

(2023) 04 DEL CK 0152

In the Delhi High Court

Case No : Civil Suit (COMM) No. 108 Of 2023

Digital Collectibles Pte Ltd And Ors

APPELLANT

Vs

Galactus Funware Technology Private Limited And Anr.

RESPONDENT

Date of Decision : 26-04-2023

Acts Referred:

Constitution Of India, 1950 — Article 19(1)(a), 19(1)(g), 19(2), 19(6), 21
Code Of Civil Procedure, 1908 — Order 39 Rule 1, Order 39 Rule 2, Order 1 Rule 8A
Delhi High Court Intellectual Property Rights Division Rules, 2022 — Rule 25
Trade Marks Act, 1999 — Section 27(2)

Citation : (2023) 04 DEL CK 0152

Hon'ble Judges : Amit Bansal, J

Bench : Single Bench

Advocate : Sandeep Sethi, Rajshekhar Rao, Shwetasree Majumder, Aditya Verma, Prithvi Singh, Rohan Krishna Seth, Parkhi Rai, Rigved Prasad, Dayan Krishnan, Raj Latha Kotni, Anoop George, Amit Sibal, Maanav Kumar, Tara Narula, Nupur, Bijaharini G., Rishab Sharma, Saksham Dhingra, Akhil Sibal, Aditya Gupta, Kruttika Vijay, Dhruv Garg, Utkarsh Srivastava, Rahul Bajaj, Sauhard Alung, Sanya Kumar, Shilpa Gamnani, Nishtha Chaturvedi

Judgement

Amit Bansal, J

INTRODUCTION

1. The present case highlights the exponential growth of Online Fantasy Sports [hereinafter "OFS"] in India. As per a report prepared by Deloitte Touche Tohmatsu India LLP and the Federation of Indian Fantasy Sports in the year 2022, the OFS market in India has (i) over thirteen crore users in the country already; (ii) provided over 5,000 indirect jobs with the potential to create more employment opportunities in the future; and, (iii) created opportunities for investment and commerce through sponsorships, partnerships and the like [FIFS & DELOITTE, FANTASY SPORTS: CREATING A VIRTUOUS CYCLE OF SPORTS DEVELOPMENT 8, 20– 37 (2022)]. In 2020, the Niti Aayog, in its discussion paper focused toward identifying the OFS space in India, highlighted the

exponential growth in the Indian OFS market and made recommendations on how to navigate the uncharted waters of online fantasy sports gaming [NITI AAYOG, GUIDING PRINCIPLES FOR THE UNIFORM NATIONAL-LEVEL REGULATION OF ONLINE FANTASY SPORTS PLATFORMS IN INDIA DRAFT FOR DISCUSSION 1–4 (2020).]. As recent as 6th April, 2023, after judgment was reserved in the present case, even the Central Government has notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023, aiming to regulate online gaming through a self-regulatory model and at the same time, provide an enabling framework to allow the OFS sector to expand [Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023, G.S.R. 275(E). (April 6, 2023).]. Before proceeding any further, it may be useful to understand what the basic concept of an OFS game is and how it functions.

2. OFS games are a form of online gaming offered on the internet that allow users/fans of sports to create and manage their own virtual teams based on real athletes in formats set by online gaming platforms. Such online games allow users to compete against each other in various virtual gaming events/leagues centred around real-world sporting events and are based on, inter alia, the statistical data of the performance of sportspersons. To participate in the fantasy sports games offered by these online platforms, users are generally required to pay an entry fee. Once a user pays the requisite entry fee, they can use their skill and knowledge to enter the online events/leagues and earn points on their players, change the composition of their teams by adding and/or removing players, and ultimately win awards and prizes.

3. There is no one standard formant of OFS and various operators are bringing out their own variations so as to differentiate their OFS games from the others. Although the legality of OFS gaming formats is not subject matter of the present dispute, the issues involving its legality have been dealt with by Indian courts. In *Varun Gumber v. Union Territory of Chandigarh and Ors.*, 2017 SCC OnLine P&H 5372 (against which Special Leave Petition (Civil) No.26642/2017 and Review Petition (Civil) Diary No.5195/2022 were dismissed on 15th September, 2017 and 9th November, 2022 respectively), a learned Single Judge of the Punjab and Haryana High Court observed that playing of a fantasy game by any participant/user requires skill, judgment and discretion and would constitute a game of skill and would not amount to gambling.

4. In this background, I shall now proceed to decide the application filed on behalf of the plaintiffs under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (CPC) as well as the applications filed on behalf of the intervenors seeking to address submissions on the legal issues involved in the present case.

PROCEEDINGS IN THE SUIT

5. The present suit, accompanied by an application for grant of interim injunction

and an application seeking exemption from serving the defendants, was first listed before the Court on 28th February, 2023.

6. Counsel for the defendants, on seeing the matter in the cause list, appeared and accepted notice on behalf of the defendants.

7. Intervention applications in the present suit were filed on 6th April, 2023.

8. Replies to the application for grant of interim injunction have been filed on behalf of the defendants no.1 and 2.

9. Submissions were heard on 28th February, 2023, 6th March, 2023, 7th March, 2023, 14th March, 2023, 16th March, 2023, 17th March, 2023, 20th March, 2023, 21st March, 2023 and 24th March, 2023, when judgment was reserved in the present applications.

I.A. 4515/2023 (R-25 of the Delhi High Court Intellectual Property Rights Division Rules) and I.A. 4443/2023 (O-I R-8A of the CPC)

10. These applications have been filed under Order I Rule 8A of the CPC, read with Rule 25 of the Delhi High Court Intellectual Property Rights Division Rules, 2022 [hereinafter "IPD Rules, 2022"].

11. Order I Rule 8A of the CPC is set out as under:

" ORDER I

Parties to Suits

...

8A. Power of Court to permit a person or body of persons to present opinion or to take part in the proceedings- While trying a suit, the Court may, if satisfied that a person or body of persons is interested in any question of law which is directly and substantially in issue in the suit and that it is necessary in the public interest to allow that person or body of persons to present his or its opinion on that question of law, permit that person or body of persons to present such opinion and to take part in the proceedings of the suit as the Court may specify."

12. Rule 25 of the IPD Rules, 2022 is set out below:

"25. Intervention by third parties

In the matters listed before the IPD, intervention by the third parties may be permitted suo moto or on an application by any person unless prohibited by law. Such person shall seek to intervene by means of an application stating the nature of interest before the Court. The Court may refuse or grant leave after hearing all concerned parties, if so required, and on such terms and conditions as it deems fit."

13. I.A. No.4443/2023 has been filed on behalf of WinZO Games Private Limited, which is a digital gaming and technology company and operates an online digital

gaming platform, "WinZO"/ "WinZO Games".

14. I.A. No.4515/2023 has been filed on behalf of All India Gaming Federation, which is a not-for-profit Society registered under the Societies Registration Act, 1860, having more than 100 members and is the largest and the oldest association of online gaming companies in India. It seeks to represent the interest of various companies offering online skill based games/platforms.

15. The intervenors in both these applications seek to address legal submissions that not only have a bearing on the present case but also have wide ranging ramifications across the gaming industry, particularly for online fantasy sports.

16. Taking into account the legal issues involved in the present case as well as the public interest concerning the aforesaid issues, it was deemed appropriate to permit both the intervenors to make submissions on the legal position.

17. Both the applications are accordingly disposed of.

I.A.3960/2023 (O-XXXIX R-1 & 2 of the CPC)

CASE SET UP IN THE PLAINT

18. The case set up in the plaint is as under:

18.1. Plaintiff no.1 is a company incorporated in Singapore and carries on its business in India and worldwide under the trade name "Rario," primarily through its website and related mobile applications. The business of the plaintiff no.1 includes creation of an online marketplace where third-party users sell, purchase and trade officially licensed "Digital Player Cards" of cricketers. Plaintiffs no.2 to 6 are well-known Indian cricketers.

18.2. The Digital Player Cards on the Rario Website use the name and photograph of the players and other aspects of their personalities referred to as "Player Attributes". By virtue of Player Services Agreements, plaintiffs no.2 to 6 have duly licensed and authorized plaintiff no.1 to exclusively use, inter alia, their names and photographs on the Rario Website.

