



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (LODG.) NO.881 OF 2010

IN

ARBITRATION PETITION (LODG.) NO.1303 OF 2010

Board of Control for Cricket in India, a society registered under the Tamil Nadu Societies Registration Act, 1975 having its registered office at M.A. Chidambaram Stadium, 5, Victoria Hostel Road, Chepauk, Chennai 600 005 and its Head Office at Cricket Centre, Wankhede Stadium, 'D' Road, Churchgate, Mumbai 400 020.

..Appellant.  
(Orig. Respondent)

versus

KPH Dream Cricket Private Limited, a Company incorporated under the Companies Act, 1956 and having its Registered Office at House No.1532, Sector 18D, Chandigarh 160 018, and its office at C1, Wadia International Centre (Bombay Dyeing), Pandurang Budhkar Marg, Worli, Mumbai 400 025.

..Respondent.  
(Orig. Petitioner)

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Mr. C.A. Sundaram, Senior Advocate with Mr. T.N. Subramaniam, Senior Advocate, Mr. PR. Raman, Ms. Akhila Kaushik, Ms. Rohini Musa, Mr. Sharan Jagtiani, Ms. S.P. Arthi, Mr. Indranil Deshmukh, Mr. Rahul Mascarenhas and Mr. Adarsh Saxena i/b Amarchand Mangaldas and S.A. Shroff & Co. for the Appellant.

Mr. D.J. Khambata, Senior Advocate with Mr. Shyam Mehta, Mr. Arif Doctor, Mr. S.V. Doijode, Ms. Deeksha Kakar, Mr. R.H. Daulat, Ms.

Amodi Borkar, Ms. Priyanka Kothari i/b Doijode Associates for the Respondent.

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**CORAM : DR.D.Y.CHANDRACHUD & ANOOP V. MOHTA , JJ.**

**15 December 2010.**

**ORAL JUDGMENT (PER DR.D.Y.CHANDRACHUD, J.) :**

1. This Appeal arises from an order of a learned Single Judge of this Court by which a petition under Section 9 of the Arbitration and Conciliation Act, 1996 was allowed. By the order of the learned Single Judge the Appellant, the Board of Control for Cricket in India, has been injuncted from acting on the basis of a termination of 10 October 2010 of a franchise agreement entered into between the parties on 10 April 2008. The order of the Learned Single Judge is subject to several conditions including amongst them (i) That the Respondent shall furnish an unconditional bank guarantee of a nationalized bank to secure the payment of players' dues initially in the sum of US \$18 million; (ii) The furnishing of an unconditional guarantee of a nationalized bank in the amount of US \$3.5 million; (iii) The filing of unconditional personal undertakings guaranteeing the due payment of any amount as may be found on adjudication by any court or tribunal, in the event that the termination is upheld; (iv) A restraint on the disposal of shares of certain companies. In order to appreciate the challenge to the order of the learned Single Judge a reference to the factual background would be in order.

2. In 2007 the Board of Control for Cricket in India ('BCCI') set up the Indian Premier League ('IPL') a domestic twenty overs per side cricket format based on the international T-20 model. Each team was to be owned and operated by private persons / corporations / entities. A franchise to operate the team was to be given to a franchisee who was the successful bidder for each team. The IPL was to consist of eight teams which would play each other between April and May every year. Eight IPL teams were identified from different States and regions in India.

3. On 27 December 2007 an invitation to tender was issued by BCCI inviting bids for IPL franchises. The terms of the tender stipulated that a franchise would be granted to operate a team for so long as the League would continue. In consideration each franchisee was required to pay to IPL a franchise fee for the first ten years, payments being distributed in annual installments.

4. On 24 January 2008 a letter of eligibility was submitted by Ms. Preity Zinta. The letter disclosed that on winning the bid a new company would be formed in which the individuals participating would be Preity Zinta, Ness Wadia, Karan Paul and Mohit Burman. The terms of tender required each bidder to pay a performance deposit of Rs.20 Crores at the time when the bid was submitted. The members of the consortium agreed to pay Rs.20 Crores distributed amongst Preity Zinta (Rs.10 Crores), Mohit Burman (Rs.5 Crores) and Karan Paul (Rs.5 Crores). On 24 January 2008 the consortium was declared as a successful bidder for the Mohali franchise. The first

season of IPL was to commence in April 2008. A franchise agreement was signed on behalf of the consortium by Ms. Zinta on 4 April 2008 and on behalf of BCCI on 10 April 2008.

5. By the agreement BCCI granted to the franchisee, the Respondent herein exclusive rights for a period of three seasons to be the only team in the League whose home stadium was located in 'the territory'. The territory was defined to mean an area within a radius of fifty miles of the Mohali stadium. Clause 3 of the agreement stipulated that it would continue for so long as the League continues subject to termination, suspension or renewal as provided by its terms. Clause 10.1 contained a provision for sale of the franchise and stipulated that the franchisee has no right to assign or delegate the performance of any right or obligation under the agreement. However, with the prior written consent of BCCI the franchisee was entitled to sell the franchise to any person. Similarly, any person who controlled the franchisee was entitled to effect or otherwise cause to occur a change of control of the franchisee. This was subject to the condition, in Clause 10.2 that no such event would occur within the first three years and the proposed purchaser or, as the case may be, controller would meet BCCI's standards of eligibility.

