

Part-9

Board of Control for Cricket in India v. Zee Telefilms Ltd.
(DB) (Markandey Katju, C.J.)

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2005 (2) CTC 609

IN THE HIGH COURT OF MADRAS

Markandey Katju, C.J. and F.M.Ibrahim Kalifulla, J.

W.A.No.636 of 2005 and W.A.No.638 and 676 of 2005 and
W.A.M.P.Nos.1246 and 1292 of 2005

2.5.2005

Board of Control for Cricket in India, (BCCI), having its registered office at
M.A.Chidambaram Stadium, Chennai – 5 having its Administrative Office at
Brabourne Stadium (North Stand), V.N.Road, Church Gate, Mumbai – 20,
rep. by its Secretary*Appellant*

Vs.

Zee Telefilms Limited, No.135, Continental Building, Annie Besant Road,
Worli, Mumbai – 18, rep. by its Executive Vice President – Legal Mr.Sanjay
Jaetep and others*Respondents*

Editors Note : The Order in W.P.No.4120/05 dated 21.3.2005 reported in 2005 (2) CTC 525 has been set aside in this order in W.A.No.636/05. The SLP (C) No. 10999-11001/05 filed against the order of the Division Bench reported hereunder was dismissed on 13.5.2005 by the Hon'ble Supreme Court.

Constitution of India, Article 226 — Other Authorities — Meaning of — Maintainability of Writ Petition against Board of Control for Cricket in India (BCCI) — International Cricket has become like big business and finances mainly come from grant of Television Rights — Other activities like selection of cricket team, controlling activities of players, etc. is done by utilizing these huge funds — Apex Court in *Zee Telefilms Ltd v. Union of India and others*, 2005 (1) SCALE 666 impliedly held that grant of Telecasting Right is public function — BCCI may not be State under Article 12 of Constitution of India but it performs public function in the matter of grant of Telecasting Rights — Some amount of regulation is required since huge amounts of money is generated by playing international cricket — Hence writ is maintainable against BCCI. (Paras 94 to 96)

Constitution of India, Article 14 — Grant of largess — Modality to be adopted in matter of grant of such largess — Public tender *vis-à-vis* private negotiation — BCCI inviting public tender for grant of telecasting rights — BCCI deciding to continue process of public tender and inviting highest two tenderers for negotiation — Private negotiation is permissible in exceptional circumstances even without resorting to public tender — Originally public contract should be given by public auction / public tender after due publicity — But in exceptional

circumstances public contract would be given by private negotiation provided transparency and fairness are maintained — Court will not invalidate such grant of public contracts by private negotiation so long as they are transparent and fair. (Paras 97 & 98)

Contract — Public Contract — Tender — Cancellation of tender process — Tender process given up and private negotiations started by inviting highest two tenderers — Highest tenderer has no right to insist that he should alone be invited for negotiation — Legally there is no bar for inviting not only the highest bidder but also next highest bidder for private negotiation — Central Vigilance Commission guidelines apply only to Government Departments or Government Corporations and not to Society like BCCI which is registered under Tamil Nadu Societies Registration Act. (Para 100)

Contract Law — Letter of Intent — Decision to award contract — Draft Letters of Intent — Legal effect — Decision to award Television Rights would not be equated to award of contract — Exchange of Draft Letters of Intent would not amount to conclusion of contract — Correspondence between parties also reveal that there is no concluded contract. (Paras 113 & 116)

Contract Law — Letters of Intent — Draft Letter of Intent — Final Letter of Intent is document which precedes Contract — Draft Letter of Intent is even less efficacious than final Letter of Intent — Letter of Intent merely expresses intention to enter into contract and does not create binding legal relationship between parties. (Paras 121 & 126)

Indian Contract Act, 1872, Section 7 — When proposal gets converted into promise — Proposal gets converted into promise only after acceptance which should be absolute and unqualified — Mere negotiation will not give rise to any legal obligation — Decision to award contract does not mean that contract has been awarded — Contract comes into existence only if there is offer, acceptance and consideration — On facts held that correspondence between BCCI and Zee Telefilms Ltd. would show that matter was at inchoate stage and did not fructify into binding contract — Draft Letters of Intent and subsequent correspondence would show that there is no concluded contract between parties. (Paras 117, 118 & 120)

Mala fides — Proof of — Plea and Proof — “Collusion and *mala fides*” — Allegations of collusion like those of *mala fides* have to be established by strong proof — Inference of collusion or *mala fides* cannot be made on mere hunches, suspicions, conjectures and surmises — Strong clinching proof is necessary for rendering finding of *mala fides* — Finding of *mala fides* has to be specifically pleaded and proved since it tarnishes reputation of person. (Paras 140, 141)

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Law of Tender — Tender conditions specifically provide that BCCI reserves right and absolute discretion to cancel entire tendering process without assigning any reason — Parties accepting such tender conditions and taking part in tender process — Compelling circumstances necessitated cancellation of tender process which is approved by Marketing Committee of BCCI and by General Body Members — Cancellation of tender process was well within the right of BCCI and does not suffer from any infirmity. (Para 164)

Constitution of India, Article 226 — Jurisdiction of Writ Court in tender matters — BCCI which is Society registered under Societies' Registration Act is not governed by any Statutory Rules — BCCI is also not State as envisaged under Article 12 of Constitution of India — Though writ may be maintainable on facts held that writ should not have been entertained since Zee Telefilms Ltd have failed to establish that they have got legal right to get Contract and such legal right has been infringed by BCCI while discharging public function. (Para 171)

Practice & Procedure — Suppression of material fact — Non-disclosure of material fact would entail dismissal of writ petition — Writ petitioner deliberately suppressed Letters of Intent as well as letter written by Zee Telefilms Ltd. to Member of Finance Committee of BCCI which clearly disclose that there is no concluded contract between parties and that entire matter was at inchoate stage viz at stage of negotiation — Had above letter been disclosed writ petition would have been dismissed at very outset since there is no legal right in favour of writ petitioner — Writ petitioner has suppressed material facts and has approached Court with unclean hands — Writ petition is liable to be dismissed. (Para 172)

Practice & Procedure — Judgment — Language of Court while writing judgment — Court should always use mild, restrained and moderate language and should not make disparaging, intemperate and harsh remarks against parties — Judge should adopt utmost restraint against using disparaging language in judgments. (Paras 173 & 176)

Constitution of India, Article 226 — Writ Jurisdiction — Rendering findings on merits and declining to grant relief to writ petitioner and relegating writ petitioner to file suit for damages — Writ petitioner has been relegated to file suit for damages — Single Judge should not have recorded finding that writ petitioner did not receive fair treatment and castigated BCCI and its President — Though Learned Judge observed that Trial Court will not be influenced by such findings strong observations made by High Court is bound to influence Trial Court when it decides suit. (Para 172)

CASES REFERRED

S. Selvarani v. Commissioner, Karaikudi Municipality, 2005 (1) CTC 81 : 2005 W.L.R. 30....(Para 97); *Shri Sachidanand Pandey v. State of W.B.*, AIR 1987 SC 1109....(Para 99); *Indian Railway Construction v. Ajay Kumar*, 2003 (4) SCC 579....(Para 102); *E.P.Royappa v. State of Tamil Nadu*, AIR 1974 SC 555....(Para 102); *Delhi Development Authority v. UEE Electricals Engg. (P) Ltd.*, AIR 2004 SC 2100....(Para 103); *Shankarlal Narayandas Mundade v. The New Mofussil Co. Ltd.*, AIR 1946 PC 97....(Para 117); *K.Sriramulu v. T.Aswatha Narayana*, AIR 1968 SC 1028....(Para 117); *M.M. & M. Refinery, Bangalore v. M.S.S.I. Corporation*, AIR 1974 Mad 39....(Para 117); *Associates Builders v. D.D.A.*, 1994 (2) Ar. LR 161....(Para 117); *S.V.R.Mudaliar & Others v. Rajabu F.Buhari & Others*, 1995 (4) SCC 15....(Para 117); *Progressive Constructions Ltd. v. Bharat Hydro Power*, 59 DLT 1995 290....(Para 117); *Bharti Televentures Ltd. v. Bell South International AsiaPacific Inc. USA*, 2000 (55) DRJ 216....(Para 117); *Baron International Airways v. Haj Committee*, AIR 1997 Del. 247....(Para 122); *Rajasthan Coop. Dairy Federation Ltd. v. Maha Laxmi Mingrate Marketing Service Pvt. Ltd.*, 1996 (10) SCC 405....(Para 125); *Radhakrishna Agarwal v. State of Bihar*, AIR 1977 SC 1496....(Para 166); *Kerala State Electricity Board v. Kurien*, 2000 (6) SCC 293....(Para 166); *Kulchinder Singh v. Hardayal Singh*, 1976 (3) SCC 828....(Para 166); *B.D.A v. Ajai Pal Singh*, 1989 (2) SCC 116....(Para 166); *Calcutta Gas Company (Proprietary) Ltd., v. State of West Bengal and others*, AIR 1962 SC 1044....(Para 168); *State of Orissa v. Madan Gopal*, AIR 1952 SC 12....(Para 168); *Director of Settlements, A.P and others v. M.R.Apparao and another*, 2002 (4) SCC 638....(Para 169); *National Textile Corporation v. Haribux*, 2004 (9) SCC 786....(Para 170); *S.J.S. Business Enterprises v. State of Bihar*, 2004 (7) SCC 166....(Para 172); *M.P.Farook v. State of T.N.*, 1995 W.L.R. 706....(Para 172); *Tessta Setalvad and another v. State of Gujarat and Others*, AIR 2004 SC 1979....(Para 174); *Mr. 'X' v. Hospital 'Z'*, 2003 (1) CTC 118 : 2003 (1) SCC 500...(Para 179).

Mr. K.K.Venugopal, Senior Counsel, Dr.Abishek Mann Singhvi, Senior Counsel, Mr.T.R.Rajagopalan, Senior Counsel & Ms.Radha Rangasamy, Advocate for Mr.S.Raghunathan, Advocates for Appellant in W.A.636/05 for Respondent No. 2 in W.A.638/05 and for Respondent No. 1 in W.A.676/05; Mr.V.V.Banarjee, Senior Counsel; Mr.A.L.Somayajee, Senior Counsel for Mr.T.Poornam for Appellant in W.A.638/05 for Respondent No. 2 in W.A.676 & 636/05; Dr.Rajeev Dhavan, Senior Counsel, Mr.P.S.Raman, Senior Counsel With Mr.Maninder Singh M/s. P.R.Raman, C.Seethapathy & V.P.Raman for Appellant in W.A.676/05 & for Respondent No. 1 in W.As.636 & 638/05.

Mr.Iqbal Chagla, Senior Counsel, Mr.Vijaynarayan, Senior Counsel for Mr.R.Parthiban for Respondent No. 3 in all the W.As.

W.A. No.636,638/2005 ALLOWED & W.P.No.4120/2005, W.A.NO.676/2005 DISMISSED

ORDER

Markandey Katju, C.J.

1. These writ appeals have been filed against the impugned judgment dated 21.3.2005 passed in W.P.No.4120 of 2005.

2. We have heard learned counsel for the parties and have perused the record.

3. W.A.No.636 of 2005 has been filed by the Board of Control for Cricket in India (hereinafter referred to as "BCCI") having its registered office at M.A.Chidambaram Stadium, Chennai. W.A.No.676 of 2005 has been filed against the same order of the learned single Judge by Zee Telefilms Limited (hereinafter referred to as Zee) which was the petitioner in

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W.P.No.4120 of 2005. W.A.No.638 of 2005 has been filed by Mr. Jagmohan Dalmiya, the Chairman of the BCCI.

4. W.P.No.4120 of 2005, in which the impugned order was delivered, was filed for a writ of certiorarified mandamus calling for the records of the first respondent - BCCI in its communication dated 21.9.2004 cancelling the tender process dated 7.8.2004, to quash the same and consequently direct the first respondent (BCCI) to act in furtherance of the decision arrived at on 5.9.2004 in the matter of exclusive television rights for telecast of cricket matches in India under the aegis of the first respondent and the International Cricket Council.

5. It is alleged in paragraph 2 of the affidavit filed in support of Writ Petition No.4120 of 2005, wherein the impugned order was passed by the learned single Judge, that the petitioner (Zee) is a company registered under the Indian Companies Act and is *inter alia* one of the largest vertically integrated media entertainment groups in India. It is further alleged that the petitioner had been engaged in the business of production and broadcast of Television programmes including live events since 1992. It is also alleged that the petitioner had also telecast live cricket on various occasions.

6. The facts of the case as alleged in the affidavit filed in support of W.P.No.4120 of 2005 are that BCCI had invited bids/tenders for telecast of cricket matches in India for the period from October 1, 2004 to September 30, 2008, by an Invitation to Tender (ITT) dated 7.8.2004, in response to which the petitioner had submitted its bid/tender on 14.8.2004.

7. When the tenders were opened on the same day *i.e.*, 14.08.2004, it was found that the petitioner had emerged as the highest bidder having offered US \$ 260 million, while the ESPN Star Sports (hereinafter referred to as "ESPN") was the second highest bidder offering US \$230 million. The details of the bid are as under:

Sl. No.	Bidder	Amount (US Dollors in Million)
1	Zee Telefilms Limited	260.76
2	ESPN Star Sports	230
3	Prasar Bharati	150
4	Sony Network	132
5	Ten Sports	115

8. In paragraph 11 of the petitioner's affidavit it is stated that the previous contract for the last four years *i.e.*, 2000 to 2004 had been for a price of US \$ 55 million. It is further alleged that on 29.8.2004 a communication was addressed by the BCCI to the petitioner-Zee as well as ESPN by which both were invited to attend the meeting of the Television

Rights Committee of the BCCI scheduled on 4.9.2004 at Chennai. It is further alleged that the petitioner was also informed that its representatives attending the meeting should be authorised to enter into negotiations with the BCCI if required. It is also alleged that the petitioner had replied to the said communication stating that its authorised representatives would attend the meeting of the Television Rights Committee of the BCCI scheduled on 4.9.2004, and shall also have the authority to negotiate and conclude appropriate arrangements.

9. However, it is alleged in paragraph 14 of the petitioner's affidavit that upon reaching the meeting on 4.9.2005, the representatives of the petitioner to their surprise found that another bidder namely, ESPN (whose bid was admittedly lower than that of the petitioner) was also attending the meeting. It is alleged that this act of inviting ESPN which was a lower bidder, was clearly impermissible in terms of the instructions issued by the Central Vigilance Committee's Circular issued with respect to the practices and procedures to be followed by authorities in matters relating to floating of tenders. It is further alleged that the said action was also contrary to the basic principles pertaining to award of contracts by a tender process and smacks of arbitrariness, impropriety and malice on the part of the 2nd respondent - Mr. Jagmohan Dalmiya, the then President of the BCCI. It may be mentioned that among the bidders only ESPN had been invited along with the highest bidder *i.e.*, the petitioner - Zee for the said meeting on 4.9.2004.

10. In paragraph 19 of the petitioner's affidavit it is alleged that it was asked to deposit a sum of US \$ 20 million within 48 hours and then the Letter of Intent (LOI) shall be issued to the petitioner. It is alleged that there was no such requirement/condition in the original terms to be complied with by the successful bidder. It is further alleged that however the said payment was made by the petitioner on 7.9.2004 in a span of just 48 hours.

