based on minimum of 27 days of international cricket. It was provided, that in the event of more than 27 days cricket being provided by BCCI, there will be no increase in the amount, however, in the event of less than 27 days in each cricketing season year, Prasar Bharti will be entitled to pro-rata reduction in the consideration amount. In case the shortfall was restored in the next year, the deducted amount was to be restored. Clause 12.2 stipulated that in the last year i.e. 2003-2004, final accounting would be done and in case 135 days of international cricket including 35 ODIs had been made available, no claim shall be made for any day in excess of 135.

41. An Agreement dated 19.02.2000 was subsequently entered into between Prasar Bharti and respondents. The first recital of the Agreement

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referred to the Agreement dated 25.09.1999 between BCCI and Prasar Bharti. Under Clause 3, the rights given to the respondents herein were defined. Prasar Bharti was to grant to Stracon the sole and exclusive global marketing rights including radio rights for all territories outside India (excluding radio rights within U.K. and internet rights) in respect of events conducted by BCCI in India.

42. Importantly, the term ‘cricketing events’ was also defined in Clause 4 of the Agreement, which is in two parts, and reads as under:

- (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 Bharti, 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.*

43. Clause 19.1 provided for compliance with the BCCI Agreement. Respondents had been notified of the terms and conditions of the BCCI Agreement and had undertaken not to commit directly or indirectly any breach of the terms of the said Agreement.

44. After the Arbitration commenced in 2003, there was some litigation between the parties before this Court.

45. The principle case of the petitioner is that under the Agreement with BCCI, the latter was to provide minimum 27 days of International

Cricket in each cricketing season to Prasar Bharti from 01.10.1999 to 30.09.2004. Thus, a total of 135 days were to be provided over five years. However, Prasar Bharti was obliged to provide only 115 days to the respondents since by the time the Agreement was entered into with the respondents on 19.02.2000, 20 days of cricket comprising the first series of India-New Zealand had already been played. It is also contended that the Agreement did not specify any minimum number of series. According to the petitioner, as against 115 days, the petitioner in fact provided 128 days of cricket and even assuming that the Agreement contemplated 9 series, the petitioner had provided 8 out of 9 series, one being the Triangular series between India-Australia-New Zealand.

46. *Per contra* the contention of the respondents is that the petitioner was to provide nine series of International matches as per the Schedule clearly specified under Clause 4(a) and the petitioner provided only 7 series. Since the respondents had deposited the entire consideration for the 9 series, it is entitled to refund of consideration of two series on pro-rata basis amounting to USD 9.722 Million. At the same time, it is also argued that under Clause 4(b), petitioner was obliged to provide 135 days of cricket, but there was a clear shortfall of 17 days and therefore, the respondents are entitled to USD 5,509,259. The contention is that 27 days cricket was to be provided in each cricketing season. It is argued that the petitioner has arrived at a calculation of 128 days of cricket by including 10 days of the Triangular series between India-Australia-New Zealand. However, the said series was not part of the series mentioned in the Schedule to the Agreement and cannot be taken into account. Thus, by a simple deduction of 10 days from the alleged 128 days, the petitioner

in fact provided only 118 days making a shortfall of 17 days of cricket from the agreed 135 days.

47. During the proceedings, the learned Arbitrator framed the following issues:

- 1. Whether the respondent was obliged to deliver cricketing series or 115 days of cricket as per the agreement dated 19.2.2000?*
- 2. Whether the respondent breached its obligation in terms of the issue No.1, if so to what effect?*
- 3. Whether the respondent was obliged to deliver a minimum of 27 days of international cricket in each cricketing season as per the agreement dated 19.02.2000?*
- 4. If yes, whether the respondent breached their obligation to deliver 27 days of international cricket in each cricketing season as per the agreement dated 19.02.2000? If so, to what effect?*
- 5. Did the Claimant delay payment of US\$6.56 million to Respondent causing commercial loss to the Respondent and amounting to US \$ 1.4765 million up to 01.01.2005?*
- 6. Did the Claimant commit breach of the Agreement by sale/ marketing of highlights/clippings of BCCI matches within India, and if so, is the Respondent entitled to seek rendition of accounts from the Claimant, and if so to what effect?*
- 7. Did the Claimant commit breach of the Agreement in making earnings by providing audio/video streaming on the internet of BCCI matches on the site www.dd.now.com or any other site, if so, is the*

Respondent entitled to seek rendition of accounts from the Claimant on that account and, if so, to what effect?

