

## A NO BALL FROM SUPREME COURT – CRITICAL ANALYSIS OF UNION OF INDIA V. BCCI

*Tushar Kapoor\**

### *Abstract*

*The Apex Court, in BCCI v Union of India, held that Star India is obligated to share feeds of live cricketing events with Prasar Bharti so that it can transmit the same on its terrestrial and its own Direct-to-Home (DTH) network, and no other DTH and cable service providers, on grounds that the licensee of BCCI, i.e., Star India is incurring huge subscription losses and there is no need to read the provisions of the Cable Television Networks (Regulation) Act, 1995 (hereinafter referred to as the Cable Act) into the Sports Broadcasting Signals (Mandatory Sharing With Prasar Bharti) Act, 2007 (hereinafter referred to as the Sports Act). The author strongly disagrees with the opinion of the Court as the judgment goes against the mandate of the Sports Act i.e. to widen the base of viewership of sporting events of national importance, which in the current case is cricket. Despite the fact that there is no law designed for DTH service providers, the Guidelines For Obtaining License For Providing Direct-To-Home (Dth)*

---

\*Tushar Kumar is a student at Dr. Ram Manohar Lohiya National University of Law, Lucknow. The author may be reached at tusharvarshney96@gmail.com.

*Broadcasting Service In India of 2001 (hereinafter referred to as the Licensing Guidelines), along with the notifications issued by the Ministry of Information and Broadcasting, clearly state that DTH operators have to adhere to the provisions of the Cable Act. This is repugnant to S.8 of the Cable Act which states that there shall be no deletion or alteration of programs by the content rights owner when it is being shared on Prasar Bharti's channels. Moreover, the Sports Act provides for a revenue sharing model for the licensee of BCCI and Prasar Bharti, which points towards the fact that it is not an expropriatory legislation. The prohibition of the broadcast on Prasar Bharti's channels on cable and DTH operators is going to hamper the advertisement revenues of Star Network severely, much more than the subscription losses that it has been incurring. The fact that majority of cricket viewers have either a cable connection or a DTH service provider, this judgment will not only jeopardize the viewership of cricket in India, but may also be responsible for reduction in the viewership of Doordarshan.*

In August 2017, the Apex Court, in *BCCI v Union of India*,

<sup>1</sup> gave an unacceptable decision for millions of cricket fans as it

affirmed the decision of the Delhi High Court directing Prasar Bharti not to re-transmit the live feeds of cricket matches to private cable operators and DTH service providers by virtue of Section 3 of the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007.

## I. BACKGROUND

BCCI awards media rights agreement to a certain licensee for broadcasting Indian cricket team's matches, pursuant to a bidding process. Earlier, Nimbus Sports held those rights from 2007 to 2012, but the same were acquired by Star Sports India subsequently.<sup>2</sup> Now, as per S.3 of the Sports Act, 2007, BCCI's licensees were obligated to share the live feeds of cricket matches, as notified by Government as "sporting events of national importance", with Prasar Bharti for re-transmission on its terrestrial and DTH networks. However, the shared feeds were causing subscription losses to Star Sports as the people, instead of subscribing for the Star Sports channel, started viewing cricket matches on the Doordarshan channel. A writ petition was filed in 2007 before Delhi HC which was summarily dismissed by a single judge bench. Eventually, a letters patent appeal<sup>3</sup> was filed in 2015, which overturned the previous decision. Subsequently, Prasar Bharti, Union of India and others preferred a special leave petition under Article 136 of the Indian Constitution before the Supreme Court.

---

<sup>1</sup>Board of Control for Cricket in India v. Union of India, (2018) 11 SCC 700.

<sup>2</sup>*Star Sports India bags BCCI media rights for Rs 6138.1 crore*, THE TIMES OF INDIA (APR. 5, 2018, 10:22 PM), <https://timesofindia.indiatimes.com/sports/cricket/news/star-sports-india-bags-bcci-media-rights-for-rs-6138-1-crore/articleshow/63628236.cms>.

<sup>3</sup>*Making a case for Letter Patents Appeal in the state*, THE TIMES OF INDIA (Nov 17, 2013, 05:27 AM), <https://timesofindia.indiatimes.com/city/goa/Making-a-case-for-Letter-Patents-Appeal-in-the-state/articleshow/25916821.cms>.