11. In paragraph 20 of the petitioner's affidavit it is alleged that vide letter dated 6.9.2004 the petitioner had intimated BCCI that it was in a position to transfer US \$ 20 million, and requested information from BCCI regarding the details of the bank where the transfer had to be made. It is further alleged that on 7.9.2004, BCCI issued a communication to the petitioner informing the details of the concerned bank and on the same day itself petitioner confirmed that an amount of US \$ 20 million had been transferred to the bank account of BCCI.

12. It is alleged in paragraph 21 of the petitioner's affidavit that by letter dated 11.9.2004, petitioner had informed the BCCI that they were fully ready to implement the contract and would like to discuss the terms proposed in the draft Letter of Intent for bringing them in conformity with the broad understanding arrived at between the parties in accordance with the terms and conditions of the tender document.

13. In paragraph 23 of the petitioner's affidavit it is alleged that ESPN was permitted by BCCI, acting under the dictates and/or influence of

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Mr. Jagmohan Dalmiya to improve its bid. It is further alleged that in the meeting ESPN offered a bid of US \$ 308 million for rights for a period of 5 years while the Invitation to Tender was for four years only. It is admitted, however, that subsequently, during negotiation ESPN agreed to give up the demand for the 5th year and agreed to pay US \$ 308 million for television rights for a period of 4 years.

14. In paragraph 10 of the petitioner's affidavit it is alleged that at the time of calling of the tender the then President of the BCCI Mr. Jagmohan Dalmiya enquired from the Chairman of the petitioner - Zee as to whether they would bid "aggressively", to which the latter replied they would not. It is further alleged that when the petitioner had also raised its bid to US \$308 million for 4 years, this made Mr. Dalmiya hostile to the petitioner, and he launched a long and arduous negotiation process contrary to the terms of the tender and also contrary to the guidelines issued by the Central Vigilance Committee, by inviting ESPN which had lost the tender to participate in the negotiation process. It is further alleged that the process, which also included evaluation of the tender, lasted for 20 days from August 14 to September 5, 2004, during which, valuable time for preparation was lost.

15. In paragraph 25 of the petitioner's affidavit it is alleged that the negotiation was virtually a re-bid, and this was done in a *mala fide* manner with a view to thwart the petitioner from winning the bid by pitting the petitioner once again against the financial might of two large global financial giants viz., Star TV and Walt Disney (partner of ESPN, and one of the largest companies in the field of electronic media and entertainment) who raised their offer from US \$ 230 million to US \$ 308 million. It is further alleged that accordingly the petitioner who had submitted the highest bid for US \$ 260 million was asked to match the higher amount offered by the 3rd respondent in the negotiations, namely, US \$ 308 million during the re-negotiation process which took place on 4/5.9.2004. It is further alleged that during the entire re-negotiation process Mr. Dalmiya was explicitly hostile to the petitioner's representatives and there were sharp exchanges between him and the representatives of the petitioner-Zee leading him to insisting for an apology from the petitioner's representatives, which they refused to give. It is further alleged that for some hidden reasons Mr. Dalmiya did not want the petitioner to emerge as the winner in the tender process. It is also alleged that in spite of the obstructive attitude of Mr. Dalmiya, the unanimous opinion of the rest of the Tender Committee and the Marketing Committee of the BCCI was to award the tender in favour of the petitioner who was originally the highest bidder. It is further alleged that since in the renegotiation on 4/5.9.2004 the petitioner Zee matched the offer of US \$ 308 Million of ESPN. Mr. Dalmiya, who was hostile to the petitioner and was in favour of ESPN, had to accept the fact that the petitioner could not be denied the acceptance of the tender. It is further alleged that accordingly the BCCI accepted the tender of the petitioner, and forthwith i.e., on 5.9.2004 it demanded the petitioner to pay within 48 hours an advance payment of US \$

20 million, even though that was not a tender condition. It is further alleged that the payment of US \$ 20 million was paid by the petitioner on 9.9.2004 itself, as part of payment of the bid amount.

16. In paragraph 26 of the petitioner's affidavit it is alleged that having failed to secure the contract ESPN made efforts to somehow scuttle the entire process and start it afresh. It is alleged that this can be understood in the context of the fact that the petitioner was the only private Indian Channel that can take on the telecast of cricket. It is further alleged that ESPN was a foreign channel (American Partnership) which had virtual monopoly over Asian cricket and would be obviously concerned at the competition from an Indian channel. It is further alleged that thus a re-bid with ESPN armed with the resources of its partners like Walt Disney, *etc.*, could always outbid the petitioner solely in order to perpetuate its monopoly. It is further alleged that the nullification of the first bid would sub-serve the interest of ESPN and also ensure that ESPN achieved its purpose of not letting the petitioner get the contract. It is also alleged that with this in mind ESPN moved a writ petition (being Writ Petition No.2462 of 2004) in the Bombay High Court challenging the award of the tender to the petitioner.

17. In paragraph 27 of the petitioner's affidavit it is alleged that at the first hearing of the writ petition in the Bombay High Court, the BCCI promptly suggested a re-bidding confining it to the petitioner and ESPN, for which ESPN readily agreed. It is further alleged that realising the game plan of some of those in the BCCI and ESPN, so acting in unison, the petitioner declined that offer and insisted on contesting the petition in the Bombay High Court.

18. It is alleged that after the petitioner was chosen for the award of the contract on 5.9.2004 on the very next day *i.e.* on 6.9.2004 ESPN filed the aforesaid Writ Petition in the Bombay High Court against the award of the contract to the petitioner.

19. In paragraph 29 of the petitioner's affidavit it is alleged that the writ petition before the Bombay High Court was filed basing it on a letter which M/s. Pricewater House Coopers (herein after referred to as "PWC" - an international audit firm originally appointed by BCCI to assist in the tender process) had written to an associate of ESPN on 6.9.2004, the date on which the writ petition was filed in response to the letter of the same date written by the associate. It is further alleged that the purport of the said letter was that PWC was not required to and did not evaluate the tender as stipulated in the tender, while in fact the BCCI had requested the PWC to evaluate the tender which the PWC had declined to do, and that the PWC did not evaluate the tender was expressly mentioned to all the bidders on the opening of the tenders and no one including ESPN objected to that and had acquiesced in that. It is alleged that the writ petition in the Bombay High Court was founded by ESPN on the basis that the letter of PWC established that a tender condition was violated and the said violation, according to ESPN, had led to the disqualification of the petitioner - Zee. It is further

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alleged that while founding the writ petition in the Bombay High Court on the aforesaid letter of PWC, the ESPN (the petitioner before the Bombay High Court) did not disclose to the Bombay High Court that PWC was an auditor of ESPN Software Private Limited, and also ESPN (ESS) and Walt Disney from which PWC was receiving huge audit fee of over US \$ 12 million a year and that PWC had written the letter in violation of its confidentiality and professional ethics to BCCI, only to enable ESS to secure a cause of action to approach the High Court. It is further alleged that this violation led to the disqualification of the petitioner-Zee (respondent before the Bombay High Court).

20. It is alleged in paragraph 31 of the petitioner's affidavit that while PWC provided relevant details to its highly valuable client, ESPN, when the solicitors of the petitioner sought the same information, much after 6.9.2004, PWC refused to part with the same on the ground that it could not disclose the client's-BCCI's confidential information to any one. It is alleged that the writ petition before the Bombay High Court was founded on a letter which is a half-truth and amounted to breach of professional mis-conduct.

21. In paragraph 32 of the petitioner's affidavit it is alleged that during the hearing before the Bombay High Court the BCCI made a statement that in view of the fact that the Australia - India Cricket Series was to commence on 6.10.2004 and to avoid the disputes before the Court, the BCCI would like to go for re-bidding in which both the petitioner and ESPN could participate. It is alleged that the said offer was immediately accepted by the ESPN, but the petitioner pursuant to its decision taken by its Board refused to accept the proposal for re-bid. It is further alleged that accordingly the Bombay High Court decided to go ahead with the hearing of the writ petition, and it granted a *status quo* order on 15.9.2004. It is further alleged that despite the *status quo* order Mr.Dalmiya had called for the meeting of the Marketing Committee of the BCCI and obtained total authority for himself and another to handle not merely the Court case but also the entire issue of telecasting, so that he could act without reference to the democratic structure of the BCCI.

22. It is alleged in paragraph 34 of the petitioner's affidavit that BCCI filed a counter affidavit before the Bombay High Court repudiating the contentions and claims of ESPN and confirming that the petitioner – Zee Telefilms Limited was the highest bidder and denying that it was not qualified.

23. It is alleged in paragraph 35 of the petitioner's affidavit that the Bombay High Court heard the matter on day-to-day basis on 15.9.2004, 16.9.2004, 17.9.2004, 20.9.2004 and 21.9.2004. It is further alleged that the Bombay High Court heard ESPN completely and then the petitioner made submissions ahead of the BCCI. It is further alleged that the counsel for BCCI made his submissions on 20.9.2004 and submitted before the Bombay High Court that the pendency of the Court proceedings would be likely to

affect the telecast of the Cricket series between India and Australia from 6.10.2004. The learned counsel for the BCCI informed the Bombay High Court of a letter received from the Australian Cricket Control Board, expressing concern over the controversy, and submitted that either parties *i.e.*, ESPN and the Petitioner-Zee could resolve the matter by re-bidding or otherwise, failing which there may be no option for the BCCI but to cancel the whole tender process, which was strongly opposed by the Zee. It is alleged that on the next day *i.e.*, 21.9.2004 BCCI filed an affidavit enclosing a letter of the Australian Cricket Control Board saying that unless the issue of the telecast of the match was decided expeditiously they may be forced to cancel the tour. It is further alleged that BCCI had also submitted that there was no concluded contract between the petitioner and BCCI, as the petitioner had not agreed to the terms of the draft letter of intent that was sent to them. It was submitted by BCCI that if the hearing of the case continued, the cricket series between India and Australia would be disturbed, and therefore it was imperative that ESPN and ZEE come to an understanding to conclude the issue before the Court, in the interest of cricket and to allow the BCCI to handle the production and telecast of the three cricket series featuring India-Australia, India-South Africa, and India-Pakistan during the period between 6.10.2004 and May 2005.

24. In paragraph 37 of the petitioner's affidavit it is alleged that at that stage the ESPN took the stand that as there was no Letter of Intent issued and there was no concluded contract, ESPN (the petitioner before the Bombay High Court) was willing to withdraw the writ petition if respondent-BCCI agreed to cancel the tender. It is alleged by Zee that the basis of the said stand taken by ESPN was obviously to oust Zee from the contract. It is further alleged that in view of the above statement the BCCI voluntarily cancelled the entire tender process and the Bombay High Court on 21.9.2004 permitted the writ petition of ESPN to be withdrawn after recording the statements of the parties.

25. It is alleged in paragraph 39 of the petitioner's affidavit that the entire process mentioned above was gross abuse of the process of the Court and to further the conspiracy to oust the petitioner-Zee, which was the successful tenderer.

26. It is alleged that the entire withdrawal of the writ petition was theatrically enacted behind the scenes by BCCI and ESPN with a view to defeat the vested rights of the petitioner-Zee. By withdrawing the writ petition before the Bombay High Court, ESPN effectively got the relief which it had sought for, namely, to get petitioner's bid cancelled. It is alleged that the most serious consequence of the collusive action of the BCCI was that the rights vested in the petitioner under the tender terms which had been accepted and confirmed by BCCI by accepting the advance amount after the writ petition had been filed by ESPN had been completely destroyed. It is alleged that the petitioner's right under Articles 14 and 19(1)(g) of the Constitution of India had been violated thereby. What ESPN

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could not achieve directly had been achieved by it indirectly and colourably by the stand taken by BCCI before the Bombay High Court. It is alleged that although the writ petition before the Bombay High Court was dismissed as withdrawn, in substance, the petitioner had been prevented from getting the award of tender, in view of the conduct of BCCI canceling the tender process. It is alleged that the petitioner had on the basis of the tender accepted by the BCCI, had gone ahead making and committing investments to the tune of Rs.200 crores for launching a sports channel, which it had decided to launch on 2.10.2004. It is further alleged that the petitioner had also made all arrangements to telecast the cricket matches under the contract which were to commence on 6.10.2004, and the petitioner had also communicated the same to BCCI on 14.9.2004. It is further alleged that the action of BCCI canceling the tender process was *mala fide*, and intended to harm the business and reputation of the petitioner and also to benefit ESPN, who are the monopoly business competitors of the petitioner, who had lost the bid and also the re-bid which Mr.Dalmiya conducted under the garb of negotiation. It is further alleged that enormous preparation had been made since the time BCCI announced the award of television rights to the petitioner-ZEE, and it had suffered great loss by the action of BCCI.

27. It is further alleged that BCCI unilaterally agreed to go for re-tender and ESPN having achieved its object conveniently withdrew its writ petition filed before the Bombay High Court. It is also alleged that aggrieved against the arbitrary action of the BCCI the petitioner moved the Supreme Court by way of a petition under Article 32 of the Constitution in W.P. (Civil) No.541 of 2004, and also by filing an S.L.P. under Article 136 of the Constitution. It is further alleged that the writ petition under Article 32 was referred to the Constitution Bench of the Supreme Court and the Constitution Bench in its verdict delivered on 2.2.2005 held that BCCI is not a “State” under Article 12 of the Constitution. However, the Supreme Court also observed:

“Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian Cricket Team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a State. Under the Indian jurisprudence there is always a just remedy for violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution which is much wider than Article 32.”

28. It is alleged that BCCI is a society registered under the relevant society’s registration law in the State of Tamil Nadu. Although it is not a “State” under Article 12 of the Constitution of India, it is alleged by the learned counsel for the petitioner that the writ petition under Article 226 of

the Constitution is maintainable in view of the above quoted observation of the Supreme Court. It is alleged that the impugned actions of the respondents are *mala fide*, arbitrary and illegal and they destroyed the petitioner's fundamental and constitutional rights guaranteed under Articles 14, 19 and 21 of the Constitution. It is further alleged that BCCI is a body discharging public functions subject to the discipline of public law and the principles of fairness and transparency. It is alleged that BCCI had acted illegally, arbitrarily and in a *mala fide* manner. It is further alleged that the tender conditions relied upon by BCCI did not empower it to cancel the award of the contract after the money was accepted. It is alleged that the action of the BCCI had already caused and is continuing to cause serious irreversible prejudice to the petitioner.

29. Counter affidavits have been filed by all the three respondents before the learned single Judge. In paragraph - 4 of the counter affidavit filed on behalf of BCCI certain preliminary objections have been taken which we have perused. It is alleged in Clause (a) of the preliminary objection that the entire thrust of the alleged grievance of the petitioner related to sale/grant of "T.V.Rights" which is a matter of contractual rights, and therefore a writ petition under Article 226 is not maintainable.