8. To the above issue in the alternative, is the respondent entitled to Rs.25 lacs per annum towards licence fee for the alleged non- exclusive internet rights by the Claimant for four years in breach of the Agreement or any other amount along with interest, and if so, to what effect?

9. Whether the respondent provided 13 or 11 days additional cricket to the claimant over and above the terms of the Agreement, and if so, is the Respondent entitled to seed rendition of accounts from the Claimant, and if so, to what effect?

10. Whether any or all of the counter claims are outside the jurisdiction of arbitration, and if so, with what result.

11. Whether all or any of the counter claims are barred by limitation?

12. Whether the parties are entitled to the claims (including interest and costs) as prayed for/ if S01 to what extent?

13. Reliefs.

48. Learned Arbitrator analysed and collated Clauses 4(a) and 4(b) of the Agreement dated 19.02.2000 and also analysed whether the two Agreements, i.e. one between BCCI and Prasar Bharti and the other between petitioner and respondents were interlinked or were stand-alone Agreements. Insofar as the second issue was concerned, the Tribunal came to a finding that the two contracts were stand-alone and insofar as the first question was concerned, the Tribunal came to a finding that Clause 4(b) would encompass Clause 4(a). The Tribunal observed that if the respondents were seeking refund on the basis of shortfall in the 9

series and ‘series’ was of significance then on what basis were the respondents claiming USD 5,509,259 on account of shortfall of 17 days. Tribunal held that the word ‘series’ was a misnomer and the claim could be based either on the number of days of matches or the number of days of International cricket. Having so held, the Tribunal relied on the Schedule appended to the Agreement detailing the 9 series which were to be telecasted and came to a finding that the Triangular series were not a part of the Schedule and therefore, the 10 days of cricket played under this series could not be added by Prasar Bharti to come to a figure of 128 days of cricket provided to respondents. The Tribunal also rejected the plea of the petitioner that by the time the Agreement was entered into with the respondents, 20 days of cricket had been played and thus only 115 days had to be provided. The Tribunal held that there was a shortfall of 17 days of cricket and awarded USD 5,509,259 to the respondents.

49. Having analysed the Award, I am constrained to notice that the observation of the Tribunal that series was a ‘misnomer’ is a plausible view. There is no doubt that when the parties entered into the Agreement, there was a Schedule appended to the Agreement, which specifically mentioned the nine series that were to be provided to the respondents.

50. The list is as under:

Sl. No.	Schedule	Team Playing	Status
1.	Feb 2000 to Mar 2000	India Vs. South Africa	Held

2.	Oct 2000 to Nov 2000	India V. Sri Lanka	Held (replaced with Zimbabwe)
3.	Feb 2000 to Mar 2001	India V. Australia	Held
4.	Dec 2001 to Jan 2002	India V. England	Held
5.	Feb 2002 to Mar 2002	India V. Zimbabwe	Held
6.	Oct 2002 to Nov 2002	India V. West Indies	Held
7.	Oct 2003 to Nov 2003	India V. New Zealand	Held
8.	Feb 2004 to Mar 2004	India V. Pakistan	Cancelled
9.	Sep 2004 to Oct 2004	India V. Australia	Held in October 2004 beyond the term of the Agreement

51. In fact in a petition filed by the respondents challenging the Award, the Co-ordinate Bench has upheld this view. The Co-ordinate Bench in the above-mentioned O.M.P. (COMM) 233/2017 has analysed the obligation of the petitioner to provide a certain number of series to the respondents and has held that the word 'series' has not been mentioned in the Agreement and the words used are 'International Matches' and 'Cricketing Events'. Annexure 'A' to the Agreement also provides for cricketing events only. Clause 4(a) indicates that the events were only