18.3. The business model of the plaintiff no.1 requires that its Digital Player Cards be technologically capable of being identified and distinguished as authentic and original in the online marketplace. Towards this, the plaintiff no.1 uses its unique software code, which is embedded in the officially licensed Digital Player Cards, by virtue of which the cards function as "Non-Fungible Tokens" [hereinafter "NFTs"].

18.4. The aforesaid NFT enabled Digital Player Cards are capable of being sold, purchased and traded for real money on the Rario Website (via the private blockchain of the Rario Website).

18.5. In general, the price of a Digital Player Card for any player depends on the relative demand and supply of that card at a particular time. It is not linked to the real-world performances of the player in the cricket match, although better

real-world performance increases a player's popularity and causes demand for their Digital Playing Cards.

18.6. Plaintiff no.1 has invested a huge amount of money, to the tune of Rs.1,48,32,35,589/- in the last year alone, to procure such exclusive licenses and authorizations from the plaintiffs no. 2 to 6. Further, the plaintiff no.1 has also spent large sums of money on advertising and marketing its business in the last few years.

18.7. Defendant no.1 carries on business under the name "Mobile Premier League" [hereinafter "MPL"]. Defendant no.2 runs a mobile application by the name "Striker," which is listed on defendant no.1's mobile application "MPL". The defendants carry on business under the trade name "Striker Club" through their website, mobile application "Striker," as also under the trade name "MPL". The defendants' business through the Striker Website includes the creation of an online marketplace where third-party users can purchase, sell and trade Digital Player Cards, which include the image of a player along with the player's name/initials. Like plaintiff no.1, the defendants also use NFT technology to authenticate player cards for the Striker Website.

18.8. Unlike the plaintiff no.1, the defendants do not have authorization or licenses from plaintiffs no. 2 to 6 to use their names, surnames, initials and images or other attributes of their personality for their business.

18.9. Through the Striker Website and Striker mobile application, the defendants have a similar business model to that of the plaintiff no.1. The defendants do not have any license or authorization from plaintiffs no.2 to 6, yet they use Digital Player Cards with NFTs which include artistic drawings of plaintiffs no.2 to 6 along with their names. The entire value of the digital art collectibles/NFTs available on the Striker Website is derived from the names, likeness and personalities of the players and not on account of the artistic contents of the images.

18.10. The cause of action for the present suit arose in January, 2023 when plaintiff no.1 became aware of the Striker Website.

19. Based on the aforesaid averments, the present suit has been filed by the plaintiffs on account of unlawful use of player marks and other attributes of plaintiffs no. 2 to 6, which amounts to (i) unfair competition (including passing off); (ii) unjust enrichment; (iii) tortious or unlawful interference with economic interest of the plaintiffs; and, (iv) breach of personality rights of plaintiffs no.2 to 6. Besides the relief of permanent injunction, the plaintiffs have also sought the relief of rendition of accounts and damages.

REPLY FILED ON BEHALF OF THE DEFENDANT NO.1

20. In the reply filed on behalf of the defendant no.1 to the application for grant of interim injunction, the case made out by the defendant no.1 is as under:

20.1. The defendant no.1 operates an online gaming platform, MPL, which also includes OFS. The MPL platform of the defendant no.1 hosts games developed by third-party game developers, including the gaming application developed by the defendant no.2 under the name Striker.

20.2. The defendant no.2 is a separate and independent corporate entity and defendant no.1 is not involved in managing the day-to-day affairs of the defendant no.2.

20.3. While the allegations in the plaint are specific only to the mobile application Striker, which is owned and operated by the defendant no.2, the prayers in the plaint as well as the interim application are towards seeking restrain on the operation of all OFS games hosted on the MPL platform of the defendant no.1.

20.4. The plaintiff no.1 has concealed the fact that they run an OFS game titled "D3.Club," which is similar to the OFS game offered by the defendant no.2.

20.5. The defendant no.1 merely provides its MPL platform to defendant no.2 to publish its game Striker and does not have any control over Striker.

20.6. The defendant no.1 has been operating OFS games on its platform MPL since 2019.

20.7. The use of names and images of sportspersons is a prevalent and prominent feature of all OFS games in India and abroad. Fantasy sports leagues are based entirely on the existence and real life performances of actual players and on-field events. By their very nature, fantasy games can only be played if all the relevant players are listed and available to choose from and capable of being identified on the platform.

20.8. The OFS offerings of defendant no.1 do not use any NFTs or similar technology.

REPLY FILED ON BEHALF OF THE DEFENDANT NO.2

21. In the reply filed on behalf of the defendant no.2, the case set up by the defendant no.2 is as under:

21.1. The defendant no.2's product, Striker only offers an OFS game, whereas the product of the plaintiffs, Rario, in addition, offers users the option to "buy" and "own" cricket moments.

21.2. The material used by the defendant no.2 for its fantasy game Striker is in the nature of facts and information available in public domain and is therefore, beyond the scope of personality rights of the players. Therefore, the plaintiffs have wrongly placed reliance on the exclusive license agreements with plaintiffs no.2 to 6.

21.3. The case set up by the plaintiffs is on a misconception that an entity requires consent/authorisation of an individual sportsperson in order to use facts, information, images and other materials necessary to identify those players to

enable the playing of games on OFS platforms.

21.4. Fantasy games such as Striker necessarily have to include all players so as to form a team by the user. The performance of a fantasy team depends upon the on-field performance of the individual player during a real cricket match.

21.5. Since the fantasy games depend upon the inclusion of all players, there is no scope of creating any impression that a particular player is endorsing the fantasy game.

21.6. The OFS of the defendant no.2 uses names, images and other information of all potential players and therefore, it cannot be said that a particular player is endorsing a fantasy game.

21.7. The defendant no.2 is not in the business of buying, selling and trading of NFT cards as stated in the plaint. The NFT cards are an entry requirement to play the OFS game of defendant no.2.

21.8. The Digital Player Cards cannot be traded or used outside the Striker platform and are only meant to enhance the user experience in the fantasy games.

21.9. A large number of fantasy games are offered worldwide, including in India, which use player identifiers, including, names, images and basic statistics, as they are all available in the public domain. Therefore, this is a well-settled industry practice in the business of fantasy sports.

21.10. There is no statutory provision in India which envisages protection of the rights claimed by the plaintiffs in the present suit. The player identifiers claimed to be owned by the plaintiffs are in the nature of factual information not protectable under any law in India.

21.11. Striker has commissioned independent artist to create original artworks based on the cricketers sought to be depicted. The defendant no.2 has not used any real photographs/images of the cricketers. The aforesaid artworks used on the Striker platform are original works and are entitled to copyright protection under the Copyright Act, 1957.

21.12. The plaintiffs have concealed that as far back as in September, 2022, the senior executives of the plaintiffs have been in contact with the senior officials of the defendants regarding the Striker platform. In this regard, the defendants have placed on record WhatsApp chats between the said employees. Even otherwise, the defendant no.2 had launched an extensive advertising and marketing campaign before launching its platform Striker, starting from August, 2022. Therefore, the claim of the plaintiffs that they became aware of the defendant no.2 only in January, 2023 is false.

21.13. The prayers in the interim application go far beyond the pleadings and are intended to shut down the business of OFS platforms.

21.14. Balance of convenience is against the grant of injunction in favour of the plaintiffs as an injunction will bring to halt the entire business of the defendants.

21.15. The present suit has been filed intentionally just before the WPL and IPL scheduled to be held at the end of March, 2023, when the OFS business would reach its peak.

SUBMISSIONS ADVANCED ON BEHALF OF THE PLAINTIFFS

22. The following submissions have been made on behalf of the plaintiffs:

22.1. Indian law recognizes the right of personality/right of publicity. The attempt of the defendants to characterize the right of personality under Indian law as being limited to cases of unauthorized endorsement is completely incorrect. The judgment in *D.M. Entertainment Pvt. Ltd. v. Baby Gift House and Ors.*, MANU/DE/2043/2010 recognizes separate torts of 'infringement of right to publicity' and 'false endorsement leading to passing off'. The tort of infringement of right to publicity requires identifiability and includes a broad category of acts of unauthorized appropriation of an individual's persona/attributes for commercial gain. Further, in *Titan Industries v. M/s. Ram Kumar Jewellers*, (2012) 50 PTC 486, the Court held that the right of publicity extends beyond the traditional limits of false advertising laws.