30. It is further alleged in Clause (b) of the preliminary objection that the alleged contract itself stands frustrated. It is alleged therein that the invitation to tender was in respect of rights set out therein for all cricket matches, domestic and international for the period from 1.10.2004 till 30.9.2008 to be awarded as one single contract for which a single bid amount was to be offered. The offer, after negotiations, of the petitioner was US \$308 million. The Australia and South Africa series were completed with the television and broadcast being made by BCCI through Ten Sports for the production and Set Satellite Singapore Private Limited for international telecast and Prasar Bharati on the National Terrestrial network. Therefore, the original contract for which bids were invited no more exists and stands frustrated. It is also alleged that on account of subsequent events having intervened namely, the India-Australia series, the South Africa series, and the tender being one and indivisible, the original tender does not exist any more. In the circumstances, the petitioner cannot make any claim under the said tender.

31. In Clause (c) of its preliminary objection in the counter affidavit the BCCI alleged that the function of televising cricket matches was not in the public domain and was neither a public duty nor a public function performed by the BCCI, but it was purely in the private domain. The entire contract was non-statutory. It is further alleged that the remedy under Article 226 of the Constitution was not available to enforce any non-statutory contract, and the remedy if any for the alleged cancellation of the tender process lies in the ordinary civil law *i.e.*, by filing a civil suit.

32. In Clause (f) of the preliminary objection it is alleged that when the BCCI takes the decision to cancel the entire tendering process by virtue of the

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specific power retained in the Invitation to Tender, the said decision cannot be subjected to judicial scrutiny under Article 226 of the Constitution of India.

33. In Clause (g) of the preliminary objection it is alleged that the petitioner itself accepted that there was no concluded contract and that only a draft Letter of Intent was sent. The petitioner itself raised disputes and protested against the terms and conditions which had to be fulfilled, and hence there was no concluded contract.

34. In Clause (k) of the preliminary objection it is alleged by the BCCI that by mere giving of a voluntary Bank to Bank Wire Transfer of any amount and return thereof, the petitioner can not acquire any vested right. It has been willfully suppressed by the petitioner that the so called voluntary payment was made by direct Bank to Bank Wire Transfer to the Bank Account of BCCI and not through any other modality of Negotiable Instrument. It is further alleged that there had been no correspondence and/or act on the part of BCCI by which it can be said that BCCI agreed to and accepted the offer of the petitioner.

35. In Clause (l) of the preliminary objection it is alleged by the BCCI that the voluntary deposit of the petitioner was also returned on 22.9.2004 and the same was duly acknowledged for and on behalf of the petitioner. It is further alleged that the decision to revoke the entire tender process was also approved unanimously by the Marketing Committee of BCCI held on 28.9.2004 at Calcutta. It is further alleged that in the meeting of the Marketing Committee of BCCI held on 5.9.2004 the requirements of BCCI and the evaluation of offers were only discussed and nothing happened beyond that. It is further alleged that no resolution of whatsoever nature was adopted in the said Marketing Committee Meeting of the BCCI.

36. In Clause (n) of the preliminary objection it is alleged that the alleged claims in the writ petition are disputed questions of fact and the same cannot be decided in writ proceedings.

37. In Clause (p) of the preliminary objection it is alleged that the petitioner had suppressed the fact that the deposit of US \$ 20 million was made by it on its own volition and that the same had been returned by the BCCI on 22.9.2004 and was duly acknowledged by it.

38. In Clause (q) of the preliminary objection it is alleged that in view of the provisions of the Specific Relief Act and the subject matter being contractual in nature, no writ lies under Article 226 of the Constitution.

39. In Clause (r) of the preliminary objection it is alleged by BCCI that being the owner of the events it is entitled to deal with its rights and the petitioner in the absence of express vested right cannot compel BCCI to have any dealing with it.

40. It is alleged in paragraph 7 of the counter affidavit filed by BCCI that during the course of negotiations on 4.9.2004 the petitioner admitted

that it had no production unit of its own capable to produce any International Cricketing event and it out sources production equipment and manpower by hiring the same from other available sources. It is further alleged that in the course of the said meeting ESPN stated that it had the full production unit of its own including most experienced personnel and it also out sources some of the equipment by hiring the same. It is further alleged that thus it was an admitted position that the petitioner-Zee had also does not have its own full-fledged production unit for producing live international cricket matches. It is further alleged that the following equipments are essential for the production of live cricket match for international standard.

REQUIREMENTS OF PRODUCTION UNIT

1. Equipments of international standard for uplinking and receiving signals directly from the ground earth station including portable and hand-held earth station.
2. Sufficient number of highest quality of cameras (minimum requirement 14).
3. Modern Technologically Developed Editing Unit.
4. Computer Generated Graphics and Scoring System.
5. Full range of lenses.
6. Stump Vision Cameras.
7. Super Slow Motion Cameras.
8. Balls Speed Monitor.
9. Hawkeye Monitor.
10. Data Windows.
11. Production Control Panel.
12. Snickometer.
13. Red Zone Cameras.
14. Stump Vision with wide and Reverse Angle Cameras.
15. Digital Cable System.

41. It is alleged that the petitioner does not possess most of these equipments and the required manpower and the same are out sourced by the petitioner.

42. In paragraph 8 of the counter affidavit filed by the BCCI it was denied that the action of the BCCI are arbitrary or *mala fide* or subject to judicial review under Article 226 of the Constitution of India. It was also denied that any contract was ever granted to the petitioner, and it is alleged that no commitment was ever made to any party including the petitioner. It is alleged that no element of public duty/function was involved in the grant of telecast rights to the petitioner.

43. In paragraph 9 of the counter affidavit filed by the BCCI it is alleged that no decision was taken to accept the bid of the petitioner. It was

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denied that there was any award of a contract in favour of the petitioner. It was also denied that US \$ 20 million was accepted by BCCI as part of the bid amount. It was alleged that the petitioner had willfully suppressed that the sum of US \$ 20 million was transmitted to the Bank Account of the BCCI through “Bank to Bank Wire Transfer” by the petitioner on its own volition and that the said amount was returned by BCCI on 22.9.2004, and acknowledged for and on behalf of the petitioner. It is alleged that BCCI by invoking the specific powers retained in Clause 5.3, 5.4(c) and 5.4(d) of the Invitation to Tender cancelled the tender process. The BCCI had retained the right and absolute discretion at any time to reject all or any tenders and not to assign any reason for the same. The decision to cancel the tender process was strictly in accordance with law and taking into account the uncalled for litigations and *mala fide* acts and conducts of the parties. It is further alleged that in the Working Committee Meeting held on 16.9.2004, by unanimous decision the then President of the BCCI Mr. Dalmiya was empowered to deal with all eventualities arising out of the tender process. The decision to cancel the tender process was also unanimously ratified by the Members of the Marketing Committee of the BCCI on 28.9.2004 at Calcutta, and it was also informed to all the Members of the BCCI in the Annual General Meeting held on 30.9.2004 at Calcutta which was accepted and acknowledged by the Members present. It is further alleged that the petitioner had willfully suppressed that 27 out of 30 members of the BCCI unanimously demanded through requisition nomination of Mr. Jagmohan Dalmiya as the “Patron-in-Chief “ of BCCI taking into account his exemplary services provided to the game of cricket. Even the rest of the 3 Institutional Members have not raised any objection to such nomination.

44. In paragraphs 11 and 12 of the counter affidavit filed by the BCCI it was denied that the petitioner fulfilled the required eligibility criteria. It is alleged that admittedly the petitioner had no “In House Production” capability and it had never produced any international cricketing event as the Event Owner or original License Holder of the signals. It was also denied that the petitioner entered into any understanding with Prasar Bharti for the use of its terrestrial network for broadcasting/telecasting of matches as alleged. Only ESPN produced the agreement with Prasar Bharti for telecast on their terrestrial network through Doordarshan.

45. In paragraph 13 of the counter affidavit filed by the BCCI the allegation in paragraph 10 of the affidavit filed by the petitioner in support of the writ petition that the then President of the BCCI Mr. Jagmohan Dalmiya enquired from the Chairman of the petitioner as to whether they would bid aggressively has been denied.

46. As regards the contents in paragraph 14 of the petitioner’s affidavit, it is stated in paragraph 16 of the counter affidavit filed by the BCCI that as owner of the Event and in terms of the Invitation to Tender BCCI was at absolute liberty to decide the methodology of granting its rights as it deems

fit and proper, including calling such parties for negotiation. It is alleged that the Invitation to Tender retained a specific right to waive any condition and arrive at any conclusive decision as it may deem fit and proper including acceptance of any tender or rejection thereof.

47. Clause 3.8 (b) and (c) of the Invitation to Tender provides:

“(b) BCCI may, in its unfettered discretion, decide to accept a Tender or reject it and it shall not be obligatory on its part to provide any reason therefore.

(c) BCCI shall have unfettered right to negotiate with any Tenderer as it may deem fit and necessary. While it shall be open to BCCI to negotiate any terms or conditions with any Tenderer so as to arrive at any conclusive decision, the same shall not be construed as a ‘right’ available to any one or that the same shall not be treated as precedent in any form or manner.”

48. It is alleged by the BCCI that the tender conditions having been accepted by the parties including the petitioner who accepted and acknowledged the above stipulations, Zee was debarred from raising any alleged dispute with regard to the acts and conducts on the part of the BCCI. It is stated that there was no bar under the Invitation to Tender to invite ESPN for negotiations merely because its original bid was lower than that of the petitioner.

49. In paragraph 17 of the counter affidavit filed by the BCCI it is denied that the instructions issued by the Central Vigilance Commission’s Circular regarding practice and procedures to be followed in matters relating to floating of tenders is applicable to BCCI. It was further alleged that BCCI was not a “State” under Article 12 of the Constitution and was within its rights to negotiate with any one as per the lawful rights expressly reserved in the Invitation to Tender and duly accepted by the petitioner and other parties. The C.V.C. guidelines apply only to Government departments and Government corporations.

50. In paragraph 17 of the counter affidavit of the BCCI it is also stated that since ESPN had offered US \$ 308 million for 4 years the petitioner was asked whether it was prepared to match the said amount. It is also alleged that petitioner was also asked as to whether it would be in a position to deposit US \$ 20 million within 48 hours. It is alleged that this obviously meant 48 hours from the date of issuance of the letter of intent. However, no decision was taken in the said meeting. It is further alleged that there was no Letter of Intent issued to the petitioner. That would also be apparent from the fact that a draft letter of intent was sent with a covering letter on 6.9.2004 by the petitioner. On 8.9.2004, the BCCI enclosed a draft letter of intent to the petitioner, to which the petitioner protested vide its letter dated 11.9.2004. It is further alleged that thus it was an admitted position that there was no acceptance/grant of any letter of intent by the BCCI. Mere information of the

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requirements of the Marketing Committee Meeting cannot and/or does not amount to a “concluded contract” by and between the parties in any manner whatsoever. It is further alleged that by its own letter dated 6.9.2004 the petitioner admitted the fact that the amount was only to be deposited after the letter of intent was finalised. However, on 6th September 2004, as ESPN filed the writ petition before the Bombay High Court, the petitioner despite the fact that no Letter of Intent was finalised, attempted to create a *fait accompli* by depositing US \$ 20 million to BCCI’s account by way of wire transfer. It is further alleged that the said amount was returned by BCCI on 22.9.2004, which fact had also been suppressed by the petitioner.

51. It is alleged that the petitioner who admittedly did not fulfill the tender requirements had no *locus standi* to state that ESPN could not have been called for negotiations as its bid was lower than that of the petitioner.

52. Clause 5.4 of the invitation of tender states:

“5.4 BCCI reserves the right and absolute discretion at any time:—

- (a) to call for further information concerning any tender,
- (b) to seek to negotiate the terms of any tender,
- (c) to reject all or any tenders, and not to assign any reason for the same, and
- (d) to cancel the entire tendering process without assigning any reason, provided however, in the event of cancellation, the tender security shall be refunded without interest within 15 days from the date of such cancellation.

53. It is further alleged that the petitioner duly accepted the above condition among others.

54. In paragraph 19 of the counter affidavit filed by the BCCI it is alleged that at no point of time the petitioner was asked to deposit US \$ 20 million within 48 hours on 5.9.2001. It is further alleged that the petitioner was asked to inform whether in the event of the grant of the rights, it would be able to deposit the said amount within 48 hours, to which the petitioner agreed. It is further alleged that thereafter the petitioner on its own volition transferred US \$ 20 million by Bank to Bank Wire Transfer. It is further alleged that the petitioner had suppressed the fact that the said amount was returned to it on 22.9.2004. It is also alleged that the draft Letters of Intent, on the petitioner’s own admission, demonstrate that no agreement was arrived at and there had been no acceptance of the offer.

55. In paragraph 21 of the counter affidavit filed by the BCCI it is denied that there was any sinister motive on the part of the BCCI or any one else acting on its behalf as alleged, and that ESPN was called first for negotiation contrary to the settled principles and CVC guidelines for negotiations. It is further alleged that the BCCI in terms of the conditions of the Invitation to Tender retained the specific right to negotiate, and the

petitioner having accepted the terms and conditions thereof is now estopped from challenging the same.

56. In paragraph 22 of the counter affidavit filed by BCCI it is denied that BCCI is acting at the dictates of Mr. Dalmiya or that it wrongfully permitted ESPN to improve its bid. It is also denied that Mr. Dalmiya exercised any undue influence. It is denied that any assurance was given to ESPN that it would be given the contract. It is alleged that only after BCCI came to know that none of the parties have full-fledged in-house Production Units, that in accordance with the terms and conditions reserved under the Invitation to Tender, both the petitioner-Zee and the 3rd respondent-ESPN were called for negotiations legally and *bona fide* as per the collective decision of the members of the Marketing Committee to improve their respective bids. It is further alleged that the BCCI never had any particular concern as to which bidder ultimately received the contract.

57. It is alleged that the object of the Marketing Committee was to make evaluation and not to undertake any decision.

58. In paragraph 23 of the counter affidavit filed on behalf of the BCCI it is stated that the allegations made against the then President of the BCCI are baseless and motivated and have been made to cause prejudice. It was denied that the petitioner paid an amount of US \$ 20 million as part payment of the bid amount.

59. In paragraph 25 of the counter affidavit filed by the BCCI it is stated that since the India-Australia series was to commence from 6.10.2004, and the writ petition was being heard by the Bombay High Court, in the larger interest to resolve the impasse and to ensure that the said important series was not cancelled as threatened by the International Cricket Council and Australian Cricket Board, a workable suggestion was offered to both the parties to submit any amount over and above the sum of US \$ 308 million in sealed covers before the Bombay High Court and the highest offerer would then be given the contract. It is further alleged that Zee sought time to consider the said offer, and ultimately on 14.9.2004 refused to accept the same. It is further alleged that thus the allegations that the said offer of the BCCI was “re-bidding” or that the petitioner “won the bid” on 14.7.2004 or that the petitioner was chosen for the award on 5.9.2004 are false and baseless.

60. It is alleged that for the first time during the course of the hearing before the Bombay High Court it was revealed that Pricewater House Coopers was also the auditors of the 3rd respondent. It is alleged that had this been known to BCCI, it would not have nominated Pricewater House Cooper to undertake the subject matter in issue. In any event, Pricewater House Coopers did not evaluate the bids and the chain of correspondence that were tendered before the Court fully proves the *bona fide* on the part of

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BCCI and the alleged imputations made in paragraphs 29 to 31 of petitioner's affidavit are baseless and motivated.

