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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS(OS) No.2722/2012& Conn.

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8th November, 2012

1. CS(OS) 2722/2012

STAR INDIA PVT. LTD.

...Petitioner

Through: Mr. Gopal Subramaniam, Sr. Advocate, Mr. Maninder Singh, Sr. Advocate with Mr. Saikrishna Rajagopal, Mr. Sidharth Chopra and Mr. Yakshay, Advocates.

VERSUS

PIYUSH AGARWAL & ORS.

..... Defendants

Through: Mr. Sudhir Chandra, Sr. Advocate with Ms. Gayatri Roy, Mr. Himanshu Bagai and Mr. Udit Sood, Advocates for D-1 and D-2. Abhinav Vasisht, Sr. Adv. with Ms. Radha Rangaswamy, Mr. Amit Sibal, Mr. Raman Kumar, Advocates for D-3.

2. CS(OS) 3232/2012

STAR INDIA PVT. LTD.

...Petitioner

Through: Mr. Gopal Subramaniam, Sr. Advocate, Mr. Maninder Singh, Sr. Advocate with Mr. Saikrishna Rajagopal, Mr. Sidharth Chopra and Mr. Yakshay, Advocates.

VERSUS

IDEA CELLULAR LTD.& ANR.

..... Defendants

Through: Mr. Rajiv Nayar, Sr. Adv. with Ms. Sonali Jaitley, Ms. Subha Chauhan and Ms. Parul Yadav, Advocates for D-1.

Mr. Mukul Rohtagi, Sr. Advocate, Mr. Abhinav Vasisht, Sr. Advocate with Ms. Radha Rangaswamy, Mr. Amit Sibal, Mr. Raman Kumar, Advocates for D-2.

3. CS(OS) 2780/2012

STAR INDIA PVT. LTD.

...Petitioner

Through: Mr. Gopal Subramaniam, Sr. Advocate, Mr. Maninder Singh, Sr. Advocate with Mr. Saikrishna Rajagopal, Mr. Sidharth Chopra and Mr. Yakshay, Advocates.

VERSUS

ONMOBILE GLOBAL LTD. & ANR.

..... Defendants

Through: Mr. Sanjay Jain, Sr. Advocate with Mr. Hardeep Singh Anand, Ms. Noor Anand, Ms. Vandana Sehgal, Mr. Rohan Thawani, Ms. Kriti Singh and Ms. Ruchi Jain, Advocates for D-1.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? YES

VALMIKI J. MEHTA, J (ORAL)

1. (i) The present judgment will result in disposal of three suits, namely, CS(OS) 2722/2012, CS(OS) 3232/2012 and CS(OS) 2780/2012. The only

contention which is urged on behalf of the plaintiff (who is the same in all the three suits) is that when Board of Control for Cricket in India (hereinafter referred to as “BCCI”) organizes cricket matches, then, any and every information pertaining to such cricket matches including the right to create and broadcast Short Message Services (SMSs) based on the said information emanating from the cricket match; and which value added services are being provided by the defendants in the suits; is the exclusive right/property of the plaintiff and therefore the engaging by the defendant in such activities for commercial benefit is illegal. The plaintiff claims exclusive rights of providing such value added services through SMSs on the basis of the agreement dated 10.08.2012 entered into between it and the BCCI, and which agreement gives exclusivity to the plaintiff qua such information and rights.

(ii) The counsel appearing for the defendants have contrarily argued that the plaintiff has no legal right as claimed, and on this Court coming to such a finding that the plaintiff has no such legal right then, the suits themselves be dismissed under Order XII Rule 6 of Code of Civil Procedure (CPC) on the undisputed position so emanating i.e once no legal right exists, the same cannot be enforced, no reliefs as prayed by the plaintiff can be granted, and the suits hence must stand dismissed.

2(i) The BCCI which is a defendant in this case supports the plaintiff and states that the suits have to be decreed. The BCCI states that it has entered into an agreement dated 10.8.2012 with the plaintiff whereby plaintiff has the rights as claimed. The BCCI reaffirms its rights and those of the plaintiff in terms of the agreement dated 10.8.2012.

(ii) The rights of the BCCI (or any of its assignees including the plaintiff) which I am deciding in this suit are only qua the issue of underlying content/information contained in the audio visual broadcast of the event called a cricket match i.e not of the audio visual broadcast itself as it is.

(iii) The defendants who are referred in the present judgment are the contesting defendants other than BCCI which is the author/producer of the cricket matches as per the meaning of such terms under Copyright Act, 1957.

3. The issue to be decided and the relevant facts are in a narrow compass and are as under: The plaintiff states that in terms of its agreement dated 10.08.2012 with the BCCI, the plaintiff has exclusive media rights. The media rights and other related rights are specified at internal page 9 of the agreement and which clauses of the agreement are reproduced in the later part of this judgment. It is also urged that with respect to such media rights, plaintiff has exclusivity by virtue of para 2 (and its various sub-paras) of the agreement dated 10.08.2012,

more particularly paras 2.2 and 2.3. It is argued that such rights of the plaintiff exist independently of the Copyright Act, 1957 (hereinafter referred to as “the Act”) i.e the copyrights provided under the Act are not exhaustive of the rights which can be created in respect of an event/live event. It is argued that the plaintiff therefore not only has rights with respect to the first right of broadcast by diffusion of information to the public, but also the plaintiff continues to even subsequently have rights to the information which is broadcasted, although, the information comes into the public domain. It is argued that for a period of 72 hours as provided in the agreement dated 10.08.2012 the media rights i.e the right to all information emanating from the event, belong exclusively to the plaintiff.

4. In response, it is argued on behalf of the defendants that once there is a specific statute, being the Copyright Act which occupies the field, and which Act specifies only specific rights to a ‘performer’ and his assignees, then, except such rights as specifically provided under the said Act, no other exclusive right, be it called by whatever name, can be claimed or granted to the performer and the assignee of the performer i.e BCCI or its further assignee (s). It is accordingly argued that once the subjects are dealt with in the Act, the plaintiff cannot claim a so-called contractual right merely because the same is so stated in the agreement

dated 10.08.2012, inasmuch as, no party can create rights which not only the statute does not provide, but rather specifically excludes/bars.

5(i) At the commencement of the discussion I must note an important statement made on behalf of the defendants and which is that the defendants admit that they are not using the audio visual recording (or any part of the same) which is created by the plaintiff as it is, and all that the defendants are doing is that once information from the visual recording and sound recording comes into the public domain, a separate data base/information bank is created, and it is from that information bank that information is further transferred to various persons, including mobile service users. It is argued that once the direct footage; whether visual or audio or both; is not utilized by the defendants, there does not take place any violation of any right of the plaintiff, inasmuch as information existing in public domain is news which is not the subject matter of a copyright and news is that subject which no-one can monopolize.

(ii) The present judgment therefore is a judgment only with respect to information which is available in the public domain after the first broadcast of the audio recording or visual recording or both, and to which original/identical recording undoubtedly only the plaintiff has the exclusive rights. Such exclusive rights the plaintiff has because the performers, and thereafter the assignee of the

performers; being the BCCI in this case; have given such rights to the plaintiff. Thus this judgment deals not with the exact and original video recording and/or sound recording, but only to the content and the information contained in the audio recording and/or visual recording which comes into a public domain pursuant to the right of first broadcast which is exercised by the plaintiff.

6(i) In order to appreciate the issue as to whether the rights which are claimed by the plaintiff are or are not covered under the Act, and putting it differently can they arise or exist independently of the Act, it is necessary at this stage to refer to the various/relevant provisions of the Act. Wherever certain language of the section(s) is underlined/emphasized, the underlining is mine and added for emphasis. The relevant sections are hereinafter reproduced:-

(ii) **“Section 38 Performer’s right.-** (1) Where any performer appears or engages in any performance, he shall have a special right to be known as the “performer’s right” in relation to such performance.”

A reading of the aforesaid Section 38 shows that there are two important expressions which are used viz a performer and the performance.

(iii) What is the meaning of these two aforesaid expressions? The meanings of these expressions are found in their definition contained in Sections 2(q) and 2(qq) of the Act which read as under:-

“Section 2(q) “performance”, in relation to performer’s right, means any visual or acoustic presentation made live by one or more performers;

Section 2(qq) “performer” includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance.”

(iv) When a cricket match is played, there are various dramatis personae in the performance. So far as the visual recording is concerned, the performers essentially are the cricket players who play out the match. Also, and in a way, the umpires are also an integral part of the live performance, and thus they can also be said to be performers in the match. Though a cricket match is not specified under Section 2(q) or Section 2(qq) as reproduced above, in view of the categorical language of these provisions, it cannot be doubted that a cricket match very much falls within the definition of expression ‘performance’ and qua such performance the cricketers/players (as also umpires) would be a performers.

