

CAS 2022/A/9246 Shashank J. Rai v. National Anti-Doping Agency, India

ARBITRAL AWARD ON JURISDICTION

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Ms. Annett Rombach, Attorney-at-law, Frankfurt am Main, Germany

in the arbitration between

Shashank J Rai, Mangalore, India

Represented by Mr. Vidushpat Singania, Mr. Achyuth Jayagopal, Mr. Kushagra Jain and Ms. Daisy Roy of Krida Legal, New Delhi, India

Appellant

and

National Anti-Doping Agency, India, New Delhi, India

Respondent

I. THE PARTIES

1. Mr. Shashank J Rai (the “Athlete” or the “Appellant”) is a 29-year-old Indian basketball player.
2. The National Anti-Doping Agency, India (“INADA” or the “Respondent”) is the national anti-doping organisation for the country of India, which regulates the prevention and fight against doping in sport.
3. The Appellant and the Respondent are collectively referred to as the “Parties”.

II. FACTUAL BACKGROUND

4. On 5 February 2022, the Athlete was subjected to an out-of-competition doping control. The Athlete’s urine sample was forwarded to the National Dope Testing Laboratory in New Delhi, India. The analysis of the sample revealed the presence of 19-Norandrosterone, a prohibited substance under the World Anti-Doping Agency’s (“WADA”) List of Prohibited Substances.
5. On 26 April 2022, the Athlete received a notice of an adverse analytical finding (“AAF”) from INADA setting out the alleged anti-doping rule violation (“ADRV”). INADA also notified the Athlete of the imposition of a provisional suspension.
6. On 29 April 2022, the Athlete requested INADA to analyse the B sample and to provide the laboratory documentation package. The Athlete’s B sample was analysed at the Laboratoria Antidoping FMSI in Rome, Italy, as a result of which the presence of the prohibited substance was confirmed.
7. On 13 July 2022, a notice of charge was sent to the Athlete by the Respondent informing him that the B sample had confirmed the AAF.
8. On 17 August 2022, the Athlete submitted his written explanation in which he denied the ADRV. On 24 August 2022, the Athlete was informed that the Anti-Doping Disciplinary Panel (“ADDP”) was constituted to hear his case. Two hearings were held before the ADDP on 2 and 16 September 2022.
9. On 13 October 2022, the ADDP delivered its decision dated 11 October 2022 (the “Appealed Decision” or “ADDP Decision”) to the Athlete. The Athlete was found to have committed an ADRV, and a period of ineligibility of four years, starting from the date of the commencement of the provisional suspension, was imposed on him. In the ADDP Decision (p. 1) the Athlete was informed as follows about his right to appeal:

“Please note that according to Article 13.2.2 of the Anti-Doping Rules of NADA 2021, the time to file an appeal to the National Anti-Doping Appeal Panel shall be twenty-one (21) days from the date of receipt of this decision by the appealing party. The appeal may be filed at the above-mentioned address.”

[Emphasis in the original]