6. Clause 11 of the agreement contains provisions for termination. Clause 11.1, entitles either party to terminate the agreement by a notice in writing upon a failure to remedy any remediable material breach of the contract within a period of thirty days of the receipt of the notice. Clause 11.2 entitles either party to terminate the agreement with immediate effect by written notice in the event of an

irremediable breach of the agreement by the other party. Clause **11.3** confers upon BCCI exclusively the right to terminate the agreement with immediate effect in certain stipulated eventualities, these being :

“(a) there is a Change of Control of the Franchisee (whether direct or indirect) and/or a Listing which in each case does not occur strictly in accordance with Clause **10**;

(b) the Franchisee transfers any material part of its business or assets to any other person other than in accordance with Clause **10**;

(c) the Franchisee, any Franchisee Group Company and/or any Owner acts in any way which has a material adverse effect upon the reputation or standing of the League, BCCI-IPL, BCCI, the Franchisee, the Team (or any other team in the League) and/or the game of cricket.”

7. Clause **11.7** defines the meaning of the expression ‘Control’ for the purposes of the agreement as follows :

“**11.7** For the purposes of this Agreement “Control” means in relation to a person the direct or indirect power of another person (whether such other person is the direct or indirect parent company of the first mentioned person or otherwise) to secure that the first mentioned person’s affairs are conducted in accordance with the wishes of such other person:

(a) by means of the holding of any shares (or any equivalent securities) or the possession of any voting power; or

(b) by virtue of any powers conferred on any person by the Articles of Association or any other constitutional documents of any company or other entity of any kind; or

(c) by virtue of any contractual arrangement

and “Controlled” and “Controller” shall be construed accordingly and a “Change of Control” shall occur if (i) a person who Controls another person ceases to do so; or (ii) a different person acquires Control of such other person (whether before or after or as a consequence of any Listing); or (iii) if any person acquires Control of another person in circumstances where no person previously Controlled such other person. For the purposes of this Clause **11.7** (and in connection with the use in this Agreement of the terms defined in this Clause **11.7**) all of the members of any consortium, partnership or joint venture which has any interest (direct or indirect) in the Franchisee shall be deemed to be one person.”

8. Clause **12** of the agreement provides that the agreement constitutes the entire agreement between the parties superseding any negotiations or prior agreements and inter alia stipulates that parties agree that the sole remedy for any breach of the warranties or representations held out in the agreement would be a claim for breach of contract. Parties agreed in Clause **21.2** to a resolution of disputes by arbitration and then postulated as follows in Clause **21.6** :

“**21.6** BCCI-IPL (but not the Franchisee) shall have the right to bring an action seeking injunctive or other equitable relief before the Courts of Mumbai if it reasonably believes that damages may not be an adequate remedy for the breach by the Franchisee of this Agreement.”

9. On **14 April 2010** the then Chairman and Commissioner of IPL by an Email addressed to all franchise owners communicated that BCCI as a public body must disclose ownership details along with the names of all the directors of the franchisees once again. On **14 April 2010** the Respondent addressed an Email to the Chief Financial Officer of IPL. Thereafter by an Email of **19 April 2010** the

Respondent forwarded a certificate of a company secretary containing details of the members of the Respondent at the time of incorporation, and of subsequent changes in membership on 8 May 2008, 30 June 2008, 16 June 2009 and as of 30 September 2009. By the communication information was furnished inter alia of the shares which were transferred from the date of the incorporation of the Respondent. In pursuance of another letter dated 28 April 2010, the Respondent addressed a communication of 8 May 2010 disclosing details of the shareholding and the transfers of shares since the inception. After the Respondent had communicated details of its shareholding pattern in April and May 2010, the Appellant continued to deal with the Respondent as the owner of a franchise, and on 5 September 2010 communicated the new rules that would govern Season IV of IPL.

10. On 10 October 2010 BCCI terminated the franchise agreement. The letter of termination contains two grounds on which BCCI had come to the conclusion that there was an irremediable breach of contract by the Respondent. Firstly, accordingly to BCCI the records of the Registrar of Companies showed that the Respondent was incorporated on 10 March 2008 with only two shareholders. The names of Preity Zinta, Ness Wadia and Karan Paul did not figure as shareholders. As on the date of the incorporation of the Respondent the entire share capital was held by (i) a company by the name of ACEE Enterprises Private Ltd. ('ACEE') which held 9900 shares and (ii) Mohit Burman who held only 100 shares. Preity Zinta, Ness Wadia and Karan Paul were not shareholders. Secondly, on 8 May 2008 both ACEE Enterprises Private Limited ('ACEE') and Mohit

Burman transferred their shares to Dabur Investment Corporation Ltd. and Windy Investments Private Ltd. These transferee companies were alleged to have thereby taken control of the franchisee. Thereupon on **30 June 2008** further changes in the shareholding of the Respondent were alleged to have taken place. No notice, it was alleged, was furnished of any of these transactions to the Appellant. In the first instance ACEE, being a **99%** shareholder transferred its entire shareholding of **9900** shares to Dabur Investment Corporation Ltd. and to Windy Investments Private Ltd. on **8 May 2008**. This according to the Appellant established that there was a change of control as defined in the franchise agreement. The second instance of the breach was when a fresh allotment of shares took place on **30 June 2008** when Dabur Investment and Windy Investments became minority shareholders.