## II. LAW INVOLVED AND RULING

The case predominantly was regarding the interpretation of S.3 of Sports Act according to which the content rights owner, carrying a live broadcast of sporting events of national importance, shall be required to share the same, devoid of its advertisements, with Prasar Bharti to enable it to re-transmit it on its terrestrial and direct-to-home networks. S. 3(2) of Sports Act also provides for a revenue sharing model between the content rights owner and Prasar Bharti as an exception when the feeds are shared with advertisement. However, the Supreme Court classified the aforementioned legislation as an *expropriatory legislation*, thereby strictly construing the language of the section, and kept the “private cable operators/DTH networks” out of the purview of “Direct-to-Home Networks” as stated in S.3. Additionally, the Court refused to take into consideration S. 8 of the Cable Act, 1995, according to which DD1 is notified as a mandatory channel to be carried by cable operators without any deletion or alteration of programs.<sup>4</sup> According to the Court, in absence of any legislative intent, the provisions of the Sports Act shall be allowed to operate independently, without being controlled by the conditions of S. 8 of Cable Act. It also ruled that the DTH network of private operators cannot be termed as “cable operators” within S.2. Consequentially, the court held that the live feeds received by Prasar Bharati from content rights owners is only for the purpose of re-transmission of the said signals on its own terrestrial and DTH networks and not to Cable Operators so as to enable the Cable TV operators to reach such consumers who have already subscribed to a cable network.

---

<sup>4</sup>The Cable Networks Regulation Act, 1995 § 8(2), No. 7 of 1995.

### III. AUTHOR'S ANALYSIS

The author disagrees with the court's opinion on multiple grounds. Firstly, there is an absence of a comprehensive clarification/law with reference to the functioning of the DTH operators in India. Guidelines for obtaining the license for providing DTH services were released in 2001,<sup>5</sup> but the same do not extend to providing guidance to the providers of DTH service about the statutory compliances that they need to adhere to. For instance, the Cable Act, 1995 regulates the gamut of cable television networks, and with the digitization drive in the picture, amendments were made in 2011 to include the regulation of broadcasters providing the service through digital addressable system.<sup>6</sup> As far as the licensing guidelines for DTH service providers are concerned, clause 7.8 of the Schedule to the licensing agreement explicitly states that the licensee shall carry channels of Prasar Bharti on most favorable financial terms. Additionally, in 2007, the Ministry of Information and Broadcasting released a notification directing all the DTH service licensees to comply with the provisions of S.8 of the Cable Act, 1995.<sup>7</sup> Even though there is no comprehensive law to govern DTH operators and the same do not qualify as cable operators, notifications by the Ministry make the position crystal clear. S. 3(1) of the Sports Act mentions the term "terrestrial and Direct-to-Home networks" in its language and does not define the scope of DTH as just DD Free Dish (Prasar Bharti's DTH Network). The "must share" obligation, emphasized by the Apex Court, under the Sports Act is

---

<sup>5</sup>Ministry of Information and Broadcasting, Guidelines For Obtaining License For Providing Direct-To-Home (DTH) Broadcasting Service In India, Order No.8/1/99-PBC (Vol.II), (Issued on March 15, 2001), <https://mib.gov.in/sites/default/files/GuidelinesforDTHServiceDated15.3.2001.pdf>.

<sup>6</sup>Suchi Bansal, *In pursuit of Digitalizing India*, MINT (21 Sep 2017, 05:44 AM), <https://www.livemint.com/Opinion/BxuAE4da07SbuUCfNrmbdN/In-pursuit-of-digitizing-India.html>.

<sup>7</sup>Ministry of Information and Broadcasting, Amended Guidelines for Obtaining License for Providing Direct-To-Home (DTH) Broadcasting Service in India, Order No.8/1/99-PBC, (Issued on Nov.6, 2007), <https://digitalindiamib.com/Detailsguidlinesupdated6.11.2007.pdf>.

intended to mean Prasar Bharti's terrestrial networks and all those DTH networks on which the channels of Prasar Bharti are being broadcasted. There is no *intelligible differentia*<sup>8</sup> to discriminate between Prasar Bharti's DTH network and private DTH networks in relation to the sharing of the broadcast of cricketing events. It is pertinent to note that necessary clarification in the licensing guidelines of DTH operators or in the Sports Act would go a long way in clarifying the liability of DTH operators.