22.2. Publicity rights are recognized in India as a facet of the right to privacy. Reliance in this regard is placed on the concurring judgment of Kaul, J. in the judgment of *K. S.Puttaswamy and Anr. v. Union of India and Ors.*, (2017) 10 SCC 1.

22.3. On the aspect of right of publicity, reliance has also been placed on judgments of courts in the United States of America [hereinafter "U.S."], viz. *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821 and *Midler v. Ford Motor Co.*, 849 F.2d 460.

22.4. The cause of action for filing the present suit is based on the sale and trade in NFTs offered on Striker's website and mobile applications using players' names, images and other attributes. It is not necessary for a user to participate in any fantasy game on Striker after purchasing an NFT Player Card on Striker. A user can simply trade the NFT Player Card or sell it.

22.5. The platform of Striker itself states that the most important part of the Striker App is the marketplace where you can buy, sell or rent Digital Player Cards (page 14 of the additional documents filed by the plaintiff).

22.6. Defendants incorrectly characterize the suit as one against the use of information/materials available in the public domain.

22.7. All sports players have limited playing time and therefore, they have a right to monetize all aspects of their personality. Therefore, defendants cannot

use the personality of a sports player for their monetary gains without any authorization from the celebrity.

22.8. The value of NFTs on the Striker platform is derived from the identity/personalities of the players and Striker is commercially gaining from the sale/trade of such NFTs without authorization from the players. This amounts to breach of personality rights.

22.9. The commercial value and status of an NFT as an asset is the sense of connection with the celebrity that the officially licensed NFT carries. Even beyond the world of cricket, celebrity NFTs are extremely valuable assets. For instance, the NFT in respect of first tweet of Jack Dorsey, the founder of the Twitter, as well as the digital trading card NFT of the famous footballer Erling Haaland, both of which were sold for huge amounts.

22.10. Striker as well as any other OFS games do not require NFTs for playing the game.

22.11. The sale price or resale price of an NFT Player Card is not based on the real-world performance of the player. The NFTs sold on the Striker platform are valued according to the personality/stature of the player. For NFTs of any particular player, the artistic work underlying the NFT is identical across the categories of NFTs, but the price is different. Hence, the price is not a function of artistic work but the personality of the player.

22.12. Both the plaintiff no.1 and the defendants are selling and trading in Digital Player Cards. The only difference is that the plaintiff no. 1 has entered into exclusive contracts with plaintiffs no. 2 to 6, whereas the defendants have not.

SUBMISSIONS ADVANCED ON BEHALF OF THE DEFENDANT NO.1

23. The following submissions have been made on behalf of the defendant no.1:

23.1. The reliance placed on behalf of plaintiffs on judgments of the American courts are not applicable as the same are based on specific statutes and not common law.

23.2. In common law jurisdictions such as the United Kingdom [hereinafter "U.K."], celebrity rights exist only in the context of endorsement. Reliance in this regard is placed on the judgment of the Court of Appeal (Civil Division) of the U.K. in Robyn Rihanna Fenty and Ors. v. Arcadia Group Brands Limited and Anr.

23.3. The various judgments relied upon by the plaintiffs are in the context of celebrity endorsement. Therefore, Indian law recognizes personality rights only in the context of endorsement, which is not the issue in the present case.

23.4. The judgment of the Supreme Court in Puttaswamy (supra) was in the context of privacy and has no application in the facts of the present case.

SUBMISSIONS ADVANCED ON BEHALF OF THE DEFENDANT NO.2

24. The following submissions have been made on behalf of the defendant no.2:

24.1. Indian law recognizes the right of publicity of a celebrity to commercially exploit their personal attributes only to the extent of restraining false endorsements and advertisements. The right does not extend to facts or information relating to the celebrity that are neither personal nor private.

24.2. Article 19(1)(a) of the Constitution of India affords Striker the right to use the aforesaid information for commercial purpose.

24.3. Striker uses only three pieces of player related content in its fantasy game, namely, (i) player name; (ii) original artistic rendition of the player (artwork); and, (iii) statistics arising out of a player's performance in real-world matches. Both the name of the player as well as the statistics are freely available in the public domain and therefore, the plaintiff cannot object to the same. This use is solely for the purpose of identification on the Striker platform. These are the essential features of all OFS games.

24.4. The Striker platform does not use any of a player's personal information or player's personal attributes such as signature, voice, height or any other aspect of his personal life.

24.5. In respect of the facts and information used by the plaintiffs, there is no inherent right in the players that could have been licensed to Rario. The plaintiffs admit that names, images/photographs as well as on-field performance of a player is being used in several OFS games for which the plaintiffs do not have any objection. Once the plaintiffs admit that there does not exist any right in them over facts and information available in public domain, the nature of use by defendants, whether with or without commercial motive, is irrelevant. Reliance in this regard is placed on the judgment of the United States Court of Appeals for the 8th Circuit in *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced*, 505 F.3d 959 and the judgment of the Supreme Court of Indiana in *Daniels v. Fan Duel. Inc.*, 109 N.E.3d 390.

24.6. As regards the example given by the plaintiffs of the NFT of Erling Haaland being traded on the platform "Sorare," the said platform itself states that it is to enable users to "collect officially licensed digital cards" for footballers. This is exactly what Rario seeks to do in respect of cricketers. However, there is nothing on the Striker platform to suggest that Striker is officially licensed to sell NFT Player Cards of players to users who seek to collect them.

24.7. The NFT Player Cards used on the Striker platform do not suggest any kind of endorsement or association of a player with the Striker platform. The Striker platform uses Digital Player Cards for all current players. The game by its very nature requires that each and every player be represented.

24.8. The use of the players' information on their NFT Player Cards by Striker does not cause any loss of earning opportunities for the players (plaintiffs no. 2 to 6).

24.9. No case of unjust enrichment by the defendant no. 2 has been made out as the only player related content used by defendant no.2 is the information available in public domain, in respect of which no person can claim proprietary rights.

24.10. The present suit has been filed by making material concealments and false statements in the plaint. The plaintiffs have wrongly stated that they came to know of the Striker platform in January, 2023, whereas they knew about the Striker platform since September, 2022 as is evidenced on the screenshots of the WhatsApp conversations between the employees of the plaintiffs and the defendants.

24.11. The plaintiff has concealed in the plaint that the plaintiff themselves run a fantasy game with Digital Player Cards similar to that run by the defendant no.2. Therefore, the present suit is an attempt to stymie competition.

24.12. The balance of convenience is in favour of the defendants and against the plaintiffs. The grant of interim injunction would cause irreparable harm and injury to the defendants inasmuch as it would result in complete closure of the defendant no.2's business and it would also cause loss to the users who have purchased the cards on the Striker platform.

SUBMISSIONS ON BEHALF OF THE INTERVENOR IN I.A. NO. 4515/2023

25. The following submissions were made on behalf of the intervenor, All India Gaming Federation:

25.1. 'Right of publicity' does not have any statutory recognition in India and cannot be created by Courts by resorting to principles of common law. Section 27(2) of the Trade Marks Act, 1999 only recognizes the tort of passing off and therefore, the Courts cannot expand the scope of the said tort so as to include 'right of publicity'.

25.2. In common law jurisdictions such as the U.K. and Australia, the tort of passing off is sufficient to deal with wrongs relating to misappropriation of goodwill and reputation of a celebrity, including use of names and likeness of celebrities. For a party to establish the tort of passing off, there has to be misrepresentation by a defendant's use of a celebrity's name/image in such a manner that consumers are misled to believe that the celebrity is endorsing the defendant's goods or services or is otherwise affiliated or associated with the defendant's goods.

25.3. The judgments of the U.S. courts cannot be applied by the Indian Courts as the said judgments are based on state-specific statutes. While the statutes in the U.S. recognize the 'right of publicity', they also spell out exceptions either provided in the statute or as per the principles of free speech under the First Amendment of the U.S. Constitution.

25.4. Conceptually, there is no difference between OFS games with Digital Player

Cards without NFT technology and OFS games with Digital Players Cards with NFT technology. Both use player names, likeness and attributes and it is these features that are used to identify the players within the online fantasy games and the real-world game.

