

Media Hotline

November 18, 2013

BROADCASTERS TO SHARE LIVE FEED OF SPORTING EVENTS WITH PRASAR BHARATI SANS ADVERTISEMENTS: DELHI HC

- Under Section 3 of the Sports Act (*as defined below*), whosoever (content rights owner or broadcaster) airs a live television broadcast of sporting events of national importance must share the feed with Prasar Bharati without any advertisements forming part of such shared signals.
- These advertisements are not limited only to those inserted by the broadcaster but also to those of the content rights owner. Therefore, even advertisements inserted by the content rights owner must not form part of the feed shared with Prasar Bharati by the broadcaster.
- Rule 5 of the Sports Rules (*as defined below*) is not unconstitutional in relation to Section 3(1) of the Sports Act (*as defined below*) as the Rule merely requires the content rights owner or the holder or a broadcast service provider to ensure compliance with the provisions of the Sports Act.

The Delhi High Court (“**Delhi HC**”), in its recent judgment in the case of *ESPN Software India Pvt. Ltd. (“Petitioner”) v. Prasar Bharati & Anr. (“Respondents”)*¹, has ruled upon the constitutionality of Rule 5² of the Sports Broadcast Signals (Mandatory Sharing with Prasar Bharati) Rules, 2007 (“**Sports Rules**”) in relation to Section 3³ of the Sports Broadcast Signals (Mandatory Sharing with Prasar Bharati) Act, 2007 (“**Sports Act**”).

Pronouncing the impugned rule to be constitutional, the Delhi HC has stated that broadcasters are under an obligation to share live broadcasting signals of sporting events of national importance with Prasar Bharati (“**Respondent No. 1**” or “**Prasar Bharati**”) without inclusion of any advertisements, whether put in place by the broadcast service provider himself or by the content rights owner, i.e., the event organizer, as required under Section 3 of the Sports Act.

BACKGROUND

The Petitioner, the sole and exclusive distributor of certain sports channels in India, had acquired rights from the International Cricket Council (“**ICC**”) to broadcast, in India, sporting events organized by it.

As per Section 3 of the Sports Act, no content rights owner or holder is allowed carriage of a live television broadcast on any cable or Direct-to-Home network or radio commentary broadcast in India of sporting events of national importance, unless it simultaneously shares the same signal, without its advertisements, with Prasar Bharati. As per certain notifications⁴ issued by the Ministry of Information and Broadcasting, certain cricketing events, amongst other sporting events, are classified as ‘sporting events of national importance’. ‘Sporting events of national importance’⁵, under the Sports Act, are defined to mean national or international sporting events which are held in India or abroad, as may be notified by the Central Government in the Official Gazette to be of national importance.

In keeping with Section 3 of the Sports Act and the notification with respect to cricketing events, the Petitioner informed Respondent No.1 that it would be sharing the live signals of cricket matches organized by the ICC with Respondent No.1, albeit with “*added features comprising of commercial elements*”, i.e., as per the feed made available to it by the organizer of the sporting event, with such commercial advertisements inserted by the organizer of the sporting event who is the principal ‘*content rights owner*’ of the broadcast.

Respondent No. 1, in its response, informed the Petitioner that the Petitioner had the obligation to share only the clean live broadcast content *sans* any commercials. In this regard, the Petitioner filed a Writ Petition in the Delhi HC seeking a declaration that its obligation to share live broadcast signals of sporting events of national importance with Respondent No.1 was limited to sharing the live broadcast signal as is, i.e., as per the feed made available to it by the organizer of the sporting event (which, in this case, also contained certain advertisements included by the organizer), who was the principal ‘*content rights owner*’ of the broadcast. Since the Petitioner’s obligation was limited to sharing the signal with the Respondent No. 1, the Petitioner contended that it had no control over the live signals received and making any modifications to the feed received from the organizer would be a breach of contract between the organizer and the Petitioner.

The Petitioner sought a declaration that Rule 5 of the Sports Rules was violative of Section 3 of the Sports Act and *ultra-vires* Article 14 of the Constitution of India which provides for the fundamental right to equality.

ISSUES

Whether Rule 5 of the Sports Rules is violative of Section 3 of the Sports Act and *ultra-vires* Article 14 of the Constitution of India.