7(i) The next relevant Section is Section 38A. This Section reads as under:

“Section 38A. Exclusive right of performers._(1) Without prejudice to the rights conferred on authors, the performer’s right which is an exclusive right subject to the provisions of this Act to do or authorize for doing any of the following acts in respect of the performance or any substantial part thereof, namely.-

(a) to make a sound recording or a visual recording of the performance, including-

- (i) reproduction of it in any material form including the storing of it in any medium by electronic or any other means;
 - (ii) issuance of copies of it to the public not being copies already in circulation;
 - (iii) communication of it to the public;
 - (iv) selling or giving it on commercial rental or offer for sale or for commercial rental any copy of the recording;
- (b) to broadcast or communicate the performance to the public **except where the performance is already broadcast.**

(2) Once a performer has, by written agreement, consented to the incorporation of his performance in a cinematograph film he shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer's right in the same film:

Provided that, notwithstanding anything contained in this subsection, the performer shall be entitled for royalties in case of making of the performances for commercial use.”

(ii) Section 38A deals with what are the legal rights of a performer. The emphasized portion of the aforesaid Section shows that a performer's right is an exclusive right only for specified purposes as stated in clauses (a) and (b) of subsection (1). In terms of the language of this provision, basically, the performer's right would be making of a sound recording or visual recording of the performance; reproducing the sound recording and the visual recording; issuing copies of the recording or communicating the same to the public; and, selling or otherwise doing a commercial act including with respect to the copy of the recording. Clause (b) of Section 38 A (1) is relevant inasmuch as a clue is

provided in this clause which seems to indicate that with respect to a broadcast already made, qua the information which is disseminated through the first broadcast in public domain (as against the audio visual recording itself) the performer cannot claim a right, inasmuch as, Section 38A(1)(b) states that the entitlement of the performer with respect to his performance rights is to broadcast or communicate the performance to the public except where the performance is already broadcast. It is, therefore, a clear pointer to the fact that once a performance is already broadcast it may be possible to say that except with respect to the actual visual and audio recording of the performance itself, there may not be other rights with respect to the information contained in the performance which is already broadcast.

(iii) Sub-section (2) of the aforesaid Section 38A states that once the rights of the performer and his performance have been incorporated in a cinematographic film, the performer cannot object to the commercial exploitation by the producer of the film of the performance rights in the same film. As will be noticed hereafter, the audio visual recording of the performance is a cinematographic film, as per the meaning/definition of the same under the Act. Observations are also made as to whether combination of the visual and audio recording; and which one normally sees in the footage of the cricket match which is broadcast near simultaneous to the

event taking place on the turf; falls within the meaning of the expression cinematographic film, and if yes what follows.

8(i) Before however we dwell on ‘cinematographic film’, continuing on the subjects of a performance and performer’s right, let us presently understand as to what all are or can be the subjects which can be the subject matters of rights as copyrights under the Act.

(ii) What are the rights which can be the subject matters of a copyright under the Act are contained in Sections 13 and 38 of the Act, and of which two sections I have already reproduced Section 38 above. The other Section 13, qua its relevant part, reads as under:

“Section 13. Works in which copyright subsists.-(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,-

- (a) original literary, dramatic, musical and artistic work;
- (b) cinematograph films; and
- (c) [sound recording]”

9(i) A conjoint reading of Sections 13 and 38 shows that a copyright subsists in seven classes of works i.e literary work, dramatic work, musical work, artistic work, a cinematograph film including video film, a sound recording, and a performer’s performance.

(ii) It is extremely important to note that except with respect to the aforesaid subject matters, copyright cannot/does not subsist in any other work, and this is made absolutely clear by Section 16 of the Act, and which reads as under:-.

“Section 16. No copyright except as provided in this Act – No person shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act or of any other for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.”

(iii) There thus can be no manner of doubt once we read the heading of the section “no copyright except provided in this Act”, and the emphasized parts of the section reproduced above, that, there cannot exist a copyright in a ‘work’ dehors the Act i.e exclusive right in a work or any right in a work is only that which is the subject matter of the Act, and merely because a particular nomenclature not stated in the Act is sought to be given to a type of ‘work’ which is urged to be not a work under the Act, proprietary rights or property rights cannot be claimed in such a work.

10(i) Let us now understand the expression ‘work’, and therefore, at this stage, it is required to reproduce the definition of the expression ‘work’ as contained in Section 2(y) in the Act, and the same reads as under:-

“Section 2(y) “work” means any of the following works, namely:-

- (i) a literary, dramatic, musical or artistic work;
- (ii) a cinematograph film;
- (iii) a [sound recording]”

(ii) Though the definition of work may not include the performer’s right, however, this Section 2(y) has necessarily to be read with Section 38 which provides for a performer to have a copyright in his performance and therefore performance is a work in which copyright is created under the Act. What are thus all those ‘works’ in which copyrights can exist are those which are found on a simultaneous reading of Sections 13 & 38 of the Act.

11. The next question which arises is that if a person has a copyright in the seven types of works as stated above, what is really the effect of having each of such copyright i.e what entitlements flow from the different types of copyright works. The effect of having a copyright, i.e benefits to be derived from a copyrighted work, are those as stated in Section 14 of the Act. As per this Section 14, the different subjects/ works which are the subject matters of copyrights, cause/bring about different/manifold rights i.e, whereas one type of work gives certain rights the other type of work gives separate rights; which can be either larger or lesser. Since I am not required to dilate on the rights which are provided

in Section 14, I am not reproducing herein the various sub-sections and the different clauses of the same, and it is sufficient for this judgment to observe that each copyright work has specific and specified consequential rights which are contained in the aforesaid Section 14. For the sake of completion of narration, I must state that the equivalent rights with respect to a performance of a performer i.e qua a copyright in a performance under Section 38 (which is not dealt with in Section 14) are those as contained in Section 38A reproduced hereinabove.

12. A conjoint reading of all the aforesaid provisions bring out the following salient conclusions:-

- (i) There are a total of seven types of copyright works;
- (ii) Each of such copyright works have specified rights as stated in Sections 14 and 38A of the Act.
- (iii) On account of the specific bar contained in Section 16, except for the specified copyrights, there does not/cannot exist any right or copyright in any other work.
- (iv) A performer's right called a performance is a subject matter of a copyright by virtue of Section 38. The performers in a cricket match are essentially: (a) the players (b) the umpires, and (c) the commentators who

give commentary, whether for the television or the radio or any other medium of broadcast.

(v) The acts/performances of the performers in the cricket match event are recorded in a visual recording and/or the sound recording of the event, and to which performance only those specific entitlements exist as specified in Section 38 A, and nothing more.

(vi) Reproduction or communication of the exact sound recording and/or the visual recording, without a license or permission being obtained from the owner of the visual/audio recording (or in violation of the terms of the license or permission obtained) amounts to infringement of the copyright as per Sections 37 & 51 of the Act, except when use of copyright material is made permissible under certain provisions of the Act such as Sections 39 and 52.

13. The most important essence which flows from all the conclusions contained in the para just above is that except to the extent of original sound recording and original visual recording of the performance, and the rights which flow therefrom, there is no other right of a performer or his assignee with respect to the audio and/or visual recording of the performance. Meaning thereby that the underlying content/information is not made a subject matter of a copyright, and

thus if only the content or information contained in an audio recording and/or a visual recording is used for creating an information bank/data base, then, use of the information/content cannot/does not amount to infringement of the copyright either in the performance or in the audio and/or visual recording of the performance.

14(i). At this stage for a better understanding of the difference between use of the exact clips/parts of the original audio and/or visual recording and use only of the information/content in such audio and/or visual recording without the exact clips/parts of the original audio and/or visual recording, I would like to bring in the discussion as regards the concept of version recording (or cover version as it is now called). The discussion will also help in understanding the aspect that a copyright which exists in original work is different from a new work created from the content/information contained in original copyrighted work.

(ii) A sound recording is created out of musical work and lyrics/literary work, and such sound recording is a copyright work vide Section 13(1)(c) of the Act. The copyright in a sound recording is in addition to the copyright in the underlying musical and literary work which are themselves also subjects of a copyright. A sound recording includes a subsequent original sound recording made from the musical and literary work and which is called a version recording i.e a sound recording made after a first sound recording is made by use of the musical work

and literary work/lyrics. The principles qua version recording (now called cover version) were contained in Section 52(1)(j) of the unamended Act which has now been deleted, and the equivalent provision of which is now Section 31C of the present Act. In order to appreciate this concept of version recording, it is necessary to refer to few important provisions in the Act, and which are reproduced herein below:

“Section 2(ffa) “composer”, in relation to a musical work, means the person who composes the music regardless of whether he records it in any form of graphical notation.

