# case analysis of Secretary, Ministry of Information and Broadcasting, Govt. of India and Cricket Association of Bengal and Ors.

BY

**SHWETA YADAV**

INTERN

2nd YEAR BBA LLB,

**SYMBIOSIS LAW SCHOOL, PUNE**

**Mob-** 8956442395

**Gmail-** 18010126150@symlaw.ac.in



**26th APRIL 2020**

# Secretary, Ministry of Information and Broadcasting, Govt. of India V. Cricket Association of Bengal and Ors. case and it’s impact on indian society

# BACKGROUND OF THE CASE

The 1995 landmark judgement of the Apex Court on the issue of airwaves relates to the dispute between the Ministry of Information and Broadcasting and the Cricket Association of Bengal (herein referred to as CAB) over whether or not the cricket organisation had the right to grant exclusive telecast rights to a private agency and not Doordarshan. To deal with the dispute between the parties, the court had to answer the bigger issue of whether or not the Government or government related agencies like Doordarshan can have monopoly over the creation of terrestrial signals and sole discretion over telecasting or not telecasting them.

The dispute arose in the early days of economic liberalization which allowed private media to enter the field which was till then a state-owned media monopoly through mediums like All India Radio and Doordarshan. At stake were also notions of what constitutes the public sphere and which agency could be said to represent the widest section of the public in India. The argument by Doordarshan was premised on the facts that they had the largest reach in terms of audience and thus a valid claim to exercise monopoly regarding broadcasting.

# FACTS IN ISSUE

On 15th March 1993, CAB sent a letter to DD asking for detailed offer on any of the two alternatives.

1. DD would create 'Host Broadcaster Signal' and also undertake live telecast of all the matches in the tournament, or
2. Any other party would create the 'Host Broadcaster Signal' and DD would only purchase the rights to telecast in India.

CAB emphasised in particular that, in either case, the foreign TV rights would remain with the cricket body. After taking into consideration the offer made by DD offered the worldwide TV rights to it which was declined. CAB entered into an agreement with the World Production Establishment (WPE), representing the interests of Trans World International (TWI), for telecast rights to all the matches. CAB pointed out that the offers received from abroad, including from TWI, were much higher than Rs 20 million and that those payments would be in foreign exchange. However, they were still keen that DD should come forward to telecast the matches since many people in India would otherwise be deprived of viewing the tournament. Accordingly, they had made TWI agree to co-production with DD and they were also appealing to DD to enter into such a co-production. CAB came up with a set of suggestions. CAB requested DD to communicate their final decision in the matter before 21 October.

On 27 October DD informed CAB that the terms and conditions of its renewed offer of 18 October were not acceptable and that DD had already intimated to CAB that they would not take signals from TWI, a foreign organisation.

On 8 November CAB filed a writ petition in the Calcutta High Court praying, among others, that the respondents should be directed to provide telecast and broadcast of all the matches and also provide all arrangements and facilities for telecasting and broadcasting of the matches by the agency appointed by the CAB, TWI. On 15th November DD filed a Contempt Petition in the High Court against CAB and another, for non-compliance with the orders of the High Court. It also filed the present Special Leave Petitions in the Supreme Court on the same day.

# ISSUES

The following issues had to be resolved:

1. What are the conditions that can be imposed by Government department concerned in the present case the Ministry of Information and Broadcasting for?
2. creating terrestrial signal of the event?
3. granting facilities of unlinking to a satellite not owned or controlled by the Government or its agencies?
4. Does the Government or Government agencies have a monopoly over creating terrestrial signals and telecasting them or refusing to telecast them?
5. Can the Government or Government agencies like DD claim to be the host broadcaster for all events, whether produced or organised by it or by anybody else in the country?
6. Can they insist upon the organiser or the agency engaged by them to telecast the event(s), taking signals only from the Government or Government agency and to telecast only with its express permission?

# PETITIONER'S ARGUMENT

There is a difference between the implications of the right conferred under Article 19 [1] (a) upon

1. the broadcaster
2. the person desiring access to the media to project his views, including the organiser of an event,
3. the viewer, and
4. a person seeking up linking of frequencies so as to telecast signals generated in India to other countries.

