

(2012) 10 DEL CK 0155
In the Delhi High Court
Case No : FAO (OS) 460 of 2012

New Delhi Television Limited

APPELLANT

Vs

ICC Development (International) Limited and Another

RESPONDENT

Date of Decision : 11-10-2012

Acts Referred:

Copyright Act, 1957 — Section 2(dd), 39, 39(b), 52, 52(1)(a)(iii)

Citation : (2012) 195 DLT 61 : (2013) 53 PTC 71

Hon'ble Judges : Pradeep Nandrajog, J; Manmohan Singh, J

Bench : Division Bench

Advocate : Rajeev Nayar, instructed by Mr. Vijay K. Sondhi, Mr. Sanjay Kumar, Mr. Varun Pareek, Mr. Suhail Malik and Mr. Saurabh Seth, for the Appellant; Amit Sibal, with Mr. Neel Mason, Harsh Kaushik, Ankit Relan, Prateek Chadha, Sankalp Dala, Ms. Manju Ganpathy, Advocates and Mr. Anup Bhambani, Advocate with Ms. Nisha Bhambani and Ms. Bavita Modi, Advocates for News Broadcasters Association, for the Respondent

Judgement

Pradeep Nandrajog, J.—T.20 : Slam-bang : Loud music : Cheerleaders : Food Fiesta, a million-dollar propaganda machine; a product of

the marketing age which only understands the language of profit requires this Court to revisit its country cousin - The 50 Over Format (The subject

of Espn Star Sports Vs. Global Broadcast News Ltd. and Others,); both forms of sports which some feel have devalued the very basics of

sports, endangering the DNA of cricket - Test Matches - where the gripping climax is reached over a period of few days. The essence of sports

lies in the joy of watching two combatants trying to outwit each other with skillful interplay at a level playing field and not a field designed in favour

of one - the batsman; to grind the ball to dust and the helpless bowler chucking the ball in supreme indignity. But millions sit in front of the idiot box,

not perhaps to see cricket, but to have fun. We are confident that if the boisterous crowd, jumping and shouting in thrill; hogging hamburgers, pizzas, popcorn, potato chips etc. and gulping gallons of coca-cola, pepsi cola, beer etc. if quizzed about the nuances of cricket i.e. where does

the forward short-leg position himself on the field or where is the long-off boundary or where is the square-leg, would scratch his/her head in

wonder. If quizzed whether the stroke played is a drive, a hook, a cover-drive, a glance, a cut, a sweep etc. would likewise scratch his/her head in

wonder. And probably respond : Hey man, Chill! Be off! We're having fun. And the new breed of investors, making huge investments, convinced

that they have created a new breed of cricket, with innovation, that enthralls all. These investors beseech this Court to protect their interest.

2. The combatants before us are the owners of the copyright i.e. broadcasting and reproduction rights, pertaining to cricket tournaments organized

by International Cricket Council (ICC) (the broadcasters claim the right under a contract with ICC) and an operator of a News Television

Network, having four TV channels, under the name NDTV 24x7 (English), NDTV India (Hindi), NDTV Profit (Business) and NDTV Good

Times (Lifestyle). A helping hand to the latter is sought to be extended by News Broadcasters Association, whose application for impleadment in

the suit was partially allowed by the learned Single Judge vide order dated September 14, 2012 permitting the association to address arguments on

the question of law.

3. We had declined right to make submissions to counsel for the News Broadcasters Association, in as much as the lis before this Court is

between the appellant and the respondents, and merely because the appellant is a member of News Broadcasters Association and some private

guidelines, without authority of law have been framed by the said association and were pressed into aid by the appellant, by way of defence, would

not be a ground to permit News Broadcasters Association to either be impleaded as a party in the suit or advance arguments.

4. The respondents instituted a suit seeking permanent injunction to restrain the appellant from infringing their copyright in the broadcast of the

cricket matches organized by ICC as also the reproduction rights therein. As per the plaint, International Cricket Council (ICC) organizes cricket

events and the first respondent, ICC Development (International) Ltd. owns and controls the commercial rights in the said cricket events. A lot of money is spent in organizing the tournaments and persons sponsoring the tournaments have a right to claim exclusive association with the tournament. Those who advertise their products during the performance of the tournament, on the field when the match is played and on the air when the match is broadcasted have an unequivocal right to protect their commercial interest and none can predate thereon. It is pleaded that ESPN (Mauritius) Ltd. has acquired the broadcasting and the reproduction rights from respondent No. 1 for all cricket members organized by ICC till the year 2015 as per an exclusive licence agreement dated July 11, 2007. Thus, the latter, acts as host broadcaster and provides broadcast services in the form of making live transmission, recording, editing and in the process produces a broadcast feed, which includes a host of alterations to the live feed such as virtual graphics, bowling analysis, players' statistics etc. The latter has the exclusive broadcasting rights for ICC events which include, but are not limited to, making live transmissions, deferred transmissions and/or delayed transmissions on designated channels and designated websites by means of any delivery system and any permitted payment mechanism together with commentary in any language. ICC Development (International) Ltd. claims to own the copyright in the footage i.e. recording. ESPN (Mauritius) Ltd. claims the right as a licensee to the exclusivity to record, edit and use footage for the purpose of making and transmitting highlights/clippings in television shows relating to cricket organized by ICC.