Section 2(o) “literary work”

Section 2(p) “musical work” means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music.

Section 2(t) “plate” includes any stereotype or other plate, stone, block, mould, matrix, transfer, negative (duplicate equipment) or other device used or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which (sound recording) for the acoustic presentation of the work are or are intended to be made.

Section 2(xx) “sound recording” means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is the method by which the sounds are produced.

Section 31C. Statutory licence for cover versions.- (1) Any person desirous of making a cover version, being a sound recording in respect of any literary, dramatic or musical work, where sound recordings of that work have been made by or with the licence or consent of the owner of the right in the work, may do so subject to the provisions of this section:

Provided that such sound recordings shall be in the same medium as the last recording, unless the medium of the last recording is no longer in current commercial use.

(2) The person making the sound recordings shall give prior notice of his intention to make the sound recordings in the manner as may be prescribed, and provide in advance copies of all covers or labels with which the sound recordings are to be sold, and pay in advance, to the owner of rights in each work royalties in respect of all copies to be made by him, at the rate fixed by the Copyright Board in this behalf:

Provided that such sound recordings shall not be sold or issued in any form of packaging or with any cover or label which is likely to mislead or confuse the public as to their identity, and in particular shall not contain the name or depict in any way any performer of an earlier sound recording of the same work or any cinematograph film in which such sound recording was incorporated and, further, shall state on the cover that it is a cover version made under this section.

(3) The person making such sound recordings shall not make any alteration in the literary or musical work which has not been made previously by or with the consent of the owner of rights, or which is not technically necessary for the purpose of making the sound recordings:

Provided that such sound recordings shall not be made until the expiration of five calendar years after the end of the year in which the first sound recordings of the work was made.

(4) One royalty in respect of such sound recordings shall be paid for a minimum of fifty thousand copies of each work during each calendar years in which copies of it are made:

Provided that the Copyright Board may, by general order, fix a lower minimum in respect of works in a particular language or dialect having regard to the potential circulation of such works.

(5) The person making such sound recordings shall maintain such registers and books of account in respect thereof, including full details of existing stock as may be prescribed and shall allow the owner of rights or his duly authorised agent or representative in inspect all records and books of account relating to such sound recording:

Provided that if on a complaint brought before the Copyright Board to the effect that the owner of rights has not been paid in full for any sound recordings purporting to be made in pursuance of this section, the Copyright Board is, *prima facie*, satisfied that the complaint is genuine, it may pass in order *ex-parte* directing the person making the sound recording to cease from making further copies and, after holding such inquiry as it considers necessary, make such further order as it may deem fit, including an order for payment of royalty.

Explanation- For the purposes of this section “cover version” means a sound recording made in accordance with this section.]”

15(i) In order to appreciate the aforesaid sections, and more particularly Section 31C, an example is required to be given. Suppose a famous singer sings particular lyrics and which singing is accompanied by an orchestra which plays out music. This performance involves various works and use of all such works jointly results in a new copyright work called the sound recording which let us call the first sound recording. In such first sound recording there are a total of three copyrights which get amalgamated to create one consolidated work. The first copyright is in the lyrics created by the lyrics writer i.e. the literary work. The second copyright is in the musical work. The third copyright is in the performance by the performers viz the singer and the persons comprising the orchestra.

To be noted is that music is different from sound i.e. music only means what are the musical notes which are found on the paper or other writing medium, and

not what we hear. What we hear, and which is called music in layman's terms, is really a sound created by the musician by playing an instrument in terms of musical notes (which is the musical work and the subject matter of a copyright) and performance brings about a 'sound recording'. Thus music as a layman understands is different from what is 'music' under the Act because when a song is sung, and which singing is accompanied by an orchestra, there results in what is commonly known as the musical work, however really, this normal concept of musical work is a misnomer inasmuch as the combination of all the three aforesaid works is really what is a 'sound recording' as per Section 2(xx) of the Act.

(ii) Once a combination of the aforesaid three works being the lyrics, music and the performer's works together, is performed and a sound recording created, that sound recording which is the first sound recording, is recorded on what is known as a 'plate' under Section 2(t) of the Act. It is from such plate that subsequently copies are prepared and the right to prepare such copies is one of the copyrights qua a copyright work which is specifically provided under Section 14(e) of the Act. Therefore, no one can prepare any copies either from the original plate or the copies of the work (which are also a subject matter of the copyright) unless permission or license is taken from the author of the sound recording.

(iii) After the first sound recording is made, then, if and after permissions are taken from the authors of the musical work and the lyrics writer which formed the basis of the first sound recording, another band of orchestra with the singer (i.e. another set of performers) can by their performances on the basis of the existing musical work and the lyrics, cause to come into being a new sound recording. This second/subsequent sound recording is called a version recording/cover version. This new/second sound recording itself is a subject matter of a copyright by virtue of Section 13(1)(c) of the Act and there exist the entitlements on the basis of such sound recording to exercise rights as provided in Section 14(e) of the Act. To further clarify, on utilization of original musical work and the lyrics from which the first sound recording is made, various independent/subsequent sound recordings can be made, and each of which subsequent sound recording would be original sound recording for being the subject matter of the copyright under Section 13(1)(c) of the Act. Of course, at the cost of repetition, no sound recording can be created from the original musical work or the lyrics unless license is taken, whether contractual or statutory under the Act, from the authors of the musical work and the literary work/lyrics.

16. I have given the aforesaid detailed narration and discussion/explanation with respect to sound recording and version recording

inasmuch as it is extremely important to note that copyright exists only with respect to a performer's work and the 'visual recording' and the 'sound recording' where that performance is recorded inasmuch as the only expressions as are found in Section 38A are of 'visual recording' or 'sound recording'. There is no copyright provided in the underlying content/information as contained in the audio visual recording. Once the sound recording and/or the visual recording comes in the public domain, then the information which comes in the public domain from the content of the audio and/or visual recording is only an underlying content/information to which there is no copyright granted under the Act. There is a difference in the audio visual recording to which there is a copyright and which is to be contrasted with the underlying content of the audio visual recording i.e in a way similar to the underlying works in a subsequent/second sound recording created from the original copyright works being the musical notes and lyrics. Whereas the underlying original works viz the musical and literary works are given specific protection under Section 13(4) although various original sound recordings are created therefrom, however, to the underlying content/information in the audio visual recording no protection is granted similar to the protection granted to the underlying musical and literary work by Section 13(4). The underlying information/content itself/ only therefore cannot be raised to a pedestal of a legal

right equivalent to a copyright or something equal to copyright; whatever be the nomenclature given for such right i.e. a common law right or property right and so on. This conclusion also becomes necessary in view of the categorical bar contained in Section 16 of the Act.

17(i) After having set out in some detail quite a few sections of the Copyright Act let me exactly quote what has been argued on behalf of the plaintiff for claiming rights with respect to the information which emanates from the event called a cricket match, and which information/ content is used and further provided by the defendants by means of value added services to its subscribers of the mobile services. What the plaintiff claims is this:-

(ii) Any information pertaining to the event is property, and such property automatically has the consequence that the said property can only be exploited by the person who owns the same. The argument is buttressed on behalf of the plaintiff by referring to the following clauses of the agreement dated 10.8.2012 entered into between it and the BCCI:-

“D. Prior to the date of submission of Bids, the Licensor made certain amendments to the ITT and the Media Rights License Agreement forming part of the ITT vide a separate document cited Clarifications to the ITT BCCI International & Domestic Series (2012-2018) dated 29th March, 2012 (the “**Clarification**”) which were deemed to be incorporated into the ITT and the Media Rights Agreement forming part of the ITT.

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Media Rights means the Television and Internet Rights, Audio Rights and Mobile Rights as further described in section 2 read with section 6 of this Agreement and section 4 of the ITT;

Minimum Transmission Requirements means the minimum coverage and delivery requirements set out in Section 6;

Mobile Activation Right means the right to make available any form of BCCI-branded schedule match and score alert and application exploited via SMS, MMS or any other form of Mobile Communications Technology or Mobile Wireless Technology; It is clarified that no other form of exploitation would be permitted such as competition, game fantasy Event, predictor game, application or other activation which are expressly prohibited.