25.5. If the use of a player's name or picture in an ordinary OFS game is descriptive or nominative, the use of the name of the player or his/her artistic impression for trading would also fall into the category of descriptive/nominative use.

25.6. When there is no claim of a card being officially licensed by a player, there cannot be any infringement of the personality rights of the player. The example given by the plaintiff of Erling Halland's card is misplaced as that was an officially licensed card by Erling Halland. Only when the cards are claimed to be officially licensed, a connection with the player can be claimed.

25.7. The judgment of the nine-judges Bench of the Supreme Court in *Puttaswamy* (supra) was in the context of the 'right to privacy' and the majority judgment held that the 'right to privacy' is a fundamental right under Article 21 of the Constitution of India. However, the said judgment does not in any manner hold that the 'right to publicity' is part of the 'right to privacy'.

SUBMISSIONS ON BEHALF OF THE INTERVENER IN I.A. 3960/2023

26. The following submissions have been made on behalf of the intervener, WinZO Games Pvt. Ltd.:

26.1. The rights guaranteed to a company under Articles 19(1)(a) and 19(1)(g) of the Constitution of India can only be curtailed by way of law enacted by the parliament in accordance with Articles 19(2) and 19(6) of the Constitution respectively. Therefore, it is only for the legislature to determine how far to curtail the freedom of speech.

26.2. None of the judgments cited on behalf of the plaintiff have defined the contours of the right of publicity in India.

26.3. In the absence of any legislation, the basis for any action for violation of publicity rights has to be in relation to the tort of deceit, passing off or unfair competition. In the case of OFS games, there is no question of deceit or misleading the customers into believing that a particular sportsperson is endorsing the product. Further, the OFS game only uses the information of the player available in public domain for the purposes of playing the game. Hence, there is no misrepresentation and no case for the tort of deceit, passing off or unfair competition is made out.

ANALYSIS AND FINDINGS

27. On the aspect of the right of publicity in India, both sides have extensively cited both Indian as well as foreign case law in support of their submissions. In order to determine the contours and the scope of the right of publicity in India, it

is deemed apposite to discuss the authorities cited on behalf of the parties.

28. Since counsels for both the sides have relied upon various judgments of the U.S., I shall briefly refer to them, however, with a caveat that most of these judgments are based on statutory laws enacted by the particular States in the U.S.

Judgments cited on behalf of the Plaintiffs

(i) *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866

[decided on 16th February, 1953]

29. In this case, the plaintiff had an exclusive right to use a ball player's photograph in connection with the sale of plaintiff's chewing gum. The defendant, a rival chewing gum manufacturer, knowing of the plaintiff's contract, deliberately induced the ball player to authorise the defendant to use the player's photograph in connection with the defendant's chewing gum. Holding that a person has a right in the publicity value of their photograph, which is statutorily recognised under the laws of New York, the Court of Appeals for the Second Circuit held in favour of the plaintiff. As is evident from the aforesaid narration, this judgment was in the context of use of a personality of a sportsman for a wrongful endorsement of a product and based on law of the State of New York.

(ii) *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821

[decided on 6th June, 1974]

30. The plaintiff in this case filed a suit seeking injunctive relief and damages for the alleged misappropriation of his name, likeness, personality and endorsement in an advertisement for cigarettes. The plaintiff was a professional driver of racing cars. The defendant used the plaintiff's car in its commercial advertisement to promote its cigarettes. The United States Court of Appeals for the Ninth Circuit held in favour of the plaintiff by observing that the advertisement using a likeness to the plaintiff's car caused confusion in the public to the effect that the plaintiff was driving the car. Once again, this judgment was based on California State Law and in the context of the image of a celebrity's car being used unauthorizedly for endorsing a product.

(iii) *Midler v. Ford Motor Co.*, 849 F.2d 460

[decided on 22nd June, 1988]

31. In this case, the defendant company used a song sung by a "soundalike," in its commercial for a car. The original song was sung by the plaintiff. The United States Court of Appeals for the Ninth Circuit reversed the decision of the district court, holding that the defendant used an imitation to convey an impression that the plaintiff was singing for them and held in favour of the plaintiff. The Court observed that 'when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers had

appropriated what is not theirs and have committed a tort in California'. What emerges from reading of the aforesaid judgment is that the likeness of a celebrity cannot be used for selling a product as that creates a false impression in the market that the said product is endorsed by the celebrity.

(iv) *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268

[decided on 31st July, 2013]

32. In this case, the United States Court of Appeals for the Ninth Circuit was seized of a matter where the defendant was a producer of video games that represented college football players as Avatars in the video games. The corresponding Avatar of every player in the game had the player's actual jersey number, identical height, weight, build, skin tone, hair colour and home State. Invoking the right of publicity as enshrined under the State law of California, the plaintiff sued the defendant. Basing its decision on the California statute, the Court held that the defendant's use of likeness of a college athlete in its video games is not protected under the First Amendment. However, in arriving at this conclusion, the court took into account the fact that the defendant, while incorporating certain player information in its video games such as height, weight and the like, did not include the athletes' names along with their likeness and statistical data. It is also to be noted that this judgment dealt with the virtual video game and not an OFS game, which cannot function without the name, image and likeness of a player. A video game, which is an interactive game, has nothing to do with the factual information about the real-world football games. Additionally, in *Keller* (supra), the defendant had used the personal attributes of the player such as height, weight, hair colour and the like, which is not the case in the present dispute.

Judgments cited on behalf of the Defendants

(v) *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced*, 505 F.3d 959

[decided on 16th October, 2007]

33. In this case, C.B.C. filed an action for declaratory judgment against Major League Baseball players to establish its right to use, without license, names and information about the Major League Baseball players in connection with its fantasy baseball products before the district court, which found in favour of the plaintiff. In the appeal before the United States Court of Appeals for the Eighth Circuit, the defendant claimed that C.B.C.'s fantasy baseball products violated rights of publicity belonging to the Major League Baseball players who had licensed those rights to the defendants. In this case also, the fantasy baseball products of the defendant incorporated the names and information of actual Major League Baseball players in an interactive form in connection with its fantasy baseball products. The court, while deciding in favour of C.B.C., observed that the information used in C.B.C.'s fantasy baseball games is readily available in

the public domain and in terms of the First Amendment to the U.S. Constitution, this information was available to be used for everyone. The court also observed that such a user would not result in consumers being misled as the fantasy baseball games depends upon inclusion of all the players and there cannot be any impression being created that only a particular player is endorsing C.B.C's products. It was further observed that all Major League Baseball players are rewarded handsomely by their participation in the games, as also through endorsements and sponsorship arrangements. The court went on to hold that C.B.C's First Amendment right in offering its fantasy products supersedes the players' rights to publicity. These observations were made by the court despite the fact that there was a law in the State of Missouri that granted the right of publicity to individuals.

34. Counsel for the plaintiff sought to distinguish the said judgment on the ground that the same was in relation to a fantasy game which did not use NFTs. However, this aspect, as discussed further on in this judgment, would not materially alter the position.

(vi) Daniels v. Fan Duel. Inc., 109 N.E.3d 390

[decided on 24th October, 2018]

35. This was yet another case before the Supreme Court of Indiana dealing with the right of an online fantasy sports operator to use the names, picture and statistics of sportspersons without their consent. Under the law of the State of Indiana, the right of publicity was a statutory right, albeit with certain exemptions. Relying upon the earlier judgment of C.B.C. (supra) the Court held that when informational and statistical data of a college athlete is presented on a fantasy sports website, it cannot be said that the athletes are endorsing a particular product in a manner of there being a violation of the right of publicity. The court observed that use of players' names, images and statistics in conducting fantasy sports competitions bears a resemblance to the publication of the same information in newspapers and news websites and therefore, would be covered within the statutory exception of "newsworthiness".

36. The above said judgments in C.B.C. (supra) and Daniels (supra) clearly hold that even in the U.S., where the right of publicity is statutorily recognized in several State laws, the use of a sportsperson's name, image and other information available in the public domain, in an online fantasy game, would not infringe the right of publicity of the sportspersons. The aforesaid usage is protected under the First Amendment to the U.S. Constitution, which is *pari materia* with the 'right to freedom of speech and expression' enshrined in Article 19(1)(a) of the Constitution of India. These judgments hold that OFS games, while using the name and image and other information of the players, do not create any impression that a particular player is endorsing the OFS and hence, there is no likelihood of confusion in the public. Even if the statute recognises the right to publicity, the same would have to give way to the constitutional right of

free speech.

