

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL ARBITRATION PETITION (I) No. 950 Of 2018**

Star India Pvt. Ltd.

..., Petitioner

vs.

Reliance Big Entertainment Pvt. Ltd. & Ors.Respondents

Mr. Virag Tulzapurkar, Senior Advocate, along with Mr. Sharan Jagtiani, Rashmin Khandekar, Sanjay Kadam, Sai Krishna, Sidharat Choprea, Apeksha Sharma, Sneha Jain, Sanjeel Kadam, Ranjeet Singh, Sayli Rajpurkar, instructed by M/s. Kadam & Company, for the Petitioner.

Mr. Aspi Chinoy, Senior Advocate, along with Dr. Birendra Saraf, Mr. Ameet Naik, Mr. Abhishek Kale, Ms. Madhu Gadodia and Mr. Vaibhav Bhure, instructed by M/s. Naik Naik and Company, for Respondent No.1

Mr. Darius Khambata, Senior Advocate, along with Gowree Gokhale, Vyapak Desai, Kshama Loya, Kartik Maheshwari and Bhavana Sunder, instructed by M/s. Nishith Desai Associates, for Respondent No.2.

CORAM: S.J. KATHAWALLA,J.

DATE: 23rd AUGUST, 2018

P.C:

1. The Petitioner, Star India Pvt. Ltd., has filed the above Petition under Section 9 of the Arbitration and Conciliation Act, 1996 ("the Act") seeking an urgent ad-interim order against Respondent No. 1 - Reliance Big Entertainment Pvt. Ltd. and Respondent No. 2 - Netflix Entertainment Services India LLP from in any manner exploiting, exhibiting, telecasting and/or making public the film 'GHOUL' directed by Patrick Graham and starring Radhika Apte and/or

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any part thereof on any medium, digital or otherwise, in any format whatsoever whether film or series or mini series or otherwise.

2. The Petition was filed on 20th August, 2018. On the same day, the Advocates for the Petitioner, mentioned the matter and requested the Court to place the same for urgent ad-interim reliefs. The Petition was therefore placed for urgent ad-interim reliefs on Tuesday, 21st August, 2018. On that day, the Advocates for the Respondents, submitted that they had just received the papers in the matter and the Application be heard on the next working day i.e. today 23rd August, 2018 (Wednesday 22nd August, 2018 being a Public Holiday).

3. According to the Petitioner, by an Agreement dated 29th June, 2017 titled as "Underproduction Film Assignment Agreement" read with First Addendum Agreement thereto dated 7th September, 2017, read with Second Addendum Agreement thereto dated 22nd June, 2018 (Film Agreements), executed between the Petitioner and Respondent No.1, the Petitioner acquired from Respondent No.1, inter alia, exclusive Satellite, Cable Television and Terrestrial Rights and certain non exclusive rights in the audio visual work/cinematograph film/mini series titled 'GHOUL' directed by Patrick Graham and starring Radhika Apte (the said film) on the terms and conditions more particularly set out in the Film Agreement. Under the non exclusive rights assigned to the Petitioner, internet and mobile rights (Digital rights) have also been granted in favour of the Petitioner by virtue of clauses 1.4.5 and 1.4.6 of the Agreements. While the Film Agreement pertains to 5 films, the present dispute is only in respect of the film 'GHOUL' and the Respondents act of seeking to release to the public and/or communicate to the public the film 'GHOUL' on the platform of the Respondent No.2. By such actions,

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Respondents are not only violating the Petitioner's rights and causing wrongful loss to the Petitioner and depriving it of its legitimate rights, the Respondents are also seeking to cause wrongful gain to themselves.

4. The global release of the film is admittedly fixed at 4.00 a.m. on 24th August, 2018. The parties, through their Advocates, have made submissions/allegations/counter allegations for more than three hours. I am not recording all the submissions/ allegations/counter allegations made by the respective Counsel representing the parties and the findings thereon because if I start doing so, it will be impossible to complete the dictation, transcribe the order and upload it before 4.00 a.m. I, therefore, only express my prima facie view that after going through the Petition, and the Affidavits filed by the Respondents, at this stage I am not convinced that the Respondent No. 2 has no rights as claimed by it or is acting in collusion with the Respondent No.1, as alleged by the Petitioner. I am also satisfied, at least at this stage, that the Petitioner is guilty of approaching the Court at the last minute for urgent ad-interim reliefs and because of the gross delay is not entitled to an order restraining Respondent No. 2 from releasing the series 'GHOUL' at 4.00 a.m. on 24th August, 2018.

5. As pointed out by Respondent No.2, several news reports regarding release by Respondent No.2 of the series 'GHOUL' flooded the public domain from **February, 2018**. For instance, in an Economic Times article dated **24th February, 2018** titled "*The next 100 mn users of Netflix will come from India: CEO Reed Hastings*", the series 'GHOUL' was mentioned as a new Netflix original show. In the Hindustan Times article dated **23rd February, 2018**, titled "*After Sacred Games, Netflix announces three new Indian original series.*

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Here's what they're about and who's starring". 'GHOUL' is described as a horror series written and directed by Patrick Graham, starring Radhika Apte and Manav Kaul. Similarly, there are several articles by prominent news publications such as India Today, ET Tech, Scroll.in, The Week, Showsa, the Indian Express, Gadgets 360, to name a few. These numerous news publications are compiled, annexed and marked as Exhibit-C (Colly.) to the affidavit filed by Respondent No. 2 dated 23rd August, 2018.