Mobile Broadcast Technology means each wireless standard or technology for the broadcast of audiovisual images to Mobile Devices including DVB-H, DAB, DMB-T, DMB-S, IDB-T and Qualcomm's MediaFlo technology and similar, related or derivative standards or technologies devised or invented in the future;

Mobile Communications Technology means any mobile wireless communications technologies with radio frequency spectrum in any band to enable or facilitate the delivery of, amongst other things, audiovisual content to Mobile Devices for reception and viewing in intelligible form including, General Packet Radio Services (GPRS), Global System for Mobile Communications (GSM), Universal Mobile Telecommunications System (UMTS) and any similar, related or derivative technology now known or devised or invented in the future;

Mobile Delivery means the delivery or provision of access to audio and/or visual material and/or audiovisual material for reception and viewing in an intelligible form by means of Mobile Broadcast Technology and/or Mobile Communications Technology;

Mobile Device means any handheld portable personal device (whether now known or hereafter developed) which is primarily designed or adapted to be capable of being used while in motion and which when connected to a mobile communications network uses Mobile Communications Technology in order to send and receive voice and data (including without limitation audio and audiovisual content);

Mobile Rights means the Mobile Activation Rights and the right to deliver or provide access to the Feed or Footage, and Audio Feed, any Unilateral Commentary and Unilateral Coverages in the Territory during the Rights Period, for reception and viewing in an intelligible form on a Mobile Device where the communication link(s) used in such delivery comprises, at least in part, Mobile Communications Technology and/or Mobile Broadcast Technology but excluding Television delivery and Internet Delivery;

Mobile Network means the mobile network on which the Mobile Rights are exploited;”

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2.1 Subject to the terms and conditions of this Agreement, and in particular, the provisions relating to minimum transmission obligations in Section 6 and the provisions pertaining to exclusivity referred to in Section 2.3 below, Licensor hereby grants to Licensee the following Global Rights:

2.1.1 During the Rights Period A

(a) the Television Rights, the Audio Rights, the Internet Rights, the Mobile Rights and the Licensee Mobile Rights on an Exclusive basis;

(b) The right to make available Interactive Services to viewers of Footage subject to prior written consent of BCCI;

(c) the right to produce Unilateral Coverage and Unilateral Commentary for transmission and delivery by means of Television Delivery, Radio Delivery, Internet Delivery and Mobile Technology and pursuant to the Licensee Mobile Rights; and

(d) the right to incorporate excerpts of Footage in promotional trailers and (in respect of such promotional trailers as incorporate excerpts of Footage) to broadcast, transmit and otherwise make them available by Television Delivery, Internet Delivery, Mobile Delivery and/or by any other means, solely to promote and market Licensee's transmissions of the Matches and not to promote any other licensee or third party goods or services, and provided that the use of Footage does not suggest endorsement of the Licensee or any of its Channels or services by Licensor, or any of its officials.

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Exclusivity and Retained Rights

2.2 If any right or licence granted to Licensee in Section 2.1 is expressed as being granted on an "Exclusive" basis, this shall mean that Licensor has not and, subject to Section 2.3 and 2.4 will not enter into agreements with any other person which license or purport to license to such other person such right save as qualified in this Agreement.

2.3 (i) Licensee acknowledges and agrees that to the extent that any of the Media Rights are granted on an Exclusive basis (as referenced in Section 2.1 above) such exclusivity shall, in respect of each Match, extend for a period of 72 hours from the conclusion of such Match, (the "**Exclusive Period**") where after;

(a) In relation to Television Rights, after the Exclusivity Period, such rights shall become non-exclusive to the extent that BCCI shall be entitled to exploit the Archive Rights subject to any such clip used in relation to such exploitation of Archive Rights being restricted to not more than 30 minutes in duration;

(b) In relation to the Audio Rights, the Internet Rights and the Mobile Rights, after the Exclusivity Period, such rights shall become non-exclusive and BCCI shall also be entitled to exploit such rights in its discretion;

(c) Licensee shall not be entitled to make available may Footage via any Video-On-Demand or other on-demand service;

(d) Lisensee shall not be entitled to sub-license any Footage to any third party; and

(e) Licensee shall not sue any Footage in conjunction with any non-Event footage.

(ii) Accordingly, Licensee further acknowledges and agrees that subject only to Section 2.3(iii) below, after the Exclusivity Period, Licensor shall be free to itself transmit, make available and otherwise exploit, or to authorise any other persons to so do, the Audio Rights, Internet Rights and the Mobile Rights within the Territory on a nonexclusive basis without restriction throughout the remainder of the Rights Period.

(iii) Licensor agrees that it shall not authorise any competitor of the Licensee to transmit, make available of otherwise exploit the Audio Rights, Internet Rights and the Mobile Rights in respect of a particular Match until 72 hours after the end of the relevant Event of which the Match forms part, subject to the News Access provisions under Section 2.6 below.”

(iii) It is argued on behalf of the plaintiff that by virtue of aforesaid clauses, and including particularly Clause 2.3, BCCI for a period of 72 hours has given exclusive rights to the plaintiff with respect to all the media rights which are mentioned as aforesaid in the agreement. It is further argued that once all the media rights are given exclusively to the plaintiff for 72 hours, and such media rights include the exclusive right to the plaintiff to disseminate information even through SMSs which are created by the defendants, then, such rights continue to exist in the plaintiff for 72 hours in spite of the fact that a first broadcast has taken

place and information is already in public domain. Such rights are argued to exist in favour of the plaintiff although the SMSs are not copies of the original sound and/or visual recording, and also in spite of the fact that only content/information existing in the already broadcast audio and/or visual recording is used after preparing an information bank created by the defendants.

18. In my opinion, the argument urged on behalf of the plaintiff is really indeed very hollow and shallow for the reasons already given hereinabove. Merely by typing/printing a very properly typed/printed document called the agreement dated 10.8.2012, the same cannot result in creation of legal rights once no such rights can exist inasmuch as the law does not provide for or entitle or sanction the existence of any such rights. The argument of the plaintiff that in terms of the agreement giving exclusivity for 72 hours, it is only the plaintiff who has monopoly of all the news and information which emanates from the event called the cricket match, is an argument which just cannot sustain as the news in public domain is not and cannot ever be in the monopoly one or more persons especially because content/information from a copyright work is not the subject matter of copyright as per Sections 13,14 and 38A and thus no rights can be claimed in the same in view of the reading of the applicable provisions of the Act, and more particularly Sections 16 & 13(4). Also, if really media rights as alleged by the

plaintiff can be created, then, I am sure why only for 72 hours even for 72 days or 72 weeks or 72 months or even for whatever period of years legally permissible under the Act, exclusivity could have been granted to the plaintiff with respect to such media rights. The crux of the matter and the issue is that it is not open to the plaintiff to contend and canvass that even after the first broadcast is made the information which is disseminated to the public i.e information comes in a public domain, even this information which comes into public domain, continues still to be the subject matter of the copyright claim of the plaintiff. Even public interest doctrine bars the claim being set up by the plaintiff once no statute gives the specific rights which the plaintiff claims.

A further reason to deny exclusivity of information to the plaintiff is when we look at the concept of entitlement of fair dealing with respect to the original/actual audio and visual recording itself and which is the subject matter of a copyright of a performer or his assignee. The principle of fair dealing quite clearly goes against the concept of there being a monopoly for 72 hours in favour of the plaintiff with respect to news created from the event which is available in public domain because if fair dealing is permitted even with the original copyright work being the original visual recording and/or the original audio recording, then, surely

qua only the content/information of the audio and/or visual recording the fair dealing concept will apply with stronger reason.

19(i) For completion of narration at this stage I would seek to reproduce the Sections which define the meaning of broadcast, the right of rebroadcasting and a cinematographic film. These provisions are contained in Sections 2(dd), 2(f) and 37 of the Act, and which provisions read as under:-

“Section 2(dd) “broadcast” means communication to the public-

(i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or

(ii) by wire,

and includes a re-broadcast;]”

Section 2(f) “cinematograph film” means any work of visual recording and includes a sound recording accompanying such visual recording and “cinematograph” shall be construed as including any work produced by any process analogous to cinematography including video films.

37. Broadcast reproduction right. – (1) Every broadcasting organization shall have a special right to be known as “broadcast reproduction right” in respect of its broadcasts.

(2) The broadcast reproduction right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which the broadcast is made.

(3) During the continuance of a broadcast reproduction right in relation to any broadcast, any person who, without the license of the

owner of the right does any of the following acts of the broadcast or any substantial part thereof,-

(a) re-broadcasts the broadcast; or

(b) causes the broadcast to be heard or seen by the public on payment of any charges; or

(c) makes any sound recording or visual recording of the broadcast; or

(d) makes any reproduction of such sound recording or visual recording where such initial recording was done without license or, where it was licensed, for any purpose not envisaged by such license; or

[(e) sells or gives on commercial rental or offer for sale or for such rental, any such sound recording or visual recording referred to in clause (c) or clause (d).]

Shall, subject to the provisions of section 39, be deemed to have infringed the broadcast reproduction right.”