5. As per the plaint, the News Broadcasters Association drafted guidelines, which are nothing more than a private affair, with no statutory power or authority to do so, titled "NBA News Access Guideline for One -Day and T-20 Cricket Matches" and when sent to respondent No. 1 for approval as per communication dated January 09, 2011, the respondent No. 1 intimated its non-acceptance informing the association that it would be issuing "ICC Cricket World Cup 2011 News Access Guidelines for India" which were issued on January 25, 2011. On January 27, 2011 the first respondent informed News Broadcasters Association that it should advise its members to abide by the guidelines issued by respondent No. 1

and not the ones framed by News Broadcasters Association, but no consensus emerged. Pleading that the appellant violated the ICC Cricket

World Cup 2011 News Access Guidelines for India when the ICC World Cup was held in the year 2011, a quia timet action was brought when

the instant suit was filed to restrain the appellant from using the footage of the proposed ICC Organized T20 World Cup Cricket Tournament,

save and except as permitted by the guidelines framed by respondent No. 1; on the likelihood of the past being repeated.

6. The appellant pleaded a defence placing reliance on Section 39 and Section 52(1)(a)(iii) of the Copyright Act 1957 i.e. the appellant did not

deny the proprietary rights pleaded by the respondents, but claimed the benefit of Section 39(b) of the Copyright Act 1957, as per which a use,

consistent with fair dealing, of a broadcast in the reporting of current events is not an infringement of the broadcasters reproduction right and as per

Section 52(1)(a)(iii) a fair dealing of a work while the reporting of current events and current affairs do not constitute an infringement of a

copyright.

7. The plaint filed by the respondents, a prolix and repetitive plaint, does not bring out, in writing, as to what was the exact offending act of the

appellant in the past and threatened to be repeated in the future. But the Compact Disc (CD) filed along with the plaint would reveal that the

appellant had, in the past, put on the air special programmes when World Cup Tournaments, be it the 50-50 over match or the 20-20 over match,

were played on the field, in which special programmes former cricketers, (for example Brian Lara), acted as experts and a presenter introduced

the show. The show was sometimes held 15 minutes to 20 minutes before a match commenced and sometimes an hour prior thereto and

terminated just about when the players walk on to the pitch; but before terminating, showed the toss on the pitch and the expert makes comments :

Whether the decision by the captain winning the toss to elect to bat or field was correct keeping in view the pitch conditions. The program/show

ends, inasmuch as no live broadcast is shown of the cricket match. It resumes when the batting side is either out within the allotted overs or bats

through the allotted overs. This is the interval time before the fielding side has to bat and the batting side has to field. The interregnum lasts between

ten minutes to half-an-hour, depending upon whether the tournament is T. 20 or 50-50 overs. In this interregnum, the expert analyzes, criticizes, offers his comments to the innings played, and if his predictions with respect to the correctness of the decision by the captain winning the toss and having elected to bat or vice versa has come true or not. When the game resumes, the program terminates and rejuvenates when the innings of the second team is over. There is further review, criticism and analysis. When the show/chat is on, footages of the ongoing tournament are aired and along therewith advertisements are aired i.e. there are short commercial breaks; and additionally on the tickers, advertisements of various products are shown; and for which advertisements (both), the appellant charges money. Another type of show is to display a screen in the backdrop with the trademark of a reputed company say, Aircel, and an image of the ICC World Cup on the table and the sponsored programme displayed boldly. For example, a special programme by the appellant displays AIRCEL as the sponsor as under:-

AIRCEL

Presents

CUP * of

PRIDE

PITCH BATTLE

8. The replica of the world cup is displayed prominently. Needless to state, the manner of displaying the graphic is prima facie likely to convey an impression in the mind of the viewer that AIRCEL is a sponsor of the World Cup Cricket Tournament or is associated with it i.e. prima-facie would give benefit to Aircel with respect to the goodwill of the world cup created in the public mind. With the aforesaid prominently displayed screen in the backdrop, what follows is brief clippings of the footages of the World Cup matches broadcasted. The photograph of players is displayed one by one and along therewith the statistics pertaining to the player i.e. runs scored, strike rate, wickets taken, strike rate of the bowler etc. are shown. As these are being displayed the expert give his comments and opinions with respect to the performance of the player as well as the team in general.

