



infochange

News and analysis on social justice and development issues in India

The airwaves as a public good: Review of a landmark judgment

Compiled by **Siddharth Narrain**

The judgment in *The Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal (CAB)* articulated the important principle that the broadcasting media should be under the control of the public as distinct from government

Introduction

The background facts that led to the landmark 1995 judgment of the Supreme Court of India on the airwaves relate to a dispute between the Ministry of Information and Broadcasting and the Cricket Association of Bengal (CAB) over whether or not the cricket organisation had the right to grant exclusive telecast rights to a private agency rather than to Doordarshan. In responding to the dispute over the facts of the case, courts at various levels had to examine the larger issue of whether or not the government or government-related agencies like Doordarshan could enjoy a monopoly over the creation of terrestrial signals and sole discretion over telecasting or not telecasting them.

This dispute occurred in the context of the early days of economic liberalisation, which saw the entry of private media into an arena that had till then been monopolised by State-owned media like All India Radio and Doordarshan. At stake were also notions of what constitutes the public sphere and which agency could be said to represent the widest section of the public in India. The claims made by Doordarshan in this case, for instance, were clearly premised on the fact that they had the largest reach in terms of audience and, therefore, had a valid claim for a monopoly as far as broadcasting was concerned.

Judges: P B Sawant, S Mohan, B P Jeevan Reddy

Citation: AIR 1996 SC 1236

Facts: On March 15, 1993, the Cricket Association of Bengal (CAB) wrote a letter to the Director General of Doordarshan (DD) saying that a Six-Nation International

Cricket Tournament would be held in November 1993 as a part of its Diamond Jubilee Celebrations. CAB asked DD to send a detailed offer for any of two alternatives:

(i) DD would create 'Host Broadcaster Signal' and also undertake live telecast of all the matches in the tournament, or

(ii) Any other party would create the 'Host Broadcaster Signal' and DD would only purchase the rights to telecast in India

CAB emphasised in particular that, in either case, the foreign TV rights would remain with the cricket body. CAB also asked DD to indicate the royalty amount the latter would pay. On March 18, the Controller of Programmes (Sports), DD, replied to the letter stating amongst other things that, during the meeting and during the telephonic conversation, CAB's president, Jagmohan Dalmiya, had agreed to send in writing the amount expected as rights fee payable to CAB exclusively for India, without Star TV getting it. On March 19, CAB informed DD that they would be agreeable to DD creating the Host Broadcaster Signal and also granting DD exclusive right for India, without Star TV getting it, and that the CAB would charge DD US \$800,000 for the same. However, CAB made it clear that they would reserve the right to sell/license the right worldwide, excluding India and Star TV. CAB also stated that DD would be under an obligation to provide pictures and commentary subject to payment of DD's technical fees.

On March 31, DD sent its bid as 'Host Broadcaster' for a sum of Rs 1 crore, stating that CAB should grant signals to it exclusively for India without Star TV getting it. DD also stated that they would be in a position to create the 'Host Broadcaster Signal' and offer a live telecast of all the matches in the tournament.

Thereafter, on May 4, 1993, DD sent a fax message reminding the CAB president about its offer made at the end of March. CAB replied on May 12 that as CAB's committee had decided to sell/allot worldwide TV rights to one party only, CAB wished to know whether DD would be interested in the deal. If so, they were to send their offer for worldwide TV rights by May 17 at the latest. The basis of the deal would be outright purchase of TV rights and sharing of rights fee.

On May 14, DD stated in a fax addressed to CAB that it was committed to its earlier bid of Rs 1 crore for exclusive TV rights in India alone. DD also stated that since there was speculation that Pakistan may not participate in the tournament ' a situation that may affect viewership and consequent commercial accruals - DD may have to rethink the earlier bid in such an eventuality. It requested CAB to reply to the letter at the earliest.

On June 14, 1993, without obtaining the required clearances from the government for telecasting, CAB entered into an agreement with the World Production Establishment

(WPE), representing the interests of Trans World International (TWI), for telecast rights to all the matches. The agreement provided for the grant of sole and exclusive rights to sell/licence or otherwise exploit throughout the world 'Exhibition Rights' in the tournament. CAB only retained radio rights for the territory of India.

Under the agreement CAB was to receive not less than US \$550,000 as a guaranteed sum. If income from the rights fee exceeded the guaranteed amount, it could be wholly retained by WPE until it was eventually split into 70:30 per cent as per the agreement. If the rights fee/income received was less than guaranteed sum, WPE was to pay the difference to CAB. WPE was to pay the television licence fee in advance of the start of the tournament, where possible.