(ii) The definition of broadcast includes rebroadcast. Obviously rebroadcast is the exact and identical audio and visual recording. It is when the original audio and visual recording is again broadcast it is called a rebroadcast. Such rights of rebroadcast are given exclusivity under the Act as per Section 37 and which provides that with respect to the rebroadcast also no one has a right to use the audio and visual recording except in accordance with the license which is taken from the owner of the original audio and visual recording. Section 37 of the Act, in a way could be said to be duplication, if not otiose, inasmuch as, once really a combination of audio and visual recording creates a video

recording/cinematographic film which is broadcasted, there would come into existence a 'cinematograph film' as per the provision of section 2(f) of the Act, and a cinematograph film is itself a subject matter of the copyright as per section 13(1)(b) of the Act. Once a cinematograph film is a subject matter of the copyright then surely no one can broadcast or rebroadcast or communicate to the public or in any manner utilize the cinematograph film except with the consent of and the permission of the owner/author of the cinematograph film, otherwise there would result infringement by the broadcast or rebroadcast in terms of section 51 and the related sections of the Act. Section 37 possibly therefore does not give any further protection to an audio visual recording which is otherwise not protected and provided for in the other relevant provisions of the Act for a cinematographic film. Obviously, using without license, the cinematographic film/video recording or the identical visual recording or audio recording or both, will amount to a clear violation of the performer's rights which have been created under Sections 38 and 38A of the Act, and thus before such identical audio and/or visual recording of the performance of the performer (which is recorded in the audio recording or visual recording) is used, the necessary license under the Act will have to be taken from the performer or his assignee.

20(i) Now I must refer to the two judgments which have been cited on behalf of the plaintiff in support of its claims. The first judgment is a judgment of the Division Bench of this Court in the case of *New Delhi Television Ltd. Vs. ICC Development (International) Ltd. & Anr. FAO(OS) 460/2012* decided on 11.10.2012. Another judgment which is relied upon is the judgment of a learned Single Judge of the Madras High Court in the case of *M/s Marksman Marketing Services Pvt. Ltd. Vs. Bharti Tele-Ventures Ltd. & Ors.* in O.A no. 78/2006 in CS No. 74/2006 dated 11.2.2006.

(ii) So far as the judgment in *New Delhi Television Ltd. (Supra)* case is concerned the same was with respect to the exact (viz identical) audio and visual broadcast of the cricket match. The judgment did not deal with the issue of content/information which becomes available in the public domain after the first broadcast of the audio and visual recording by the BCCI or its assignee (which is the plaintiff in this case). Some of the observations in the said judgment are in favour of the present plaintiff and some of the observations are in favour of the defendants herein, and I would hereafter reproduce them, however, before that is done it is necessary to refer to the pithy observations of the Constitution Bench of the Supreme Court in the case of *Padma Sundara Rao (Dead) & Ors. vs. State of Tamil Nadu & Ors., 2002 (3) SCC 533*, and which judgment states that the ratio of

a case necessarily arises only with the facts of a particular case, and, even difference of a single fact can make difference to the ratios of two cases. Para 9 of this judgment reads as under:-

“9. Courts should not place reliance on decisions without discussion as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington v. British Railways, Board*. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.” (underlining added).

The aforesaid judgment of the Supreme Court has also been followed in subsequent judgments of the Supreme Court including in *Krishna Mochi & Ors. vs. State of Bihar, 2002 (6) SCC 81* and *Charan Singh & Ors. vs. State of UP, 2004 (4) SCC 205*. In view of the ratio of *Padma Sundara Rao's (supra)* case, the observations of the Division Bench of this Court in the *New Delhi Television Ltd (supra)* have to be read confined to the facts and issue of that case, and which were concerned with exclusive right/copy right of the broadcast as it is i.e the identical audio and visual recording of the broadcast and not qua the underlying content/information from the audio visual recording.

21(i) On behalf of the plaintiff, the following paragraphs of the judgment in the case of *New Delhi Television Ltd. (supra)* are relied upon:-

“22. Conscious of the fact that our decision would not be irrelevant for the purpose of adjudicating the suit filed by the respondents notwithstanding the T.20 ICC World Cup Tournament being over on October 07, 2012 since respondents claim a right to all tournaments organized by ICC till the year 2015, we propose to lay down the principles of law granting interim injunction which have to be kept in mind while deciding future litigation, and would be highlighting the facts which have to be objectively viewed, for the reason we find that neither the impugned decision nor the decision of the Division Bench of this Court in *ESPN Star Sports* case (supra) has adverted thereto.

23. With reference to clause (b) of Section 39 of the Copyright Act 1957, it has to be kept in mind that while reporting current events use, consistent with fair dealing, of excerpts of a performance or of a broadcast do not constitute infringement of the broadcast reproduction right or the performers’ right. Similarly, with reference to Section 52(1)(a)(iii) of the Copyright Act 1957, the reporting of current events and current affairs but as fair dealing do not constitute an infringement of the copyright held by the broadcaster or a performer. Thus, one has to first determine : Whether the offending activity is by way of reporting or otherwise. For if the offending activity is not reporting, that would be the end of the matter; and we caution : We are restricting our discussion to sports events and sporting affairs.

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26. Thus, two objective facts would determine whether the offending activity is reporting or not. The first objective fact would be the nature of the coverage with respect to information being diffused i.e. *Is it result oriented*. And while analyzing the first objective fact, the second objective fact to be simultaneously identified is : *Is it primarily an analysis or review of the sporting event*. These facts are capable of a percipient reception by a Judge i.e. are exoteric and are not esoteric and can be objectively pleaded by parties and shown as objective facts to a Judge.

27. If the offending activity fails to qualify as 'reporting' as understood afore-noted i.e. is not result oriented but is by way of analysis or review that would be the end of the matter. Injunction must follow without any further analysis. Question of further considering whether the use of the footage is fair or unfair does not arise because law permits a broadcast or a performance to be used for reporting a current event or an affair and thereafter places restrictions in the use by requiring the same to be in a fair manner.

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32. The freedom guaranteed to speech and expression by the Constitution would confer the right to disseminate any kind of information and this activity and would be non-actionable, provided the footages of the activity is not misused, and as we would be highlighting hereinafter, the method of disseminating information has not to be in a manner where the consumer i.e. the viewer would be misled or enticed into believing that the sponsor of the programme is a sponsor of the activity or is intimately associated with the event.

33. Thus, the cry in the media or the press, which we may possibly hear tomorrow after our opinion is pronounced, that freedom of the media and the press to disseminate information has been curtailed by us, if at all, is set at rest by us by noting that the freedom of the press and the media to disseminate information was recognized by the society keeping in view the press and the media which existed in the 19th and the 20th Century i.e. as organs of thought, of empowerment, of culture and of refinement. Not as organs of entertainment and revenue generation; least of all as an organ offering on its back, a piggy ride for commercial entities i.e. business houses to advertise their products by commercializing the goodwill of others.

34. The media is free to continue with its activities of disseminating information in whatever manner the media feels and this is their unhindered and unobstructed right, but not by offering its back for piggy riding who have money bags. Besides, our view permits footages to be used while reporting sports events in both hard news and sports news

programmes but only if the programmes were pre-existing news format programmes and were not designed for a particular sports event and specific advertisements are not solicited from third parties to be put on the air in the programme or the third party has not voluntarily approached the TV channel and paid special premium for its advertisement to be put on the air.

35. We terminate the discussion on the first limb and proceed to the second, but by making it clear that if the offending activity is not reporting, no footage whatsoever can be used and the question of considering whether the use of the footage is fair or unfair would not arise. It is only when the activity is found to be reporting, issues of use being fair or unfair would arise and thus our discussion hereinafter must not be misunderstood to be expanding the rights. It has to be understood as limiting the rights even when the activity is reporting, for the reason the use has to be a fair use.

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43. We take the example of ICC T.20 World Cup Tournament. The organizers of the tournament spend millions of dollars to pay money to the participating teams. It pays special prize money for the team which comes first, second, etc. Then, special prize money is paid for the Man of the Match, at each match, for the best catch etc. by the sponsors of the tournament or the match. A special prize for the Man of the Series, the best batsman of the series, the best bowler of the series is paid. And these are by the sponsors of the tournament. These sponsors pay money to ICC, apart from paying money for the special prizes. Why would they do so? Obviously to cash upon the goodwill generated by the cricket tournament. Then, people pay money for their product to be advertized on the field or of the field, within the precincts of the cricket stadium. They pay huge sums of money because they know millions of viewers, while seeing the broadcast or the footages replayed, would simultaneously be seeing their advertisements. Advertisers pay during commercial breaks when the match is on. To put it pithily, money flows from different channels to the organizers of the cricket tournament and from this reservoir the organizers of the cricket tournament spend money; which flows out, for the tournament to be held. We have already commented in paragraph 1 above that a propaganda machine, which is a product of a marketing age, has

come into being. We commented that this propaganda only understands the language of profit. And now we understand why so. The propaganda machine spends millions of dollars but raises investment from third parties i.e. sponsors of the tournament; sponsors of the special prize monies; merchandisers who display their advertisements on and off the field, but within the precincts of the cricket stadium; merchandisers who advertise during commercial breaks. The collective money pooled in is used to organize the sports events. No philanthropy is done. It is a business/commercial venture which seeks money in return. A pound of flesh for a pound of flesh is the motto. Nobody can take flesh by making the venture bleed.