(vii) *Cardtoons, L.C. v. Major League baseball Players Ass'n.*, 95 F.3d 959

[decided on 27th August, 1996]

37. In this case, the United States Court of Appeals for the 10th Circuit was dealing in an action where the plaintiff sought a declaratory judgment that its parody trading cards featuring active Major League Baseball players do not infringe on the publicity rights of the players. In the said case, the player cards used similar names, recognizable caricatures and a commentary on the individual players. While discussing the scope of the right of publicity, the court observed that (i) it is the right of the person to control the commercial use of his or her identity; (ii) the cards provide social commentary on public figures and are entitled to protection under the First Amendment; (iii) a significant creative component had been added to the celebrity's identity in the card, which created an entirely new product (iv) though the trading cards are freely sold in the marketplace, they do not amount to commercial speech as they do not advertise another unrelated product; (v) the justification for the right of publicity cannot be as compelling as those for other forms of intellectual property, particularly in the case of celebrity parodies.

(viii) *Winter v. DC Comics*, 30 Cal. 4th 881

[decided on 2nd June, 2003]

38. The Supreme Court of California in the instant case observed that the right of publicity is essentially an economic right and the right possessed by the celebrity is not a right of censorship but a right to prevent others from misappropriating the economic value generated by the celebrity's fame through merchandising of name, voice, signature, photograph or likeness of the celebrity. However, the economic value/interest that emanates from the right of publicity remains unaffected when a work contains significant transformative elements, since works of parody or other unconventional depictions of celebrities do not generally threaten the celebrity memorabilia market.

39. Now, I shall deal with the English case law cited on behalf of the defendant no.1.

(i) *Robyn Rihanna Fenty and Ors. v. Arcadia Group Brands Limited and Anr.*, [2015] F.S.R. 14

[decided on 22nd January, 2015]

40. This case involved the defendant selling t-shirts displaying the image of the plaintiff, Rihanna, a famous singer. Like in India, U.K. does not have a specific law with regard to the right to publicity of a celebrity. The Court of Appeals observed that a celebrity seeking to control the use of their image must rely upon some other cause of action such as breach of contract, breach of confidence, infringement of copyright or passing off. Applying the principles of

passing off, it was held that the use of Rihanna's image indicates that the t-shirts have been authorized and approved by Rihanna and amounted to endorsement by Rihanna and hence, a case of passing off. What emerges from a reading of this judgment is that a celebrity does not have any right in English Law to prevent the use of their image unless an impression is created that the celebrity has endorsed the goods or that the use of the image has been authorized by the celebrity.

41. From the discussion above, the legal position with regard to the right of publicity in the U.S. and the U.K. can be summarized as under:

- i. In the U.S., there is no federal law in respect of the right of publicity. However, there are various State-specific laws that recognize this right albeit with statutory exemptions/defences.
- ii. The U.S. judgments discussed above clearly hold that the right of publicity is subservient to the right of free speech guaranteed under the First Amendment to the U.S. Constitution.
- iii. The right under the First Amendment to the U.S. Constitution protects all information about the celebrity/sportsperson available in the public domain, such as name, image, performance information and the like. Therefore, use of such information by OFS games would be protected by the First Amendment.
- iv. The courts in the U.S. recognize the use of celebrity names, caricatures, parodies and the like as being protected under the First Amendment to the U.S. Constitution.
- v. U.S. courts have held in favour of the plaintiff where the defendant is using the image or voice or any other likeness of a celebrity/sportsman in the context of an advertisement or an endorsement to sell its products/services, as this amounts to trading in an unfair manner on the reputation and goodwill of a celebrity and meets the threshold of likelihood of confusion in the minds of the public.
- vi. Where a significant creative component has been added to a celebrity's identity, it would amount to permissive use and would not fall within the purview of violation of the right of publicity.
- vii. U.S. courts view the right to publicity as a right to prevent others from misappropriating the economic value generated by the celebrity's fame through merchandising of name, voice, signature, photograph or likeness.
- viii. Unlike the U.S., the United Kingdom does not have any statute that recognizes the right of personality or publicity of a celebrity. The position in the U.K. is governed by common law. As noted in the judgment of the Court of Appeal in *Robyn* (supra), there is no inherent right of publicity in a celebrity and principles of passing off are to be invoked in the context of the name or an image of a celebrity being used to sell a product.

Extent of the Right of Publicity in India

42. Now, I shall refer to the Indian case law on the subject.

(i) ICC Development v. ARVEE Enterprises and Anr., (2003) 26 PTC 245 (Del)

[cited on behalf of the plaintiffs]

43. In this case, the International Cricket Council (ICC), which was organizing the Cricket World Cup, filed a suit against the defendants along with an application seeking temporary injunction restraining the defendants from publishing any advertisement associating themselves with the ICC and the Cricket World Cup on the grounds of passing off, unfair trade practice and misappropriation of publicity rights. Though the Court recognized that a right of publicity vests in an individual and such individual alone is entitled to profit from it, the Court also held that such a right cannot vest in an organizer of an event, such as the ICC. The learned Single Judge of this Court held that there were no elements of passing off as there is no likelihood of any confusion in the mind of the public that the defendants are associated with the Cricket World Cup being organized by the ICC. In that view of the matter, injunction was declined. Since the case involved publicity rights of the organizer and not of an individual player, the observations therein with regard to the publicity rights of a player would not constitute the ratio decidendi of the judgment. In any event, the judgment does not define the scope of the right to publicity or the limitations thereon. Further, the Court applied the principles relevant for determining an action for passing off while denying injunction.

(ii) D.M. Entertainment Pvt. Ltd. v. Baby Gift House and Ors., MANU/DE/2043/2010

[cited on behalf of the plaintiffs]

44. In this case, a learned Single Judge of this Court, Bhat, J. (as he then was) was dealing with a situation where the defendants were in the business of selling dolls that were imitations of a famous singer/artist, Daler Mehndi, and also sang a few lines of the artist's famous compositions. The suit was filed alleging that the defendants have, without the plaintiff's authority, misappropriated the artist's persona and likeness and have invaded the exclusive right of the plaintiff to market his personality. While granting a decree of permanent injunction, the Court made the following observations:

"13. To avail the right against the infringement of right to publicity, the plaintiff must be 'identifiable' from defendant's unauthorized use. In this instant case, the evidence on record very well establishes the primary requirement. As a secondary consideration, it is necessary to show that the use must be sufficient, adequate or substantial to identify that the defendant is alleged to have appropriated the persona or some of its essential attributes. The right of publicity protects against the unauthorized appropriation of an individual's very persona which would result in unearned commercial gain to another. In the present instance, the commercial use of an individual's identity is intended to increase

the sales of product by fusing the celebrity's identity with the product and thereby the defendants were selling those dolls, on the basis of publicity value or goodwill in the artist's persona into the product i.e. doll. In *Ali v. Playgirl Inc.* 447 F Supp 723, it was observed that;

'The distinctive aspect of the common law right of publicity is that it recognizes the commercial value of the picture or representation of a prominent person or performer, and protects his proprietary interest in the profitability of his public reputation or persona.'

A similar view is echoed in *Onassis V. Christian Dior- New York Inc.* 472 NYS 2D 261;

'No one is free to trade on another's name or appearance and claim immunity because what he is using is similar to but not identical with the original.'

14. The right of publicity can, in a jurisprudential sense, be located with the individual's right and autonomy to permit or not permit the commercial exploitation of his likeness or some attributes of his personality. However, a word of caution has to be expressed here. In a free and democratic society, where every individual's right to free speech is assured, the over emphasis on a famous person's publicity rights can tend to chill the exercise of such invaluable democratic right. Thus, for instance, caricature, lampooning, parodies and the like, which may tend to highlight some aspects of the individual's personality traits, may not constitute infringement of such individual's right to publicity. If it were held otherwise, an entire genre of expression would be unavailable to the general public. Such caricature, lampooning or parody may be expressed in a variety of ways, i.e. cartoons in newspapers, mime, theatre, even films, songs, etc. Such forms of expression cannot be held to amount to commercial exploitation, per se; if the individual is of the view that the form of expression defames or disparages him, the remedy of damages for libel, or slander, as the case may be, would then, is available to him.