9. Injunction prayed for in the suit filed by the respondents is in the following terms :-

(i) An order and decree of permanent injunction restraining the defendant, its partners, officers, servants, agents and representatives, franchisees,

and all others acting for and on its behalf from copying, reproducing, using, broadcasting or communicating to the public, telecasting or streaming,

utilizing or otherwise dealing in any manner whatsoever without permission from the plaintiff No. 1 with any of the footage of the cricket matches

held and hereafter to be held under the aegis of the ICC or Footage of the ICC Events broadcast by the plaintiff No. 2; and

(ii) An order and decree of permanent injunction restraining the defendants, its partners, officers, servants, agents and representatives, franchisees,

and all others acting for and on its behalf from commercially utilizing the Footage of the cricket matches held and hereafter to be held under the

aegis of the ICC, or from doing any other act that is likely to lead to infringement of copyright or other rights of the plaintiff No. 1 or the exclusive

broadcast rights, broadcast reproduction rights or other rights of the plaintiff No. 2 in respect of the ICC Events; and

(iii) An order and decree of permanent injunction restraining the defendant, its partners, officers, servants, agents and representatives, franchisees,

and all others acting for and on its behalf, from broadcasting, telecasting, streaming or otherwise communicating to the public live scores, or

updates of scores or any match content, commercially utilizing the match content or otherwise utilizing the intellectual property of the plaintiffs in any

manner whatsoever arising out of the events held and hereafter to be held under the aegis of the ICC; and

(iv) An order and decree for damages of (Rs.)21,00,000/- to be paid by the defendant to the plaintiff No. 1 on account of its infringing activities;

and

(v) An order and decree for damages of (Rs.)21,00,000/- to be paid by the defendant to the plaintiff No. 2 on account of its infringing activities;

and

(vi) Award the costs of the suit equally to the plaintiffs; and

(viii) Any further orders as this Hon"ble Court deems fit and proper in the facts and circumstances of this case.

10. Vide impugned order dated September 18, 2012, the learned Single Judge has injuncted the appellant as under:-

(i) The duration of the footage of the plaintiffs, whether fresh or archival, by the defendant would be limited to the extent permitted under the "ICC

Twenty 20 World Cup, Sri Lanka, 2012" News Access Regulations in India. This would include not only the maximum footage, but also the

maximum footage per hour of the broadcast, repeat of the footage and the total number of broadcast of such footage, as stipulated in the said

guidelines/regulations.

(ii) The fresh footage of the plaintiff will be delayed by at least 30 minutes, in terms of the regulations of the plaintiffs.

(iii) The defendant shall not air any advertisement immediately before, during or immediately after the footage of the plaintiffs, during the news

bulletins, except to the extent indicated in (iv) below.

(iv) If the footage of the plaintiff is shown in the new bulletins, the defendant shall subject to the condition and limitations stipulated herein below, be

at liberty to carry advertisements on the tickers, even when the footage, whether fresh or archival, is shown during regular news bulletin provided

that such advertisement(s) have not been booked by the defendant to be shown only during reporting of ICC Twenty 20 World Cup, Sri Lanka,

2012. The advertisement(s)/logo(s) of the sponsor(s) of the news bulletin in which footage of the plaintiff is shown can be carried by the defendant

on tickers at the time of reporting of the event, only if the sponsorship is of the news bulletin and the logo and/or advertisement of the sponsor

appears on the ticker(s) throughout the news, except when the advertisements of others are being aired.

(v) If advertisements are carried by the defendant immediately before, during or immediately after the special/sponsored programmes on ICC

Twenty 20 World Cup 2012 telecasted on its news channel, the footage of the plaintiff will not be shown in the programme(s).

(vi) If the advertisements are carried even on tickers, immediately before, during or immediately after such special/sponsored programmes, the

footage of the plaintiff will not be shown in the programme.

(vii) The defendant would not use the footage of the plaintiff if it gives any such title to its special/sponsored programmes as would indicate an

association between the advertiser(s) and the event subject matter of the programme.

(viii) The defendant, while showing the footage whether fresh or archival would paste "courtesy bug" acknowledging the plaintiffs, with due prominence, throughout the broadcast of the footage.

(ix) The defendant would use the name "ICC Twenty 20 World Cup, Sri Lanka, 2012 or a shorter title "ICC World Twenty 20" and the event logo while using the footage of the plaintiff, whether during the special programme or during news bulletin.

(x) In case the official logo of the plaintiff is covered by the logo of the defendant when the footage is shown, it would include a courtesy line extended at the bottom or elsewhere on the screen.

(xi) No advertisement would be carried on the footage of the plaintiff.

11. A brief resume of the impugned decision would reveal that after noting the definition of "broadcast" as in Section 2(dd) of the Copyright Act

1957, the learned Single Judge has noted the law declared by a Division Bench in the decision reported as *Espn Star Sports Vs. Global Broadcast*

News Ltd. and Others, wherein it was held that both copyright and broadcasting reproduction rights could separately co-exist and that the same may vest with two different persons or even with a single person.

12. Noting that the Copyright Act 1957 does not define "fair dealing", the learned Single Judge has relied upon the observations made in *ESPN*

Star Sports decision (supra) wherein it was observed that the broadcasting reproduction right of the broadcaster was an exclusive one and that

excessive usage of the telecast in the form of news may amount to infringement as the exclusive monopoly to broadcast the live feed or its

reproduction lay with the broadcaster. The learned Single Judge has noted that prolonged and repeated footage of the broadcast, beyond what

was permissible by fair dealing, would unfairly affect the goodwill, advertising and commercial prospects of the right holder.