44. The propaganda machine which spends millions of dollars has, in turn, millions of dollars invested in it. In the marketing age and the age of media saturation, a hype is built when sports events are held all over the world. In soccer loving nations, the soccer events are preceded by a media hype, with the organizer of the event advertising, by booking time slots, that the countdown has begun. Say for example, the World Cup football. The countdown begins about sixty days prior. Information is disseminated as to which teams are in which group. Where would the matches be played. Special events are organized, which are nothing but propaganda. Advertisers step in and join the propaganda. They make investments by paying the organizers while buying the time slots. Celebrities participate in chat shows sponsored by these sponsors. Money is invested. The hype created results in the football/soccer lovers thinking that they are a part of the World Cup themselves. It is akin to man creating the image of his God on the belief that his God looks like him. But soon starts thinking that he looks like his God. The fans i.e. the viewers start eating, drinking, walking, talking and for that matter doing mundane activities thinking that they are soccer themselves. This belief makes them to think that they are a part of the tournament. The physical manifestation of the belief is that they start living with the product of the sponsor. It is this physical manifestation which returns the revenue to the sponsor. In India, with cricket it is likewise.

45. Thus, when the tournament is on, any association by a third party, with respect to the footages of the tournament or in the manner noted by us in paragraph 8 and 9 above (where we have highlighted a programme by

Aircel) would ex-facie be competing and simultaneously exploiting the copyright of the copyright owner i.e. the broadcaster with the right of reproduction, in that, the potential customers of those who have invested would be predated upon. Such activities i.e. special events would clearly infringe the rights of the broadcaster which would include the reproduction rights **when footages are used** and along therewith commercial advertisements are put on the air and in particular where the commercial advertisements are specially targeted for the programmes in question.

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52. To put in common man's language. Unlike events such as an accident; a judicial verdict being pronounced; a Finance Minister making a statement, where nothing is spent by anybody for creating the event and thus nobody being entitled to appropriate the newsworthy content of the event, special events such as a cricket match are organized by investing huge sums of money running into millions of dollars. It is a creation of the investors and sans a fair use pertaining to reporting current events and affairs, nobody is entitled to even a drop of milk from the milch cow."

(ii) Before one understands the meaning of the aforesaid observations, and therefore the binding ratio of the judgment in the *New Delhi Television Ltd (supra)*, it is also necessary to refer to paras 46 to 49 of the said judgment and which read as under:-

"46. Stale news is no news. Law permits current events and affairs to be reported i.e. recognizes that stale news is no news and thus must be reported currently. That is the reason why an archival footage acquires the status of being archaic after 24 hours. A fact not disputed by either party. (see para 71 of *Media Works NZ*'s case (supra) and para 27 of *ESPN Star Sports* case). It could thus be said that a rough and a ready thumb rule to apply to an event or an affair being news would be the **time period of 24 hours** within which the event or the affair remains a news and thereafter **it mutates into history**. Thus, the lifespan of an

event or an affair, in its form of news, is 24 hours. Lapsing into history, any reflection thereon would not be news but would be views.

47. Now, is the problematic area! When does an event or an affair become news? Does news has a gestation period to mutate into history? If yes, what would be the gestation period? Questions which are easy to pose, but extremely difficult to answer with empirical precision. Just as the life span of creatures and the gestation period, before they take their ultimate manifested form, vary from species to species, same has to be, in our opinion, with events and affairs. We take cue from the analogy in the field of biology. We extend the Galilean – Newtonian method i.e. Naturalism, to resolve the issue. Mosquitoes and flies, from the embryonic stage i.e. egg, pass on to the stage of a larvae/maggot, and the mosquito larvae finally metamorphose as adults and the fly egg metamorphose as an adult, from maggot, within a span of less than three to four days and live a life as adults of a few days and die. The mosquito egg would be news of being an egg the moment it is laid and would be news of becoming a larva when it metamorphoses and becomes news (and a nuisance) when it emerges as an adult, and all this within a short span of time. Similar would be the position of some kinds of events and affairs. But an elephant has a gestation period of 22 months, and lives as a calf dependent upon the mother for a couple of years before attaining adulthood. The conception of an elephant in the womb of the mother would continue to remain news for 22 months and it would continue to be news of being a calf for couple of years till it would become news that an adult elephant has come into being.

48. How does it translate to an event of sports? Each match would be an event. Thus, the span of the match as an event being news would span the entire duration of the match. But, within this period of match, the fall of a wicket; the achievement of a milestone in the career of a player : to wit 1000 runs scored, 2000 runs scored etc. or 100 wickets taken, 150 wickets taken or the 50th catch taken would be events, spanning a momentary duration, and being news when the event takes place. The latter i.e. a wicket falling, a century being scored (by a player or by the team), would be events which on the principle of stale news is no news and analogy with biology, would require it to be held that to put an

embargo on reporting said event at a cricket match by putting the time restriction 30 minutes would amount to not permitting news to be reported but history to be reported, for the reason the news element content of such an event i.e. a wicket falling or the century being scored is momentary.

49. In the world of media reporting, the dissemination of news pertaining to the event of a wicket falling or a century being scored, would encompass not only the audio mode of dissemination but even the visual mode of dissemination and thus such kind of events, i.e. momentary events which remain news for momentary durations are entitled to be diffused so as to reach the audience by TV channels with limited footage, restricted to the fall of the wicket or the scoring of the milestone run. Logic and reason demands this. The interest of the consumer i.e. the viewer also demands this. Let us say, a particular match is of no consequence for the reason Team „A“ has already earned the requisite points to move into the semi-final stage. The opposite team „B“ is at the bottom of the group and has no chance to either reach the semi-final or by winning, eliminate any other team to reach the semifinals. Viewers interest in the match being very low, a TV buff may prefer to be watching a sports news bulletin, but it would become news for him if some personal milestone is reached by a player of either team „A“ or of team „B“; say for example bowler „X“ of team „A“ has achieved a hat-trick; being the first in the tournament. It would be fair use if under the caption „Breaking News“ the normal sports show on the air is briefly interrupted, for 10 seconds to 15 seconds, and to the audience three wickets falling in succession are shown. This use of footage, within seconds of the event i.e. hat-trick occurring, would not amount to an unfair use. The reason is obvious. It was not an expected event and it being aired on the normal sports news programme or hard news programme was not preconceived i.e.

would not be a case of competition, much less to predate on the revenue of the broadcaster or its viewers. During course of reporting news such kind of reporting would obviously be a case of fair use i.e. a permitted use. Thus, we hold that, be it a case of reporting hard news or a case of „reporting sports news programme“, if during a cricket match an event of the kind we have been discussing in the present paragraph occurs,

footage relating thereto can be shown within seconds of the said kind of event taking place.”

(iii) A reading of all the aforesaid paras of the Division Bench judgment shows that the Division Bench has held that the issue is whether the programme which is made by a person other than the original broadcaster is reporting or it is result oriented. If the programme which is conducted is not reporting, injunction must follow. This the Division Bench has observed with respect to the programmes which contain discussions on the match during the match or during the intervals of the match or immediately after the match, and which discussions show actual clips from actual audio and visual recording which is broadcast by the plaintiff and to which obviously ordinarily except the plaintiff no one else can have a right except for the purpose of fair dealing. Therefore, the observations, and the paragraphs which have been relied upon by the plaintiff in the Division Bench judgment in the case of *New Delhi Television Ltd (supra)*, firstly cannot have application to the facts of the present case which does not deal with the copying of actual audio and visual recording which is broadcast by the plaintiff. Secondly the Division Bench has itself in paragraphs 46 to 49 have stated that “Stale news is no news. Law permits current events and affairs to be reported”. The Division Bench has also observed that whether a news is a stale news for no longer being the

exclusive entitlement of a licensee from BCCI to report, the same will necessarily depend on the type of event or the information which is generated from the event in question. In fact, the Division Bench has dealt with the doctrine of fair dealing/fair use and observed that in fact showing of 10 seconds or 15 seconds clips of the original audio visual recording to the audience such as of three wickets falling in succession or other momentary events of the match from the footage which is in the exclusive copyright of the BCCI or its licencees, will not amount to infringement of copyright because it is permissible under the doctrine of fair dealing/fair use.