‘proposed cricketing events’ and that undisputedly the list of the Events was altered, as India vs. Sri Lanka matches were replaced by India vs. Zimbabwe matches. The Court has upheld the interpretation of the Arbitral Tribunal that provision of Clause 9.4.2 of the Agreement stipulates reduction in the consideration agreed in reference to the minimum number of days of International Cricket and not series. Significantly, the Court has held that the language of clause 4 clearly indicates that assurance of minimum number of cricketing events is stipulated in clause 4(b) and not clause 4(a). Relevant part of the judgment reads as under:

“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:—

<i>Feb 2000 to Mar 2000</i>	<i>India v. South Africa</i>
<i>Oct 2000 to Nov 2000</i>	<i>India v. Sri. Lanka</i>
<i>Feb 2000 to Mar 2001</i>	<i>India v. Australia</i>
<i>Dec 2001 to Jan 2002</i>	<i>India v. England</i>
<i>Feb 2002 to Mar 2002</i>	<i>India v. Zimbabwe</i>
<i>Oct 2002 to Nov 2002</i>	<i>India v. West Indies</i>

<i>Oct 2003 to Nov 2003</i>	<i>India v. New Zealand</i>
<i>Feb 2004 to Mar 2004</i>	<i>India v. Pakistan</i>
<i>Sep 2004 to Oct 2004</i>	<i>India v. Australia</i>

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.”

52. In view of the said judgment, it is not open for this Court to adjudicate on the issue of the entitlement of the respondents on the basis of lesser number of series and at the same time, it is also not open to adjudicate on the issue that ‘Cricketing Events’ mentioned in the Schedule were fixed and not tentative.

53. Since the Co-Ordinate Bench has dealt with the issue of series in entirety and upheld the Award to that extent, the only issue that remains

to be adjudicated by this Court is the entitlement of the respondents to their claim of shortfall of 17 days under clause 4(b). At the cost of repetition, the Tribunal has allowed the claim on the ground that the 10 cricketing days could not have been provided as these were a part of the Triangular Series, which were not mentioned in the Schedule. Once the Co-ordinate Bench has held in its judgment, which has attained finality, that the list was only a 'proposed' list and there had been an earlier change in the India-Sri Lanka matches, this finding of the Tribunal cannot be sustained. It is significant to note that when the India-Sri Lanka matches were replaced, respondents had not raised any protest and in fact even when the Triangular Series were played, the respondents had telecast the same and exploited the series. They had earned revenue therefrom, without any demur or protest.

54. Respondents may be right in their contention that the Triangular Series may not have earned as much revenue as was expected from another series between India-Pakistan and India-Australia, but this argument cannot be raised by the respondents at this stage. When the petitioner granted the right to the respondents to market and telecast the Triangular Series, the petitioner should have objected at that stage, instead of telecasting the series and earning revenue therefrom. Thus, in my view, the finding of the Arbitrator allowing the claim of the respondent towards the shortfall of 10 cricketing days is patently illegal and cannot be sustained, more particularly in view of the judgment of the coordinate Bench. To this extent, the Award deserves to be set aside.

55. Respondents have contended that in each cricketing season, petitioner was obliged to provide 27 cricket days under Clause 4 (b) of

the Agreement. The stand of the petitioner before the Arbitrator was that since 20 cricketing days were provided prior to the Agreement dated 19.02.2000, only the remaining 115 days could have been provided in the five cricketing seasons and this was in the knowledge of the respondents while signing the Agreement. Petitioner had thus claimed that it was not obliged to provide 135 days but was only obliged to provide 115 days and since it had provided 128 days, it had actually provided excess number of cricketing days and sought payment towards the cricket days over and above the 115 days. This was by way of counter-claim No. 4. The Arbitrator was of the view that both the Agreements were stand alone Agreements. The stand of the petitioner that under the Agreement between it and the BCCI, it could only provide 115 days of cricket was not accepted by the Arbitrator. A categorical finding has been rendered that the petitioner was bound to provide 135 days of International cricket to the respondents. The Arbitrator thereafter relied on a table given by the petitioner showing the details of how it arrived at a figure of 128 days. Analyzing the table, the Arbitrator came to a conclusion that a total of 118 days of cricket was provided, of course deducting the 10 days on account of the Triangular Series. Finally, the Arbitrator rejected the contention of the petitioner that it had provided more days of international cricket than envisaged in the Agreement and thus rejected counter-claim No. 4. What thus emerges is that the respondents have been held to be right in their submission that the petitioner was indeed obliged to provide a total of 135 days over a period of 5 cricketing seasons. This finding has been upheld by the Co-ordinate Bench. Only because the BCCI provided 115 days and when the second Agreement was entered

into, 20 days of cricket had been played, cannot be a reason for the petitioner to contend that it was obliged to provide only 115 days.