CONTENTIONS RAISED BY THE PARTIES

The Petitioner raised the following contentions:

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The Bitcoin Effect

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1. It had no control over the live signals received from the organizer of the event and that it was required to share the broadcast signal as is, i.e., in the form provided to it by the event organizer.
2. The expression 'its advertisements' in Section 3 of the Sports Act referred to the advertisements of the broadcaster in India and not the advertisements of the content rights owner, i.e., the event organizer.
3. Any removal or any insertion in the broadcast signal received from the event organizer would be a breach of the Petitioner's contractual obligations with the event organizer.
4. The demand of Respondent No.1 that a clean feed be provided to it would be an act impossible of being performed by the Petitioner.
5. In accordance with the decision of the Supreme Court in *State of MP. & Ors. v. Vishnu Prasad Sharma & Ors.*⁶ (where the Land Acquisition Act, 1894 was pronounced to be an expropriatory act and therefore, was to be interpreted in a manner least burdensome to the person whose land was expropriated), the Sports Act was similarly argued to be an expropriatory act since it compulsorily extracted a revenue from the broadcaster and therefore, it was urged that it be interpreted in a fashion least burdensome to the broadcaster.

The Respondent raised the following contentions:

1. Any challenge to the reasonableness of the impugned provisions had to be considered with reference to the fact that spectrum / air waves of which the State was a custodian of the public right was / were being used and the Government could set down any condition or a term for the use thereof, which could include a revenue sharing formula.
2. What cannot be done directly cannot be permitted to be done indirectly. Thus, since it was the Petitioner's obligation that it was to provide a clean feed *sans* any advertisements, the same could not have been overruled by placing reliance on the feed provided by the content rights owner.
3. If the Petitioner's plea was accepted, it could lead to strategic methods adopted by event organizers by inserting advertisements in the live feed, thereby appropriating the revenue to foreign shores, leaving nothing to be gained by way of advertisement revenue in India.

DECISION

The Delhi HC, considering the arguments advanced by the parties, opined that the only issue raised by the Petitioner was with respect to the constitutionality of Rule 5 of the Sports Rules *vis-à-vis* Section 3 of the Sports Act.

To determine the *vires* of Rule 5 of the Sports Rules, the Delhi HC considered it crucial to look into the interpretation of Section 3 of the Sports Act. Giving a literal interpretation to the Section, it stated that the expression '*unless it simultaneously shares the live broadcasting signal, without its advertisements, with the Prasar Bharti....*', with reference to the two words '*its advertisements*' in the phrase, was capable of only one interpretation, i.e., that the live broadcast signals shared with Respondent No. 1 had to be without any advertisements.

The reason accorded for the same stemmed from the grammatical interpretation that this Section was to apply to the content rights holders / broadcasting service providers and the phrase "without its advertisements" meant advertisements with respect to any of the said content rights holders / broadcasting service providers. Thus, the Delhi HC held that, simply put, the Section was to be interpreted to mean that whosoever airs a live television broadcast of sporting events of national importance must share the same with Respondent No. 1 without any advertisements forming part of such shared signals.

In light of such interpretation, the Delhi HC has passed the decision in favour of the Respondents stating that Rule 5 of the Sports Rules is not violative of the right to equality under Article 14 of the Constitution of India since Section 3(1) of the Sports Act clearly provides that all live broadcasting signals shared with Respondent No. 1 are to be devoid of any advertisements, irrespective of whether they are provided by the content rights owner or by the broadcaster.

Lastly, the Delhi HC, considering the Petitioner's argument that the Sports Act was expropriatory in nature, stated that such argument was untenable. It held that this argument overlooks the fact that there is no compulsory appropriation of anybody's property in the instant case. Therefore, it was held that the Sports Act is not an expropriatory legislation. The Delhi HC further relied on the judgment of the Supreme Court in the case of *Secretary Ministry of Information & Broadcasting v. Cricket Association of India*⁷ where it was held that the air waves and spectrum are public property held in trust by the Government for the benefit of public good and a person using the same, had to pay for the use thereof and the mode of payment could include a revenue sharing of the gains made as a result of the broadcast.

It is important to note that the Delhi HC did not delve into discussions with respect to (i) the fact that the Petitioner had no control over the live signals, so as to be able to extract the advertisements put in place by the event organizer; and (ii) Section 3(1) of the Sports Act, which casts certain obligations upon the Petitioner which are impossible of being performed by the Petitioner as it would violate its contractual obligations with the copyright owner of the broadcast. The Delhi HC reasoned that the issues related to the *vires* of Section 3(1) of the Sports Act were not a part of this writ petition and that since Section 3(1) of the Sports Act was not challenged by the Petitioner, the aforementioned issues could not be considered.