6. As pointed out by Respondent No. 2 in its affidavit, the Petitioner's business itself was mentioned in some of the news publications. For instance, in a news article by Live Mint dated **26th February, 2018**, Netflix CEO Reed Hastings has commented that *"We're also mostly western content and mostly in English with some Hindi. So, we have got a number of limiters compared to Reliance Jio or Hotstar (platform of the Petitioner)"*. The plan of Respondent No. 2 to release 'GHOUL' has also been reported in the same article.

7. In view of the above, it is inconceivable that the Petitioner, which is a media and entertainment company and owns a network of TV Channels and also has digital presence through the website www.hotstar.com and the Mobile App 'Hotstar' was not aware of the release of the series 'GHOUL' by Respondent No.2.

8. Mr. Tulzapurkar, the Learned Senior Advocate appearing for the Petitioner, has tried to offer an explanation by submitting that even if the Petitioner's attention was drawn in February, 2018 to these Articles, the Petitioner would not be incorrect in ignoring the same since the Petitioner was assigned non-exclusive digital rights qua the film 'GHOUL' and , Respondent No. 1 was therefore free to assign rights in favour of other entities like Netflix, subject to

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the negative covenant contained in clause 2.6 of the Agreement with the Petitioner dated 29th June, 2016. However, Mr. Tulzapurkar, in view of the very limited time that he had to go through the affidavit of Respondent No.2 and the Annexures thereto, missed the fact that it is also mentioned in the Article dated 20th February, 2018, published in Hindustan Times that “*From drama to horror to mystery, these broad and diverse stories, upon completion, will debut **exclusively** to over 117 million Netflix members in 190 countries*” (emphasis supplied).

9. Again on July 10, 2018, the trailer of the series was released with wide publicity and the series was widely discussed in the media. All the news articles are compiled, annexed and marked as Exhibit-D Colly. to the affidavit filed by Respondent No. 2 dated 23rd August, 2018. The Petitioner has pointed out that more than 55 million viewers have watched the trailer since 9th July, 2018.

10. Though the Advocates for the Petitioner have relied on the decision of the Hon'ble Supreme Court in the case of *Midas Hygiene Industries P.Ltd. And anr. vs. Sudhir Bhatia and others*¹ wherein it is held that mere delay in bringing action is not sufficient to defeat grant of injunction in such cases, in my prima facie view the Petitioner cannot seek assistance of the same at this urgent ad-interim stage since the Petitioner, despite the aforesaid facts, has not come out clean with the Court but have instead in the Petition represented to this Court in paragraph 3.26 that “.....very recently in the first week of August, 2018 it learnt about the proposed exploitation of the film by the Respondent No. 2 which is scheduled on 24th August, 2018”. For reasons best known to the

1 2004 (3) SCC 90

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Petitioner, the Vice President (Legal) of the Petitioner who has verified the Petition has in the verification clause not even bothered to mention which paragraphs in the Petition are true to his knowledge and which are on the basis of information. Instead, he has in the verification clause chosen to leave the paragraph numbers blank. When this Court enquired from the said Vice President (Legal) who was present in Court as to how the Petitioner came to know about the rights created in favour of Respondent No. 2 in the first week of August, 2018, he informed the Court that his business team informed him about the same. However, he has himself not gone through any material which showed that rights have been created in favour of Respondent No. 2 qua the film/series 'GHOUL'. In a further query by the Court as to when exactly the business team noted the fact that third party rights were created in favour of Respondent No. 2 qua the series 'GHOUL', he after making a call to a member of the business team informed the Court that they came to know about the same on 1st August, 2018 after reading the Article on the NDTV site.

11. In any event, even after admittedly being aware of the fact that third party rights have been created in favour of Respondent No. 2 on 1st August, 2018, the Petitioner did not deem it fit to issue a notice to Respondent No.2 calling upon them not to act on the rights created in their favour. Instead, they sent a notice to Respondent No. 1 and forwarded only a copy of the same to Respondent No.2. Again, the said notice was sent only on 6th August, 2018 and the Court was not moved upto 21st August, 2018 for urgent ad-interim reliefs, on the ground that the Petitioner received the reply to its legal notice from Respondent No. 1 only on 17th July, 2018.

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12. In view of the above, the Petitioner is not entitled to grant of urgent ad-interim relief as prayed.

13. Since Respondent No.2 - Netflix has undertaken immense efforts and incurred enormous costs to ensure the worldwide release of the series as more particularly set out in paragraphs 28 onwards in their affidavit, in my view, the balance of convenience is also in favour of Respondent No.2.

14. In the circumstances, the following order is passed:

- (i) Respondent No. 2 may globally release the series 'GHOUL' on 24th August, 2018 at 4.00 a.m. strictly subject to the further orders passed by this Court at the time of hearing and final disposal of the above Petition.
- (ii) The Learned Senior Advocate appearing for the Petitioner has stated that the Petitioner will file its rejoinder to the affidavits filed by the Respondents on or before Monday, 27th August, 2018. The statement is accepted.
- (iii) Place the Arbitration Petition for hearing and final disposal on Thursday, 30th August, 2018.
- (iv) Needless to add that the above Petition shall be heard and decided finally without being influenced by any of the observations made herein.

(S.J. KATHAWALLA J.)