56. Insofar as the claim of the respondents towards shortfall of 17 days of International cricket is concerned, relevant part of the Award reads as under:

“I find Claimant said there is shortfall of 17 days of international cricket which was not provided to the Claimant. Details of the international matches as per series has not been provided to the Claimant and there no reason not to accept the statement provided by the Respondent. Accepting there is shortfall of 17 days of international cricket, Claimant would be entitled for 17 days cricket i.e. US \$ 550,92,592 million.

The view which I have taken would squarely answer the questions posed by me in earlier part of this Award.

Obviously this amount has been arrived at first calculating one day cricket considering the consideration of US \$ 43,750 million for 135 days of cricket. For 17 days cricket: US \$ 32,40,740 per day X 17 days = US \$ 5,509,259 million.

It would appear paradoxical that this amount of consideration of US \$ 43,750 million will cover two independent defaults (i) under Clause 4(a) and (ii) under Clause 4(b). That cannot be so and things will fall in place only if I hold that default in not providing all nine series under Clause 4(a) would be covered not providing 135 days of cricket under Clause 4(b).

Respondent would appear to be right in its defence that consideration of US \$ 43,750 million would be for 135 days of cricket during the period of agreement.

Prasar Bharati takes shelter for not providing 135 days of cricket under the agreement dated 25.09.1999 which it had entered into with BCCI which agreement Prasar Bharati calls mother agreement. I have already said that both the agreement dated 25.09.1999 between the BCCI and Prasar Bharati and that dated 19.02.2000 between Prasar Bharati and the Claimant are stand alone agreements. This stand of the Prasar Bharati that since under the agreement between it and BCCI it could get only 115 days of cricket, it provided only that number of days of cricket to the Claimant cannot be accepted. It was bound to provide 135 days of international cricket and though it has contended that it has provided 128 days of cricket as per the following table:-

<i>Series</i>	<i>Days of ODIs</i>	<i>Days of Test matches</i>	<i>Total days</i>
<i>India-South Africa Mar-Apr 2000</i>	<i>5</i>	<i>10</i>	<i>15</i>
<i>India-Zimbabwe November, 2000</i>	<i>5</i>	<i>10</i>	<i>15</i>
<i>India-Australia March, 2001</i>	<i>5</i>	<i>15</i>	<i>20</i>
<i>India-England November 2000 to February 2001</i>	<i>6</i>	<i>15</i>	<i>21</i>
<i>India-Zimbabwe February, 2002</i>	<i>5</i>	<i>10</i>	<i>15</i>
<i>India-West Indies October- November 2002</i>	<i>7</i>	<i>15</i>	<i>22</i>
<i>India-New Zealand</i>	<i>-</i>	<i>10</i>	<i>10</i>
<i>India-Australia-New Zealand</i>	<i>10</i>	<i>-</i>	<i>10</i>

<i>Triangular Series October, 2003</i>			
<i>TOTAL</i>	<i>43</i>	<i>85</i>	<i>128</i>

It would be seen that last series in the table between India –Australia - New Zealand is not part of the series under the agreement. So 10 days of cricket sought to have been provided to the Claimant has to be ignored. Thus 118 days cricket would appear to have been provided to the Claimant as per the table. There would be thus 17 days of cricket which Respondent - Prasar Bharati has failed to provide to the Claimant (135 days - 118 days = 17 days). Claimant also says that there was shortfall of 17 days of cricket not having been provided to it by the Prasar Bharati. As to how 118 days cricket was provided by the Prasar Bharati to the Claimant, details are given in the aforementioned table. Claimant has not given any details of the days of cricket provided to it. In the circumstances, I would accept the table of the Prasar Bharati showing how 118 days of cricket was provided to the Claimant.