61. In paragraph 27 of the counter affidavit filed by the BCCI it is stated that it was false and motivated to allege that Mr. Dalmiya obtained total authority for himself in the Working Committee Meeting held on 16.9.2004. In the said meeting it was unanimously and in the best interest of the BCCI decided to fully empower the President Mr. Dalmiya to undertake any decision. It is further alleged that the status quo order of the Bombay High Court passed on 15.9.2001 did not restrain BCCI from convening the meeting of the Marketing Committee. The order of status quo was limited to award of any television rights.

62. In paragraph 28 of the counter filed by the BCCI it is alleged that BCCI apprised the ICC about the on going litigation vide its letter dated 10.9.2004, to which ICC replied that they would be reluctant to consider any request from BCCI for the conduct of Test Matches between India and Australia without being broadcast on Television. It is further alleged that the same was reiterated by other letters including that of the Australian Cricket Board. It is further alleged that by two letters dated 17.9.2004 Australian Cricket Control Board informed BCCI that unless the series was televised live, the tour would have to be cancelled. It is further alleged that in the light of the above and as the obstructive approach on the part of Zee continued unabated, the decision was taken to cancel the entire bidding process on 21.9.2004 and this was unanimously approved by the members of the Marketing Committee. It is further alleged that it was in the best interest of the game of cricket that at the meeting held on 28.9.2004 the Marketing Committee decided that the production and telecasting of the Australia and South Africa Series as well as the Platinum Jubilee One Day International between India and Pakistan would be done by BCCI itself by producing the same through Ten Sports and telecast in India by Doordarshan and by Sony at International level. It was also expressly clarified that the grant of the rights would remain subject to any order being passed by the Supreme Court where the writ petition and S.L.P. filed by the petitioner- ee is pending. It is further alleged that the Working Committee deliberated at length and authorised its President to take all decisions in the subject matter of the grant of T.V. rights. The decisions have not been taken by one individual but were unanimous, and all the decisions that were taken are of the BCCI and were taken *bona fide* in the best interest of the BCCI and the game of cricket.

63. In paragraph 29 of the counter affidavit filed by the BCCI in the writ petition denied the allegations that the withdrawal of the writ petition by the 3rd respondent was a device and strategy of the BCCI to oust the petitioner as baseless, *mala fide* and made only in order to cause prejudice.

64. In paragraph 31 of the same counter affidavit it was denied that there has been any *mala fide* action on the part of the BCCI or any of its

officials or that there had been any collusion between BCCI and any one else. It was denied that the tender of the petitioner had been accepted by the BCCI or that any legal right accrued to the petitioner under Article 19(1)(g) of the Constitution of India read with Article 14 as alleged. It was denied that there was any abuse of the process of the Court.

65. In paragraph 32 of the counter affidavit of the BCCI it was denied that that there had been any acceptance of the tender, or that in furtherance of that acceptance the petitioner had made investment of the value of Rs.200 crores as alleged. At any event it is for the party to take any commercial decision, but it does not given any right to have any cause of action against BCCI. It was denied that the action of BCCI was to protect foreign monopoly business of parties.

66. We have also perused the counter affidavit filed on behalf of the second respondent/Mr. Jagmohan Dalmiya. In paragraph 3 of the counter affidavit it is alleged that the second respondent is only dealing with the allegations made in the writ petition relating to him personally. In paragraph-4 it is alleged that false, malicious and defamatory allegations have been made against the second respondent Mr. Dalmiya by the petitioner knowing fully well that the same are false with the intent to defame the second respondent's credibility and reputation. The second respondent has reserved his right to initiate appropriate proceedings against the writ petitioner in accordance with law. In paragraph-5 of the counter affidavit it is alleged that each and every decision adopted and implemented by and on behalf of the first respondent/BCCI by the second respondent was just, correct and in accordance with settled rules and made with *bona fide* intention in the best interest of the game of cricket. The petitioner has made false, reckless and malicious allegations solely to make wrongful commercial gain.

67. In paragraph 6 of the counter affidavit, it is stated that at no point of time any decision was taken, either by the BCCI or the second respondent, to accept the bid of the petitioner. A sum of US \$ 20 Million was transmitted by Zee to the bank account of the BCCI through 'Bank to Bank' wire transfer on its own volition and the said amount was returned to Zee on 22.9.2004 and accepted by it. It is false and malicious to state that the decision to cancel the tendering process was tainted by the vice of malice on the part of the second respondent. The decision to cancel the tendering process was strictly taken in accordance with law and taking into account the uncalled for motivated acts and conduct on the part of the parties. The said decision to cancel the Tendering Process was unanimously ratified by the Members of the Marketing Committee of the BCCI on 28.9.2004. This decision was placed before the Annual General Body Meeting of the BCCI in its Annual General Meeting held on 30.9.2004 at Calcutta, and it was duly accepted and acknowledged by the members.

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68. In paragraph 7 of the counter affidavit of Mr. Dalmiya it is alleged that 27 members of the BCCI out of 30 (the remaining 3 being Institutional Members) unanimously requisitioned a Special General Meeting of the BCCI for nominating the second respondent (Mr. Dalmiya) as Patron-in-Chief of the BCCI, and a unanimous resolution was adopted and signed by 27 members in the Special General Meeting held on 28.9.2004. Hence it is false and malicious to allege that the second respondent arranged to have himself appointed as the Patron-in-Chief or as the sole representative to International Cricket Council. It is alleged that the malicious intention on the part of the vested interested persons including the petitioner would be apparent from the fact that since the subject matter of grant of 'Television Rights' was brought under judicial proceedings, a series of illegal, wrongful and vexatious proceedings were initiated by or through 'Interlopers' and 'Intermeddlers' who have no relationship of whatsoever nature with the BCCI.

69. In paragraph 10 of the counter affidavit the second respondent has denied that at the time the tender was called for, he enquired from the Chairman of the petitioner as to whether the bid of the petitioner would be aggressive or not, or that an impression was created in the mind of the second respondent that the bid of the petitioner would not be very high. These false and malicious allegations have been made knowing well that the same are false and would defame the credibility, image and reputation of the second respondent. It is alleged that the second respondent has succeeded in achieving highest honours personally, in addition to promoting the game of cricket, which no one else has succeeded so far. A few examples of the various honours conferred on the second respondent are mentioned in paragraph 10 of his counter affidavit.

70. In paragraph 12 of the counter affidavit, the second respondent has alleged that the BCCI called upon both the petitioner and ESPN for negotiation wherein it was revealed that the petitioner does not have any capability of producing the cricketing events on its own which was a condition precedent, and did not have the requisite experience of telecasting International Cricketing Events, and also lacked full fledged production unit of its own. Accordingly most of the members of the Marketing Committee intended to award the contract to ESPN, on the basis of its offer of US \$ 308 million. However, it was decided that the petitioner-Zee would also be asked as to whether it is agreeable to match the said offer of ESPN. Following the said meeting on 5.9.2004 no contract of whatsoever nature or Letter of Intent was executed by the BCCI or was delivered to any party whosoever. It is, therefore, baseless to allege that the petitioner was fully ready to implement the contract. There was no question of implementation of any contract, because no contract of whatsoever nature was awarded to any party, and it is false to allege that the petitioner was assured that it would be given the contract at the price of 308 Million US \$ or otherwise. The *bona fides* on the part of the BCCI would be clearly evident from the fact (which has been

totally suppressed by the petitioner before this Court) that at the first opportunity before the Bombay High Court, an option was given to both Zee and ESPN to submit any amount higher than 308 Million US \$ in sealed covers before the High Court, and the higher offerer would forthwith be given the right. While ESPN accepted the said offer, Zee refused the same as it is the sole intention on the part of the Zee to make wrongful commercial gain overlooking the larger interest of the game of cricket in India.

71. In paragraph 13 of his counter affidavit the second respondent has stated that it is false, frivolous and malicious to allege that the second respondent was hostile to the petitioner or did not want the petitioner to emerge as the winner of the tender process or acted arbitrarily. The said false aspersions are defamatory in nature and the petitioner is put to strict proof thereof and the second respondent has reserved his right to initiate appropriate proceedings against the petitioner in accordance with law. It is utterly false to allege that on 5.9.2004 a demand was made upon the petitioner to pay within 48 hours an amount of US\$ 20 Million. The petitioner was only asked whether it would be in a position to deposit US \$ 20 Million within 48 hours or not. This was obviously meant to mean 48 hours from the date of the acceptance of the Tender and issuance of the Letter of Intent. In fact, in its letter dated 6.9.2004 the petitioner has stated that the amount would be paid after the Letter of Intent is finalized.

72. In paragraph 14 it is stated that it is an admitted fact that Zee had never produced, telecast and transmitted any cricketing event on its own.

73. In paragraph 15 it is stated that that the subject matter of appointment of Price Waterhouse Coopers came up for the first time during the course of hearing before the Bombay High Court. It is stated that during the course of hearing it had come to light that Price Waterhouse Coopers was also the auditor of ESPN. It is stated that had this been known to the BCCI earlier, the said reputed International Firm of Auditors would not have been appointed by the BCCI to evaluate the tender offers.

74. It is alleged in paragraph 16 of the counter affidavit that the decisions taken by the second respondent have been unanimously approved and ratified by the members of the Marketing Committee, as well as the members of the BCCI in its Annual General Meeting.

75. In paragraph 17 of the counter affidavit it is alleged that it is false to state that the entire process was theatrically enacted behind the scene by the BCCI and the third respondent with a view to defeat the rights of the petitioner. There is no relationship whatsoever between the BCCI and the third respondent.

76. In paragraph 18 of the counter affidavit it is denied that the second respondent acted *mala fide* or in a collusive manner. It is alleged that in fact it is the petitioner who is bent upon making false defamatory aspersions so as to make wrongful commercial gain.

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77. We have also perused the counter affidavit filed on behalf of the third respondent.

78. In paragraph 3 of the same, clause 3.5(a) of the Invitation to Tender (in short 'ITT') has been quoted, which states:

"Only the entities qualified to submit Tenders, as provided in Condition 2 above, are entitled to submit the Tenders. No Tender submitted by any entity who does not qualify the above shall be opened and/or considered and automatically rejected".

79. Accordingly it is alleged that the petitioner was not entitled to even submit a bid, as it was ineligible.

80. Clause 2 of the ITT provides:

"Only the entities that have existing own in-house production and telecasting units and channel network and have successfully telecasted live and delayed International Cricket Events of International Standard having atleast two years experience (not as a licensee) shall be entitled to the Invitation to Tender and permissive right to submit offers. No Event Management Body or Agency, or Network who is either an "Arranger" or is an "Event Operator" or merely having a Channel Network and/or is desirous to obtain or hire "Production Unit" or licence or sell the rights to any other "Telecaster" or is not having in House production, transmitting Unit as also own Channel is entitled to either purchase Tender Document or submit the Tender...."

81. Clause 3.2 of the ITT provides that the Tender shall, *inter alia*, comprise of:

"details of existing own in-house infrastructure for production and telecast".

82. It is alleged that the petitioner does not fulfill the above eligibility requirements as it does not have any existing in-house production unit nor does it have International Telecasting Experience.

83. Clause 3.2 of ITT states that the tender shall, *inter alia*, comprise of

"Particulars of production and telecast (both live and delayed) of International Cricketing Events of International standard in last 2 English Calendar years with supporting documents".

84. The above provision in the ITT clearly mandates that a bidder should have at least two years experience of producing and telecasting (not as a licensee) live and delayed international cricket events of international standards. It is alleged that the petitioner does not fulfill this eligibility criteria as it admittedly does not have any experience of producing any International Cricket Match on its own. The petitioner's lack of experience was expressly admitted by the petitioner's representatives to the members of

BCCI Marketing Committee at the meeting held on 5.9.2004 and in its letter dated 5.9.2004 addressed to the first respondent.

85. In paragraph 4 of the counter affidavit the third respondent has alleged that the scope of work of PWC did not require them to examine whether the bidders fulfilled the requirement of clause 2 of the ITT, but only required them to tabulate the bids received.

86. In paragraph 6 of the counter affidavit it is stated by the third respondent that there was no collusion, conspiracy or strategy between the third respondent and the first respondent as alleged by the petitioner. It was also denied that there was any favouring of the third respondent by the BCCI. On the contrary the grievance of the third respondent is that the first respondent and the second respondent favoured the petitioner by accepting, opening and considering the bid of the petitioner, as also negotiating with the petitioner when the petitioner *ex facie* did not fulfill the eligibility criteria. It is denied that the proceedings in the writ petition and affidavits filed in Bombay High Court were collusive and/or an abuse of the process of the Court.

87. In paragraph 13 of the counter affidavit it is stated that the experience of the petitioner-Zee in production is confined to Television soaps/serials and shows, and it had no experience in the production of live sporting events such as cricket.

88. In paragraph 17 of the counter affidavit it is stated that the third respondent was the highest bidder when it confirmed to the first respondent in writing that it was willing to pay US \$ 308 Million for four years. However, the third respondent was shocked to find out that the first respondent for inexplicable reasons apparently gave yet another opportunity to Zee to match the amount offered by the third respondent.

89. In paragraph 20 it is alleged that the third respondent had fulfilled the eligibility criteria, but the petitioner did not. In paragraph 26 it is stated that the first respondent was right in calling upon the third respondent for negotiations, as the third respondent was the highest eligible bidder.

90. In paragraph 36 the allegation of monopoly of the third respondent over Asian Cricket has been denied. Rights for International Cricket played in India have been with Prasar Bharthi for the last five years. Rights for International Cricket played in Pakistan and Sri Lanka are currently with Ten Sports. ESPN has the rights for International Cricket played in Bangladesh. The rights for ICC World Cup 2003 and 2007 including rights for ICC Mini World Cup are held by Sony Entertainment Television.

91. As regards the allegations relating to Price Water House Coopers, it is alleged in paragraph 36 of the counter affidavit of the third respondent that Price Waterhouse has stated in its letter dated 6.9.2004 “we were not required to, and we did not, evaluate whether the entities were qualified to participate or not”. This is a clear indication that condition 3.8(a)(i), and

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consequently condition no.2 of the ITT have been disregarded and breached by the BCCI. The third respondent being aggrieved by the said breach was constrained to approach the Bombay High Court.

92. In paragraph 38 of the counter affidavit, it is alleged that the tender bids were opened on 14.8.2004, and the third respondent objected to the eligibility of the petitioner on 16.08.2004 *i.e.* at the earliest since August 15, 2004 was a Sunday apart from being Independence Day. Hence it is not correct that the third respondent had not objected to the eligibility of the petitioner. It is alleged that ESPN realized that BCCI was bent upon considering favourably the bid of the ineligible petitioner (Zee), and therefore with a view to safeguard its own interest it had moved the Bombay High Court. In paragraph 54 it is stated that the petitioner has failed to disclose any material to show that it had committed investments of Rs.200 crores for launching a sports channel on 02.10.2004. The said day has come and gone, but there is no sports channel launched by the petitioner till date, and the petitioner has failed to give any reasons for its failure to do so.

93. The learned single Judge in his impugned judgment has referred to the above facts, and has noted the contentions of the learned counsel for the parties in paragraphs 1 to 74 of his judgment.