**11.** The Respondent replied to the termination on **2 November 2010**. In a petition under Section **9**, Arbitration Petition **1340** of **2010**, an order was passed by consent on **19 November 2010** by which all the disputes and differences between the parties were referred to the sole arbitration of Mr. Justice B.N. Srikrishna, Former Judge of the Supreme Court under Clause **21.2** of the franchise agreement. The Respondent was granted leave to withdraw the petition under Section **9** with liberty to move an application for interlocutory relief under Section **17** before the sole arbitrator. Parties agreed to co-operate in the expeditious hearing of the application under Section **17** before the learned arbitrator. When the application under Section **17** came up before the arbitrator, the Appellant had certain reservations about the continuance of the arbitrator. The arbitrator recused himself. The

order of the learned arbitrator dated 1 December 2010 records what had transpired in the proceedings :

“1. At the beginning of the proceedings the Arbitrator disclosed that when he was at the Bar he had appeared in a number of matters on behalf of the Wadia Group of Companies.

2. This fact was also disclosed in the Arbitration proceedings held in the matter with disputes between BCCI and Jaipur IPL Cricket Pvt. Ltd. (“JIPL”) held at New Delhi, although mistakenly without realising that JIPL had nothing to do with the Wadia Group of Companies. No objection thereto was raised by the BCCI on the ground that JIPL had no connection with the Wadias. Today, however, Mr. Raman, after taking instructions from the President of the BCCI states that the President has some reservations in the matter.

3. In the result, the Arbitrator has decided that he should recuse himself from the proceedings in view of the reservation expressed by one of the parties, namely the BCCI.

4. The Arbitrator also disclosed that he was a nominee Arbitrator of BCCI in another Arbitral Proceeding between BCCI and Zee Entertainment Enterprises Limited. Mr. Khambata on behalf of KPH Dream Cricket Pvt. Ltd. stated that his client had no objection.”

12. Thereupon, a fresh petition under Section 9 was moved before the learned Single Judge in which the impugned order has been passed.

13. Before we deal with the submissions which have been urged before us by counsel, and having regard to the grounds which have been set out in the notice of termination, it would be necessary to extract from a chart which has been placed before this Court to

reflect the shareholding of the Respondent since the inception :

<b>SHAREHOLDING PATTERN OF KPH DREAM CRICKET P LTD. PURSUANT TO VARIOUS TRANSFERS AND ALLOTMENTS</b>			
<b>Date</b>	<b>Name of Co./Person</b>	<b>No. of Shares</b>	<b>Equity Stake</b>
March 10, 2010	Acee Enterprises Pvt. Ltd.	9,900	99.000%
	Mohit Burman	100	1.000%
		<b>10,000</b>	<b>100%</b>
May 8, 2008	Dabur Investment Corporation Ltd.	5,000	11.979%
	Windy Investments Pvt. Ltd.	5,000	11.979%
	Preity Zinta	10,000	23.958%
	Ness Wadia	10,000	23.958%
	Colway Investments Ltd.	10,000	23.958%
	Karan Paul	1,739	4.166%
		<b>41,739</b>	<b>100.00%</b>
June 30, 2008	Dabur Investment Corporation Ltd.	2,28,850	11.979%
	Windy Investments Pvt. Ltd.	2,28,850	11.979%
	Preity Zinta	4,57,700	23.958%
	Ness Wadia	4,57,700	23.958%
	Colway Investments Ltd.	4,57,800	23.958%
	Karan Paul	79,600	4.167%
		<b>19,10,400</b>	<b>100.00%</b>
January 16, 2009	MB Finmart P Ltd.	2,28,850	11.500%
	Windy Investments Pvt. Ltd.	2,28,850	11.500%
	Preity Zinta	4,57,700	23.000%
	Ness Wadia	4,57,700	23.000%
	Colway Investments Ltd.	4,57,700	23.000%
	Karan Paul	79,600	4.000%
	Root Invest P Ltd.	79,600	4.000%
		<b>19,90,000</b>	<b>100.00%</b>

(Note : Dabur Investment Corporation Ltd. changed to MB Finmart P Ltd.)  
 Note : There has been no change after this.