Thus as per the table days of Test Matches in respect of seven series would be 85 and for the same period One Day International Matches would be 33 which would make a total of 118 days of international cricket.

57. As is evident from the above, the Tribunal has come to a conclusion that there is shortfall of 17 days, on two counts. The first reason as is evident from the reading of the Award is that the ten days sought to be included by Prasar Bharti were on account of the Triangular series, which was not a part of the agreed Schedule and the second was

that the initial 20 days of cricket days in 1999 before the Agreement could not be added.

58. Petitioner in my view is not right in its contention that the said 20 days were to be excluded and therefore it was obliged only to provide only 115 days in the cricketing season. The Agreement was entered into between the parties on 19.02.2000. It was clearly known to the petitioner on the date of signing the Agreement that 20 days of cricket had been played in the year 1999, yet, when the Agreement was entered into, it was clearly mentioned that 27 cricket days would be provided in each season for the 5 cricket seasons. Had the petitioner intended that these 20 days were to be included, the Agreement would have read otherwise. It is not open for the petitioner at this stage to argue contrary to the terms of the Agreement. My view is further fortified by Clause 12.1 of the Agreement between the petitioner and the BCCI dated 25.09.1999, where there is a clear provision of carrying forward of cricket days in case of shortfall in a particular cricket season. Thus, this contention of the petitioner has to be rejected. Thus, the respondents were entitled to clear 135 days of Cricketing Events in 5 seasons but this would include the 10 days of Triangular Series. Thus, the part of the Award which has held that respondents are entitled to payment for 17 days of shortfall is set aside. Respondents are only entitled to 7 days of shortfall and are at liberty to raise this claim in accordance with law.

59. Counter claim No. 1 of the petitioner pertains to loss due to delayed payment of USD 6.56 million allegedly payable on 30.09.2003, but actually paid on 24.12.2004. The petitioner has argued that in terms of the Agreement, the annual instalment of 22.5% consideration was

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payable every year by 30th September, but the instalment due on 30.09.2003 was not paid. The stand of the respondents was that the counter claim was belated. The amount of USD 6.56 million was deposited by the respondents under orders of the Court, on 26.09.2003. Petitioner had filed an application for release of the money, but the request was declined by the Court on 13.09.2004. Respondents had filed a petition under Section 9 of the Act being O.M.P. (I) (COMM) 438/2004 which resulted in an order dated 30.11.2004 for deposit by the respondents of an amount of USD 2.18 million and the petitioner stood fully secured for the entire amounts due and payable under the Agreement and it was wrong to contend that the respondents did not pay the instalment due on 30.09.2003.

60. The Arbitrator rejected the counter claim on the ground that the petitioner had not shown any loss suffered by it so as to claim damages, in accordance with provisions of Section 73 of the Indian Contract Act. A mere lip service of losses suffered, would not entitle a party to claim damages. As per the Arbitrator, the claim under this Head was merely on account of loss of interest @18% from 30.09.2003 till 24.12.2004, which according to the Arbitrator did not discharge the burden of proof to claim Damages. The second reason for rejection was that once the payment stood deposited in Court and the application of the petitioner for withdrawal was not allowed, the petitioner cannot set the clock back and claim interest.

61. The view taken by the Arbitrator is in accordance with the settled law of claiming damages under Section 73 of the Contract Act and is also based on the fact that the money was deposited in Court by the
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respondents. This Court finds no reason to interfere with the view taken by the Arbitrator and thus this part of the Award deserves to be upheld.

62. Counter claim No. 2 of the petitioner was on account of the alleged breach of the Agreement by the respondents in selling/marketing of highlights/clippings of BCCI matches within India and it sought rendition of accounts. The basis of the counter claim was that the rights granted to the respondents were only outside India as in the bid submitted by the respondents, the Territory was specified as 'All territories outside India with the exception of radio rights in UK'. However, in the first week of October, 2002 respondents sold the highlights and clippings to various parties including ESPN and Star Sports. Respondents countered the argument by arguing that the counter claim was not only barred by limitation, but stood waived by the petitioner.