Secondly, the provisions of the Sports Act should not be interpreted strictly in isolation with the provisions of the Cable Act. The Apex Court has stated that by virtue of the Sports Act curtailing the rights of Star India Pvt. Ltd. under certain provisions of Copyright Act, it is of expropriatory character and should be strictly construed, without the provisions of the Cable Act being read into the Sports Act and granting it an extended interpretation. As held by Supreme Court in *Devendra Singh v State of Punjab*<sup>9</sup> and affirmed in subsequent decisions,<sup>10</sup> expropriatory legislations deal with the compulsory acquisition of properties of a citizen in the exercise of "eminent domain" and, therefore, require strict construction. The author here contends that the Sports Act is not an expropriatory legislation as there is no compulsory acquisition of property of an individual or an absolute curtailment of rights. Even though sharing the live feeds with Prasar Bharti is extracting some amount of revenue from licensees of BCCI, it does not mean that there is a compulsory acquisition of their property or revenue in the current case. S. 3(2) of the Sports Act, as an exception to the above clause, also provides for advertisement revenue sharing model in the ratio of not less than 75:25 between the content rights owner and Prasar Bharti. Moreover, the division bench

---

<sup>8</sup>Ram Krishna Dalmia v. S.R. Tendolkar, 1959 SCR 279.

<sup>9</sup>Devendra Singh v. State of Punjab, (2008) 1 SCC 728.

<sup>10</sup>Dev Sharan v. State of Uttar Pradesh, (2011) 4 SCC 769; Prabhawati v. State of Bihar, (2014) 13 SCC 721.

of the Delhi HC in *ESPN Software Pvt. India Ltd. v Prasar Bharti and Anr*<sup>11</sup> had clearly stated that the Sports Act is not an expropriatory legislation, which was later affirmed by the Hon'ble Supreme Court in *Star Sports India (P) Ltd. v. Prasar Bharati*<sup>12</sup> in 2016.

Even if the Sports Act is taken to be that of an expropriatory character, the approach by the Supreme Court to construe the legislation strictly and not contextually goes against the objective of the legislation. The Apex Court in *Delhi Airtech Services Pvt. Ltd. v. State of UP*<sup>13</sup> has held that the strict construction of an expropriatory legislation must be accompanied by literal and contextual interpretation so that the purpose of the legislation is not defeated. By limiting the scope of "Direct-to-Home Networks" to that of Prasar Bharti's DTH network and not private DTH networks, the Court, in the present case, has contributed to the eventual reduction in the viewership of cricket and has, therefore, jeopardized the object of the legislation, which is to provide access to the largest number of listeners and viewers, on a free-to-air basis, of sporting events of national importance. Additionally, the provisions of the Sports Act cannot be read in isolation to the provisions of the Cable Act as the former pertains to the sharing of the broadcast of cricket matches on Prasar Bharti's channels and the latter imposes an obligation on cable operators to mandatorily transmit Prasar Bharti's channels in their service. The provisions of the Cable Act, 1995 should not be understood to be whittled down by the enactment of the Sports Act, 2007, as stated by Mukul Rohatgi in his submissions. S.8(2) of the Cable Act, 1995 bars the DTH network operators from any deletion or alteration of the program from the re-transmitted Prasar Bharti's channels. Non-transmission of the cricket matches on Prasar Bharti's channels on cable operators would constitute a gross violation of the

---

<sup>11</sup>*ESPN Software Pvt. India Ltd. v. Prasar Bharti and Anr*, (2013) 204 DLT 339 (DB).

<sup>12</sup>*Star Sports India (P) Ltd. v. Prasar Bharati*, (2016) 11 SCC 433.

<sup>13</sup>*Delhi Airtech Services Pvt. Ltd. v. State of Uttar Pradesh*, (2011) 9 SCC 354.

Cable Act and make such cable operators liable to penal sanctions. Additionally, S. 8 of the Cable Act was enacted to obligate the cable operators to carry news and information concerning the nation<sup>14</sup> and to mitigate the growing popularity of foreign/private channels over Doordarshan.<sup>15</sup> S.3 of the Sports Act enables widening of the viewership base of cricket in India by incorporating a “must share” obligation. Considering the fact that a huge chunk of television viewers is on the radar of DTH service providers and cable operators, this judgment vehemently goes against the mandate of the respective provisions of the Cable Act and the Sports Act.

Lastly, according to the author, the reasoning that Star Sports India Ltd. is facing a loss of revenue due to the live feeds being shared on Prasar Bharti’s and private cable operator’s DTH networks and the money invested to the extent of Rs. 3,000 crore is not being realized in full, does not sustain. It is pertinent to note the observation of the Hon’ble Supreme Court in *Star Sports India (P) Ltd. v. Prasar Bharati*<sup>16</sup> that the coverage of Prasar Bharti is far more reaching insofar as the Indian population is concerned as it is present in every corner of the country. Sharing of such signals with Prasar Bharti on all kinds of DTH networks and cable operators magnifies the viewership of such matches. The advertisement revenues are directly proportional to the number of people viewing it. The increased viewership, as a result of sharing with Prasar Bharti, would generate more advertisement revenues to Star Sports rather than reducing them. Moreover, if the shared feeds are not allowed to be broadcasted on Prasar Bharti’s channels of private cable/DTH operators, it is bound to reduce the viewership of cricket, which is the most decorated sport in India.