On June 18, DD sent a fax to CAB stating that it had learnt from press reports that CAB had entered into an agreement with TWI for TV coverage of the tournament, and DD had decided not to telecast the matches if it involved paying TWI. DD further stated that it was not prepared to enter into any negotiations with TWI to obtain television rights for the event.

On September 2, 1993 the Department of Youth Affairs and Sports, Ministry of Human Resources Development, addressed a letter to CAB informing it that the government had no objection to the proposed visit of the cricket teams of Pakistan, South Africa, Sri Lanka, West Indies and Zimbabwe for participation in the tournament. The department further stated that no foreign national could visit any restricted/protected/prohibited area of India without permission from the Ministry of Home Affairs. It was also clarified that the sanction of foreign exchange was subject to the condition that CAB would utilise only the minimum foreign exchange required for the purpose and would deposit foreign exchange obtained by it by way of fee, sponsorship, advertisements, broadcasting rights, etc, through normal banking channels under intimation to the Reserve Bank of India.

With respect to CAB's application to VSNL of September 7, CAB was advised to approach the respective ministries, as well as the Telecom Commission, for (a) approval of import of earth station and transmission equipment, and (b) frequency clearance from the Telecom Commission. VSNL also said the satellite to be used for the coverage and transmission was to be specified. It further stated that CAB should approach VSNL for uplinking signals to INTELSAT at Washington. TWI was advised to apply to VSNL for the necessary coordination channels and the DD phone facility covering each location.

On October 9, 1993 TWI wrote to VSNL seeking frequency clearance from the Ministry of Communications. TWI informed VSNL that they would be covering the tournament

and that they were formally applying for permission to uplink their signal according to the list attached to the letter. They also sought frequency clearance for walkie-talkie sets.

On October 13, the Ministry of Home Affairs informed CAB that it had 'no objection' to the filming of the cricket matches at any of the places mentioned in CAB's letter and that the 'no objection' pertains only to the filming of the matches on the cricket grounds. The ministry also gave its 'no objection' to the use of walkie-talkie sets to be used in the playgrounds during the matches, subject to permission from WPC.

On October 18, CAB addressed a letter to DD regarding rights for telecasting matches, mentioning that DD's earlier offer of Rs 10 million via its fax message dated March 31, specifying that CAB should not grant any right to Star TV, was uneconomical. Considering the enormous organisational cost, they said, they were looking for a minimum offer of Rs 20 million. CAB also pointed out that the offers received from abroad, including from TWI, were much higher than Rs 20 million and that those payments would be in foreign exchange. CAB also stated that since they were given to understand that DD was not interested in increasing the offer, they had entered into a contract with TWI for telecast of the matches. However, they were still keen that DD should come forward to telecast the matches since many people in India would otherwise be deprived of viewing the tournament. Accordingly, they had made TWI agree to co-production with DD and they were also appealing to DD to enter into such a co-production.

CAB's letter further stated that the details were worked out during a joint meeting, including the supply of lists of equipment by the respective parties, and that it was decided in principle to go for a joint production. CAB stated that it was also agreed that DD would not claim exclusive rights and that CAB would be at liberty to sell the rights to Star TV. Thereafter CAB learnt from newspaper reports that DD had decided not to telecast the matches. That is why they had written a letter to DD on September 15 seeking to confirm the authenticity of the news, but they had not received any reply from DD. Meanwhile they had been repeatedly approached by Star TV, Sky TV and other networks seeking permission to telecast matches to the Indian audience, some of them wanting permission on an exclusive basis. But CAB had not taken a decision on those offers since they did not want to deprive DD's viewers of the opportunity to see the tournament.

CAB mentioned that they had also learnt that DD would be interested in acquiring telecast rights provided it was allowed to produce the matches directly, and the matches produced by TWI were made available to it live, without payment of any technical fees.

According to CAB, on the basis of the above developments, they had come up with fresh set of proposals, the gist of which was as follows:

1. TWI and Doordarshan would cover 9 matches each in the tournament independently
2. TWI would cover the matches with their own equipment, crew and commentators. Similarly, Doordarshan would also have their own crew, equipment and commentators for the matches produced by them.
3. Doordarshan would be at liberty to use their own commentators for matches produced by TWI for telecast in India. Similarly, TWI may also use their own commentators if they televised matches produced by Doordarshan in other networks.
4. TWI would allow Doordarshan to pick up the signal and telecast live within India, free of charge. Similarly, Doordarshan would allow TWI to have the signal for live/recorded/highlights telecast abroad, free of charge.
5. Doordarshan would not pay access fees to CAB, but would allow 4 minutes advertising time per hour (ie, 28 minutes in 7 hours). CAB would be at liberty to sell time slots to advertisers and keep the proceeds received through such sales.
6. A contract would be entered upon by CAB and Doordarshan directly for the above arrangements. TWI would give a written undertaking about the coverage breakup as mentioned in point 1.
7. The score card and graphics would be arranged by CAB and the expenses for production or income derived from sponsorships would be in CAB's account. Both TWI and Doordarshan would use score cards and graphics arranged by CAB.