94. On the question of maintainability of the writ petition under Article 226 of the Constitution of India, the learned single Judge has followed the majority view of the Constitution Bench decision of the Supreme Court in *Zee Telefilms Ltd. v. Union of India and others*, 200 5 (1) SCALE 666. We agree with the learned single Judge that in view of what is stated in paragraph 31 of the aforesaid majority verdict of the Constitution Bench decision of the Supreme Court, the writ petition under Article 226 is maintainable.

95. Mr. K.K.Venugopal, learned Senior Counsel appearing for the appellant/BCCI submitted that the Supreme Court has only held that activities like selection of Indian cricket team and controlling the activities of players and others involved in the game of cricket are public duties or public function, but telecasting the cricket matches cannot be said to be a public function. We do not agree. It must be understood that the major portion of the funds for International Cricket are nowadays provided by T.V rights. International Cricket nowadays has almost become like big business and the finances mainly come from grant of Television Rights. Without these huge funds there cannot be other activities like selection of cricket team, controlling the activities of the players, etc. Everything in the world nowadays function on finance. Hence, it is implicit in paragraph 31 of the aforesaid majority decision of the Constitution Bench of the Supreme Court that grant of telecasting rights is also a public function. This may not have been expressly stated by the Supreme Court, but it is implicit in paragraph 31 of the verdict.

96. It is true that the BCCI has been held not to be a 'State' under Article 12 of the Constitution, but it is evident from the observation of the Supreme Court in paragraph 31 of the majority verdict that the Supreme Court was conscious of the fact that International Cricket nowadays involves a huge amount of money, and hence some amount of regulation is required, otherwise there can be misuse/misappropriation of those funds by some persons. Probably with this thought in mind the Supreme Court made the observation in paragraph 31 of its verdict. The said observations are binding on us under Article 141 of the Constitution, and hence we hold that the writ petition under Article 226 of the Constitution of India is maintainable.

97. The learned single Judge, in our opinion, has rightly held in paragraph-94 of his judgment that there was no substance in the writ petitioner's attack on the process of negotiations by inviting ESPN also. The facts referred to above show that though initially the procedure which had been adopted by the BCCI was of public tender, later on this process was abandoned (when it was found that both the highest bidders Zee and ESPN were ineligible), and the procedure of private negotiations was resorted to by the BCCI. Though normally Courts have frowned on private negotiations and have held that ordinarily the process of public tender/public auction should be adopted as that leads to transparency vide, *S. Selvarani v. Commissioner, Karaikudi Municipality*, 2005 (1) CTC 81 : 2005 W.L.R. 30, in our opinion, there is no total prohibition of private negotiations in exceptional circumstances.

98. It must be remembered in this connection that the basic principle in public contracts is that there should be transparency and fairness. It is for this reason that the Courts have required that *ordinarily* such contracts should be given by public auction/public tender after advertising it in well known newspapers. However, in exceptional cases, the contract could also be given by private negotiations, provided transparency and fairness are maintained. If while holding private negotiations there is transparency and fairness, the Courts will not invalidate the contract. The basic principle in such matters therefore is transparency and fairness, while open public auction/public tender is only a means to attain that basic principle, but it is not itself the invariable principle.

99. Thus, in *Shri Sachidanand Pandey v. State of W.B.*, AIR 1987 SC 1109 (*vide* paragraph 39), the Supreme Court observed:

"One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. *Though it is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule* but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing

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justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism.”

100. In the present case when the process of public tender was given up by the BCCI (since both the highest bidders, Zee and ESPN, were ineligible) and it resorted to private negotiations, there was, in our opinion, no legal bar in inviting ESPN also, apart from inviting Zee for such private negotiations. Hence, in our opinion, the learned single Judge has rightly held that there was no substance in the contention of the learned Senior Counsel for Zee that Zee alone should have been invited for private negotiations. The C.V.C. guidelines do not apply to BCCI as it is neither a Government Department nor a Government Corporation. Also, here even the highest bidder Zee was initially ineligible.

101. The learned single Judge, however, from paragraphs 95 to 125 of his judgment has held that there was victimization, *mala fides* and unfair conduct by the BCCI, and in particular by its President Mr. Dalmiya. The learned single Judge has made a scathing, vituperative attack on Mr. Dalmiya, and accused him of various improprieties. We are of the opinion that these remarks made by the learned single Judge against the BCCI, and in particular against Mr. Dalmiya, were unjustified, uncalled for and unsustainable.

102. In *Indian Railway Construction v. Ajay Kumar*, 2003 (4) SCC 579 (*vide* paragraph 23), the Supreme Court observed: -

“It cannot be overlooked that the burden of establishing *mala fides* is very heavy on the person who alleges it. The allegations of *mala fides* are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. As noted by this Court in *E.P.Royappa v. State of Tamil Nadu*, AIR 1974 SC 555, Courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration.”

103. The same view was repeated in *Delhi Development Authority v. UEE Electricals Engg. (P) Ltd.*, AIR 2004 SC 2100 (*vide* paragraph 16).

104. In the present case, we are of the opinion that the writ petitioner has been unable to prove that the BCCI or Mr. Dalmiya had acted with *mala fides* or in collusion with ESPN. The facts disclosed to us rather prove that the BCCI and Mr. Dalmiya have acted very fairly. The facts also disclose that in the private negotiations with Zee and ESPN there was total transparency and fairness.

105. It may be noted that the bids were opened at Bombay on 14.8.2004. The two highest bidders namely, Zee, which made a bid of US \$ 260.76 Million and ESPN, which made a bid of US \$ 230 Million, were both found to be ineligible, because they did not possess the two essential requirements for eligibility namely,

- (i) In-house production unit, and
- (ii) Previous experience in live telecasting of International Cricket in their own right and not as a sub-licensee.

106. Clause 2 of the Invitation to Tender issued by the BCCI states:

“Only the entities that have existing own in-house production and telecasting units and channel network and have successfully telecasted live and delayed International Cricket Events of International Standard having atleast two years experience (not as a licensee) shall be entitled to the Invitation to Tender and permissive right to submit offers.”

107. It is an admitted fact that both Zee and ESPN did not have the above mentioned two eligibility requirements. This infact has been stated by the learned single Judge in the impugned judgment in paragraph 104. Since the bids of the remaining three tenderers were far below those of the top two tenderers, the BCCI decided to hold private negotiations with the two top tenderers namely, Zee and ESPN, and called them for a meeting on 4.9.2004 before its Marketing Committee. We have already observed that in law there is no total bar to private negotiations provided there is transparency and fairness. We have, therefore, to see whether there was transparency and fairness in the private negotiations in the present case.

108. Before the Marketing Committee, Zee was prepared to raise its bid to US\$ 280 Million. ESPN initially offered a bid of US \$ 308 Million for five years, but later on it offered a bid for US\$ 308 Million for four years. The writ petitioner Zee was then asked by the Marketing Committee to match the higher offer of US \$ 308 Million by ESPN, and ZEE agreed to increase its bid to US \$ 308 Million. The minutes of the meeting of the Marketing Committee on 5.9.2004 disclose that the Marketing Committee decided that subject to the acceptance of the terms and conditions of BCCI, it could agree to give the Television Rights to Zee (since it was originally the highest bidder), subject to its unconditional acceptance of the other terms and conditions including the payment terms within the stipulated time, should they agree to match the offer of US \$ 308 Million. The Committee stated that the payment terms would be as follows:

- “ Zee would be required to pay USD 20 Million upfront within two days.
- BCCI would thereafter issue a Letter of Intent.
- A binding Heads of Agreement would be finalized within ten days and before its execution, Zee would furnish a Bank Guarantee of US D 75 Million.
- Quarterly payments would be made in advance of the concerned quarter, with the first quarterly payment commencing on 30th September 2004.”

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In our opinion there was total transparency and fairness in these proceedings. In fact if there was any favour it was to Zee, because ultimately both Zee and ESPN had bid the same amount *i.e.*, US \$ 308 million, and there is no rule of law that in such a situation the contract must be given to the original highest bidder.

109. Dr.Rajeev Dhawan, learned Senior Counsel appearing for Zee submitted that it was not open to the Marketing Committee to ask the bidders to increase their bid. We find no merit in this submission. It must be realized that after the BCCI had given up the procedure of public tender (in view of the fact that both the top two tenderers were found ineligible according to the Invitation to Tender), it switched over to the procedure of private negotiations. As already observed above, though normally private negotiations is frowned upon by the Court and public tender/public auction is preferred, there is no absolute bar to private negotiations provided transparency and fairness are not given up. In certain exceptional circumstances, public contracts could be given by private negotiations, though normally that should not be done. In the present case, there were exceptional circumstances namely, that both the two top tenderers were ineligible, and the India-Australia series were to begin from 6.10.2004, and hence time constraint was pressing. In such circumstances, in our opinion, BCCI was justified in holding private negotiations, and we have to only see whether there was transparency and fairness in doing so.

110. The exceptional circumstances due to which private negotiation was resorted to by BCCI when both the top bidders, Zee and ESPN were found ineligible, were as follows:

- (a) About 3 weeks was required for award of the contract and transporting loads of equipments into India for telecast, a matter specially mentioned in the counter affidavit of BCCI;
- (b) The Austration Cricket Board (Cricket Austratia) was threatening to withdraw from the test series if no television coverage was provided;
- (c) The ICC, in spite of repeated requests by the BCCI refused to waive the requirement of live telecast of the matches;
- (d) The arguments in the High Court of Bombay were incomplete on 20.9.2004, when only 15 days were left for the commencement of the Australian cricket series;
- (e) A *status quo* order was passed on 15.9.2004, by the Bombay High Court which prevented the grant of award of television rights to any other party."

111. Once private negotiations are done everything becomes open (provided there is fairness and transparency). Hence, obviously the BCCI could seek to raise the bids, since naturally it would like to earn more money. We see nothing illegal or suspicious about this.

112. Learned Senior Counsel appearing for Zee also submitted that the *mala fides* of the BCCI is also established, as it required ZEE to discharge a very onerous condition of making payment of US \$ 20 Million within 48 hours, though such a condition was not contemplated under the Invitation to Tender. We see no substance in this argument also. Obviously when the contract was decided to be given for US \$ 308 million, BCCI would naturally want itself to be satisfied that the party making the bid is serious about the matter, and should make some deposit to prove its good faith and seriousness. US \$ 20 Million is only about 6% of US \$ 308 Million, and hence this can hardly be called an onerous condition. Moreover, we are of the opinion that mere deposit of this US \$ 20 Million does not amount to a concluded contract, or part-payment of the bid amount.

113. It is true that the Marketing Committee had taken a decision to award the Television Rights to Zee, but a decision is not a contract. 'A' may decide to give a contract to 'B', but subsequently he may not give the contract to 'B'. It is true that the Marketing Committee had decided on 5.9.2004 to give the Television Rights to Zee, but from the facts it is evident that thereafter no contract was entered into between Zee and BCCI. Rather the facts disclose that subsequent to the aforesaid decision of the Marketing Committee of the BCCI, BCCI and Zee were negotiating about the terms of the contract which would be entered into in future, which is proved by the fact that both of them sent their own draft letters of intent to each other. Thus on 6.9.2004 Mr. Himanshu Mody, on behalf of Zee wrote to Mr. N. Srinivasan, Chairman, Finance Committee, Board of Control for Cricket in India, a letter enclosing the draft letter of intent, which is as follows:

“Letter of Intent

Dated

Between Board of Control for Cricket in India
of
(hereafter referred to as “BCCI”)
and Zee Telefilms Ltd.
(hereafter referred to as “ZEE”)

WHEREAS

- a) BCCI have conducted a tendering process regarding the granting of worldwide telecasting and broadcasting rights relating to cricket matches and tournaments to be played in India (the “Rights”) between 1st October 2004 and 30th September 2008 (the “Term”)
- b) BCCI confirms that Zee satisfies all criteria set out in its Invitation to Tender (“ITT”) and accordingly is eligible to acquire such Rights;
- c) BCCI further confirms that Zee has provided the highest bid for said rights in accordance with the tendering procedure; and

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d) Accordingly Zee has been declared the winner of said tendering process and will acquire the Rights subject to the terms and conditions of this Agreement.

e) The parties agree to be bound by this Agreement.

NOW IT IS HEREBY AGREED:

1. BCCI hereby confirms its intention to grant to Zee the Rights for the Term on the basis of the financial terms as offered by Zee and as set out in Schedule 1, subject to conclusion of a detailed written long form contract between them in relation to Zee's acquisition of the Rights (the "Contract").

2. In consideration for the payment of the equivalent of US \$ 20,000,000 (twenty million US Dollars) *i.e.*, INR 925,000,000 (nine hundred twenty five million Indian Rupees) as an advance against sums due under the Contract) the "Advance") and receipt of which is hereby acknowledged by BCCI. BCCI undertakes to Zee that neither it nor any member thereof nor any person, body or entity on their behalf will enter into any agreement, negotiate any agreement, offer to negotiate, discuss or otherwise entertain any offers or other approaches whether existing or new from any third party in respect of the Rights or any part thereof, during the period from the date hereof to the signing of the Contract (the "Formalisation Period"). After the formalisation period, the Contract will govern the relationship between the parties.

3. During the Formalisation Period both parties undertake to act in good faith and use their best endeavors to conclude the Contract in the form as described above, granting to Zee the rights before September 15th 2004 or such other date as both parties may agree.

4. For the avoidance of doubt, the Bank Guarantee provided as Tender Security by Zee on 14th August 2004, under the terms of the ITT, in the sum of INR 40,000,000 shall be returned to Zee immediately upon receipt of the said sum of INR 925,000,000 and the Advance of INR 925,000,000 paid hereunder shall be adjusted alongside the payments due in the final year under the Contract as per Schedule 1.

5. On signing of the Contract, Zee shall provide to BCCI a bank guarantee from a bank reasonably acceptable to BCCI covering the period of the Term and in the INR equivalent of a sum of \$ 75,000,000 *i.e.*, 3,450,000,000 (three billion four hundred fifty million Indian Rupees).

6. The parties mutually undertake that they will maintain strict confidentiality at all stages of negotiation and will not disclose any information relating to these negotiations and/or the business of the other to any third party.

7. This Agreement shall be governed by and construed in accordance with the Laws prevailing in India.

8. All or any dispute arising of this would be subject to the provisions of Indian Arbitration and Conciliation Act, 1996."

114. In its turn, the BCCI wrote a letter on 8.9.2004 to the Chairman of Zee enclosing its own draft letter of intent to be issued by BCCI to Zee, which is as follows:

“ DRAFT

Mr.Himangshu Mody,
Zee Telefilms Limited,
Continental Building,
135, Dr.Annie Besant Road,
Worli,
Mumbai - 400 018.