The primary object of the telecast by CAB is to raise funds and hence the activities are essentially of trade. The deployment of profits for promotion are immaterial. The broadcaster does not inherit the right as such to access the airwaves without a license either for the purposes of telecast or for the purposes of up linking, no general right exists to a license to use the airwaves which, as a scarce resource, have to be used in a manner that the interests of the largest number are best served. The paramount interest is that of the viewers.

The grant of a license does not confer any special right inasmuch as the refusal of a license does not result in the denial of a right to free speech. The state monopoly created as a device to use the resource is not per se violative of the right of free speech as long as the paramount interests of viewers are served and access to the media is governed by the fairness doctrine. The right to telecast/broadcast has certain inherent limitations imposed by nature, whereas Article 19(2) applies to restrictions imposed by the State. The object of licensing is not to cast restrictions on the expression of ideas, but to regulate scarce resources to ensure their optimum enjoyment by all including those who are not affluent enough to dominate the media.

The rights of an organiser to use airwaves as a medium to telecast and thereby propagate his views, are distinct from his right to commercially exploit the event. Unless, therefore, the rights of the viewers are given priority, it will in practice result in the affluent having the sole right to air their views, completely washing away the right of the viewers.

The right of the viewer can only be safeguarded by the regulatory agency by controlling the broadcast frequencies, as it is otherwise impossible for viewers to exercise their right to free speech qua the electronic media in any meaningful way. A mere creation of the monopoly agency to telecast does not per se violate Article 19 [1] (a) as long as the access is not denied to the media either absolutely or by imposition of terms that were unreasonable. Article 19 [1] (a) proscribes monopoly in ideas and as long as this is not done, the mere fact that access to the media is through a Government-controlled agency is not per se violative of Article 19 [1] (a) A general permission to all who seek frequencies to telecast would not better serve the principle underlying Article 19 [1] (a) in the socio-economic scenario of this country and would result in passing the control of the media from the Government to private agencies affluent enough to buy access.

# RESPONDENT'S ARGUMENTS

The right to organise a sports event inheres in the entity to which the right belongs and that entity in this case is the BCCI and its members, which include the CAB. The right to produce an event includes the right to deal with the event in all manner and mode that the entity chooses. This includes the right to telecast or not to telecast the event, by or through whom, and on what terms and conditions. In the event the entity chooses to telecast its own events, the terms and conditions for televising such events are to be negotiated by it with any party with whom it wishes to negotiate. The BCCI and CAB had a right under Article 19 [1] (a) to produce, transmit, telecast and broadcast their event directly or through its agent. The right to circulate information is a part of the right guaranteed under Article 19 [1] (a). Even otherwise, viewers and persons interested in sports by way of education, information, record and entertainment have a right to such information, knowledge and entertainment. The content of the right under Article 19 [1] (a) reaches out to protect the information of the viewers also. In this case, there was a right of the viewers and also the right of the producer to telecast the event. In view of these two rights; there was an obligation on the part of the Department of Telecommunication to allow the telecasting of the event. The grant of a licence under Section 4 of the Act is a regulatory measure and does not entitle MIB either to deny a license to BCCI/ CAB for the purposes of production, transmission and telecasting sports events or to impose any condition unrelated to Article 19 [2]. If such denial or imposition were made, it would amount to a prohibition. The Constitution did not visualize any monopoly in Article 19 [1] (a).

Hence DD could not claim the same nor could the commercial interest of DD or claim of exclusivity by it of generation of signals be a ground for declining permission under Section 4 of the Act. Hence the following restrictions that were sought to be imposed fell outside the ambit of Article 19(2) and were unconstitutional. There was no monopoly in relation to what the viewer can see since satellites can beam directly on to television sets, through a dish antenna, all programmes whose footprints are receivable in the country. The non-availability of a channel is of no consequence in the present days of technological development. Any person intending to telecast/broadcast an event could do so directly even without routing signal through the channels of DD or MIB. What was required was to ensure is that the secured channel did not interfere with each other. On account of the availability of innumerable satellites in the Geo-Stationary Orbit of the Hemisphere, the signals could directly be uplinked through any of the available transponders of satellite whose footprints can be received back through appropriate electronic device. Merely because an organization may claim profit from an activity whose character is predominantly covered under Article 19 [1] (a), it would not convert the activity into one involving Article 19 [1] (g) (Freedom to practise one’s trade and profession).