14. The order of the Learned Single Judge has been assailed on behalf of the Appellant and in the submission of the learned counsel,

the Respondent had committed material and irremediable breaches of the franchise agreement. The following submissions were urged by the learned counsel -

- i) At the stage of the letter of eligibility the consortium consisted of Ms.Preity Zinta, Mr. Mohit Burman, Mr. Karan Paul and Mr. Ness Wadia and others. The Respondent was constituted as the vehicle through which the franchise agreement would be implemented. However, on the date of the execution of the franchise agreement, only one of the four members of the consortium was a shareholder of the company. At that stage, the only shareholders of the Respondent were ACEE which held **9900** shares and Mohit Burman who held **100** shares;
- ii) There was a change in the constitution of the consortium subsequently on **8 May 2008** as a result of which ACEE ceased to hold any shares in the Respondent and three of the members of the consortium were allotted fresh shares;
- iii) On **8 May 2008**, **28%** of the share capital of the Respondent was allotted to another company by the name of Colway Investments Ltd. and on **16 January 2009** another **4%** was allotted to a company called Root Invest Private Ltd. As a result of these allotments a change had taken place from absolute control to restrictive control;
- iv) The control which is envisaged in Clause **11.7** of the franchise agreement means de jure control and not de facto control;

v) The learned Single Judge has erred in coming to the conclusion that a strong prima facie case was made out by the Respondent for the grant of interim relief. The fact that allotments and subsequent transfers have taken place is not disputed. Similarly, the fact there were subsequent transfers involving a change in the shareholding pattern has not been disputed. Whether these transfers would involve a change of control was a matter of evidence. Whether a transfer constituted a remediable or irreparable breach is similarly an issue which has to be decided in the course of the arbitral proceedings on the basis of evidence. These, it was submitted, are matters of trial and the learned Single Judge was not justified in granting mandatory relief staying the termination of the franchise agreement;

vi) Clause **21.6** of the agreement specifically contemplates that only BCCI and not the franchisee shall have the right to institute an action for injunctive or equitable relief in a court of law where damages may not be an adequate remedy for a breach by the franchisee of the agreement. On the basis of Clause **21.6** it was urged before the Court that the right to seek injunctive and equitable relief is available only to BCCI and not to the franchisee and the remedy of the franchisee upon a termination of the agreement must only sound in a claim of damages before the arbitral tribunal.

15. On behalf of the Respondent it has been submitted that –

- i. The conditions pre-requisite to the termination of the contract under Clause **11.7** were not made out. The learned Single Judge having found a strong prima facie case for the grant of interim relief, the exercise of discretion does not fall for interference in appeal;
- ii. The contract between the Appellant and the Respondent was for the entire duration of IPL. Clause **11.7** contemplates both a direct and indirect form of control. The contention of the Appellant that Clause **11.7** contemplates only de jure control is erroneous;
- iii. The successful bidders in the present case constituted a consortium consisting of Preity Zinta, Ness Wadia, Mohit Burman and Karan Paul. At all material times right from the inception these members of the consortium were and continued to be under the control of the Respondent;
- iv. The existence of control over the Respondent by the members of the consortium can be established from several indicia among them being (i) Resolutions dated **2 February 2008** and **3 March 2008** passed by ACEE; (ii) The capital contributions in the amount of **Rs.25 Crores** brought in by the members of the consortium to the Respondent between January and April **2008**; (iii) The treatment of an amount of **Rs.9.95 Crores** as share application money in the balance-sheet of the Respondent and in the ledger accounts pertaining to the members of the

consortium in the books of the Respondent; (iv) The disclosures made in the income tax return for the assessment year **2008-09** of the Respondent; (v) The only directors of the Respondent have at all material times been only members of the consortium; (vi) Monies have been raised from the bankers for the purposes of the franchise against personal guarantees executed by the members of the consortium;

- v. Clause **21.6** of the franchise agreement must be construed strictly insofar as it excludes a statutory remedy or right. Clause **21.6** speaks of any breach by a franchisee. If Clause **21.6** is construed to prohibit a franchisee from bringing an action under Section **9** of the Arbitration and Conciliation Act **1996** for injunctive or equitable relief in a situation where damages may not provide an adequate remedy, such a clause would be hit by Section **28** of the Contract Act.

**16.** The rival submissions now fall for determination by the Court. We preface our analysis with the observation that we decide upon the submissions only for the purpose of the Petition under Section **9**, out of which the appeal arises.