Dear Mr. Mody,

Re: *TELECAST AND BROADCAST RIGHTS FROM: OCTOBER 2004 TO 30TH SEPTEMBER 2008.*

Pursuant to your Tender dated 13 August 2004 and in the course of the negotiations and discussions on 4th and 5th September 2004, you had agreed amongst others, the following with a view to obtain the assent of BCCI:

1. The offer of Zee Telefilms shall stand revised to US D 308 Million which would be paid and secured in the manner provided in the ‘Schedule’ of payments attached herewith.
2. Zee Telefilms, shall on or before 15 September 2004, provide unconditional and irrevocable Bank Guarantee of US D 75 Million, which shall remain valid and operative till one month after the last date of the final payment.
3. The production of the Events shall be made through either Channel Nine or TWI (selected by BCCI out of the four names proposed by Zee) without attaching any liability to BCCI.
4. Within three days, Zee Telefilms shall cause a true copy of the Agreement said to have been entered with Prasar Bharathi as notified in the Tender for telecast and broadcast of Events ‘live’ and ‘delayed’ through Doordarshan in its Terrestrial Network. BCCI shall have no obligation in the subject matter of acquiring appropriate signals and uplink or otherwise.
5. Zee Telefilms shall cause commentary through four selected commentators by BCCI out of a panel of eight commentators to be provided by Zee.
6. Zee Telefilms shall cause telecast of atleast 52 days of Domestic Cricket per cricket season as per the schedule to be approved by BCCI.

Subject to the fulfillment of the above stipulations offered by you with express assurance of no deviation, default, breach or violation of primary terms and conditions as enumerated in Part II of the Invitation to Tender as well as other terms and stipulations in the formal Heads of

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Agreement, BCCI hereby grants this Letter of Intent in your favour for permissive licence as offered by the Invitation to Tender. You are hereby called upon to comply with the above.

Thanking you,
Yours faithfully,

S.K.NAIR
Hony. Secretary.

Encl: Schedule of Payments”

115. It, thus, appears that both Zee and BCCI exchanged draft Letters of Intent with each other. In our opinion, the word ‘draft’ is important. It signifies that there was no final Letter of Intent, far less a concluded contract, and the parties were only negotiating. Subsequently, on 11.9.2004 Mr.Himanshu Mody on behalf of Zee wrote a letter to the BCCI that the draft Letter of Intent sent by the BCCI did not capture the entire understanding between the parties on the telecast and broadcasting rights. It also mentioned that Zee was ready to discuss the terms of the Letter of Intent and long form agreement. The said letter dated 11.09.2004 states: -

“11 September 2004
Mr.N.Srinivasan
Chairman, Finance Committee,
Board of Control for Cricket in India,
4th Floor, 827 Anna Salai,
Chennai - 600 002.
Fax : 044 - 2852 0702.

Dear Sir,

Re: Draft Letter of Intent

We refer to your fax dated 8th September, 2004 addressed to Mr. Subhash Chandra, Chairman, Zee Telefilms Limited enclosing therewith draft of the Letter of Intent for acceptance.

On careful reading of the draft Letter of Intent, we find that it does not capute the entire understanding between us on the telecast and broadcasting rights from 1st October, 2004 to 30th September 2008, as discussed in the meeting of 5th of September, 2004.

We hereby record our readiness to discuss the terms of Letter of Intent and long-form agreement in respect of the telecast and broadcasting rights within the agreed timeframe. Also we confirm our readiness to perform all our obligations under the contract including providing of bank guarantee equivalent to US D 75 million and payment of 1st installment by 30th September 2004.

Please note that we have responded to your letter under reply in view of our having received the letter and to keep the record complete.

Yours sincerely,

For Zee Telefilms Ltd.

Himanshu Mody

Cc: Mr.Jagmohan Dalmiya, President, BCCI,

Fax: 033-2248 7555.

Mr.Kishore Rungta, BCCI,

Fax : 0141-222 2100/199

Mr.S.K.Nair, Hony.Secretary,

Fax: 0471-246 4620

Mr.Jyoti Bajpai, Hon.Treasurer, BCCI,

Fax No.: 0512 - 236 9854.”

In our opinion, the above documents clinchingly demonstrate that there was no concluded contract between the parties, and the matter was at the stage of negotiations only.

116. It is quite possible that had a petition not been filed in the Bombay High Court by ESPN, the television rights may have ultimately, been given by the BCCI to Zee, as a decision was taken in that regard in the meeting of the Marketing Committee held on 5.9.2004. However, the fact remains that no contract had been entered into between Zee and the BCCI for the Television Rights, and the matter was still being negotiated, since only draft Letters of Intent had been exchanged, and Zee had some objections to the draft sent by the BCCI. From the contents of the draft Letter of Intent sent by Zee to BCCI on 6.9.2004 and the letter of Zee dated 11.9.2004 it is evident that even Zee itself understood and accepted that there was no concluded contract.

117. Dr.Rajeev Dhawan, learned Senior Counsel for the Zee Telefilms Pvt. Limited submitted that a contract had come into existence and only some details had to be worked out. He has relied on the decisions in *Shankarlal Narayandas Mundade v. The New Mofussil Co. Ltd.*, AIR 1946 PC 97; *K.Sriramulu v. T.Aswatha Narayana*, AIR 1968 SC 1028; *M.M. & M. Refinery, Bangalore v. M.S.S.I. Corporation*, AIR 1974 Mad 39; *Associates Builders v. D.D.A.*, 1994 (2) Ar. LR 161; *S.V.R.Mudaliar & Others v. Rajabu F.Buhari & Others*, 1995 (4) SCC 15; *Progressive Constructions Ltd., v. Bharat Hydro Power*, 59 DLT 1995 290 and *Bharti Televentures Ltd. v. Bell South International Asia Pacific Inc. USA*, 2000 (55) DRJ 216. We have carefully perused these decisions, and we find that they do not help the case of the petitioner-Zee.

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118. In our opinion, in the present case, it cannot be said that the parties had come to an agreement which constituted a binding contract which had only to be given formal shape. From the facts it is evident that there was only a decision to award the contract to Zee, but no contract was ever actually entered into. As already observed above, a mere decision by itself is not a contract. For a contract to come into existence there must be offer, acceptance and consideration. Under Section 7 of the Contract Act, the acceptance must be absolute and unqualified.

119. Section 7 of the Contract Act states:-

*“In order to convert a proposal into a promise, the acceptance must
(1) be absolute and unqualified;”*

120. Until there is absolute and unqualified acceptance of a proposal, the parties are still at the stage of negotiations, and no legal obligation can be attached to that. In the present case the parties were only at the stage of negotiations, since only *draft* Letters of Intent had been exchanged between the parties, and by its letter dated 11.9.2004 Zee had specifically mentioned that the draft Letter of Intent of BCCI does not capture the understanding between the parties, and it was ready to discuss the terms of the Letter of Intent and draft agreement in respect of the telecasting and broadcasting rights. Thus, the matter was inchoate and never ultimately fructified into a binding contract. In fact, from the draft Letter of Intent sent on 6.9.2004 by Zee and its letter sent on 11.9.2004 it is evident that Zee itself understood and accepted that there was no concluded contract which had been entered into between the parties.

121. In *T.S.Venkatesa Iyer’s ‘The Law of Contracts and Tenders’*, it is stated:

“ By giving a letter of intent a party cannot be said to have intended to agree or do anything in order to give rise to a binding contract.”

122. In *Baron International Airways v. Haj Committee*, AIR 1997 Del. 247 the facts were that in order to facilitate air passage to the intending Haj pilgrims to go to Jeddah and return the Haj Committee invited bids. After the bids were evaluated, the appellant was invited for negotiations, in pursuance of which a formal letter of intent was issued to it. In pursuance of the Letter of Intent the respondent was to inspect the aircrafts offered by the appellant. Due to non-compliance of certain conditions the transaction did not materialise. In a writ petition seeking specific performance of the contract, the Delhi High Court held that the letter of intent did not amount to a binding and concluded contract between the parties, as such letter of intent was only at an offer stage.

123. In *Cheshire, Fifoot and Furmston’s ‘Law of Contract’* (Twelfth Edition, page 43), it is stated:

“A letter of intent is a very commonly employed commercial device by which one party indicates to another that *he is very likely to place a contract* with him.”

124. In *Advanced Law Lexicon* by P.Ramanatha Aiyar (3rd Edition, Volume 3, *vide* page 2707), it is stated:

“*Letter of Intent*. A document that outlines some intended action sent to establish intent in the eyes of law”

125. In *Rajasthan Coop. Dairy Federation Ltd. v. Maha Laxmi Mingrate Marketing Service Pvt., Ltd.*, 1996 (10) SCC 405, (*vide* paragraph 7), the Supreme Court observed:-

“The Letter of Intent merely expresses *an intention* to enter into a contract..... There was no binding legal relationship between the appellant and respondent no.1 at this stage.”

126. Thus, even a final letter of intent is not a contract, but is a document which precedes a contract. Hence, a draft Letter of Intent is even less a contract, because it is not even a final letter of intent. The negotiations between Zee and BCCI never went beyond the stage of draft letters of intent, and no final letter of intent, far less a concluded contract was executed between the parties.

127. As regards the deposit of US\$ 20 million, by its letter dated 7.9.2004 Zee expressly stated that this payment of US \$ 20 million would be effected immediately upon agreeing to the draft Letter of Intent. However, it appears that Zee transferred US \$ 20 million *even though no letter of intent or contract had been finally executed*. In the writ petition, Zee has suppressed the fact that US \$ 20 million was refunded by BCCI on termination of the tendering process on 23.9.2004, receipt whereof was acknowledged by Zee.

128. It was at this stage of negotiations that a writ petition was filed by ESPN in the Bombay High Court making BCCI and others as respondents. Unless we presume that the writ petition in the Bombay High Court was filed in collusion between ESPN and BCCI, we have to hold that BCCI has acted in a very fair manner. We have therefore to examine whether there is any material to hold that the writ petition was filed collusively before the Bombay High Court.

129. In its writ petition before the Bombay High Court, being W.P.No. 2462 of 2004, ESPN alleged that Zee was not eligible to bid for the Television Rights, as it did not fulfill the requirements mentioned in Clause 2 of the ITT. Allegations had been made in the writ petition against BCCI of acting arbitrarily and *mala fide*. Since serious allegations were made against BCCI in the writ petition of ESPN before the Bombay High Court, naturally BCCI had to prove its *bona fides* and show that it was not favouring Zee. Hence, apparently it did not want to pre-empt the issue by immediately

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awarding the contract to Zee when the matter was sub-judice. In these circumstances, while in its counter affidavit BCCI defended its action of permitting Zee to match the bid of ESPN, it also stated in the hearing before the Bombay High Court that both Zee and ESPN can be asked to give sealed tenders in the Court making the base price at US \$ 308 Million, and whoever's bid was higher would be given the contract. In our opinion, nothing more fair could have been done by BCCI. No doubt it had earlier taken a decision to award the telecasting rights to Zee, but as already stated above, a mere decision is not a contract. In fact it is evident that no contract ever came into existence, rather negotiations were going on as the parties had exchanged draft letters of intent, and Zee had objected to BCCI's draft letter of intent. The writ petition was filed in the Bombay High Court. making allegations against the BCCI, which in substance amounted to allegations of favouring Zee. Faced with these allegations, the BCCI took a fair stand by stating that it was not interested in any particular party, and hence both Zee and ESPN could give sealed tenders in the Court (making US \$ 308 Million as the base price), and whoever's bid is higher would be given the contract. In our opinion, this was a totally fair attitude of the BCCI, and we cannot see how it can be faulted with, unless one is trying to make a mountain out of a molehill by noting a few minor mistakes here and there, which might have been committed by the BCCI or its President.

130. The Bombay High Court had granted an order of *status quo* on 15.9.2004 and in this situation, the BCCI was left in a quandary, since time was pressing in view of the forthcoming India-Australia series, and hence it decided to cancel the tender process and decided to produce and telecast matches on its own, being the event owner, and it also decided that the said matches would be shown live and relayed on the terrestrial network of Doordarshan. The BCCI informed the Court that the production would be done by Taj TV Limited (Ten Sports) on behalf of BCCI, and telecasting internationally would be done by Set Satellite (Singapore) Pvt. Ltd. on revenue sharing basis and by Prasar Bharti through National and Terrestrial network live in India. The BCCI stated that the whole procedure for organizing equipment for telecast of the matches, involves a minimum time frame of three weeks as two planeloads of sophisticated and technical equipment have to be brought and set up at the match venues to enable the telecaster to get the advertisements organized and in place. Since time was pressing, the tender process was cancelled as stated above. We find nothing *mala fide* or illegal in the action of the BCCI in doing so.

131. In our opinion there is no material to show that the writ petition was filed in the Bombay High Court collusively. If the intention of BCCI was all along to award the contract to ESPN it could have decided to award it to ESPN in the meeting of the Marketing Committee on 4/5.9.2004. Also, since both Zee and ESPN ultimately raised their bids to US \$ 308 Million, the Marketing Committee on 4/5.9.2004 could itself have asked for sealed tenders from both Zee and ESPN making US \$ 308 Million the base price,

and then awarded the contract to the highest bidder. However, what the Marketing Committee actually did was to decide to award it to Zee. Thus if any one was favoured by the Marketing Committee it was really Zee and not ESPN.

132. The learned single Judge in paragraphs 95 and 103 of his judgment has made much of the involvement of Price Waterhouse Coopers and the *mala fides* of BCCI. It may be mentioned that the BCCI has stated in paragraph 26 of its counter affidavit that they were not aware of the fact that Price Waterhouse Coopers was the auditor of ESPN. Had it known this it would not have involved the said auditing firm in the matter at all.

133. Paragraph 26 of the BCCI's counter affidavit states:-

"It is however, placed on record that for the first time during the course of the hearing before the Hon'ble High Court at Bombay, it was revealed that Price waterhouse Coopers was also the auditors of Respondent 3. Had it been known to the respondent 1, it would not have nominated Price waterhouse Coopers to undertake the subject matter in issue."

134. At any event, we fail to find what wrong BCCI or Mr. Dalmiya has done in this connection, and we are of the opinion that the learned single Judge has made much ado about nothing. When ultimately no role was played or evaluation done by P.W.C., and no harm was done to the tendering process (as the learned single Judge himself holds) we fail to understand why the learned single Judge has so elaborately dealt with the matter and made an issue out of a non-issue.

135. It may be mentioned that Mr. Dalmiya wrote a letter on 30.7.2004 to Mr. Rathin Dutta, Chairman & CEO of Price Waterhouse Coopers, Calcutta. The said letter states:-

"Jagmohan Dalmiya
President

30 July 2004

Mr.Rathin Dutta

Chairman & CEO, PRICE WATERHOUSE COOPERS

Y-14, Salt Lake, Block EP, Sector 5,

Salt Lake, Kolkatta - 700 091.

Tel: 23579100

Fax: 23573394/5

Dear Mr.Dutta,

The Board of Control for Cricket in India (BCCI) would soon be floating tenders and inviting bids for the Television Rights of the cricket

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matches played in India. BCCI would restrict the offers from those companies that have existing own in-house production, telecasting units and Channel Network and have successfully telecasted live and delayed International Cricket Events of International standard for a period of at least two years.

It is our intention to make the entire process transparent and we wish to take the active assistance of your esteemed organization for this purpose.

We would be placing an advertisement in the national media around second week of August 2004 inviting the bids. The bids could be received within seven or ten days and thereafter opened at a specific date. Our headquarters being in Mumbai, we would request PWC to receive the sealed bids on our behalf at your offices in Mumbai and the same be opened at a designated date in the presence of a high functionary of PWC and a representative of BCCI along with those of the bidders.

BCCI would obviously be prepared to pay a reasonable fee to PWC for the entire exercise.