# free Speech

“Freedom of expression is the matrix, the indispensable condition, of nearly every other form of freedom.” —U.S. Supreme Court Justice Benjamin N. Cardozo in Palko v. Connecticut.

Freedom of speech is a bellwether: how any society tolerates those with minority, disfavoured, or even obnoxious views will often speak to its performance on human rights more generally.  In international law, access to information and free expression are two sides of the same coin, and both have found tremendous accelerators in the Internet and other forms of digital communication.  At the same time, efforts to control speech and information are also accelerating, by both governments and private actors in the form of censorship, restrictions on access, and violent acts directed against those whose views or queries are seen as somehow dangerous or wrong. From our earliest days, when we were called The Fund for Free Expression, we have fought all forms of repression of speech, in all media, around the globe.

The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an “aware” citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgement on all issues touching them. This cannot be provided by a medium controlled by a monopoly – whether the monopoly is of the State or any other individual, group or organisation. As a matter of fact, private broadcasting stations may perhaps be more prejudicial to free speech right of the citizens than the government-controlled media, as explained in the body of the judgement. The broadcasting media should be under the control of the public as distinct from Government. This is the command implicit in Article 19 (1) (a). It should be operated by a public statutory corporation or corporations, as the case may be, whose constitution and composition must be such as to ensure its/ their impartiality in political, economic and social matters and on all other public issues. It/they must be required by law to present news, views and opinions in a balanced way ensuring pluralism and diversity of opinions and views. It/they must provide equal access to all the citizens and groups to avail of the medium.

# Airwaves a public property

Airwaves constitute public property and must be utilised for advancing public good. No individual has a right to utilise them at his choice and pleasure and for purposes of his choice including profit. The right of free speech guaranteed by Article 19 (1) (a) does not include the right to use airwaves, which are public property. The airwaves can be used by a citizen for the purpose of broadcasting only when allowed to do so by a statute and in accordance with such statute. Airwaves, being public property, it is the duty of the State to see that airwaves are so utilised as to advance the free speech right of the citizens which is served by ensuring plurality and diversity of views, opinions and ideas. This is imperative in every democracy where freedom of speech is assured. The free speech right guaranteed to every citizen of this country does not encompass the right to use these airwaves at his choosing. Conceding, such a right would be detrimental to the free speech rights of the body of citizens in as much as only the privileged few powerful economic, commercial and political interests- would come to dominate the media. By manipulating the news, views and information, by indulging in misinformation and disinformation, to suit their commercial or other interests, they would be harming – and not serving – the principle of plurality and diversity of views, news, ideas and opinions. This has been the experience of Italy, where a limited right, i.e. at the local level but not at the national level was recognised. It is also not possible to imply or infer a right from the guarantee of free speech which only a few can enjoy.

# The Indian Telegraph Act, 1885

The Indian Telegraph Act, 1885 is totally inadequate to govern an important medium like the radio and television, i.e., broadcasting media. The Act was intended for an altogether different purpose when it was enacted. This is the result of the law in this country not keeping pace with the technological advances in the field of information and communications. While all the leading democratic countries have enacted laws specifically governing the broadcasting media, the law in this country has stood still, rooted in the Telegraph Act of 1885. Except Section 4 (1) and the definition of telegraph, no other provision of the Act is shown to have any relevance to broadcasting media. It is, therefore, imperative that the Parliament makes a law placing the broadcasting media in the hands of a public/statutory corporate or the corporations, as the case may be. This is necessary to safeguard the interests of public and the interests of law as also to avoid uncertainty, confusion and consequent litigation.