**17.** The basis and foundation of the notice of termination is that while in the bid that was submitted by the members of the consortium a representation was held out to BCCI, that the four members consisting of Preity Zinta, Ness Wadia, Mohit Burman and Karan Paul would control the affairs of the franchisee, this was belied when the Respondent was initially constituted. The gravamen of the

allegation of BCCI is that when the franchise agreement was entered into on **10 April 2008**, none of the members of the consortium was a shareholder of the Respondent. Now from the chart which has been extracted in the earlier part of this judgment it would be abundantly clear that on the date of the franchise agreement the shareholding of the Respondent was held between ACEE which held **9900** shares and Mohit Burman who held **100%**. Clause **11.7** of the franchise agreement defines the expression 'control' to mean the direct or indirect power of another person to secure that the affairs of another are conducted in accordance with his wishes. The exercise of both a direct as well as an indirect control is therefore within the contemplation of Clause **11.7**. Clause **11.7** also postulates that this control may be exercised by either of three modalities, these being – (i) the holding of any shares or the possession of voting power; (ii) by the powers conferred under the Articles of Association of a company and (iii) by virtue of any contractual arrangement. Ex facie, Clause **11.7** is not confined to the exercise of de jure control. Clause **11.7** recognizes that control may be wielded by a broader set of commercial arrangements, sanctified by contract or agreement. The Respondent in its petition under Section **9** specifically set up the plea in paragraph **4.10** that Mohit Burman who was a member of the consortium had identified ACEE which was a family investment company as a company which would initially hold a majority of the shares of the Respondent. The assurance of Mohit Burman to the members of the consortium was that he had full control over ACEE which would act in accordance with the decisions of the members of the consortium which in fact it did. The second statement of the Respondent in its pleadings under Section **9** is that Mohit Burman

was always in control and continues to be in control of ACEE, Windy Investments and MB Finmart Pvt. Ltd. (earlier known as Dabur Investment Corporation Ltd.) At this stage what necessitates emphasis is that the control which is postulated by Clause 11.7 is not merely a direct or de jure control but a control that may be indirect as well. Clause 11.7 expressly recognizes that control may be exercised in terms of the holding of shares, the exercise of voting powers, through the Articles of Association or for that matter even by a contractual arrangement.

18. There are, in our view, prima facie at this stage atleast seven circumstances which weigh in support of the conclusion of the learned Single Judge that the members of the consortium right from the inception exercised control over the affairs and management of the Respondent. As we have noted earlier, on 10 March 2008 the entire share capital of the Respondent was held by ACEE and by Mohit Burman. The first circumstance is that on 2 February 2008 ACEE had passed a resolution in the following terms :

“RESOLVED THAT pursuant to the provisions of Section 292 and subject to all other applicable provisions of the Companies Act, 1956 the consent of the Board be and is hereby accorded to authorize Mr. Mohit Burman, Director of the Company, individually to invest the fund of the Company in any Franchisee in Northern India for bidding to BCCI.

RESOLVED FURTHER THAT the consent of the Board be and is hereby accorded to incorporate a new Company / Special Purpose Vehicle on request of other promoters to commence the above venture and Mr. Mohit Burman be and is hereby authorized to defray expenses thereon and pay any fees.

RESOLVED FURTHER THAT the Board hereby takes note that the promoters of the new Company / Special Purpose Vehicle shall be Ms. Preity Zinta, Mr. Ness Wadia, Mr. Karan Paul, Mr. Mohit Burman and others as per the ratio to be mutually agreed between the promoters.” (emphasis supplied)

19. The resolution expressly recognizes – (i) the consent of the Board of directors for Mohit Burman individually to invest the funds of the company in any franchisee in Northern India for bidding to BCCI; (ii) the consent of the board for the incorporation of a new company on the request of the other promoters and (iii) that the promoters of a new company would be the four members of the consortium namely Preity Zinta, Ness Wadia, Karan Paul and Mohit Burman. The ‘other promoters’ mentioned in the second paragraph are the promoters referred to by name in the third paragraph. On 3 March 2008 a second resolution was passed at a meeting of the Board of ACEE to the following effect :

“RESOLVED THAT the Board hereby takes note that the bid applied by the company alongwith other promoters to purchase Mohali Franchise (amounting USD 76 million and One US Dollar) has been accepted by BCCI.

RESOLVED THAT the consent of the Board be and is hereby accorded to incorporate a new Company in the name of K.PH. Dream Cricket Pvt. Ltd. on request of the other promoters to commence the above venture, initially with following shareholders and Directors :

NAME OF THE SHAREHOLDERS:

1. ACEE Enterprises
2. Mr. Mohit Burman

NAME OF THE DIRECTORS:

1. Mohit Burman

## 2. Ness Wadia”

20. This resolution specifically took notice of the bid submitted for the Mohali franchise which was accepted by BCCI. More significantly it extended the consent of the Board to incorporate the Respondent on the request of the other promoters and initially with certain shareholders and directors. Significantly, the first directors of the Respondent were Mohit Burman and Ness Wadia who were members of the consortium which had submitted the bid to BCCI for the Mohali franchise. Thus, the first important circumstance is the fact that ACEE was at all material times since the inception cognizant of and had consented to the arrangement whereby Mohit Burman would join in the constitution of the Respondent; that the promoters of the Respondent would be the members of the consortium and initially two members of the consortium would be directors of the Respondent.