CAB requested DD to communicate their final decision in the matter before October 21.

On October 26, VSNL sent a communication to INTELSAT at Washington seeking information on uplinking timings for the TV transmission requested by CAB/TWI. On October 27, the Telecommunications Department sent a letter to the Central Board of Excise and Customs on the question of temporarily importing the electronic production equipment required for transmission of one-day matches.

Communications to the proposal, subject to the organisers coordinating with WTC (DoT) for frequency clearance, from the "Standing Advisory Committee on Frequency Allocation (SACFA)", for TV up-linking from different places and coordinating with VSNL, Bombay for booking TV transponders.

On October 27, DD informed CAB that the terms and conditions of its renewed offer of October 18 were not acceptable and that DD had already intimated to CAB that they would not take signals from TWI, a foreign organisation. They also made it clear that they had not agreed to any joint production with TWI.

On October 29, CAB replied to DD that they were surprised at the outright rejection of the various alternative proposals they had submitted. They pointed out that the only reason given for rejection seemed to be that DD would not take signals from TWI because it was a foreign organisation. Since they had also suggested production of live matches by DD the question of taking signals from TWI did not arise. CAB further stated that, purely in deference to DD's sensitivity about taking signals from TWI, CAB would be quite happy to allow DD to produce its own footage of matches and that DD may like to buy rights and licenses from CAB at "a price which will be mutually agreed upon, and that these rights would be on nonexclusive basis on Indian territory."

On October 30, DD sent a message to CAB stating that they would not pay access fees to telecast the matches. Instead, for DD to telecast the matches live, CAB had to pay technical charges/production fee at Rs 5 lakh per match. In such a case DD would have exclusive rights for the signal generated and the parties interested in taking the signals would have to negotiate directly with DD. DD sent a fax message to CAB to the same effect on October 31.

On November 1, 1993, VSNL deputed its engineers/staff to be at the venues where the matches were being played to coordinate with TWI for TV coverage.

On November 2, TWI paid US \$29,640 to VSNL as fees for INTELSAT charges. On the same day, the Finance Ministry permitted TWI's equipment to be imported on certain conditions by waiving the customs and additional duties of customs.

On November 4, CAB addressed a letter to DD referring to the latter's fax message of October 31, asking for certain clarifications on the offer made by DD. In this letter CAB stated that since DD had asked for fees for the production and telecast of matches, it was presumed that all revenue generated from the matches, or the entire time slot for advertisements, would belong to CAB and that they would have the right to charge access fees, including other charges from parties abroad, and DD would telecast those matches for which CAB will pay the charges. The choice of the matches to be telecast by DD would be determined by CAB.

On November 5, DD rejected the above terms.

On November 8, CAB filed a writ petition in the Calcutta High Court praying, among others, that the respondents should be directed to provide telecast and broadcast of all

the matches and also provide all arrangements and facilities for telecasting and broadcasting of the matches by the agency appointed by the CAB, TWI. Interim relief was also sought.

On the same day, the high court directed the advocate of the Union of India to obtain instructions in the matter and, meanwhile, passed interim orders making it clear that they would not prevent DD from telecasting any match without affecting the existing arrangements between CAB and TWI. The writ petition was posted for further hearing on November 9. On that day the single judge confirmed the interim orders passed the previous day and the respondents were restrained from interfering with the frequency lines given to respondents.

On November 10, VSNL contacted INTELSAT at Washington seeking cancellation of its request for booking. On November 11, the judge partly allowed the writ by directing All India Radio to broadcast matches. On November 12, in the appeal filed by the Union of India against the aforesaid orders of the Division Bench, the high court passed an interim order to the following effect:

- (a) CAB would pay DD a sum of Rs 5 lakh per match and the revenue collected by DD from sponsorships would be kept in a separate account
- (b) DD would be the host broadcaster
- (c) The Ministry of Telecommunication would consider the question of issuing a licence to TWI under the Telegraphs Act and decide on it within three days

On November 12, the Film Facilities Officer of the Ministry of Information and Broadcasting informed the Customs Department at New Delhi, Bombay and Calcutta airports that, since TWI had not obtained the required clearances from the government for coverage of the tournament, they should not be permitted to take exposed film out of India till it was cleared by the government.