We would indeed be grateful if you could please let us know how we could proceed in the matter and the quantum of fees that we would be required to pay to PWC for its services.

With kind regards,
Yours sincerely,
J.Dalmiya,
President”

The above letter shows the *bona fide* intention of Mr. Dalmiya, who only wanted the involvement of PWC, a reputed audit firm, to make the tender process transparent.

136. The reply of Price Waterhouse Coopers in its letter dated 3.8.2004 to Mr. Dalmiya is as follows:

“August 3, 2004
Mr.Jagmohan Dalmiya,
President,
The Board of Control for Cricket in India,
Eden Gardens,
Dr.B.C.Roy Club House,
Kolkata - 700 021.

Dear Mr. Dalmiya,
Thank you for your letter of 30th July, 2004.
If the scope for PWC is only

(a) to receive sealed bids at PWC's Mumbai Office on behalf of BCCI, and

(b) simply be present on a designated date when the sealed bids will be handed over by PwC to BCCI in the presence of bidders and immediately opened

then we will do this free for the cause of cricket.

Kindly request somebody from BCCI to get in touch with Devender Chawla, Executive Director at the following address:

Pricewaterhouse Coopers Pvt. Ltd.

Trade Word, 8th Floor, C Wing,

Kamala Mills Compound,

Senapati Bapat Marg,

Lower Parel,

Mumbai - 400 013.

Phone No. (022) 5623 9094.

Mobile: 98201 46222

Yours sincerely,

Rathin Dutta

Chairman & CEO"

137. The above correspondence makes it clear that there was nothing fishy or suspicious in the involvement of Price Waterhouse Coopers. The letter itself shows the transparency of the BCCI and Mr. Dalmiya in the matter.

138. The learned single Judge in paragraph 96 of his judgment has quoted condition No. 3.8(a)(i) of the Invitation to Tender. In paragraphs 98 to 103 of his judgment, the learned single Judge has launched into a virtual inquest into the role of Price Waterhouse Coopers when the fact is that ultimately Price Waterhouse Coopers did not play any role in the tender process at all.

139. The learned single Judge in paragraph 102 of his judgment has observed that it is true that ultimately no evaluation was done by Price Waterhouse Coopers, and therefore, no harm was done to the tender process. Having observed this, the learned single Judge goes on to say "but when the issue is focused from the angle of positive allegations by the petitioner that there was collusion between the second respondent and the third respondent from the beginning and that the second respondent wanted to favour the third respondent, the Board as well as the second respondent owe a lot of explanation which they have failed to submit." In our opinion, when the learned single Judge had himself observed that Price Waterhouse Coopers did not play any role in the tender process and no harm was done to the

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tender process, it is difficult to understand how he could have held that the earlier involvement of Price Waterhouse Coopers shows collusion between respondents 2 and 3. In our opinion, the learned single Judge has resorted to conjectures and surmises in this connection, which have no basis.

140. In our opinion, there is no proof of collusion between ESPN and the BCCI in the filing of the writ petition before the Bombay High Court. Allegations of collusion, like those of *mala fides*, have to be established by strong proof, and inference of collusion or *mala fides* cannot be made, as it has been made by the learned single Judge, on mere hunches, suspicions, conjectures and surmises.

141. The learned single Judge has observed that many questions have not been properly answered by the BCCI regarding the episode of the involvement of Price Waterhouse Coopers. In our opinion, merely because some questions have not been properly answered by a party this does not entitle the Court to give a verdict of *mala fides* or collusion against that party. A finding of *mala fides* is a serious matter as it tarnishes the reputation of a person. There must be strong and clinching proof before a finding of *mala fides* is given, and such proof is totally lacking in this case. With profound respect to the learned single Judge, he has resorted to an unnecessary roving exercise seeking to find some piece of material on the basis of which findings of *mala fides* and collusion could be given, which are really based on hunches, conjectures and surmises.

142. In paragraph 105 of his judgment, the learned single Judge observed:

“After the petitioner left, enhancing the bid to 281 million US \$, the third respondent is called for discussion and the third respondent hiked the bid to 308 million US \$. It is in this background, the conduct of the Chairman/President becomes relevant. Either the negotiations should have been held in the presence of both the competing bidders so that the highest offer will be known to the other party and the highest revenue could be secured without unnecessary delay. The other alternative is that the petitioner being the highest bidder, should have been given the last opportunity to match the offer of the rival. Without doing so, the bid is closed at the stage of the third respondent having increased its offer. The Chairman informs the Committee (paragraph 29) that the third respondent is the highest bidder. The intentions of the Chairman is, therefore, very clear, after having brought forth a situation whereby the second highest bidder is made the highest bidder and negotiations are closed and the matter is brought before the Committee, declaring the third respondent as the highest bidder. But, it is heartening to find that the members have chosen to approach the issue in a conscientious manner and had expressed themselves at paragraphs 29 and 30 as follows:

29) The Chairman thereafter informed the members of the Marketing Committee that accordingly the two revised bids were received from

Zee and ESS. The revised bids revealed that both parties had furnished unconditional offers. While ESS had offered USD 308 million, the revised offer of Zee was US D 281 million. Both the parties had also submitted their respective plans to cover Domestic Cricket.

30) The members observed that since US D 308 million was a higher offer resulting out of the revised bids, the offer of ESS could be accepted. But since Zee was the highest bidder initially, they should be provided an opportunity to match the highest offer.”

143. In our opinion, the above observation of the learned single Judge cannot be sustained. We have already mentioned above that the tender process had been given up by the BCCI when the two top tenderers were found ineligible and private negotiation was resorted to. As already stated above, in exceptional circumstances private negotiation is permissible, provided there is transparency and fairness. In private negotiation it is not necessary that both the competing bidders should be brought together. We fail to understand on what legal principle the learned single Judge has made the above observations. We also fail to understand how the learned single Judge has made insinuations against the Chairman of BCCI. As noted above, in private negotiations as long as there is transparency various methods can be adopted, and in this case we are satisfied that there was total transparency on the part of the BCCI and its Chairman.

144. In paragraph 106 of his judgment, the learned single Judge has sought to create an impression that the members of the Marketing Committee were in opposition to the Chairman, but this again is an incorrect finding based on conjectures and surmises. There is nothing to show from the minutes that the ‘members have politely recorded their dissent’ as observed by the learned single Judge. The learned single Judge in paragraph-106 of his judgment has made observations which create an impression as if the Chairman and the Members were at loggerheads, which is not borne out by the record.

145. If the Marketing Committee Members and the Chairman of BCCI Mr. Dalmiya were at logger heads, we fail to understand why the Marketing Committee in its meeting held on 12.9.2004 gave Mr.Dalmiya all powers to deal with all eventualities. The minutes of the Marketing Committee meeting held on 12.9.2004 at Chennai states:

“After detailed deliberations, the members observed that the Chairman as the BCCI President be authorized to take necessary steps that he deemed fit in the best interest of the Board.

The Chairman observed that the matter was of utmost importance, he would suggest that the Working Committee be involved if any decision had to be taken in the matter.”

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146. Again in the minutes of the Emergent Working Committee of the BCCI held on 16.09.2004 at Calcutta it is mentioned:

“The members endorsed all actions taken by the Chairman as the BCCI President and authorized him to take any further action in the matter in the best interest of the Board.”

147. Then again in the minutes of the meeting of the Marketing Committee of the BCCI held on 28.09.2004 at Calcutta it is mentioned:

“The Working Committee deliberated at length and authorized the President, BCCI to take all decisions in the subject matter of the grant of TV Rights.”

148. These minutes clearly demonstrate that it is not correct that the members of the Marketing Committee were at loggerheads with the Chairman, BCCI. If they were at logger heads, why should they repeatedly endorse the actions of Mr.Dalmiya, and authorize him to take further action in connection with the grant of TV rights as he deems fit ?

149. From a reading of the minutes of the meeting of the Marketing Committee held on 5.9.2004 which is set out in the impugned judgment it is clear that the inference drawn by the learned single Judge that the members of the Marketing Committee were at loggerheads with the Chairman was not justified and is not borne out from the record.

150. Paragraph 30 of the said minute refers to the observations of the Members of the Committee. The “Members” of the Committee includes the Chairman of the Committee also because the Chairman is also a Member of the Committee. From nowhere in the said minute it can be inferred that Mr. Dalmiya wanted to give the Television rights to ESPN or that he put up any onerous or sadistic stipulation. Paragraph 31 of the minutes expressly records the decision of the Marketing Committee, which obviously includes each and every member of the Marketing Committee including the Chairman.

151. The observation of the learned single Judge that Mr. Dalmiya had misled the Committee is not even the pleading of Zee in its writ petition. Even the members of the Marketing Committee have not come forward to make any statement that they were misled by Mr.Dalmiya or that a ‘blanket cheque’ was wrested from them.

152. Similarly, the finding of the learned single Judge that the ‘power’ that was given to the Chairman was only limited to deal with the case and not any more is not borne out from the record, because paragraph 10 of the minutes of the Working Committee on 16.9.2004 expressly states that all actions taken by Chairman had been unanimously endorsed by the Committee and he was fully authorized to take any further action in the matter in the best interest of the Board. Thus, all actions taken by the Chairman were endorsed unanimously by the Working Committee and he

was fully authorized to take any further action in the matter. The expression “any further action” is not limited to advising the lawyers of BCCI about the case. Thus, the inference of the learned single Judge that Mr. Dalmiya and the Members of the Committee were at loggerheads and that the Members recorded their dissent from his views is wholly unjustified and incorrect and not borne out from the record. If the members of the Committee were at loggerheads with the Chairman, they would not have endorsed the actions he had taken and they would not have authorized him to take further action in this connection. Also, it was the Working Committee which unanimously decided that Zee would be required to pay US \$ 20 million upfront and this decision of requiring a deposit of US \$ 20 million was also of the Working Committee and not of Mr. Dalmiya alone.

153. The learned single Judge has also made much about the condition of deposit of 20 Million US \$ by observing:

“Immediately after the attempt to eliminate the petitioner failed, a very strange and onerous condition is imposed, namely, that once the petitioner agrees to match the highest offer and agrees to comply with all the conditions, the petitioner should be asked to pay 20 Million US \$ as upfront within two days and that the Board would, thereafter, issue L.O.I. It is pertinent to note that the I.T.T does not lay down any such condition that the successful bidder, immediately on being identified, should deposit 20 million US \$ within two days as a pre-condition for issuing L.O.I.”

154. In our opinion the above observations were totally unjustified and unsustainable. In fact even Zee has not stated in its writ petition that the demand of US \$ 20 million was onerous or motivated. In fact, Zee agreed to the decision of the BCCI for the deposit of the US\$ 20 million. US \$ 20 million was only about 6% of US \$ 308 million, which in our opinion, cannot be considered as an onerous demand. In fact, Zee on 6.9.2004 confirmed that they were in a position to transfer US \$ 20 million and such transfer shall be effected immediately upon agreeing on the draft Letter of Intent that BCCI is looking to provide Zee. US \$ 20 million was transferred by Zee on 7.9.2004 by wire transfer, since ESPN had on 6.9.2004 filed a writ petition before the Bombay High Court challenging the decision to accept Zee’s bid. In our opinion, this seems to have been done by Zee to create a *fait accompli*. In fact Zee had itself written that the transfer of US \$ 20 million to BCCI will be made only *after* agreement on the draft Letter of Intent which BCCI would provide to it. Since there was no such agreement (as is evident from the letter of Zee dated 11.9.2004) it should not have made the said transfer.

155. There is nothing to show that the BCCI or the Chairman wanted to eliminate Zee from the negotiations, rather, as already stated above, the Marketing Committee of BCCI had decided to award the Television Rights to Zee (although the contract was not subsequently concluded). In fact this

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really amounted to favouring Zee, since ultimately both Zee and ESPN had raised their bids to the equivalent amount of US \$ 308 million, and hence the Marketing Committee on 4/5.9.2004 could have well invited both Zee and ESPN to give their respective bids in sealed covers making US \$ 308 million as the base price, and ultimately award the contract to the highest bidder. In fact this was the proposal which BCCI made before the Bombay High Court, but it could have done so in the meeting of 4/5.9.2004 itself. As regards the demand of deposit of US \$ 20 Million there is nothing strange in this, as it was obviously sought to ensure that the offer of Zee was in good faith and was serious. The observation that *“the said condition is nothing but a sadistic stipulation with the fond hope that the petitioner will not be able to comply with the said condition”* is, in our opinion, wholly unjustified and unsustainable. Even Zee has not made these allegations. In our opinion, judicial language should be more temperate and restrained.

156. It may be mentioned that by its fax letter dated 6.9.2004 Mr. Himanshu Mody of the Zee had written to the Chairman, Finance Committee of BCCI as follows:

“We are happy to confirm that we are in a position to transfer US\$ 20 million advance payment. Please provide us with the details of the bank where such transfer can be made. It would be helpful if your bank is on the RTGS system.

Such transfer shall be effected, immediately upon agreeing on the draft of the LOI that the BCCI is looking to provide us.”

157. Thus, it is evident from the own letter of Zee that the transfer of the pre-deposit of US \$ 20 million was only intended to be made *after the Letter of Intent was finalised*. Since, the Letter of Intent was never finalised there was no occasion for Zee to transfer US \$ 20 million to the account of BCCI on its own, and it appears that this was done by Zee only to try to create a fait accompli and obviously to allege that a contract had been entered into. It may be mentioned that Zee had by its separate letter to BCCI on 6.9.2004 forwarded its draft Letter of Intent, and hence it should have transferred US \$ 20 million *only if and when* the Letter of Intent was finalised and the contract was entered into. It may be mentioned that even on 11.9.2004 Zee wrote to BCCI that BCCI’s draft Letter of Intent did not capture the terms of understanding between Zee and BCCI, and therefore it requested BCCI for negotiations to finalise the terms of the Letter of Intent. Thus it is evident that there was no absolute and unqualified contract between the parties as required by Section 7 of the Contract Act, and the matter was still at the stage of negotiations.

158. In paragraph 113 of his judgment the learned single Judge has observed that the remedy was not by cancelling the tender process, but there were many other alternatives. In our opinion, it is not for the Court to decide which particular alternative should be preferred, and as long as the

alternative adopted by the party is not illegal or *mala fide*, the Court cannot interfere. A party may have several options, and as long as the option adopted is not illegal, it is not for the Court to suggest that this or that option should have been adopted.

159. Learned Senior Counsel appearing for Zee had also made much about the statement in the minutes of Working Committee of the BCCI wherein it has been stated that the Chairman Mr. Dalmiya stated that the Court had asked both the parties to re-bid before the Court. No doubt Mr. Iqbal Chagla, learned counsel appearing for ESPN, admitted before the learned single Judge that the suggestion for a re-bid came only from the Board, and not from the Court. However, it is difficult to understand what can be made out of this mistake which the Chairman may have committed.