21. The second circumstance is that a little prior to the incorporation of the Respondent, Form 1A was filed with the Registrar of Companies on 18 February 2008 disclosing the names of the promoters. Form 1A expressly stated that the promoters of the Respondent were Mohit Burman, Ness Wadia, Karan Paul and Preity Zinta, besides ACEE. However, on behalf of the Appellant reliance was sought to be placed on Form 1 filed with the Registrar of Companies on 6 March 2008. All that Form 1 contained was a disclosure that there were two subscribers to the Respondent viz. ACEE and Mohit Burman. Now there is no factual dispute about the

position that on the date of the constitution of the Respondent these indeed were the two initial shareholders. Therefore Form 1 really does not advance the case of the Appellant.

22. The third circumstance to which a reference must be made is that in January 2008 Preity Zinta, Mohit Burman and Karan Paul brought in an amount of Rs.20 Crores towards payment of the performance deposit which was required to be effected in favour of BCCI. Between 9 March 2008 and 8 April 2008 Ness Wadia brought in an additional amount of Rs.5 Crores as capital contribution. In the ledger accounts of the Respondent, an amount of Rs.9.95 Crores was treated as share application money contributed by the four members of the consortium. The balance-sheet of the Respondent similarly reflected an amount of Rs.9.95 Crores as having been paid towards share application money. The Respondent in its income tax return for assessment year 2008-09 filed in October 2009 also disclosed the share application money of Rs.9.95 Crores. Obviously, these sums of money were brought in by each of the four members of the consortium on the basis and foundation that they would be allotted shares, something that, as we would note shortly hereafter did in fact take place. The fourth important circumstance to which a reference must be made is that the only directors of the Respondent from the inception were members of the consortium. Initially as we have noted, the directors of the Respondent were Mohit Burman and Ness Wadia. On 28 March 2008 Preity Zinta was inducted as an additional director. The fifth circumstance is that monies were raised from the bankers of the Respondent against the furnishing of personal guarantees by the members of the consortium. Sixthly, on 8 May

2008 a fresh allotment of shares took place. At that allotment Preity Zinta and Ness Wadia were allotted each **23.958%** of the share capital of the Respondent. Karan Paul was allotted **4.166 %**. Altogether the three promoters came to hold **52.08%** of the share capital. ACEE and Mohit Burman in turn transferred their shareholding in the Respondent to two companies viz. Dabur Investment Corporation Ltd. (MB Finmart P. Ltd.) and Windy Investments Private Ltd. Now the contention of the Respondent is that all these three companies are in fact family investment companies of Mohit Burman. As regards ACEE it has been stated that Mohit Burman held **12.5 %** of the shares, his mother held **25%** shares, his brother held **12.5%** while a cousin held **50%**. What is significant is that on **8 May 2008** ACEE issued a fresh allotment of shares to Preity Zinta, Ness Wadia, Karan Paul, the effect of which was that together they would constitute a majority comprising of **52.08%**. ACEE thereafter retained a stake only through Windy Investments Private Ltd, a wholly owned subsidiary. ACEE had in other words given up **99.9%** of its shareholding in the Respondent for a shareholding of **12.5%** through its subsidiary, Windy Investments. This could have been only on the hypothesis that this was done at the behest and bidding of Mohit Burman who was one of the members of the consortium controlling ACEE.

**23.** The entire basis of the letter of termination is erroneous and flawed. The termination of the agreement states that when the Respondent was formed on **10 March 2008**, none of the members of the consortium figured as shareholders. The letter then states that in the first instance on **8 May 2008** ACEE and Mohit Burman transferred their shares to Dabur Investment and Windy Investments

as a result of which the transferee companies had taken control over the franchisee. This totally ignores the factual position that while on **8 May 2008** a transfer had taken place of the shareholding of ACEE and Mohit Burman in the Respondent, this was accompanied by the allotment of fresh share capital to Preity Zinta, Ness Wadia and Karan Paul, all of them being members of the consortium who together came to hold over **52%** of the share capital. Secondly, the termination then proceeds on the basis that on **30 June 2008** further changes took place as a result of which the **100%** control over the franchisee exercised by Dabur Investment and Windy Investments came down to only **23%**. Ex facie, this part of the notice is equally fallacious. Neither Dabur nor Windy had at any point of time exercised **100%** control, or for that matter control over the Respondent within the meaning of Clause **11.7**. Moreover, as the chart which has been extracted in the earlier part of the judgment shows, on **30 June 2008** there was a further issue of shares in the same proportion of the existing shareholding of the Respondent. In these circumstances, it is to our mind abundantly clear that the Appellant purported to terminate the contract on a basis which was factually incorrect. At this stage, it would be relevant to note that during the course of the hearing, the Learned Single Judge, in order to test the bonafides of the members of the consortium and of their case that ACEE, Windy Investments and Dabur Investment were companies controlled by Mohit Burman, had enquired as to whether Windy Investments and Dabur Investment would transfer the entire shares held by them aggregating to about **24%** in the Respondent in the name of Mohit Burman. The learned Judge recorded that counsel appearing on behalf of the Respondent on taking instructions

immediately agreed.