---

<sup>14</sup>Board of Control for Cricket in India v. Union of India, (2018) 11 SCC 700.

<sup>15</sup>Standing Committee on Cable T.V. Network (Regulation) Bill 1993.

<sup>16</sup>Star Sports India (P) Ltd. v. Prasar Bharati, (2016) 11 SCC 433.

A huge chunk of Indian population who watch cricket comprises of a section that can afford to have a DTH operator installed at home, but would not refer to subscribe to a Star Sports channel just for watching some of the cricket matches, unless it is broadcasted on their DD1 channel. The same, however, does not apply to the incidence of major ICC tournaments like the World Cup or the Champions Trophy because cricket enthusiasts may not want to miss such tournaments. However, these are not the only tournaments that the Indian cricket team plays in a calendar year. There are numerous other series (One Day International/Test Match/ T20 Match) that India participates in, either in India or on foreign soil. Those viewing every other match on DD1, before August 2017, would not prefer to subscribe to Star Sports or ESPN, just for the sake of watching an India- Zimbabwe series, or say, an India-Bangladesh series. This reluctance is bound to have a negative impact on the viewership of cricket in India. The consequential losses that the Star Network will suffer after the judgment, would, in any case, be more than the subscription losses than what it had been incurring.

As far as figures are concerned, out of 155 million households having TV connection, a miniscule number of people i.e. 4.6 million have Prasar Bharti's terrestrial networks;<sup>17</sup> approximately 22 million have DD free dish<sup>18</sup> or Prasar Bharti's DTH network and the rest have cable services and private DTH networks. Purchasing DD free dish just for the sake of watching matches would be an exaggeration of what the Supreme Court is endorsing, but the services offered by Prasar Bharti's DTH network are less lucrative than those of private

---

<sup>17</sup>Ashwini Vaidialingam, *Part II: Union of India v. BCCI – 'Doosra' from the Supreme Court on Broadcast of Cricket Matches by Prasar Bharti*, SPICYIP (Oct. 10, 2017), <https://spicyip.com/2017/10/part-ii-union-of-india-v-bcci-doosra-from-the-supreme-court-on-broadcast-of-cricket-matches-by-prasar-bharti.html>.

<sup>18</sup>Anushree Bhattacharya, DD FreeDish a hit with advertisers, broadcasters; subscriber base reaches 40 mn mark, FINANCIAL EXPRESS (July 11, 2017: 6:34 AM), <https://www.financialexpress.com/industry/dd-freedish-a-hit-with-advertisers-broadcasters-subscriber-base-reaches-40-mn-mark/758045/>.

DTH like TataSky, Airtel, etc. A huge chunk of people would continue to prefer private networks over Prasar Bharti's DTH services and in such a scenario, this judgment is bound to reduce the public access to a sport like cricket, which has in past gathered viewership of 201 million in a Champions Trophy final.<sup>19</sup>

Practically, it is also the case that the same result can be produced without requiring an intervention from a court as the private DTH operators can, in any case, make that sports channel a part of the basic subscription and add minimal costs to the price, which will, in turn, ensure that there are no subscription losses and the public access to cricket also does not suffer. It is high time that the Apex Court took into account a proper balancing of competing interests between private profits of BCCI's licensees and public access to cricket. Cricket has been at the top of priority of Indian television viewers for quite some time<sup>20</sup> and the same, if tampered with, would have a drastic effect on the popularity and the growing enthusiasm amongst youngsters to adulate iconic cricketers like Sachin Tendulkar in India.

---

<sup>19</sup>Gaurav Laghate, *India-Pakistan ODI clocks impressive TV viewership and creates history*, THE ECONOMIC TIMES (June 16, 2017: 12: 17 PM), <http://economictimes.indiatimes.com/industry/media/entertainment/media/india-pakistan-odi-creates-tv-viewership-history/articleshow/59168451.cms>.

<sup>20</sup>Rajender Sharma, *Cricket Undisputed Leader in Indian TV Viewership in 2017*, INSIDESPOT (Jan. 18, 2018), <https://www.insidesport.co/cricket-undisputed-leader-indian-tv-viewership-2017-508012018/>.