13. Next, noting the law declared by a learned Single Judge of the High Court of New Zealand, dated September 18, 2007 *Media Works NZ*

Limited & Anr. v. Sky Television Network Ltd. wherein it was held that in the context of fair dealing, the extract must be brief and should be

considered in the context of the length of the recording and that the extracts had

to be used within 24 hours of the event in order for it to amount to a "current event", and that too, only in a program that reported current events, and not a magazine show, the learned Single Judge has proceeded to discuss the facts of the instant case, without highlighting the exact activity of the appellant in the past and threatened to be carried out in future; on the presumption that the activity would be offending. And has held against the appellant and has issued the directions here-in-before noted.

14. With respect to the guidelines framed by ICC and News Broadcasters Association, the learned Single Judge has held that private guidelines framed by News Broadcasters Association had no sanctity in law, but with respect to the guidelines framed by ICC, though having no statutory backing, has held may be used as an aid to determine what would be fair dealing with the footages of the proposed ICC T.20 World Cup Cricket Tournament; and as of today, having been held from late September 2012 and the final played on October 07, 2012. The learned Single Judge has held that if advertisers have associated themselves specifically with the special programmes of the defendant i.e. the appellant, the use of the names of the advertisers was bound to give an impression to the viewers that they were a part of the official sponsors of the T20 World Cup Cricket Tournament. The learned Single Judge has held that these special shows are bound to diminish the interest of the official advertiser/sponsor of the tournament. Holding in paragraph 12, that while nobody could object to the appellant putting on the air special programmes, but when footages were used with advertisements immediately before, during or immediately after the special programmes, use thereof would amount to a commercial exploitation of the copyrighted work of the respondents. The learned Single Judge noted that the guidelines framed by ICC placed restrictions for use of the footages within 30 minutes of the match, and as against that, noted that the guidelines framed by News Broadcasters Association provide for a delay of 5 to 7 minutes. The learned Single Judge has opined that 30 minutes interregnum period was fair and that use of the footages after 30 minutes were not likely to affect the revenue of the respondents or persons associated with the respondents and that said use within a period of less than 30 minutes was likely to adversely affect the interest of the respondents or those associated with the respondents.

15. The grievance in the appeal is to directions issued vide serial No. (ii), (v) and (vi) passed by the learned Single Judge.

16. Section 39 of the Copyright Act 1957 reads as under:-

39. Acts not infringing broadcast reproduction right or performer's right - No broadcast reproduction right or performer's right shall be deemed to

be infringed by-

(a) the making of any sound recording or visual recording for the private use of the person making such recording, or solely for purposes of bona

fide teaching or research; or

(b) the use, consistent with fair dealing, of excerpts of a performance or of a broadcast in the reporting of current events or for bona fide review,

teaching or research; or

(c) such other acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright u/s 52.

17. No broadcast right or performers right is deemed to be infringed by the use, consistent with fair dealing, of excerpts of a performance or of a

broadcast when current events are reported : proclaims clause (b) of Section 39. This statement of law was not disputed by counsel for the parties.

18. Section 52(1)(a)(iii) reads as under:-

52(1) The following acts shall not constitute an infringement of copyright, namely: -

(a) a fair dealing with any work, not being a computer program, for the purposes of:

(i).....

(ii).....

(iii) the reporting of current events and current affairs, including the reporting of a lecture delivered in public.

19. A fair dealing with a work while reporting current event or a current affair does not constitute an infringement of copyright, proclaims Section

52(1)(a)(iii). And this statement of law was not disputed by learned counsel for the parties.

20. An affair, excluding an affair, i.e. a matter that is a particular person's concern or responsibility (to wit a love affair), and for which we are not

to discuss; would be an event or sequence of events of a specified kind on a

matter of public interest and importance. A sporting event may concededly be an event/affair and a matter of public interest; and in the facts of the instant case, knowing the public craze in India for cricket; and other sports having a miniscule public craze/interest (and regretfully we must state), the ICC T.20 Cricket Cup would be an event as well as an affair worthy of being reported, notwithstanding our comments in the first paragraph of our opinion, that T.20 and even 50:50 over cricket matches would strictly not be a sports, since both forms do not have the DNA of sports i.e. a level playing field; both being fun games i.e. entertainment. We record at the outset that an event or an affair which may be entertainment to the masses would not negate the fact that it would be an event or an affair to be reported. As held in the decisions reported as (1999) 48 IPR 333 Nine Network Australia Pty Ltd. vs. Australian Broadcasting Corpn. and 2002 (190) ALR 468 TCN Channel Nine Pty Ltd. vs. Network Ten Pty Ltd., there can be overlap between news coverage and entertainment.

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

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

activity is not reporting, that would be the end of the matter; and we
caution : We are restricting our discussion to sports events and sporting affairs.

23. The statute i.e. the Copyright Act 1957 does not define "reporting".

24. In the decision reported as (1992) 1 Ch. 141 British Broadcasting Corp'n. Ltd. v. British Satellite Broadcasting Ltd., Scott J. held that

programmes of analysis or review of matches would not be reporting, and
pertaining to Soccer, held that Sporting News Programmes which were

by way of analysis or review of matches would not qualify as Reporting Current
Events pertaining to Soccer. In other words, pertaining to sports,

reporting of an event or an affair would be to give a coverage which is result
oriented. This view was cited with approval in Media Works NZ's

case (supra), which decision was followed by the Division Bench of this Court in
ESPN Star Sports case (supra).