15. An individual claiming false endorsement must prove that the use of the identity likely misled consumers into believing the concerned personality endorsed the product at issue. In this case, it has been seen that the use of Mr. Mehndi's persona for the purpose of capitalizing upon his name by using its conjunction with the commercial product is not proper or legitimate; it amounts to a clear dilution of uniqueness of such personality and gives rise to a false belief that, plaintiff has either licensed or the Defendants have some connection with them (i.e. the plaintiff or the artist), to use its exclusive right to market images of the artist.

16. In a passing off action, one has to see as to whether the Defendant is selling goods/service so marked to be designed or calculated to lead purchasers to believe that they are plaintiff's goods. Even if a person uses another's well-known trademark or trade mark similar thereto for goods or services that are not similar to those provided by such other person, although it does not cause confusion

among consumers as to the source of goods or services, it may cause damage to the well-known trade mark by reducing or diluting the trademarks power to indicate the source. Further, where a person uses another person's well-known trade mark or trademark similar thereto for the purpose of diluting the trade mark, such use does not cause confusion among consumers but takes advantage of the goodwill of the well-known trade mark, it constitutes an act of unfair competition."

45. A holistic reading of the aforesaid observations would demonstrate that while the Court recognized the right of publicity of an individual, the Court also observed that the said right is not unrestricted and cannot be overemphasized in light of the right to freedom of speech enshrined under Article 19(1)(a) of the Constitution. By way of illustration, Bhat, J., carved out certain exceptions such as caricature, lampooning, parodies and the like, that may not constitute infringement of an individual's right to publicity. The learned Judge went on to say that the aforesaid usage can be by way of cartoons, mime, theatre or even films and songs. It was further observed that if the aforesaid use defames an individual, his remedy would be by way of a suit for defamation.

46. In the context of passing off, it was observed that the defendant was selling goods in a manner to lead purchasers to believe that they are the plaintiff's goods.

47. On the aspect of false endorsement, the plaintiff would have to show that the use of his identity likely misled consumers into believing that the plaintiff had endorsed the said product or has licensed the same or that the defendants have a connection with the plaintiff or the artist so as to use the likeness of the artist.

48. In the facts of that case, it was held that the defendants were creating a false impression that the plaintiff had licensed the defendants or that the defendants had some connection with the plaintiff.

49. In light of the discussion above, I am not persuaded by the submission of the plaintiffs that the aforesaid judgment holds the right of publicity to be an inherent or an unrestricted right in India, based solely on the unauthorized appropriation of an individual's persona/attributes for commercial gain. In my reading of the judgment, the observations made in D.M. Entertainment (supra) with regard to the violation of the right of publicity would have to be seen only in the context of giving the impression of having a connection to a celebrity or a false endorsement i.e., the defendants misleading the consumers to believe that the celebrity had endorsed/licensed use of their image/likeness/attributes.

(iii) Titan Industries v. M/s. Ram Kumar Jewellers, (2012) 50 PTC 486

[cited on behalf of the plaintiffs]

50. This case involved the defendant putting up hoardings depicting Amitabh Bachchan and Jaya Bachchan as the endorser of the defendant's jewellery. The plaintiff had a contract with Amitabh Bachchan and Jaya Bachchan for endorsing

its brand of jewellery. Accordingly, it was alleged in the plaint that the defendant is misleading the public into believing that the defendant's jewellery is associated with the plaintiff's brand of jewellery. In the aforesaid background, the learned Single Judge of this Court held that the advertisement of the defendant suggests an endorsement of his jewellery by Amitabh Bachchan and Jaya Bachchan and would amount to an infringement of their right of publicity. Clearly, the observations made by the learned Single Judge with regard to right of publicity were in the context of false endorsement and advertising. In any event, the judgment does not hold the right of publicity to be an unrestricted right.

(iv) K. S. Puttaswamy & Anr. v. Union of India & Ors., (2017) 10 SCC 1

[cited on behalf of the plaintiffs]

51. On behalf of the plaintiff, reliance has also been placed on the concurring judgment of Kaul, J. in Puttaswamy (supra) to submit that the right of publicity is recognized under Indian law. The fundamental issue before the Supreme Court of India in Puttaswamy (supra) was whether the right to privacy is a fundamental right under the Constitution of India. The majority judgment authored by Chandrachud, J. (as he then was), on behalf of Khehar, C.J., Agrawal, J., himself and Nazeer, J., held that the right to privacy is a fundamental right under Article 21 of the Constitution of India. The majority view did not hold that the right of publicity is recognized in Indian law or that it is part of right to privacy. Out of the five separate concurring judgments in Puttaswamy (supra), the reference to right to publicity has only been made in the judgment by Kaul J. In his concurring judgment, Kaul J. discussed the aspect of the right of publicity as existing in the U.S. but did not hold that the said right exists in India. This is clear from a reading of paragraphs 625 to 627 relied upon by the plaintiffs. All the aforesaid paragraphs bear a footnote where a reference has been made to a judgment of the courts in the U.S. or an article published in the U.S. Clearly, Kaul J. was not in any manner holding that the right of publicity is recognized under Indian law. Therefore, the reliance placed by the plaintiff on the aforesaid judgment is misplaced.

52. In a 2021 publication by Nina R. Nariman, Advocate titled "A Cause Celebre: Publicity Rights in India" (2021) 6 SCC J-1, the author advocates for the narrowing of the scope of the tort of publicity in India, taking into account the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution of India. The author further argues for the use of the test of confusion of a customer/viewer for the purposes of law of publicity so as to allow free speech interests, art, and scholarship to triumph over the publicity rights of celebrities. The relevant extract of the text is as under:

"It is apposite that the right to freedom of speech guaranteed by Article 19(1)(a) of the Indian Constitution cannot be subservient to the tort of publicity. For instance, Article 19(1)(a) of the Indian Constitution would militate against an action in publicity rights by a celebrity attempting to prohibit a biography being

written or a play being enacted on publicly available material on the celebrity. Article 19(1)(a) of the Indian Constitution thus becomes the touchstone for the development of a strong defence in an action brought under the tort of publicity.”

53. In the absence of a specific legislation, the right to publicity cannot be an absolute right in India. Intellectual property rights, such as trademarks, copyrights and patents, that have a statutory basis in India, are also not absolute rights. The extent of these rights is defined by the statute and the statute itself provides defences or exemptions [To illustrate: §§ 30–36 Trade Marks Act, 1999; §52 Copyright Act, 1957]. Even in jurisdictions where right to publicity is recognized as a statutory right, such as the U.S., the statute itself provides exemptions or defences [In *Daniels v. Fan Duel. Inc.*, 109 N.E.3d 390, the court noted the exemption of “newsworthiness”].

54. None of the judgments cited by the plaintiff recognize the right of publicity as an absolute and unrestricted right. In *Titan* (supra) the images of the celebrities were being used in an advertisement to promote the jewellery of the defendant and in *D.M. Entertainment* (supra), the dolls being sold by the defendant used the voice of Daler Mehndi, which conveyed endorsement/licensing by the singer. In *ICC* (supra) interim injunction was denied on the ground that there was no likelihood of any confusion of the defendants being associated with the Cricket World Cup being organized by the ICC. The Court in all the aforesaid cases applied the principles of passing off while dealing with the infringement of the right of publicity.

55. In view of the discussion above, in my opinion, the violation of the right of publicity in India has to be considered on the touchstone of the common law wrong of passing off, as also weighed against the ‘right to freedom of speech and expression’ enshrined under Article 19(1)(a) of the Constitution. ‘Passing off,’ though a remedy under common law, is referenced in statutory law in India [§§ 27(2), 134(1)(c) and 135 Trade Marks Act, 1999.]. It has been recognized in various judgments of the Supreme Court and High Courts. The action of passing off is based on the foundation of deceit and misrepresentation. Reference in this regard may be made to *Kaviraj Pandit Durga Dutt Sharma v. Navratna Pharmaceutical Laboratories*, AIR 1965 SC 980. In my considered view, the very same principles that are applied in the case of passing off, will have to be applied for determining infringement of the right of publicity. Where the identity or the image of a celebrity is used to promote the sale of a product or a service or to show its endorsement by the celebrity or an association with the celebrity, without their consent, it would amount to misrepresentation and cause likelihood of confusion in the market. In such cases, consumers would be misled into believing that a celebrity is endorsing the defendant’s goods/services or is otherwise associated with them. This would result in infringement of the right of publicity of the celebrity. In other words, there has to be misappropriation of goodwill and reputation of a celebrity in selling a good/service. The right of publicity cannot be infringed merely on the basis of a celebrity being identified or

the defendant making commercial gain, as is sought to be contended on behalf of the plaintiff.