63. The Arbitrator agreed with the contention of the respondents that once the petitioner having raised the issue in 2003, chose not to pursue the same inasmuch as it did not appoint an Arbitrator, it cannot raise the counter claim at a belated stage.

64. The Arbitrator found as a matter of record that the petitioner had filed a petition under Section 9 of the Act claiming an injunction against the respondents. Single Judge of this Court by order dated 21.02.2003 had restrained the respondents from marketing the clippings and highlights within India, till adjudication of the matter by the Arbitrator. In an appeal by the respondents, the operation of the judgment was stayed and the Division Bench noted that the petitioner had failed to take concrete steps to appoint an Arbitrator. Even till two years thereafter, the petitioner did not seek reference of the matter to Arbitration.

65. This Court finds no patent illegality in the said finding in the Award. If a party has a grievance, it certainly has a right to seek appointment of an Arbitrator. However, in case it fails to do so for a reasonable period, law does not permit a bystander or fence-sitter to raise the claim belatedly after several years.

66. The third counter claim of the petitioner was with regard to the alleged breach by the respondents by providing audio/video streaming on the internet of the BCCI matches. Petitioner claimed that the Agreement dated 19.02.2000 excluded all internet rights. By a separate letter/ Agreement dated 18.02.2000, respondents were given exclusive rights to license internet rights to unlimited users. Though, the said letter offered rights on a non-exclusive basis to the respondents, subject to annual fee of Rs. 25 lakhs, respondents only made payment for the first year and yet availed the rights in the subsequent years. The respondents had argued that the petitioner had waived its right to the said claim by not having raised the same in the other arbitration proceedings between the same parties.

67. The learned Arbitrator agreed with the respondents and held that the petitioner had indeed waived its right to raise the said counter claim. In another arbitration initiated by the respondents, it had alleged breach of Agreement dated 19.02.2000 and letter dated 18.02.2000. The respondents had raised various claims which are as under:-

1. (a) US\$ 500,000 on account of loss suffered due to payment withheld/deducted by sport.com for non-display of website address during the India - South Africa series.

(b) US \$ 4.0 million on account of loss suffered of the licence value of the rights for eight more series.

(c) In the alternative, amount of US\$ 4.465 million on account of the value of rights no delivered by Prasar Bharati.

2. (a) US\$ 270,000 being the amount withheld ART (Arab Radio & Television) due to spill over of the signals in the Middle Este during India-South Africa series.

(b) a declaration that if further amounts are claimed by ART or any other Middle Eastern broadcaster on account of overspill, it will be paid by Prasar Bharati to the Claimant.

(c) In the alternative, amount of US\$ 3.10 million on account of diminished/lost value of rights.

3. (a) An amount of US\$ 500,000 on account of loss of the value of right that would have been obtained by selling the radio rights to a third party and/or the value which would have been obtained had rediff.com being directed to the claimants to obtained multi-media rights from the Claimant.

(b) In addition, amount of US\$ 0.39 million on account of prorated cost of the diminished valued of the radio rights for three series.

4. (a) US \$ 1 million on account of loss of total direct loss suffered of the value of rights which could not be sold or exploited in the territories of Sri Lanka, Bangladesh and Nepal;

(b) In the alternative, amount of 1.01 million on account of the value of exclusive right lost and not delivered by Prasar Bharti under the Agreement.

Petitioner had taken a stand that the claims made by the respondents were not arbitrable as the letter dated 18.02.2000 did not contain an arbitration Agreement and now the petitioner was claiming on the basis of same very Agreement.

68. In my view, the arbitrator has rightly held that it was open to the petitioner to have raised a similar counter claim in the said proceedings, but on the contrary, it chose to take a stand that the claims were not arbitrable. The view of the Arbitrator that the counter claim was barred by constructive *res judicata* is a plausible view and calls for no interference.

69. Petition is thus partly allowed, as above. Part of the Award dated 26.12.2016 holding a shortfall of 17 Cricketing Days in favour of the respondents is set aside. Respondents are at liberty to agitate their claim of 7 days shortfall in Cricketing Days, in accordance with law. Remaining part of the Award is upheld.

MARCH 13th, 2020

yg /rd/yo

JYOTI SINGH, J