CONCLUSION / CRITICAL ANALYSIS

This case is the first of its kind where the constitutionality of Rule 5 of the Sports Rules has been challenged and the interpretation of Section 3 of the Sports Act has been provided by the Delhi HC.

Owing to the pronouncement of the Delhi HC, the broadcasters are now liable to share only advertisement-free signals with Prasar Bharati, the Respondent No. 1 herein. While the decision may be appreciated in terms of the fact that the Delhi HC has provided a sound interpretation to Section 3(1) of the Sports Act and Rule 5 of the Sports Rules, it has, indeed, highlighted certain contentious questions which have been left unanswered by the Delhi HC despite their unmistakable significance. Importantly, the Delhi HC has repeatedly clarified that this judgment is limited only to testing the *vires* of Rule 5 and to that extent the Delhi HC has presumed Section 3 of the Sports Act to be *intra-vires* the Constitution of India. These issues, especially those concerning the obligation on the broadcasters to share the signals *sans* advertisements provided by the event organizers (despite probable breaches of contract between the organizers and the broadcasters), may be brought up by the broadcasters in future litigations. Thus, the

issues left unanswered in this decision may open a fresh can of worms in the broadcasting industry and the respite sought to be provided by the Sports Act and the Sports Rules may but be elusive.

However, at this point, in the instant case, with the issue on the Petitioner having no control over the live signals provided to it by the event organizer being left unaddressed, it appears that the Petitioner and the event organizer would need to, once again, consider the terms of the contract entered into between them and make the necessary amendments that would either (i) allow the Petitioner to remove the advertisements before sharing the feed with Respondent No. 1 or (ii) require the event organizer to provide a fresh set of signals to the Petitioner *sans* any advertisements.

On the one hand, this ruling spells good news for Prasar Bharati, who would now be able to manage, display and embed its own advertisements in the clean feed provided by the Petitioner as per its will. Consequently, this will result in higher revenue for Prasar Bharati *vis-à-vis* the circumstance where the feed contained commercials from either the broadcaster or from the content rights owner, resulting in sharing of the advertisement time between the two entities as also the revenues. However, in keeping with Section 3(2) of the Sports Act, Prasar Bharati would still be required to share the advertisement revenue between itself and the content rights owner or the broadcaster in the ratio of 25:75 for television coverage and 50:50 in case of radio coverage.

On the other hand, owing to the judgment, the broadcasters would now be required to take due measures to deflect any liability which may arise under existing or future contracts between them and the content rights owners. In an event where the content rights owners provide to the broadcasters the broadcasting feed with advertisements included, broadcasters are advised to negotiate and / or amend existing contracts to ensure compliance with Section 3(1) of the Sports Act and Rule 5 of the Sports Rules. Moreover, in such instances, due caution may be observed by the broadcasters while entering into new contracts with content rights owners so as to make sure that the signals shared with the Prasar Bharati do not contain any advertisements, including the ones put in place by the content rights owners.

– **Varuna Bhanrale, Kartik Maheshwari & Khushboo Baxi**

You can direct your queries or comments to the authors

¹ W.P.(C) 3611/2013

² **Rule 5 of the Sports Rules: Responsibility of a television or radio channel broadcasting the sporting event**—If the television or radio broadcasting service provider is different from the content rights owner or holder, it shall be its duty to ensure that adequate arrangements for compliance with the provisions of the Act and the rules are made at the time of acquisition of the rights from the content rights owner or holder.

³ **Section 3 of the Sports Act: Mandatory sharing of certain sports broadcasting signals**– (1) No content rights owner or holder and no television or radio broadcasting service provider shall carry a live television broadcast on any cable or Direct-to-Home network or radio commentary broadcast in India of sporting events of national importance, unless it simultaneously shares the live broadcasting signal, without its advertisements, with the Prasar Bharati to enable them to re-transmit the same on its terrestrial networks and Direct-to-Home networks in such manner and on such terms and conditions as may be specified.

(2) The terms and conditions under sub-section (1) shall also provide that the advertisement revenue sharing between the content rights owner or holder and the Prasar Bharati shall be in the ratio of not less than 75:25 in case of television coverage and 50:50 in case of radio coverage.

(3) The Central Government may specify a percentage of the revenue received by the Prasar Bharati under sub-section (2), which shall be utilised by the Prasar Bharati for broadcasting other sporting events.

⁴ The notification dated October 3, 2007 refers to cricketing events and classifies them as 'sporting events of national importance'.

⁵ Section 2(1)(s) of the Sports Act

⁶ (1966) 3 SCR 557

⁷ (1995) 2 SCC 161

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