24. For these reasons, we are of the view that the learned Single Judge was entirely justified in coming to the conclusion that at all material times right from the inception, control over the affairs and management of the Respondent continued to rest in the members of the consortium. We may also note that Article 31 of the Articles of Association of the Respondent postulates that the Directors shall be entitled to exercise all such powers and to do all such acts and things as the company is authorized to exercise and do. The judgment of the Supreme Court in **Life Insurance Corporation of India v. Escorts Ltd.**<sup>1</sup> is an authority for the proposition that “there are many powers exercisable by the Directors with which the members in general meeting cannot interfere. The most they can do is to dismiss the Directorate and appoint others in their place, or alter the articles so as to restrict the powers of the Directors for the future.” This principle of law has been established also by the Court of Appeal in England in **John Shaw and Sons (Salford), Ltd. v. Peter Shaw and John Shaw**<sup>2</sup> and **Automatic Self-Cleansing Filter Syndicate Company Ltd. V. Cuninghame**<sup>3</sup>. The only directors of the Respondent since the inception are members of the consortium and them alone.

25. On behalf of the Appellant it has been urged that Clause 21.6 of the franchise agreement interposes a bar upon the remedy of a franchisee to seek injunctive or equitable relief. Counsel appearing

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1 AIR 1986 SC 1370.

2 (1935) 2 King's Bench Division 113

3 (1906) 2 Chancery Division 34.

on behalf of the Appellant submitted that the import of Clause **21.6** is that it is only BCCI which is entitled to bring an action before a Court for injunctive or equitable relief and that the remedy of a franchisee can only be to claim damages upon termination.

26. Now at the outset, it must be noted that Clause **21.6** postulates that BCCI shall have the right to bring an action before the Courts of Mumbai for injunctive or equitable relief, if it reasonably believes that damages may not be an adequate remedy for a breach by the franchisee of the agreement. The words “but not the franchisee” are pressed in aid of the submission that the right of the franchisee to move a court for injunctive or equitable relief is excluded. Under Clause **21.2** parties have agreed that if any dispute arises under the agreement which cannot be amicably resolved, parties shall submit their dispute to arbitration. However, by Clause **21.6** BCCI is empowered to bring an action before a Court in Mumbai in order to seek injunctive or equitable relief. Now the belief of BCCI, if it were to bring an action claiming injunctive or other equitable relief, that damages would not be an adequate remedy is by no means conclusive, in the event, that an action is brought before a Court. It is for the Court to determine in the first place as to whether damages would or would not constitute an adequate remedy. Clause **21.6** essentially deals with a situation where there is a breach of the agreement by the franchisee. Now what the argument of the Appellant essentially requires the Court to accept, is that the franchisee is barred by Clause **21.6** from bringing an action under Section **9** of the Arbitration and Conciliation Act **1996** to claim injunctive relief in respect of an unlawful termination of the contract

even in a circumstance where damages would not provide an adequate remedy. Whether the damages would or would not provide an adequate remedy is a separate issue altogether. However, in our view, it would be wholly destructive of the underlying principles of Section 28 of the Contract Act to allow a party to assert that the effect of a contractual term is to prohibit access to the Court in a petition under Section 9 of the Arbitration and Conciliation Act 1996 for obtaining suitable injunctive relief even if, damages were not to provide an adequate recompense. The Court would not readily adopt such a construction of Clause 21.6 and indeed if it were to do so, there would be serious questions in regard to validity of Clause 21.6. A construction must therefore be placed on Clause 21.6 which makes business sense. After all, the franchise agreement reflects a business understanding between parties to a commercial document. When the Court construes a commercial document, the effort must be to give business efficacy to a commercial understanding between the parties. We decline to read Clause 21.6 as enabling BCCI to successfully set up the defence that the remedy of injunctive relief under Section 9 is barred even if the franchisee is able to establish that damages would not provide an adequate remedy. Significantly when parties agreed to a consent order in Arbitration Petition 1340 of 2010, they left it open to the Respondent to file an application before the sole arbitrator for interim relief under Section 17.

27. That leaves the Court with the question as to whether, in the facts of this case the grant of interlocutory relief was warranted. The effect of the order of the learned Single Judge is to stay the termination by BCCI of the franchise agreement. We are of the view

for the reasons indicated earlier that the learned Single Judge was justified in coming to the conclusion that a strong prima facie case was made out by the Respondent for the grant of interlocutory relief. The Respondent in the course of its arbitration petition has set out several circumstances as to why, the franchise agreement needs to be specifically enforced. These circumstances are :