56. The extent of right of publicity also has to be considered in the context of the 'right to freedom of speech and expression' protected under Article 19(1)(a) of the Constitution of India. Even if the right of publicity were to be considered to be an absolute right in India, it still must be subservient to Article 19(1)(a) of the Constitution of India. This is exactly what Bhat, J. sought to explain in paragraph 14 of his judgment in *D.M. Entertainment* (supra) and carved out exceptions in the form of caricature, lampooning, parodies and the like. Even in the U.S., courts have held the right of publicity to be subservient to the right of free speech under the First Amendment [*C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced*, 505 F.3d 959; *Daniels v. Fan Duel. Inc.*, 109 N.E.3d 390.]. Some of the defences recognized by the U.S. courts include newsworthiness, cartoons, caricatures, parodies and other information available in public domain.

57. In my opinion, use of celebrity names, images for the purposes of lampooning, satire, parodies, art, scholarship, music, academics, news and other similar uses would be permissible as facets of the right of freedom of speech and expression under Article 19(1)(a) of the Constitution of India and would not fall foul to the tort of infringement of the right of publicity.

58. Applying the aforesaid principles in the context of an OFS game, it cannot be denied that various OFS platforms use names and images of celebrity and other information available in public domain. It is also a matter of fact that OFS platforms use such information with regard to all available players and not in respect of a few selected players. As illustrated in the judgments of *C.B.C.* (supra) and *Daniels* (supra), even in the U.S., where right of publicity is a statutory right in certain States, the courts have held that use of celebrity name, image and other information available in public domain would not amount to infringement of the right of publicity in the context of OFS. In my considered view, the use of the name and/or the image of a celebrity along with data with regard to his on-field performances by OFS platforms is protected by the right to freedom of speech and expression under Article 19(1)(a) of the Constitution of India. It is a settled position of law that protection under Article 19(1)(a) extends to commercial speech as well [*Tata Press Ltd. v. Mahanagar Telephone Nigam Limited and Others*, (1995) 5 SCC 139; *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788.]. Therefore, even if the defendants are using players' names, images and statistics for commercial gain, this would be protected under Article 19(1)(a) of the Constitution of India.

59. Nor would the aforesaid use by OFS operators amount to infringement of the common law right of publicity. OFS operators use information of all available players available in public domain for the purposes of identification of the players for playing the game. This obviates any possibility of confusion that a particular OFS platform is being endorsed by a particular player or has an association with a particular player. The plaintiffs themselves concede the right of an OFS

operator to use all information with regard to sportspersons available in the public domain, including their images/photographs.

60. Now, I proceed to apply the aforesaid principles to the facts of the present case.

61. From a perusal of the digital downloads of the Striker Website filed by the plaintiffs, the scenario that emerges is as follows:

- i. The defendant no.2's game, Striker, is an OFS game.
- ii. To play the game, the user requires player cards as entry tokens.
- iii. The entry tokens/NFT Player Cards use the players' names and the original artistic rendition of the players.
- iv. The team comprises of five players.
- v. The user gets a certain number of points based on performance/statistics of its players in a real cricket match.
- vi. The Digital Player Cards can be traded as well as rented on the platform of the defendant no.2.
- vii. The said defendant has created additional feature on the Digital Player Cards, in the form of experience points (XP) and health points (HP), which impact the points earned by a user in the real match.
- viii. Defendants also use five different kinds of Digital Player Card rarities which have different values as they impact the points earned by the player.
- ix. Since the Digital Player Cards are NFT enabled, they have a unique identity and token number, as recorded in the blockchain. The NFT enablement ensures (a) digital certificate of authenticity; (b) proof of ownership; and, (c) transaction history.
- x. Digital Player Cards of all the current players are available on the website.

62. The aforesaid features have been added by Striker so as to differentiate its game from other OFS. Therefore, on the Striker platform, the outcome of the game is the function of four factors, namely, (i) a player's on-field performance; (ii) XP; (iii) HP; and, (iv) the Player Card rarity. Out of the aforesaid four factors, a player's on-field performance is clearly available in the public domain and the remaining three factors are specially created by the defendant and have no relation to the player.

63. The information used by Striker i.e., player name and data concerning a player's real-world match performance, is freely available in the public domain and can be used by anyone. It is not the plaintiffs' case that the defendants are using any personal information such as the height and weight of the players, which is not in the public domain. The information which is available in public

domain cannot be owned by anybody, including the players themselves. Therefore, such publicly available information cannot be the subject matter of an exclusive license by the player in favour of a third party. Similar view has also been taken by U.S. courts in *C.B.C.* (supra) and *Daniels* (supra), as discussed above.

64. Facts which are available in public domain such as match information cannot be monopolized and even if a third-party were to publish such information for commercial gain, no actionable right arises in favour of the plaintiffs. A Division Bench of this Court in *Akuate Internet Services Pvt. Ltd. and Anr. v. Star India Pvt. Ltd. and Anr.*, 2013 SCC OnLine Del 3344 has held that one can monetize or license only that over which one has property rights. In the aforesaid case, the plaintiff filed a suit for permanent injunction and damages alleging that the defendants had violated “mobile rights” and “mobile activation rights” of the plaintiffs that were exclusively assigned to the plaintiffs by the BCCI. A learned Single Judge of this Court granted injunction in favour of the plaintiffs. In appeal, the Division Bench reversed the judgment of the learned Single Judge by observing that facts and information that are available in public domain cannot be claimed as an exclusive property of an entity and such information cannot be licensed by the said entity in favour of another. Resultantly, even if the defendants are using the information available in public domain in the course of commerce, no injunction can be granted in favour of the plaintiffs.

65. It is also relevant to note that Striker uses artwork of the players on its Digital Player Cards and not the actual photographs. These artworks contain creative elements that distinguish them from the actual image of the players in question. As noted above, the Supreme Court of California in *DC Comics* (supra) held that when a work contains significant number of transformative elements or creative contributions, they become the defendant’s own expression rather than the celebrities’ likeness and would therefore be entitled to the protection under the First Amendment. As noted in *Cardtoons* (supra), the use of transformative elements and artistic contributions in the player cards of the defendants would be in the nature of caricature, which would constitute permissive use. Such use, in my view, would also be protected under Article 19(1)(a) of the Constitution of India.

66. It may also be relevant to note that the plaintiffs concede that they have no exclusive right over the players’ names, photographs/image and performance statistics that are used in an ordinary OFS game. Therefore, they do not have any grievance with regard to the aforesaid player information being used in an ordinary OFS game that does not use NFT technology for their Digital Player Cards. Their grievance is only with the use of the NFT enabled Digital Player Cards that can be traded.

67. To a pointed query from the Court as to whether the plaintiff would have any grievance if a Digital Player Card is used only for playing a game and not for trading, senior counsel appearing on behalf of the plaintiffs replied in the

negative. On a further query as to what is the difference between use of image in an OFS game as against the use of an image in an NFT card, senior counsel on behalf of plaintiffs submitted that in an OFS game, the image/photograph is used only as a matter of reference to identify the player.