On the same day, DD asked CAB to provide various facilities at each match venue as this was a prerequisite for creating host broadcaster signals in India. CAB sent an immediate reply calling upon DD to telecast matches within India pursuant to the high court's order. Also on the same day the Collector of Customs, Bombay called upon CAB to pay customs duty on the equipment as there was a breach in the terms of the exemption order.

On the same day 'ie, November 12 - the Committee of Secretaries decided that the telecast of all sporting events would be within the exclusive purview of the DD/MIB. It was also decided that for the purposes of obtaining necessary clearances for

telecasting different types of events for the country, a single window service would be followed where the concerned administrative ministry would be the 'nodal' ministry (NM) to which the application would be submitted. It would thereafter be the function of the nodal ministry to obtain permissions from all the concerned ministries/agencies.

On November 14, the high court, clarifying its order of November 12, directed (among others) as follows:

[a] In case the signal is required to be generated by TWI separately, necessary permission should be given by DD and/or other competent authorities.

[b] Differences with regard to the placement of cameras, etc., if any, between the cricket authority and DD should be mutually worked out and, if this was not possible, the dispute should be decided by the head of the police in the place where the match was being played.

[c] TWI's equipment, which had been seized by the Customs authorities, should be released upon an undertaking that the same would not be used for any other purpose.

[d] VSNL should take proper steps for uplinking, and should not take any steps to defeat the orders of the court. For its part, TWI should comply with all financial commitments to VSNL.

On November 15, CAB and another filed the present Writ Petition No 836 of 1993. On the same day the Supreme Court passed an order directing the Secretary, Ministry of Communications, to hold a meeting by 4.30 pm on that day itself and to communicate the decision by 7.30 pm. The Customs authorities were directed to release the equipment. Later that night another order was passed partly staying the orders of the Chairman, Telecommunications and Secretary, DoT. TWI was permitted to generate its own signals and the Customs authorities were directed to release the goods forthwith.

Also on the same day DD filed a contempt petition in the high court against CAB and another, for non-compliance with the orders of the high court. It also filed the present special leave petitions in the Supreme Court on the same day.

Issues:

What, if any, are the conditions that can be imposed by the government department concerned - in the present case the Ministry of Information and Broadcasting - for:

[a] creating terrestrial signal of the event?

[b] granting facilities of uplinking to a satellite not owned or controlled by the

Government or its agencies?

Does the government or government agencies like DD - in the present case - have a monopoly over creating terrestrial signals and telecasting them or refusing to telecast them?

Can the government or government agencies like DD claim to be the host broadcaster for all events, whether produced or organised by it or by anybody else in the country? Can they insist upon the organiser or the agency engaged by them to telecast the event(s), taking signals only from the government or government agency and to telecast only with its express permission?

Arguments:

MIB's arguments:

There is a difference between the implications of the right conferred under Article 19 [1] (a) upon [i] the broadcaster - ie, the person operating the media, [ii] the person desiring access to the media to project his views, including the organiser of an event, [iii] the viewer, and [iv] a person seeking uplinking of frequencies so as to telecast signals generated in India to other countries.

The primary object of the telecast by CAB is to raise funds and hence the activities are essentially of trade. The fact that the profits are deployed for promotion of sports is immaterial for the purpose.

A broadcaster does not have a right as such to access the airwaves without a licence either for the purposes of telecast or for the purposes of uplinking. There is no general right to a licence to use the airwaves which, as a scarce resource, have to be used in a manner that the interests of the largest number are best served. The paramount interest is that of the viewers.

The grant of a licence does not confer any special right inasmuch as the refusal of a licence does not result in the denial of a right to free speech.

The nature of the electronic media is such that it necessarily involves the marshalling of available resources for the largest public good. The state monopoly created as a device to use the resource is not *per se* violative of the right of free speech as long as the paramount interests of viewers are served and access to the media is governed by the fairness doctrine.

The right to telecast/broadcast has certain inherent limitations imposed by nature, whereas Article 19(2) applies to restrictions imposed by the State. The object of licensing is not to cast restrictions on the expression of ideas, but to regulate and marshal scarce resources to ensure their optimum enjoyment by all including those who are not affluent enough to dominate the media.

The rights of an organiser to use airwaves as a medium to telecast and thereby propagate his views, are distinct from his right to commercially exploit the event. Unless, therefore, the rights of the viewers are given primacy, it will in practice result in the affluent having the sole right to air their views, completely eroding the right of the viewers. The right of the viewer can only be safeguarded by the regulatory agency by controlling the broadcast frequencies, as it is otherwise impossible for viewers to exercise their right to free speech qua the electronic media in any meaningful way.