25. Thus, two objective facts would determine whether the offending activity is
reporting or not. The first objective fact would be the nature of the

coverage with respect to information being diffused i.e. Is it result oriented. And
while analyzing the first objective fact, the second objective fact to

be simultaneously identified is : Is it primarily an analysis or review of the
sporting event. These facts are capable of a percipient reception by a

Judge i.e. are exoteric and are not esoteric and can be objectively pleaded by
parties and shown as objective facts to a Judge.

26. If the offending activity fails to qualify as "reporting" as understood afore-
noted i.e. is not result oriented but is by way of analysis or review

that would be the end of the matter. Injunction must follow without any further
analysis. Question of further considering whether the use of the

footage is fair or unfair does not arise because law permits a broadcast or a
performance to be used for reporting a current event or an affair and

thereafter places restrictions in the use by requiring the same to be in a fair
manner.

27. In other words news, including sports news, would qualify to be a case of
reporting if the broadcast is result oriented and not an analysis by

way of review or comments. Specialist sports news programmes may also be
reporting current events, but only if they fall within the ambit of

programmes of the kind noted in British Broadcasting Corporation's case (supra)
and Media Works NZ's case (supra).

28. By way of illustration, we may note that the methodology to analyze whether a sports programme is a news programme or a magazine show

would be the one adopted in the Media Works NZ's case (supra), and reference could be conveniently made to paragraphs 17 to 34 of the

decision. To summarize, the learned Judge therein was considering a grievance of infringement of broadcasting and reproduction rights of Media

Works NZ Ltd. by Sky Television Network Ltd. using footages of Rugby World Cup Tournament in its four broadcasts : (i) Prime News or Sky

News; (ii) The Cup; (iii) The Crowd Goes Wild; and (iv) Sports 365.

29. Whereas the plaintiff raised no objection to the use of footages in Prime News or Sky News, it had raised an objection to the use of footages of

the Rugby World Cup Tournament in the programmes at serial No. (ii), (iii) and (iv), but gave up the claim pertaining to the footages used in Sport

365 programme because it conceded that the programme was designed as a sports news programme and was a pre-existing news format

programme covering a wide range of sports and was not specifically designed for the Rugby World Cup. There was no plea that pertaining to the

programme in question the defendant had targeted specific advertisements from third parties, to be put on the air when news was disseminated.

Pertaining to the programme "The Cup", the programme was a 30 minute studio based programme played Sunday to Wednesday usually at 6:30

AM and repeated three times on one channel and four times on the other channel. Amount of footage used was limited to no more than 90

seconds per match. The programme was specifically developed for the Rugby World Cup. The presenter, Ian Jones, would introduce the show

which he described as following the progress of the All Blacks through the Rugby World Cup. Early on in the programme brief highlights from the

first All Blacks game played, preceded and followed by a graphic "Sports 365 Update" was shown. There was expert analysis and interviews with

retired All Blacks current and coaching staff. It was opined to be a "magazine show". The replays were sandwiched between reports on general

interest items and panel discussions. The programme "Reunion" was likewise opined to be a magazine show and the same was the position with

the programme "The Crowd Goes Wild". Blanket injunction was granted restraining use of any footage, not even for a second and irrespective of

the time gap. The reason was two-fold. Firstly, the programmes were held not to be reporting current events i.e. the emphasis was on the

programmes not reporting at all. The second reasoning was of the use being unfair. But for the moment we are only concerned to be highlighting,

with reference to paragraphs 24 to 29 above, as to what would constitute reporting of an event or an affair.

30. However, we need to highlight that an issue may arise in an appropriate case with respect to Sports News Programmes, even if they be

reporting current sports news and current sports events, in the context of the Sports News Programmes being specially designed with an eye on

the revenues which can be generated with reference to an ensuing sports event and further if the sports event, as in India cricket, is a craze. We

shall be discussing the issue in the context of fair dealing.

31. The freedom guaranteed to speech and expression by the Constitution would confer the right to disseminate any kind of information and this

activity and would be non-actionable, provided the footages of the activity is not misused, and as we would be highlighting hereinafter, the method

of disseminating information has not to be in a manner where the consumer i.e. the viewer would be misled or enticed into believing that the

sponsor of the programme is a sponsor of the activity or is intimately associated with the event.

32. Thus, the cry in the media or the press, which we may possibly hear tomorrow after our opinion is pronounced, that freedom of the media and

the press to disseminate information has been curtailed by us, if at all, is set at rest by us by noting that the freedom of the press and the media to

disseminate information was recognized by the society keeping in view the press and the media which existed in the 19th and the 20th Century i.e.

as organs of thought, of empowerment, of culture and of refinement. Not as organs of entertainment and revenue generation; least of all as an organ

offering on its back, a piggy ride for commercial entities i.e. business houses to advertise their products by commercializing the goodwill of others.