68. The primary use and the function of a Digital Player Card in the context of the Striker platform is for the purposes of playing an OFS game. Like in the case of an ordinary OFS platform, the OFS games with NFT Player Cards also use the NFT Player Cards essentially for the purposes of player identification to form a fantasy team to compete with other users on the same platform. The trading of the Digital Player Cards is a feature added by the defendant no.2 in its OFS so as to enable users to make changes in their teams by trading one or more players with others. It is common knowledge that trading of players is a part and parcel of all professional sporting leagues in the world. For instance, the management of a professional football club in the English Premium League (EPL) would often trade one or more players for others. The trading value of a player would depend upon the performances of the players as well as the demand and supply for that player. Similarly, the defendant no.2 enables a user to wear the hat of a manager of a team so as to enable him to trade in players. This is nothing but an innovative feature in the OFS platform of defendant no.2 to enhance the user experience. However, this would not change the nature and character of the platform of defendant no.2 from being an OFS platform to a trading platform per se. Any person who trades or rents the aforesaid cards would primarily be doing so for the purpose of the game, though in theory, it may be possible to buy and sell the Digital Player Cards without playing the game. In this context, a reference may be made to the terms and conditions on the Striker Website, the relevant portion of which is set out below:

"We offer a website/app that provides and provides Users the opportunity to collect, trade (buy/sell), store, or display digital cards ('Cards') for playing online fantasy games ('Game') organised on www.striker.club ('Site'), partner website(s), mobile application(s) and other portal(s) ('Platform')."

69. Therefore, in my prima facie view, the NFT Player Cards are in fact 'in-game' assets to be used for enhancing the experience of playing the game.

70. The plaintiffs have also submitted that the defendant no.2 is using the names and artworks of sportspersons on NFT technology enabled Digital Player Cards without obtaining any authorization/license from the concerned sportspersons. If the name or image of a player can be used in an ordinary OFS game for descriptive or nominative purposes, there is no reason as to why it cannot be used for the same purposes on a Digital Player Card. Therefore, in my considered view, there is no difference between an OFS game with NFT enabled Player Cards and an ordinary OFS game insofar as use of the name or artistic impression/ photograph of a player is concerned.

71. The plaintiffs cannot claim to have an exclusive right over the use of an NFT

technology. NFT is a technology that is freely available. The defendants used the NFT technology to ensure security and authenticity as a means of proof of ownership of its cards and to keep a record of transactions on a blockchain.

72. Major grievance of the plaintiffs emerges from the fact that Digital Player Cards are traded on the platform of the defendant no.2 at huge prices and the defendant no.2 earns commission on the same. As per the plaintiffs, this amounts to the defendants capitalizing on the personality rights of the players. The plaintiffs contended that the high price on the NFT Player Cards is on account of the persona of the player on the card. I do not agree with this submission. As discussed earlier, the price of a Digital Player Card on the Striker platform would depend upon various factors such as (i) rarity of the card; (ii) on-field performance of the player; (iii) XP and HP factors on the card, which are game related features; and, (iv) most importantly, the demand and supply in the market. In respect of the same cricketer, the price of the card may be higher if the card is of a higher rarity as compared to a card of a lower rarity. Similarly, in respect of the same player, the card with a higher HP would possibly fetch a higher price.

73. The plaintiffs have also compared the selling and trading of NFTs on the Striker platform as akin to a bat of a cricketer being sold with his autograph without his authorization. In my view, this analogy is completely misplaced. Unlike a bat which is signed by a particular player, the NFT Player Cards in the present case do not have any such signature/autograph or anything to establish a connection, license or endorsement from a player.

74. The plaintiffs place reliance on the disclaimer on the Striker Website to contend that that defendants are wrongfully claiming that resemblance in their Digital Player Card to the sportsperson concerned is coincidental when in reality, the image therein resembles the player and also bears his name/initial.

75. At this stage, a reference may be made to the 'Disclaimer' on the Rario Website.

"Disclaimer: Each Card is an original work of Art as defined in the Copyright Act, 1957. Any resemblance to a person living or dead is purely coincidental. We do not claim or have any affiliation or licence from any individual or organisation except those recorded in these Terms nor do we intend to hurt any sentiments or infringe any third party rights. In case of any concern in this regard, write to us at legal@strikergame.com."

76. In the aforesaid disclaimer, the defendants clearly state that they do not have any affiliation or license from any individual. The aforesaid disclaimer is not in respect of resemblance with the player concerned, as the player himself is named in the Digital Player Card. The said disclaimer is only in respect of rights that a third-party may claim in the artwork.

77. As per the case set up in the plaint, the plaintiff no.1's website, Rario is a

digital collectible platform where fans of sport can collect, trade and play with officially licensed digital collectibles, ranging from player cards to video moments to cricket artefacts. However, the defendants do not claim to be selling or trading in any video moments or cricket artefacts or officially licensed player cards/video moments/cricket artifacts. A perusal of the Digital Player Cards being used by the defendants on the Striker platform would show that the said cards do not suggest any kind of endorsement or association with the player concerned. Nor do they claim that the cards have been autographed or officially licensed by the players. Further, the NFT Player Cards offered by Striker do not contain the original photograph of a player and only use artwork. Therefore, unlike the plaintiff no.1, the defendant no.2 is not projecting its Digital Player Cards as collectibles. A collector or a fan of a player would be less inclined to buy such a card as memorabilia when other NFTs using the actual photograph/video moments of sportspersons are available to purchase on the Rario platform.

78. Since the Digital Player Cards are available for all current players that are available for selection, it cannot be said that the defendants are claiming any endorsement from a player or promoting its game on the basis of the personality of a player. In this regard, reference may be made to the following observations of the United States Court of Appeal for the 8th Cir. in C.B.C. (supra):

"nor is there any danger here that consumers will be misled, because the fantasy baseball games depend on the inclusion of all players and thus cannot create a false impression that some particular player with 'Star Power' is endorsing CBC's products."

79. The plaintiffs have argued that by using the name and artwork of a player's image/photograph on their cards, the defendants are unjustly enriching themselves at the expense of the sportsperson concerned. I do not find merit in this submission. As noted in C.B.C. (supra), sportspersons are rewarded handsomely by their participation in the games, as also through endorsements and sponsorship arrangements. In the context of the present case also, it is a known fact that Indian cricketers earn huge amounts through Indian Premier League auctions, BCCI contracts, match fees, besides various brand endorsements and other sponsorships.

80. The defendants submit that the plaintiffs have deliberately not disclosed in the plaint that the Rario platform also offers an OFS game, being "D3.Club," which is similar to Striker. This submission has not been rebutted by the plaintiffs. A perusal of the documents would reveal the following similarities between the Rario and the Striker platforms:

- i. Both plaintiff no.1 and the defendant use NFT Player Cards of the players in relation to the games.
- ii. Buying and selling of the Digital Player Cards can be from the website, from other players in the marketplace or third-party marketplace, Good Game Exchange.

iii. Both plaintiff no.1 and the defendant no.2 use blockchain technology to ensure security and proof of ownership.

81. The defendants, along with their reply to the application for interim injunction, have placed on record screenshots of WhatsApp conversations between officials of the plaintiffs and the defendants to show that the plaintiffs were aware of the launch of the Striker platform by the defendants in September/October, 2022. It is hard to believe that the plaintiff no.1, who was already in business then, was not aware of the said launch. Yet, the plaintiff filed the present suit only on 24th February, 2023, just before the start of the Women's Premier League and the Indian Premier League. It is also pertinent to mention that the suit was filed along with an application seeking exemption from advance service on the defendants. It is a different matter that the counsel for the defendants appeared on the date when the suit along with the interim applications were listed before this Court for the first time on 28th February, 2023 and the defendants were consequently granted time to file reply.

82. Considering that the defendants were already running their game for almost six months and the grant of an ex parte injunction order would have gravely prejudiced the business of the defendants, who are direct competitors of the plaintiff no.1 in the OFS industry, the application filed on behalf of the plaintiff seeking exemption from advance service, in my opinion, was not bona fide.

83. Even on the parameter of balance of convenience and irreparable harm, I am of the view that these factors are in favour of the defendants and against the plaintiffs. An injunction granted at this stage would result in closure of the business of the defendant no.2 and would cause huge financial losses not only to defendant no.2 but also to the users of the Striker platform. On the other hand, in the event the plaintiff succeeds in the suit, it can always be compensated.

84. In view of the discussion above, the plaintiffs have failed to make out a case for grant of interim injunction.

85. Accordingly, I.A. 3960/2023 is dismissed.

86. Needless to state, any observations made herein are only for the purposes of deciding the present application and would have no bearing on the final adjudication of the suit.

CS(COMM) 108/2023

87. List before the Joint Registrar on 10th July, 2023 for completion of pleadings.