A mere creation of the monopoly agency to telecast does not per se violate Article 19 [1] (a) as long as the access is not denied to the media either absolutely or by imposition of terms that were unreasonable. Article 19 [1] (a) proscribes monopoly in ideas and as long as this is not done, the mere fact that access to the media is through a Government-controlled agency is not per se violative of Article 19 [1] (a)

A general permission to all who seek frequencies to telecast would not better serve the principle underlying Article 19 [1] (a) in the socio-economic scenario of this country and would result in passing the control of the media from the government to private agencies affluent enough to buy access.

CAB/BCCI's arguments:

The right to organise a sports event inheres in the entity to which the right belongs and that entity in this case is the BCCI and its members, which include the CAB. The right to produce an event includes the right to deal with the event in all manner and mode that the entity chooses. This includes the right to telecast or not to telecast the event, by or through whom, and on what terms and conditions. In the event the entity chooses to televise its own events, the terms and conditions for televising such events are to be negotiated by it with any party with whom it wishes to negotiate.

The BCCI and CAB had a right under Article 19 [1] (a) to produce, transmit, telecast and broadcast their event directly or through its agent. The right to circulate information is a part of the right guaranteed under Article 19 [1] (a). Even otherwise, viewers and persons interested in sports by way of education, information, record and entertainment have a right to such information, knowledge and entertainment. The

content of the right under Article 19 [1] (a) reaches out to protect the information of the viewers also. In this case, there was a right of the viewers and also the right of the producer to telecast the event. In view of these two rights; there was an obligation on the part of the Department of Telecommunication to allow the telecasting of the event.

The grant of a licence under Section 4 of the Act is a regulatory measure and does not entitle MIB either to deny a licence to BCCI/CAB for the purposes of production, transmission and telecasting sports events or to impose any condition unrelated to Article 19 [2]. If such denial or imposition were made, it would amount to a prohibition.

The Constitution did not visualise any monopoly in Article 19 [1] (a). Hence DD could not claim the same nor could the commercial interest of DD or claim of exclusivity by it of generation of signals be a ground for declining permission under Section 4 of the Act. Hence the following restrictions that were sought to be imposed fell outside the ambit of Article 19(2) and were unconstitutional.

There was no monopoly in relation to what the viewer can see since satellites can beam directly on to television sets, through a dish antenna, all programmes whose footprints are receivable in the country.

The non-availability of a channel is of no consequence in the present days of technological development. Any person intending to telecast/broadcast an event could do so directly even without routing signal through the channels of DD or MIB. What was required was to ensure is that the secured channel did not interfere with each other. On account of the availability of innumerable satellites in the geo-stationary orbit of the hemisphere, the signals could directly be uplinked through any of the available transponders of satellite whose footprints can be received back through appropriate electronic device.

Merely because an organisation may claim profit from an activity whose character is predominantly covered under Article 19 [1] (a), it would not convert the activity into one involving Article 19 [1] (g) (Freedom to practise one's trade and profession).

Decision:

i) The Supreme Court held that the airwaves or frequencies were a public property. Their use had to be controlled and regulated by a public authority in the interests of the public and to prevent the invasion of their rights. Since the electronic media involved the use of the airwaves, this factor creates an inbuilt restriction on its use, as in the case of any other public property.

ii) The Supreme Court held that the right to impart and receive information is a species

of the right of freedom. The best means of imparting and receiving information as such is to have access to telecasting for the purpose. However, this right to have access to telecasting has limitations on account of the use of public property - viz, the airwaves - involved in the exercise of the right and can be controlled and regulated by a public authority. This limitation imposed by the nature of the public property involved in the use of the electronic media is in addition to the restrictions imposed on the right to freedom of speech and expression under Article 19 [2] of the Constitution.

iii) The Supreme Court instructed the Central Government to take immediate steps to establish an independent, autonomous public authority representative of all sections and interests in society to control and regulate the use of the airwaves. The Supreme Court said that a diversity of opinions, views and ideas cannot be provided by a medium controlled by a monopoly - whether the monopoly is of the State or any other individual, group or organisation. "As a matter of fact, private broadcasting stations may perhaps be more prejudicial to the free speech right of the citizens than government-controlled media, as explained in the body of the judgment. The broadcasting media should be under the control of the public as distinct from government. This is the command implicit in Article 19(1)(a)."

(Siddharth Narrain works with the Alternative Law Forum, Bangalore)

InfoChange News & Features, June 2009