33. The media is free to continue with its activities of disseminating information in whatever manner the media feels and this is their unhindered and

unobstructed right, but not by offering its back for piggy riding who have money bags. Besides, our view permits footages to be used while

reporting sports events in both hard news and sports news programmes but only if the programmes were pre-existing news format programmes

and were not designed for a particular sports event and specific advertisements are not solicited from third parties to be put on the air in the

programme or the third party has not voluntarily approached the TV channel and paid special premium for its advertisement to be put on the air.

34. We terminate the discussion on the first limb and proceed to the second, but by making it clear that if the offending activity is not reporting, no

footage whatsoever can be used and the question of considering whether the use of the footage is fair or unfair would not arise. It is only when the

activity is found to be reporting, issues of use being fair or unfair would arise and thus our discussion hereinafter must not be misunderstood to be

expanding the rights. It has to be understood as limiting the rights even when the activity is reporting, for the reason the use has to be a fair use.

35. The second limb of the journey. It has then to be seen whether the use of the footage is consistent with the principles of fair dealing, the

expression used in both sections i.e. Section 39(b) and Section 52(1)(a)(iii) of the Copyright Act 1957.

36. The jurisprudence applicable?

37. Now, fair dealing is a question of degree of impression. Traditionally, Courts have posited themselves by looking at fairness in the context of

unfairness when issues pertaining to copyright in works are brought before the Courts.

38. But in relation to sports events, the issue appears to have been initially decided on the principle of : Judged by the objective standard of

whether a fair minded and honest person would have dealt with the copyrighted work in the manner in which the defendant did for the purpose in

question. But, it dawned that this was actually a restatement of the use being fair as juxtaposed to unfair.

39. The decision in Media Works NZ Ltd's case (supra) which was cited with approval by a Division Bench of this Court in ESPN Star Sports's

case (supra), to our mind brings out clear principles to be applied, which are capable of an objective analysis, and thereby give credence to the

decision by removing a subjective analysis; and needless to state decisions which are arrived at on the basis of objective analysis are more prone to

same conclusion being reached by different persons as against to decisions which are arrived at on a subjective analysis.

40. The first factor, which is objective, (refer paragraph 44 of the decision in Media Works NZ Ltd's case (supra)) is the proximity of time of the

sports news being put on the air to the sports event. The more proximate the time : the more the weightage to the use being unfair. A caveat once

again. Only one of the various factors and not conclusively determinative of, as a factor, having diminishing weightage as the proximity of time of

the reporting and the event becoming longer. The second factor, which is also objective, (refer paragraph 58 of the decision Media Works NZ

Ltd's case (supra)) is to see whether the offending programme competes with exploitation of the copyright by the copyright owner, and this would

mean the effect of the offending use on the actual or the potential market for the copyright work (refer paragraph 62 of the decision Media Works

NZ Ltd's case (supra)). The constituents, of the second factor, which need to be objectively identified, could be stated to be : (i) competition, (ii)

extent of use (which would include both the duration of the footage used and its repetition), (iii) the third constituent, which would have both, an

objective as well as a subjective part, would be to see the body of viewers (an objective standard) and the effect of the use on the potential market

i.e. the viewers (a subjective standard), keeping in view the likelihood of the advertiser/sponsor of the special programme (the offending

programme) being perceived by the potential market i.e. the viewers as being associated with the sponsor of the sports programme or in the

context of the special programme, being specifically designed keeping in view the goodwill generated or likely to be generated by the sports events

and the potential market i.e. the viewers being the targeted audience to be weaned away and in the process not only the TV news channel making

extra money but even the advertiser/sponsor of the special programme on the news channel generating a goodwill for its product by piggy riding on

the sports event.

41. The basis for the aforesaid jurisprudence?

42. We take the example of ICC T. 20 World Cup Tournament. The organizers of the tournament spend millions of dollars to pay money to the

participating teams. It pays special prize money for the team which comes first,

second, etc. Then, special prize money is paid for the Man of the Match, at each match, for the best catch etc. by the sponsors of the tournament or the match. A special prize for the Man of the Series, the best batsman of the series, the best bowler of the series is paid. And these are by the sponsors of the tournament. These sponsors pay money to ICC, apart from paying money for the special prizes. Why would they do so? Obviously to cash upon the goodwill generated by the cricket tournament.

Then, people pay money for their product to be advertized on the field or of the field, within the precincts of the cricket stadium. They pay huge sums of money because they know millions of viewers, while seeing the broadcast or the footages replayed, would simultaneously be seeing their advertisements. Advertisers pay during commercial breaks when the match is on. To put it pithily, money flows from different channels to the organizers of the cricket tournament and from this reservoir the organizers of the cricket tournament spend money; which flows out, for the tournament to be held. We have already commented in paragraph 1 above that a propaganda machine, which is a product of a marketing age, has come into being. We commented that this propaganda only understands the language of profit. And now we understand why so. The propaganda machine spends millions of dollars but raises investment from third parties i.e. sponsors of the tournament; sponsors of the special prize monies; merchandisers who display their advertisements on and off the field, but within the precincts of the cricket stadium; merchandisers who advertise during commercial breaks. The collective money pooled in is used to organize the sports events. No philanthropy is done. It is a business/commercial venture which seeks money in return. A pound of flesh for a pound of flesh is the motto. Nobody can take flesh by making the venture bleed.