The CAB did not ever apply for a license under the first proviso to Section 4 of the Telegraph Act nor did its agents-ever make such an application. The permissions, clearances or exemption obtained by it from the several departments (mentioned in judgement) are no substitute for a licence under Section 4(1) proviso. In the absence of such a license, the CAB had no right in law to have its matches telecast by an agency of its choice. The legality or validity of the orders passed by Shri N. Vithal, Secretary to the Government of India, Telecommunications Department, need not be gone into since it has become academic. In the facts and circumstances of the case, the charge of malafides or of arbitrary and authoritarian conduct attributed to Doordarshan and Ministry of Information and Broadcasting is not acceptable. No opinion need be expressed on the allegations made in the Interlocutory Application filed by BCCI in these matters. Its intervention was confined to legal questions only.

# Article 19

The fundamental right to the freedom of speech and expression guaranteed by Article 19(1)(a) and the implications of the restrictions permitted to be imposed on the said right, by Article 19(2). Let us look at the number of judgements that clarified the same.

In Romesh Thappar v. The State of Madras[[1]](#footnote-1), the facts were that the Provincial Government in exercise of its powers under Section 9(1-A) of Madras Maintenance of Public Order Act, 1949, by an order imposed a ban upon the entry and circulation of the petitioner's journal 'Cross Roads'. The petitioner approached this Court under Article 32 of the Constitution claiming that the order contravened the petitioner's fundamental right to freedom of speech and expression. He also challenged the validity of Section 9 (1-A) of the impugned Act. The majority of the Court held that the freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation.

The view was reiterated in Brij Bhushan and Anr. v. The State of Delhi[[2]](#footnote-2) where Section 7(1)(c) of the East Punjab Public Safety Act, 1949 as extended to the Province of Delhi, providing that the Provincial Government or any authority authorised by it in this behalf, if satisfied that such action was necessary for preventing or combating any activity prejudicial to the public safety or the maintenance of public order, may pass an order that any matter relating to a particular subject or class of subjects shall before publication be submitted for scrutiny, was held as unconstitutional and void. The majority held that the said provision was violative of Article 19(1)(a) since it was not a law relating to a matter which undermined the security of, or tended to overthrow the State within the meaning of the then saving provision contained in Article 19(2). The Court further unanimously held that the imposition of pre-censorship of a journal was a restriction on the liberty of the press which was an essential part of the right to freedom of speech and expression declared by Article 19(1)(a).

In Bennett Coleman & Co. and Ors. v. Union of India and Ors.[[3]](#footnote-3), the majority of the Constitution Bench held that newspapers should be left free to determine their pages, their circulation and their new edition within their quota which has been fixed fairly. It is an abridgment of freedom of expression to prevent a common ownership unit from starting a new edition or a new newspaper. A common ownership unit should be free to start a new edition out of their allotted quota and it would be logical to say that such a unit can use its allotted quota for changing its page structure and circulation of different editions of same paper. The compulsory reduction to ten pages offends Article 19(1)(a) and infringes the freedom of speech and expression. Fixation of page limit will not only deprive the petitioners of their economic viability, but will also restrict the freedom of expression by reason of the compulsive reduction of page level entailing reduction of circulation and including the area of coverage for news and views.

In Odyssey Communications Pvt. Ltd. v. Lokvidayan Sanghatana and Ors.[[4]](#footnote-4) it was held that the right of citizens to exhibit films on Doordarshan subject to the terms and conditions to be imposed by the Doordarshan is a part of the fundamental right of freedom of expression guaranteed under Article 19(1)(a) which can be curtailed only under circumstances set out under Article 19(2). The right is similar to the right of citizen to public his views through any other media such as newspapers, magazines, advertisement hoardings etc. subject to the terms and conditions of the owners of the media. The freedom of expression is a preferred right which is always very zealously guarded by the Supreme Court.

In S. Rangarajan v. P. Jagjivan Ram and Ors.[[5]](#footnote-5) , it was held that the freedom of speech under Article 19(1)(a) means the right to express one's opinion by words of mouth, writing, printing, picture or in other manner. It would thus include the freedom of communication and their right to propagate or publish opinion. The communication of ideas could be made through any medium, newspapers, magazine or movie. But this right is subject to reasonable restriction in the large interests of the community and the country set out in Article 19(2). These restrictions are intended to strike a proper balance between the liberty guaranteed and the social interests specified in Article 19(2).