I should not observe anything further so far as the judgment of the Division Bench of this Court is concerned inasmuch as I have already stated above that the Division Bench was dealing with the issue of direct copying of the audio and visual recording of the BCCI or its assignee, and which resulted in violation of the copyright with respect to the actual broadcast viz original audio and visual recording and to which only the BCCI or its assignee had rights. As has been already stated that the present case however does not pertain in any manner even remotely to the defendants broadcasting the actual audio recording, or the visual recording, or both, of the plaintiff.

22(i). I may note that the judgment of the Division Bench in the case of *New Delhi Television Ltd.(supra)* was in fact an appeal from the judgment of learned Single Judge of this Court dated 18.9.2012 in *ICC Development(International) Ltd. & Anr. Vs. New Delhi Television Ltd.*, and in which judgment the learned Single Judge has also given a short finding in favour of the defendants qua the issue which also arises in this suit. This finding is contained in para 21 of the said judgment which reads as under:-

“21. The plaintiffs have also objected to the score cube at the bottom of the screen where the defendant gives score of the match on a continuous basis alongwith the name of an advertiser/sponser. This, to my mind, cannot be objected to by the plaintiffs since it does not involve any use of the work of the plaintiffs. The score of the match is in public domain and can be broadcasted by any channel as a part of its right to report current news and events. In my view, mere giving the name of an advertiser/news sponsor of the defendant along with with the live score does not give an impression of the advertiser/sponsor of the plaintiff being associated with the event.” (underlining added).

(ii) It is not disputed before me that the denial to the plaintiff in the said case of the rights as per para 21 of the judgment dated 18.9.2012 was not appealed from and therefore has become final. Therefore, the observations of the learned Single Judge contained in para 21 of the judgment dated 18.9.2012 also persuade me to hold that with respect to news there cannot be monopoly by preventing such information being the news from being disseminated among the public, after of course the first right of broadcast of the plaintiff.

23(i) So far as the judgment of the Madras High Court in the case of *M/s Marksman Marketing Services Pvt. Ltd (supra)* the following paragraphs are some of the paragraphs relied upon by the plaintiff:-

“16. Though the case proceeded at the stage of interim injunction, in the peculiar feature of the case and since the case is first of its kind, the Court has deemed it proper to consider the underlying questions. The following questions arise for consideration::

1. Whether there is property in providing Scores, alerts and updates in the cricket through SMS technology?
2. Whether PCB/Organizer has the exclusive Right over SMS Rights of the Cricket Match?
3. Whether the Defendants are entitled to appropriate Scores, alerts and updates in the cricket match by transmitting through SMS for their commercial use?
4. Whether the Plaintiff has proved its prima facie case of SMS Rights in providing Scores, alerts and updates in respect of India's 2006 Tour in Pakistan for the territory of India?
5. Whether the Plaintiff is entitled to the interim injunction prayed for?

21. The learned Senior Counsel Mr. Sriram Panchu has mainly placed reliance upon 1996 US District Lexis 10262 *The National Basket Ball Association and NBA Properties Vs. Ports Team Analysis and Tracking System Inc.* and contended that the organized events which are already in the public domain involve no labour or skill. Such organized events are not subjected to Copyright protection. It is further contended that organized events like sports and the facts and information thereon are not protectible Rights. In the said decision NIMMER on Copyright has been referred to which is now relied upon by the Defendants. The US Court has quoted NIMMER on Copyright as under:-

“179. In fact, Nimmer on Copyright the oft-cited treatise which the Supreme Court recently characterized as the work of a “leading scholar” Feist, 499 US at 347 specifically and resoundingly rejects the analysis and conclusion of the Court in Baltimore Orioles regarding the protectibility of an athletic event. 1.M.Nimmer & D.Nimmer, Nimmer on Copyright @2.09[F] (1996)[hereinafter Nimmer]

180.Nimmer points out, inter alia, the problematic consequences of according copyright protection to an athletic event, as opposed to its telecast.

181. For example, it is unclear who in addition to NBA would be considered a copyright owner and, therefore, whose consent a party would have to obtain prior to using copyrightable portions of the game. Id. @ 2.09[F] at 2-169. One coaches, and all other participants whose creative energies contributed to the NBA game. See Eastern Microwave, Inc. v. Doubleday Sports, Inc. 691, F.2d 125, 128(2d Cir. 1982) (discussing the unworkability of requiring a party “to obtain” the consent of or negotiate with numerous copyright owners”) Cert. Denied, 459, US 1226, 75 L. Ed. 2D 67, 103 S.Ct. 1232 (1983); Booth Vs. Colgate-Palmolive Col. 362 F. Supp. 343, 347 (S.D.N.Y.1973). (The recognition of a performer’s right in a copyrighted work would impose undue restraints on the potential market of the copyright proprietor since a prospective licensee would have to gain permission from each of possibly many performers who might have rights in the underlying work before he could safely use it.”)

182. Similarly, if a coach copied a play devised by another coach, the second coach might be forced to defend a copyright infringement action if he or she failed to obtain the consent of the first coach. Nimmer @ 2.09 (F) at 2-169.

183. In the end, Nimmer concludes that the “more reasonable Construction (is) that athletic events are subject to legal protection pursuant only to right of publicity, misappropriation and other established legal doctrine outside the ambit of statutory copyright.

184. In addition to Nimmer, case law, although far from bountiful, suggests that organized events are not subject to copyright protection. See *Morrissey V. Procter & Gamble Co.* 379 F. 2d 675, 678 (1st Cir. 1967) (characterizing as “unquestionably correct” the proposition that the substance of a promotional sweepstakes contest was not copyrightable). *Production Contractors, Inc V. WGN Continental Broadcasting Co.* 622 F. Supp. 1500, 1503 (N.D.III.1985) (holding that a “[Christmas] parade, including its production and promotion, is not a work of authorship entitlement to copyright protection”).[underlining added].

The Plaintiff claims infringement of its Right in respect of live, providing of Scores, alerts and updates.

23. On behalf of fourth Respondent the learned Senior Counsel Mr. T.R.Rajagopalan has placed reliance upon 2001 PTC 217 (Del[Eastern Book Company & Others Vs. Navin J. Desai and another]. The said case related to publication of Law Books by Eastern Book Company and CD ROM by the Defendants, wherein the Plaintiffs alleges infringement of their Head Notes on Law Reports by the Defendants. The Supreme Court found that unless the Head Notes of the Judgments have been prepared by the Plaintiff with his own labour and skill and that there is originality or creativity in the preparation of Head Notes, the Plaintiff cannot allege infringement. In the above said case, the Supreme Court has held:

“In terms of Section 51(1)(q) of the Act, reproduction of a Judgment of the Court, is an exception to the infringement of the copyright. The orders and judgments of the Court are in the public domain and anyone can publish them. Not only that being a Government work, no copyright exists in these orders and judgments but no one can claim copyright in these judgments and orders of the Court merely on the ground that he had first published them in his book. If there are some typographical mistakes in a Judgment or an order of the Court, can it be said that merely because the first publisher of these judgments and orders has corrected those mistakes or has inserted certain commas or full stops and dates therein, a copyright will exist in the person who has corrected such mistakes in

the Judgment published by him? The answer, in my opinion, has to be in the negative. Changes consisting of elimination, changes of spelling, elimination or addition of quotations and corrections of typographical mistakes are trivial and hence no copyright exists therein.”

37. There is much fallacy in the above contentions raised by the Defendants, equating themselves with any cricket fan viewing the telecast in TV. Certainly, one who watches the cricket match telecast in the TV may communicate the Scores or alerts gratuitously or for any legitimate purpose, not interfering with PCB’s ‘Right to make merchandise of it. But to transmit the Hot News or alerts for commercial use and seeking to justify the same, is entirely a different matter and the same cannot be equated with a common viewer. By the very fact of advancing this contention, the Defendants only admit that they are taking material that is telecast by Ten Sports, to whom the Telecast Right was assigned by PCB which is the result of organization and the expenditure of labour, skill and money, which is salable by PCB for money. The Defendants are only exploiting this for their commercial purpose.

44. TO SUM UP: :

a) a) Right of providing Scores/alerts and the updates via SMS Technology is the result of Organisation and expenditure of labour, skill and money, which is salable only by PCB/organizers.

b) Through the SMS technology, the process of sending Scores, alerts and updates amounts to unauthorized, interference with the normal operation of PCB/Organiser’s legitimate business.

c) The act of the Defendants in appropriating facts and information from the telecast and selling it by providing Scores and alerts over SMS is nothing but endeavouring to reap the profit where they have not down.

d) The whole process of SMS amounts to unauthorized interference with the PCB’s organizers legitimate business proceed at the point where the profit is to be reaped.

e) By the act of the Defendants they are making profit and thereby diverting the material portion of the profit of SMS which PCB would have earned.”