43. The propaganda machine which spends millions of dollars has, in turn, millions of dollars invested in it. In the marketing age and the age of media saturation, a hype is built when sports events are held all over the world. In soccer loving nations, the soccer events are preceded by a media hype, with the organizer of the event advertising, by booking time slots, that the countdown has begun. Say for example, the World Cup football. The countdown begins about sixty days prior. Information is

dissiminated as to which teams are in which group. Where would the matches be played. Special events are organized, which are nothing but propaganda. Advertisers step in and join the propaganda. They make investments by paying the organizers while buying the time slots. Celebrities participate in chat shows sponsored by these sponsors. Money is invested. The hype created results in the football/soccer lovers thinking that they are a part of the World Cup themselves. It is akin to man creating the image of his God on the belief that his God looks like him. But soon starts thinking that he looks like his God. The fans i.e. the viewers start eating, drinking, walking, talking and for that matter doing mundane activities thinking that they are soccer themselves. This belief makes them to think that they are a part of the tournament. The physical manifestation of the belief is that they start living with the product of the sponsor. It is this physical manifestation which returns the revenue to the sponsor. In India, with cricket it is likewise.

44. Thus, when the tournament is on, any association by a third party, with respect to the footages of the tournament or in the manner noted by us in paragraph 8 and 9 above (where we have highlighted a programme by Aircel) would ex-facie be competing and simultaneously exploiting the copyright of the copyright owner i.e. the broadcaster with the right of reproduction, in that, the potential customers of those who have invested would be predated upon. Such activities i.e. special events would clearly infringe the rights of the broadcaster which would include the reproduction rights when footages are used and along therewith commercial advertisements are put on the air and in particular where the commercial advertisements are specially targeted for the programmes in question.

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

and thereafter it mutates into history. Thus, the lifespan of an event or an affair, in its form of news, is 24 hours. Lapsing into history, any reflection thereon would not be news but would be views.

46. Now, is the problematic area! When does an event or an affair become news? Does news has a gestation period to mutate into history? If yes,

what would be the gestation period? Questions which are easy to pose, but extremely difficult to answer with empirical precision. Just as the life

span of creatures and the gestation period, before they take their ultimate manifested form, vary from species to species, same has to be, in our

opinion, with events and affairs. We take cue from the analogy in the field of biology. We extend the Galilean - Newtonian method i.e. Naturalism,

to resolve the issue. Mosquitoes and flies, from the embryonic stage i.e. egg, pass on to the stage of a larvae/maggot, and the mosquito larvae

finally metamorphose as adults and the fly egg metamorphose as an adult, from maggot, within a span of less than three to four days and live a life

as adults of a few days and die. The mosquito egg would be news of being an egg the moment it is laid and would be news of becoming a larva

when it metamorphoses and becomes news (and a nuisance) when it emerges as an adult, and all this within a short span of time. Similar would be

the position of some kinds of events and affairs. But an elephant has a gestation period of 22 months, and lives as a calf dependent upon the

mother for a couple of years before attaining adulthood. The conception of an elephant in the womb of the mother would continue to remain news

for 22 months and it would continue to be news of being a calf for couple of years till it would become news that an adult elephant has come into

being.

47. How does it translate to an event of sports? Each match would be an event. Thus, the span of the match as an event being news would span

the entire duration of the match. But, within this period of match, the fall of a wicket; the achievement of a milestone in the career of a player : to

wit 1000 runs scored, 2000 runs scored etc. or 100 wickets taken, 150 wickets taken or the 50th catch taken would be events, spanning a

momentary duration, and being news when the event takes place. The latter i.e. a wicket falling, a century being scored (by a player or by the

team), would be events which on the principle of stale news is no news and

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

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

be shown within seconds of the said kind of event taking place.

49. But, in relation to a match or an inning, with respect to specially designed sports news programmes i.e. where TV channels have specially

designed the news programmes and have earned advertisement revenue to advertise products of third parties, it would constitute an act of

infringement if footages are used of the sports event and simultaneously, sitting within the special programme, advertisements are put on the air. The

reason is that the broadcasters themselves, having a right to do so, earn revenue by putting on the air specifically designed shows in which the

footage is used. It would be a case of unfair competition if during the special sports news programme of TV channels, other than broadcasters or

those who have acquired rights from them, they use the footages, for the reason the same viewers may be predated upon. Further, on issues

pertaining to injunctions, even third party rights being adversely affected have to be kept in mind. Those who have obtained time slots to have their

product put on the air by way of advertisement during immediately before, the currency of the match and immediately thereafter, would be losing

on the viewership and thus would be adversely affected, in the context of the revenue paid by them to either the organizers of the tournament or the

broadcasters. We note that in the decision in Media Works NT's, case (supra), which decision was cited with approval by the Division Bench in

ESPN Star Sports" case (supra), it was categorically held that specially designed shows cannot use the footages of the plaintiff's therein. In

paragraph 79 to 85, it was observed as under:-

79. In the use of the material in The Cup, The Crowd Goes Wild and Reunion, Sky will inevitably compete with TV3, in the key area TV3 is

targeting, the magazine format show. Indeed, it can expect to compete very well in that sector, since it has the opportunity to provide viewers with

access to Rugby World Cup material on a more or less constant basis, unlike TV3. Sky is using TV3's own footage to compete with it and that

competition has the potential to adversely affect the value of TV3's investment in the rights. Sky is entitled to compete with TV3 in this manner, but

is it fair that it use TV3 footage to do so? There must be a strong case that it is not.