# JUDGMENT IN A GLANCE

1. The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. However, this right to have an access to telecasting has limitations on account of the use of the public property.
2. Right to receive and impart information was considered in the context of privilege pleaded by the State in relation to confidential documents relating to public affairs and the freedom of electronic media in broadcasting/telecasting certain events.
3. The Central Government shall take immediate steps to establish an independent autonomous public authority representative of all sections and interests in the society to control and regulate the use of the airwaves.

# OVERVIEW OF THE JUDGEMENT

Through its landmark judgement on 09.02.1995, the Supreme Court held the following:

1. Airwaves or frequencies were to be considered as public property. Their use had to be controlled and regulated by a public authority in the interests of the public and to prevent the invasion of their rights. Since the electronic media involved the use of the airwaves, this factor creates an inbuilt restriction on its use, as in the case of any other public property.
2. The Supreme Court held that the right to impart and receive information is a species of the right of freedom. The best means of imparting and receiving information as such is to have access to telecasting for the purpose. However, this right to have access to telecasting has limitations on account of the use of public property. The airwaves involved in the exercise of the right and can be controlled and regulated by a public authority. This limitation imposed by the nature of the public property involved in the use of the electronic media is in addition to the restrictions imposed on the right to freedom of speech and expression under Article 19 [2] of the Constitution.
3. The Supreme Court instructed the Central Government to take immediate steps to establish an independent, autonomous public authority representative of all sections and interests in society to control and regulate the use of the airwaves. The Supreme Court said that a diversity of opinions, views and ideas cannot be provided by a medium controlled by a monopoly -- whether the monopoly is of the State or any other individual, group or organisation. “As a matter of fact, private broadcasting stations may perhaps be more prejudicial to the free speech right of the citizens than government-controlled media, as explained in the body of the judgment. The broadcasting media should be under the control of the public as distinct from Government. This is the command implicit in Article 19(1)(a).”

# Suggestions

Knowledge is power. It empowers the possessor. Information is the basis of knowledge. It is not wrong to say that information is directly related to empowerment. In a democratic country, the empowerment of people is essential for its successful governance.

Restrictions on ownership have been important features of media regulation in most mature democracies like UK, USA, France, Germany, and Australia. In the experience of several countries, every move towards deregulation has intensified concentration of ownership. Many media watchers, as well as informed sections of the public, in many parts of the world are concerned about this growing trend, which is understood to be a central aspect of the ongoing process of media globalization.

But unfortunately the Broadcasting Services Regulation Bill was put off numerous times due to several reasons. The disputes over the transmission and ownership of broadcasting signals is regularly being raised before the Supreme Court and different High Courts in India. So the need for a comprehensive legislation in this area has certainly been felt.

# REFERENCES

1. Romesh Thappar v. The State of Madras [1950] CriLJ1514
2. Brij Bhushan and Anr. v. The State of Delhi [1950] CriLJ1525
3. Bennett Coleman & Co. and Ors. v. Union of India and Ors. [1973]2SCR757
4. Odyssey Communications Pvt. Ltd. v. Lokvidayan Sanghatana and Ors. AIR[1988] SC 1642

# BRIEF ABOUT AUTHOR

Shweta Yadav is pursuing B.B.A.LLB (Hons) from Symbiosis Law School, Pune. She is currently an Intern in ProBono India. She is the member of Human Rights Cell of Symbiosis Law School, Pune. She has interests in Family Law, Criminal Law and Corporate Law. By being part of Team ProBono, she is contributing to society through legal aid.

1. Romesh Thappar v. The State of Madras [1950] CriLJ 1514 [↑](#footnote-ref-1)
2. Brij Bhushan and Anr. v. The State of Delhi [1950] CriLJ 1525 [↑](#footnote-ref-2)
3. Bennett Coleman & Co. and Ors. v. Union of India and Ors. [1973] 2SCR757 [↑](#footnote-ref-3)
4. Odyssey Communications Pvt. Ltd. v. Lokvidayan Sanghatana and Ors. AIR [1988] SC1642 [↑](#footnote-ref-4)
5. S. Rangarajan v. P. Jagjivan Ram and Ors. [1989]2SCR204 [↑](#footnote-ref-5)