Some other paragraphs of the Madras HC judgment were also relied upon on behalf of the plaintiff, but, since the aforesaid paras sum up the basic stand of the plaintiff, and the conclusions given by the Court in that case, I am not reproducing the other paragraphs.

(ii) With all respect and humility I am unable to agree with the view which has been taken by the learned Single Judge of the Madras High Court in the case of *M/s Marksman Marketing Services Pvt. Ltd. (supra)* inasmuch as the learned Single Judge has not discussed the various important provisions of the Act, more particularly Sections 13,14 and 16 which I have discussed above, and also because the judgment more importantly does not draw a distinction between what is the original visual recording and/or the sound recording as contrasted with the underlying information which is contained in the said audio visual recording and which underlying information after coming into the public domain is utilized by the mobile service providers/telecom companies, including the present defendants, to create an information bank and thereafter that information bank is used for further commercial exploitation. The contents of an original recording, if utilized as a bank containing news and thereafter, the news contained in that information

bank is exploited, the same cannot mean that what is being exploited is the audio and/or visual recording of the plaintiff to which only the plaintiff has a copyright. I therefore, respectfully disagree with the judgment of the learned Single Judge of Madras High Court in the case of *M/s Marksman Marketing Services Pvt. Ltd.(supra)* because of the detailed reasoning as given above in this judgment.

24(i) I must at this stage bring into discussion the repeated emphasis which was laid on behalf of the plaintiff on the aspect that gargantuan amounts of monies, running into hundreds of crores of rupees are invested in cricket matches, and therefore, automatically to the information qua the cricket matches/ mega events which the public likes, the plaintiff gets ownership/property rights which should be held to legally exist.

(ii) Unfortunately, I am not able to agree. Can I take the argument of the plaintiff to mean that merely because hundreds of crores of rupees are spent, a property right can be created although such a property right is specifically barred under law viz Section 16 of the Act? Or, putting it in different words, once there is and cannot be a bar upon any person to use an information which otherwise comes in public domain, and which is not the subject matter of copyright inasmuch as what is the subject matter of the copyright is only the original audio visual recording and definitely not the information which is contained in the audio visual

recording, then merely because huge sums of money are invested that should not at all have any bearing. In my opinion whether hundreds of crores of rupees, or thousands of crores of rupees are spent, surely, the same only would be the outlook of those persons who invest such amounts, however, that cannot persuade this Court to give any legal right to any such person who claims those rights as property rights; pure and simple because law does not sanction or permit or give existence to such legal rights.

(iii). In order to understand the frailty in the arguments urged on behalf of the plaintiff, I put a proposition to the learned senior counsel for the plaintiff. The proposition was that suppose if on the next day after the match a newspaper gives an exact ball by ball commentary in its newspaper, then, will it amount to violation of copyright of the plaintiff qua its audio and visual recording? Learned senior counsel for the plaintiff had to concede that surely this would not amount to infringement of the copyright inasmuch as the information had become news after 24 hours. Thus if information after 24 hours is news which is not the sole entitlement of the plaintiff, then the principle is not disputed that the content of the audio and/or visual recording of which the plaintiff has a copyright, can surely become news or stale news or ordinary news at any one later point of time use of which does not violate the copyright of the plaintiff.

25(i) The issue thus would be what is that later point of time after the first broadcast for the information contained in that first broadcast to cease to be taken to be part of that first broadcast. Putting it differently, what should be the time gap that is required so as to distinguish the right of first broadcast from the content/information contained in the broadcast. In my opinion, that later point of time, would be that point of time at which the hiatus or the period or the interregnum ends by which the information can be no longer be said to be part of or so intimately associated to/with the first right of the broadcast of the plaintiff. Once the information ceases to be associated and is no longer closely associated with the first right of broadcast of the plaintiff, thereafter, such information becomes ordinary news, and, thereafter the information which is contained in audio and/or visual recording cannot be allowed to be monopolized by the plaintiff inasmuch as no one can monopolize news in larger public interest. As already stated, allowing the BCCI or the plaintiff monopolize news would result in an absurd proposition of taking away the existence of news; good or bad; from the public domain which is legally impermissible. Additionally, if one cannot prevent exercising of the right of fairness/fair dealing qua even the original audio visual recording, then afortiori the exercise of fair dealing qua the underlying

content/information is perfectly legal especially because no right has been given of a copyright to the content/information.

(ii) The issue therefore boils down to what is that hiatus after which any information which comes out of the event called the cricket match pursuant to first broadcast by the owner of the copyright that it can be said that after which hiatus there cannot be said to be any copyright in the information/content of the broadcast. Obviously the period will vary as per the subject event/performance, however, in this judgment I am dealing with the content/information contained in the audio and visual recording of the 50 over a side cricket match for deciding when the content/information in the audio and video recording ceases to be called the first right of broadcast, for the further dissemination of the same on commercial basis to be not stopped.

(iii) I have thought long and hard on this aspect. The 50 overs a side cricket match takes a time of roughly about eight hours. What should be period of time qua such event, and after which period the information contained in the first audio and/or visual recording broadcast becomes an information in the public domain for it to become ordinary news which any one can commercially use and would not be taken as a part and parcel or closely associated to the broadcast. In my opinion, after a period of two minutes of the first broadcast by the plaintiff, the information

thereafter will become information in the public domain which is ordinary news for not being taken as part of the first broadcast. After two minutes the content/information in the broadcast can be commercially exploited by any person. I may hasten to clarify that qua momentary news, for example a fall of a wicket or a crucial momentary event, the same becomes stale news or ordinary news within seconds as per the ratio contained in para 48 of the judgment of the Division Bench in *New Delhi Television Ltd's (supra)* case which has been reproduced above. To ordinary news, I cannot and am not giving exclusive rights to the plaintiff for 72 hours merely because the plaintiff as per its agreement with the BCCI has been granted such a right by the BCCI.

(iv) I have decided the time lag period to be of two minutes because in today's age and world technology has really reached stupendous heights that the dissemination of information is very fast. A period of two minutes from the first broadcast is more than sufficient time so that the plaintiff can, in that period, commercially exploit its exclusive audio and visual rights arising from the cricket match as if that is a part and parcel or so closely associated with the right of first broadcast. Thereafter, it is impermissible to stifle the news which comes into public domain.

26. I therefore hold that, except for momentary important events for which no time lag can be put, so far as the other information contained in the first audio and/or visual broadcast of the plaintiff, after a period of two minutes of the first broadcast, as long as any of the defendants are not using/copying in any manner the original /identical audio and/or visual recording of the plaintiff; and the defendants are only using the information or content from the original audio and/or visual or video recording or cinematographic film, there is no bar upon the defendants to use and disseminate the information for commercial purposes.

27. The upshot of the above discussion is that a meaningful, and not a formal/cursory reading of the plaint (vide **T. Arvindandam Vs. T.V. Satyapal and Another AIR 1977 SC 2421**), shows that there is absolutely no legal right of the plaintiff after a period of two minutes to prohibit the defendants from using the information/content contained in the audio visual recording of the plaintiff, provided of course as stated above no exact portion of the audio and visual recording of the plaintiff is used as it is. I am appropriately empowered to exercise powers both under Order 7 Rule 11 and Order 12 Rule 6 CPC in order to examine whether on the admitted facts as stated in the plaint, whether any legal right or a legal cause of action is made out. If on the admitted averments in the plaint, no cause of action or legal right is made out, it would be a futile exercise to keep the

suit alive for considering it further. Counsel for the defendants agree that the entitlement of the defendants is not to use the original audio and/or visual recording except for fair dealing, but so far as the information which comes in public domain, there cannot be any bar upon the defendants to use the same. However, when can the information become an information in public domain, and not be an information which can really be said to be almost the part and parcel of the original audio and/or visual recording of the broadcast of the plaintiff, is in my opinion, purely a legal issue. Therefore, pronouncing and deciding this legal issue, I am of the opinion that a hiatus of two minutes is required with respect to the defendants using the content/information in the first audio and/or visual broadcast of the plaintiff, except of course with respect to momentary events for which there need not be any time lag.

28. The suits are therefore dismissed with the observations that the defendants can in terms of conclusions in paras 25 to 27 above commercially use the content/information contained in the original audio and/or visual recording after two minutes of the first broadcast by the plaintiff. Decree sheets be prepared. Parties are left to bear their own costs.

NOVEMBER 08, 2012
Godara/Ne/ib

VALMIKI J. MEHTA, J.