80. Sky says that it does not meaningfully compete with TV3 because the

footage used by Sky is of short duration, whereas TV3 can use longer excerpts. However in the magazine format it is unlikely that footage significantly in excess of 2 minutes would be used by TV3 from any one match.

The principal use of the footage in such a format appears to be to create a visually engaging programme, which deals authoritatively with the subject matter. The footage enhances the impression of the programmes (and by inference the broadcasters) connection to the events of the Rugby World Cup, further developed by interviews and panel discussions.

81. Sky argues that fairness requires it to have access at the current level because its audience expects saturation coverage from it, and indeed Sky's programming suggests that saturation is what it is aiming at. However, Sky was not the successful tenderer and cannot reasonably expect to be able to provide saturation coverage of the Rugby World Cup which incorporates TV3's footage. The lack of the ability to compete with TV3 in terms of its coverage of the tournament. But that is an inevitable consequence of TV3 winning, and Sky losing, the tender.

82. As to its argument that accurate sports news reporting (and Sky includes its magazine programmes in that description) requires use of adequate visual footage, I accept that there is a public interest in some use of footage in sports news programmes. However, the programmes must be news in their format, and repeated at spaced intervals. Sky's coverage goes far beyond what is required to meet that public interest.

83. There are therefore two grounds upon which I find there to be a strong case that the use by Sky of TV3's footage does not amount to fair dealing.

84. The first is that on the issue of whether the use of the footage is for the reporting of current events, the footage used in The Cup, The Crowd Goes Wild and Reunion does not fall into that category.

85. Secondly, when considering whether the use is fair, the rate of repetition of TV3's footage across all of the programmes and the use of that footage in magazine style programmes is such as to unfairly undermine TV3's ability to exploit its copyright in that footage. This factor is not outweighed by the public interest in viewing the footage. That public interest can be adequately provided for at a far less extensive level of use of TV3 footage by Sky.

50. Thus, the TV channels would have two options, only one of which can be opted for in relation to special sports news programmes. Firstly, to

opt to put on the air, an advertisement specifically targeted during special programmes, and not to use the footages. Secondly, to opt to use the

footages but not put on the air any advertisements. The choice would be theirs.

51. To put in common man's language. Unlike events such as an accident; a judicial verdict being pronounced; a Finance Minister making a

statement, where nothing is spent by anybody for creating the event and thus nobody being entitled to appropriate the newsworthy content of the

event, special events such as a cricket match are organized by investing huge sums of money running into millions of dollars. It is a creation of the

investors and sans a fair use pertaining to reporting current events and affairs, nobody is entitled to even a drop of milk from the milk cow.

52. It has to be kept in mind that we are in an age of media invasion where the media is used by the marketing industry in a manner described by

us in paragraph 42 and 43 above. Millions of dollars are spent to create an atmosphere where the viewer i.e. the lovers or those who romance

with T.20 or 50-50 overs cricket are led to believe that they are a part of the tournament and the physical manifestation of the belief is to live with

the product of the sponsor.

53. With respect to a cap on the amount of footage used and repetition thereof, as correctly observed by the Division Bench of this Court in

ESPN Star Sports case (supra); refer paragraph 26 and 27 of the decision, each case would have to be viewed on its facts depending upon the

number of matches played per day at different venues.

54. Pertaining to tickers, the position would be similar to that of putting on the air advertisements. We see no qualitative or quantitative difference

between tickers with advertisements being put on the air and regular advertisements sitting within the special shows.

55. Of course, it is always open to the event organizers or the broadcasters, to give something more to the TV channels and thus we observe that

anything which flows to the TV channels from the guidelines framed by ICC would always be there for the TV channels to enjoy, but anything

restrictive in the guidelines which foul the legal position as herein above explained would not be protected.

56. We are accordingly not commenting upon the three directions out of the ten issued by the learned Single Judge which are in challenge before us

in the present appeal inasmuch as the action brought by the respondents was a quia timet action and related to events of the past with an

apprehension of being threatened for the ensuing T.20 ICC World Cup Tournament which is already over. It would be expected that for future

events, the TV channels would use the footages strictly in accordance with the law declared by us or they would be free to pay money and

purchase the right to use footages as per the agreement with either ICC or the broadcaster to whom ICC has assigned the broadcasting and

reproduction rights. The appeal stands disposed of without there being any order as to costs.