160. When the matter had gone to the Bombay High Court in the writ petition filed by ESPN obviously BCCI and its Chairman had to show their *bona fides* and they infact did so by stating before the Court that both Zee and ESPN can give their sealed tenders in the Court (keeping the base price at US \$ 308 Million), and whoever's bid was higher would be given the contract. It is very possible that by a *bona fide* mistake the Chairman Mr.Dalmiya told the Working Committee that the suggestion for re-bid came from the Court. It is difficult to understand what possible *mala fide* objective Mr.Dalmiya could have to mislead the Working Committee by making this statement. In paragraph 114 the learned single Judge observed:

“The fact remains that the President had deliberately misled the Committee on that issue, thereby damaging the cause of the petitioner. The members of the Committee fell into the trap, having been impressed that the attitude of the petitioner was very unreasonable and the situation of ensuing Australia-India series was so desperate and the Committee therefore gives a free hand to the President, authorizing the President to take any further action in the matter in the best interest of the Board.”

161. The above observations, in our opinion, were wholly unjustified, uncalled for, and unsustainable. We are of the opinion that the President by mistake stated to the Working Committee that the Court had asked for a re-bid, but it was a *bona fide* mistake. There was no deliberate intention of Mr. Dalmiya to mislead the Committee, because we cannot see what benefit Mr. Dalmiya could get from this statement. If Mr. Dalmiya and the Marketing Committee were so hostile to Zee we cannot see why they decided to award the contract to Zee in the meeting of 4/5.9.2004 in the first place, when the ultimate bids of Zee and ESPN were the same *i.e.* US \$ 308 million, and there was no legal obligation to award the contract to Zee in this situation.

162. It may be mentioned that clause 3.8(b) and (c) of the Invitation to Tender reads:

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“(b) BCCI may in its unfettered discretion decide to accept a Tender or reject it and it shall not be obligatory on its part to provide any reason therefore.

(c) BCCI shall have unfettered right to negotiate with any Tenderer as it may deem fit necessary. While it shall be open to BCCI to negotiate any terms of conditions with any Tenderer so as to arrive at any conclusive decision, the same shall not be construed as a right available to any one or that the same shall not be treated as precedent in any form or manner.”

163. Clause 5.4 states that the BCCI reserves the right and absolute discretion at any time:

“(d) to cancel the entire tendering process without assigning any reason provided however, in the event of cancellation, the tender security shall be refunded without interest within 30 days from the date of such cancellation.”

164. Hence, in our opinion, the BCCI was well within its right to cancel the tender process under the above clauses. The ultimate decision to cancel the tender process was taken in a compelling situation which decision was not only approved by the Marketing Committee of the BCCI on 28.9.2004, but also by the General Body Meeting of the BCCI on 30.9.2004 in its Annual General Meeting. Hence, in our opinion, the cancellation of the tender process was well within the right of BCCI.

165. It may be mentioned that the BCCI had sought permission from the International Cricket Council to hold matches without TV coverage, but by its letter dated 10.09.2004, the International Cricket Council declined to consider this request. It may also be mentioned that by letter dated 17.9.2004, the Chairman of the Cricket Board of Australia wrote to Mr. Dalmiya that if the October/November 2004 of Australia Tour to India is cancelled it cannot be rescheduled in the foreseeable future and would be cancelled with significant losses not being recoverable. Hence the BCCI was left with no other resort but to cancel the tender process and take the action which it finally did.

166. Mr. K.K.Venugopal, learned Senior Counsel appearing for the BCCI, has relied on the decisions of the Supreme Court in *Radhakrishna Agarwal v. State of Bihar*, AIR 1977 SC 1496; *Kerala State Electricity Board v. Kurien*, 2000 (6) SCC 293 (paragraphs 9, 10 & 11); *Kulchinder Singh v. Hardayal Singh*, 1976 (3) SCC 828 (paragraph 10); *B.D.A v. Ajai Pal Singh*, 1989 (2) SCC 116, etc. in support of his contention that even assuming that there was a contract no writ could be issued under Article 226 of the Constitution of India to remedy the alleged breach of contract. In our opinion, when we have found that there was no contract at all between Zee and BCCI, it is not necessary to go into this question.

167. Since we have held that there was no contract between the parties, we fail to understand how the writ petition could have been entertained at

all. To maintain a writ petition, the petitioner must establish that some right of his has been infringed. That right may flow from the statute or contract. When the writ petitioner has not been able to establish either any statutory or contractual right in his favour, we fail to understand how the writ petition could have been entertained at all.

168. In *Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal and others*, AIR 1962 SC 1044 (vide paragraph 5), a Constitution Bench of the Supreme Court observed:

“It is implicit in the exercise of the extraordinary jurisdiction (under Article 226) that the relief asked for must be one to enforce a legal right. In *State of Orissa v. Madan Gopal*, AIR 1952 SC 12, this Court has ruled that the existence of the right is the foundation of the existence of jurisdiction of the Court under Article 226 of the Constitution of India.”

169. In *Director of Settlements, A.P and others v. M.R. Apparao and another*, 2002 (4) SCC 638, (vide paragraph 17) the Supreme Court observed: -

“One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed”

170. The same view has been reiterated in *National Textile Corporation v. Haribux*, 2004 (9) SCC 786 (paragraph 7).

171. Thus, it is well settled that before any writ can be issued, the petitioner must show that he has some legal right, and that legal right has been infringed by the respondent. In the present case, the petitioner has not been able to show any legal right whatsoever, either statutory or contractual. There is no statute governing the tender process and Article 14 of the Constitution of India does not apply because it has been held by the Supreme Court that BCCI is not a ‘State’ under Article 12 of the Constitution. As held by us, there is also no contract which can be enforced. Hence, the writ petition should have been thrown out on this ground alone instead of going into other details.

172. In paragraph 124 of his judgment the learned single Judge has accepted the fact that a firm Letter of Intent has not been issued, and hence the Court cannot order the issue of any contract. The learned single Judge has also noted that the grant of contract was from 1.10.2004 to 30.9.2008, but by now the Australia and Pakistan series are over, and hence even assuming that there was a contract the same cannot be possibly enforced. However, the learned single Judge went on to say that the petitioner could file a suit for damages, as it has been a victim of unfair action of the BCCI. No doubt in paragraph 126 of the judgment, the learned single Judge has observed that the observations made in his judgment will be disregarded in

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any suit for damages, but we fail to understand why, when the learned single Judge is of the opinion that the petitioner should be relegated to his remedy of a suit for damages, he should have gone into such great detail in castigating the BCCI and its President in paragraphs 95 to 125 of his judgment. All these observations were really unnecessary once the learned single Judge was of the view that the remedy of the petitioner was to file a suit for damages. No doubt the learned single Judge has observed that the Court hearing the suit will not be influenced by his judgment. But we cannot be oblivious to the fact that a judge of the Subordinate Judiciary will definitely be influenced by such strong observations which have been made by a High Court Judge, which were really uncalled for. It is strange that while the learned single Judge holds that no relief can be granted to the petitioner, he has made a scathing criticism and vituperative tirade against the BCCI and its President. We are, further, of the opinion that the writ petitioner has deliberately suppressed the draft Letters of Intent as well as the letter dated 11.9.2004 of Mr. Himanshu Mody of Zee addressed to Mr. N. Srinivasan, Chairman, Finance Committee, Board of Control for Cricket in India, which clearly indicates that there was no contract between the parties, and the matter was inchoate and only at the stage of negotiations. Had this been disclosed, it is quite possible that the writ petition would have been dismissed at the very outset on the ground that there was no concluded contract, and hence there was no legal right in favour of the writ petitioner. As held by the Supreme Court in *S.J.S. Business Enterprises v. State of Bihar*, 2004 (7) SCC 166 and by this Court in *M.P. Farook v. State of T.N.*, 1995 Writ L.R. 706, if the petitioner suppresses material facts, he has not come to the Court with clean hands, and the writ petition should be dismissed on that ground itself.

173. The learned single Judge, in our opinion, has passed disparaging intemperate and harsh remarks against Mr. Dalmiya, which were wholly unjustified and uncalled for. The language of the Court should ordinarily be mild, restrained and moderate.

174. In *Tessta Setalvad and another v. State of Gujarat and Others*, AIR 2004 SC 1979 (*vide* paragraph 7) the Supreme Court observed:

“Judicial decorum requires dispassionate approach and the importance of issues involved for consideration is no justification to throw to winds basic judicial norms on mere personal perceptions as saviours of the situation.”

175. In paragraphs 9 and 10 of the same judgment the Supreme Court observed:

“Observations should not be made by Courts against persons and authorities, unless they are essential or necessary for decision of the case. Rare should be the occasion and necessities alone should call for its resort. Courts are temples of justice and such respect they also deserve because they do not identify themselves with the causes before

it or those litigating for such causes. The parties before it and the counsel are considered to be devotees and Pandits who perform the rituals respectively seeking protection of justice; parties directly and counsel on their behalf. There is no need or justification for any unwarranted besmirching of either the parties or their causes, as a matter of routine.

Courts are not expected to play to the gallery or for any applause from anyone or even need to take cudgels as well against any one, either to please their own or any one's fantasies. Uncalled for observations on the professional competence or conduct of a counsel, and any person or authority or harsh or disparaging remarks are not to be made, unless absolutely required or warranted for deciding the case."

176. In paragraph 12 of the same judgment the Supreme Court emphasised the need for Judges to adopt utmost judicial restraint against using strong deprecatory language and imputation of corrupt motives.

177. In the present case, the learned single Judge in paragraph 113 of his Order observed:

"The manner in which the Chairman had presented the issues before the Working Committee is a sad example of how a highly placed personality, on the strength of the sheer trust reposed on him, could deliberately mislead a group of equally highly placed and well informed persons. He had presented a story/picture by clear misrepresentation of what had happened before the Court at Bombay and thereby successfully prejudiced the Committee against the petitioner and wrested from them a blank cheque to do whatever he liked.

178. In our opinion the above observations of the learned single Judge were not only uncalled for but they are also wholly unsustainable. We have already pointed out that it is not correct that the Working Committee and the Chairman Mr. Dalmiya were at loggerheads, rather the Committee repeatedly endorsed the actions of the Chairman and authorised him to take further steps in connection with the grant of Television rights.

179. The learned single Judge has, in our opinion, indiscriminately labelled the actions of Mr. Dalmiya and BCCI as actuated by bias and *mala fides* in every single aspect, although the documents and other materials on the record totally contradict the assumptions on the basis of which he has given his findings on bias and *mala fides*. In our opinion, these findings are based on mere suspicions, surmises and conjunctures, and cannot be sustained. The Supreme Court has repeatedly held that Court should not make observations in regard to matters which are not necessary for the disposal of the case, vide *Mr. 'X' v. Hospital 'Z'*, 2003 (1) CTC 118 : 2003 (1) SCC 500 (vide paragraph 6).

180. In the present case, having held that the relief sought for by the petitioner could not be granted, the learned single Judge ought to have

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dismissed the writ petition straightaway without making any further observation on the issues, which were wholly unnecessary for the disposal of the case. The Courts must realize that such censorious and vituperative strictures can cause irreparable damage to the reputation of a person, and hence Judges must be very careful before making them.

181. We may therefore summarise our reasoning and conclusions in this judgment for holding that the writ appeals filed by BCCI and Mr. Dalmiya deserve to be allowed and the writ appeal and the writ petition filed by the Zee Telefilms Pvt. Ltd. deserves to be dismissed.

Summary of Reasons and Conclusions:

We may summarise our reasoning step by step.

(1) It cannot be said that the Marketing Committee and the Chairman Mr. Dalmiya were at loggerheads on 4/5.9.2004 or subsequently, because in fact on several occasions, as already mentioned above, the Marketing Committee endorsed the actions of Mr. Dalmiya and also authorized him to take any further action in regard to the grant of Television rights. If the Marketing Committee was in opposition to Mr. Dalmiya why should it have done so ?

(2) The Marketing Committee, which included Mr. Dalmiya, had unanimously decided to give the contract to Zee (though the contract was not eventually executed), and this demonstrates that Mr. Dalmiya or the Committee could not possibly have any animus against Zee. In fact the favour, if any, was to Zee because the ultimate bid of both Zee and ESPN was the same *i.e.* US \$ 308 million, and hence it was not necessary to decide in favour of Zee merely because it was originally the highest bidder. There is no rule of law that in such a situation the contract must be given to the original highest bidder.

(3) The contract for Television rights could not ultimately be given by BCCI to Zee because of the filing of the writ petition before the Bombay High Court. Although it is true that the BCCI had earlier decided to award the contract to Zee it did not ultimately do so in view of the writ petition filed by ESPN before the Bombay High Court, because apparently BCCI did not want to create the impression that it was seeking to pre-empt the issue by awarding the contract to Zee when the matter was sub-judice before the Bombay High Court.

(4) The allegation that the writ petition before the Bombay High Court was filed in collusion between BCCI and ESPN cannot be accepted because had there been collusion then BCCI would not have decided to award the contract to Zee in the first place at all. If BCCI and Mr. Dalmiya were determined to grant the contract to ESPN, then in the meeting of the Marketing Committee held on 4.9.2004 they could have decided to grant the contract to ESPN instead of Zee. The fact that the decision was taken by BCCI Committee (including Mr. Dalmiya) to give the contract to Zee belies the allegation of Zee that BCCI was in collusion with ESPN and that the writ petition was filed collusively.

(5) Although it is true that the status quo order was passed by the Bombay High Court only on 15.9.2004 in the writ petition filed by ESPN on 6.9.2004, BCCI apparently did not want to create an impression in the Court that it was pre-empting the issue and hence it did not implement its earlier decision to award the contract to Zee.

(6) The *bona fide* of BCCI is further proved by the fact that before the Bombay High Court it stated that it was not favouring any particular party, but was prepared to award the bid to the person whose bid was highest. For this purpose BCCI submitted before the Bombay High Court that both Zee and ESPN can be asked to give their fresh bids in sealed covers before the Bombay High Court making US \$ 308 million as the base price, and the contract would be awarded to the highest bidder. In our opinion, nothing fairer could have been done by BCCI, and it is wholly wrong to castigate its actions as *mala fide*.

(7) As regards the statement of Mr. Dalmiya to the Marketing Committee that the Bombay High Court wanted a re-bid, that was no doubt a wrong statement as it was the BCCI which suggested a re-bid and not the Court. The question, however, remains whether the said statement of Mr. Dalmiya before the Marketing Committee was *bona fide* or *mala fide*. In our opinion, Mr. Dalmiya could have no motive to mislead the Members of the Marketing Committee. If Mr. Dalmiya was bent upon granting the contract to ESPN he would not have in the meeting of the Marketing Committee on 4.9.2004 decided, along with the other members of the Marketing Committee to award the contract to Zee merely because Zee was originally the highest bidder. There is no rule of law that the contract must be given to the original highest bidder, particularly when the tender process had been given up and private negotiations were being done. Thus, we are of the opinion that this was only a *bona fide* mistake and not *mala fide*.

(8) No concluded contract between BCCI and Zee had ever come into existence, and hence no right accrued in favour of Zee. The writ petition of Zee was therefore not maintainable as a writ lies when there is a legal right which is infringed.

182. In view of the above, writ appeal No.636 of 2005 (filed by BCCI) and writ appeal No. 638 of 2005 (filed by Mr. Jagmohan Dalmiya) are allowed, and writ petition (W.P.No.4120 of 2005) and writ appeal No. 676 of 2005 (filed by Zee Telefilms Limited) are dismissed. The impugned judgment of the learned single Judge is set aside. No costs. Consequently, connected W.A.M.Ps are closed.

ALS