- i. There exists no standard for ascertaining the actual damage that may be caused by the non performance of the franchise agreement and compensation in money would not afford an adequate relief;
- ii. The franchise agreement is a perpetual agreement, co-terminus with the life of the IPL and not one which in its nature is determinable;
- iii. The subject matter of the franchise agreement is of special value and interest to the Respondent and the rights acquired by the Respondent are not readily available in the market;
- iv. The Respondent had spent a large amount of effort, time and money in developing and creating the business and the brand of Kings XI Punjab;
- v. As a result of the letter of termination the Respondent would be precluded from participating in the auction for cricketers which is scheduled to take place in January 2011. Players are normally signed up for two year contracts with the option of a one year extension;
- vi. The Respondent would also not be able to trade players with other franchisees at mutually agreed prices;
- vii. The Respondent is a representative franchisee for the States of Punjab, Haryana, Himachal Pradesh and Jammu & Kashmir

which provides a platform for cricketers of the region to develop their skills;

viii. The Respondent has built up a large number of sponsors who have chosen to become part of the brand, Kings XI Punjab. In the year 2010 itself 14 sponsors had signed up with the Respondent, some of them having signed a contract which extends for a period upto three years;

ix. The Respondent has been promoting cricket in far off places, in remote areas of Himachal Pradesh and is currently in the process of setting up a cricket academy in conjunction with the Cricket Associations of Punjab and Himachal Pradesh.

28. We are of the view that sufficient grounds were made out on behalf of the Respondent for establishing that damages would not provide an adequate remedy and that an interim order staying the termination was warranted. Such an order falls within the contemplation and purview of Section 9. The Arbitrator has power to grant specific performance. The Arbitrator, if appointed again, will decide finally all the issues after taking note of material and submissions. During this period, the Court is empowered to pass a protective order in order to preserve the subject matter of the Arbitration and to safeguard the rights in adjudication before the arbitral tribunal from being frustrated. In view of the nature of the transaction, the conduct of the parties, to avoid irreparable loss, injury and harm to goodwill and reputation, and in the interests of justice as a strong prima facie case is made out, we are inclined to maintain the order passed by the learned Single Judge. We are also of the view that the balance of convenience lies in favour of the

Respondent. It was just and convenient to pass an order to protect and preserve the subject matter of the dispute, to avoid further complications in the matter, particularly when the action of an abrupt termination of the contract which had a life coextensive with the duration of IPL is unjust, unfair and illegal. Damages will hence not provide adequate or sufficient recompense. Therefore, clause 21.6 does not affect the power and jurisdiction of the Court under Section 9 to pass such an order, at the interim stage, till the award of the arbitral tribunal. However, this is subject to the conditions set out in the order of the learned Single Judge.

29. In **Hindustan Petroleum Corpn. Ltd. Sriman Narayan<sup>4</sup>**, the Supreme Court reiterated the principles which were laid down in **Dorab Cawasji Warden v. Coomi Sorab Warden<sup>5</sup>** for the grant of interlocutory mandatory injunctions. The circumstances which have been enunciated in the judgment of the Supreme Court include that (i) The plaintiff must establish a strong case for trial, a higher standard than a prima facie case normally required for a prohibitory injunction; (ii) The Plaintiff must establish that it is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money; (iii) The balance of convenience must be in favour of one seeking such relief. We are more than satisfied that the learned Single Judge is justified in coming to the conclusion that these principles are duly fulfilled.

30. The judgment of the Supreme Court in **Lachoo Mal v. Radhye**

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4 (2002) 5 SCC 760.

5 (1990) 2 SCC 117.

**Shyam**<sup>6</sup> deals with the question as to whether a landlord could waive the exemption benefit available for constructions made after the stipulated date in the U.P Control of Rent and Eviction Act. The Supreme Court laid down that the general principle is that every individual has a right to waive an advantage of a rule made solely for the benefit of the individual unless it can be shown that an agreement in such circumstances is contrary to public policy. The judgment of the Supreme Court would really not advance the case of the Appellant.

31. The learned Single Judge while granting an interlocutory injunction, carefully weighed the equities and has made the final relief subject to stringent conditions. These conditions include the requirement that the Respondent furnish a bank guarantee of US \$ **18** million to secure the payment of players' dues and another bank guarantee in the amount of US \$ **3.5** million, both of nationalized banks. In addition, the learned Single Judge has recorded a personal undertaking to guarantee the payment of any amounts that may be found due and payable by any court, tribunal or by any other authority. Having regard to the settled principles enunciated by the Supreme Court in **Wander Ltd. v. Antox India P Ltd.**<sup>7</sup>, no case has been made out for interference. Before concluding, we must advert to the judgment of the Supreme Court in **Board of Control for Cricket in India v. Netaji Cricket Club**<sup>8</sup>. While it is true that BCCI is not State within the meaning of Article **12** of the Constitution, the Supreme Court has held that nonetheless the Board is bound to

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6 AIR 1971 SC 2213.

7 1990 (Supp) SCC 727.

8 (2005) 4 SCC 741.

follow the doctrines of fairness and good faith in all its activities having regard to the enormity of the power exercised by it. For the reasons which we have indicated, we have come to the conclusion that the termination of the contract was anything but fair. The termination was wholly arbitrary, and was founded on an erroneous factual basis. It therefore deserved the treatment which it has received in the Court of the learned Single Judge. We therefore do not find any reason to interfere. The Appeal shall accordingly stand dismissed.

There shall be no order as to costs.

(Dr. D.Y. Chandrachud, J.)

(Anoop V. Mohta, J.)