III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

10. On 2 November 2022, the Appellant filed his Statement of Appeal with the Court of Arbitration for Sport (“CAS”) against the Appealed Decision, pursuant to Articles R47 *et seq.* of the Code of Sports-related Arbitration (the “CAS Code”). The Appellant requested the appointment of Mr. Steven Bainbridge or Mr. Rajat Taimni as an arbitrator in accordance with Articles R48 and R50 para. 1 of the CAS Code.
11. On 7 November 2022, the CAS Court Office informed the Parties about the Appeal, acknowledged the Appellant’s designation of his Statement of Appeal as his Appeal Brief and noted the Appellant’s choice to proceed with his appeal in the English language. In addition, the Respondent was asked to submit its Answer and nominate an arbitrator from the list of CAS arbitrators in accordance with Article R53 of the CAS Code.
12. On 23 November 2022, the CAS Court Office informed the Parties that the Respondent had not nominated an arbitrator within the prescribed time limit, therefore pursuant to Article R53 of the CAS Code, it would be for the President of the CAS Appeals Arbitration Division, or her Deputy, to nominate an arbitrator *in lieu* of the Respondent.
13. On 30 November 2022, the CAS Court Office acknowledged receipt of the Respondent’s preliminary reply dated 29 November 2022 (“Preliminary Reply”) and noted that the Respondent objected to the CAS jurisdiction on the grounds that the Appellant was not an “international-level athlete” within the meaning of the World Anti-Doping Code (“WADA Code”) and the 2021 INADA Anti-Doping Rules (“INADA ADR”). The Appellant was invited by the CAS Court Office to comment on the Respondent’s jurisdictional objection.
14. On 6 December 2022, the Appellant filed his Response to the Preliminary Reply. Furthermore, on the same day, the Appellant filed additional submissions related to the merits of the case.
15. On 14 December 2022, the Appellant communicated to the CAS Court Office his intent to nominate a sole arbitrator instead of a three-member panel. In this regard, the CAS Court Office informed the Parties about the Appellant’s request to proceed with a sole arbitrator and the Respondent was invited to comment on the Appellant’s request until 19 December 2022.
16. On 22 December 2022, the CAS Court Office noted that the Respondent had not submitted any answer to the Appellant’s request for the appointment of a sole arbitrator and therefore advised the Parties that would be for the President of the CAS Appeals Arbitration Division, or her Deputy, to decide on the issue.
17. On 9 January 2023, the Parties were informed by the CAS Court Office that the President of the CAS Appeals Arbitration Division had decided to submit the case to a sole arbitrator.
18. On 28 February 2023, pursuant to Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted as follows:

Sole Arbitrator: Ms. Annett Rombach, Attorney-at-law, Frankfurt am Main, Germany.

19. On 22 March 2023, the CAS Court Office provided the Parties with a copy of the CAS Court Office letter sent to the International Basketball Federation (“FIBA”) on behalf of the Sole Arbitrator. In that letter, FIBA was asked to answer certain questions raised by the Sole Arbitrator in relation to the Athlete’s alleged status as an “international-level athlete” under the applicable FIBA regulations. The Parties were advised that they would be granted the opportunity to comment on FIBA’s response.
20. On 29 March 2023, FIBA replied to the Sole Arbitrator’s questions (the “FIBA Letter”). The FIBA Letter reads as follows:

“As per your request, FIBA provides the following answers to the questions of the Sole Arbitrator:

1. Beyond the criteria mentioned in the introductory section of the Book 4 FIBA International Regulations (FIBA IR), FIBA does not have any additional defined criteria to classify Players as “International Level”.

2. The 3x3 Pro Basketball League in India, in which the team Bangalore Machas competed, was a “FIBA Event” for the year 2022 in the sense of the FIBA IR (Book 4).

3. The Bangabandhu 6th Asian Basketball Championship 2021, which took place in Dhaka, Bangladesh is not a “FIBA Event” in the sense of the FIBA IR (Book 4).

4. In terms of the temporary scope of how often an Athlete must need to have competed in a “FIBA Event” to qualify as an “International Level Athlete”, FIBA considers all relevant circumstances relating to the case and uses a pragmatic approach. FIBA takes into consideration:

a. The time elapsed since the player’s last participation to a FIBA Competition or International League.

b. The specific competitions to which the players participated. FIBA considers whether the Player’s participations were in a main official competitions of FIBA or other type rather in other “FIBA Event” (e.g. FIBA Club Competitions, FIBA-Recognised Competitions).

c. The frequency with which the player has played in a “FIBA Event”.

21. On 4 April 2023, the CAS Court Office invited the Appellant to comment on the FIBA Letter. More particularly, the Appellant was invited to provide additional information on the exact games in which he participated, and on which dates, in the 3x3 Pro Basketball League. Furthermore, the Appellant was invited to address FIBA’s submission that the Bangabandhu 6th Asian Basketball Championship 2021 (“SABA Championship”) is not a FIBA Event.
22. On 8 April 2023, the Appellant filed his comments to the FIBA Letter.
23. On 13 April 2023, the CAS Court Office invited the Respondent to file its comments on

the Appellant's submission by no later than 20 April 2023. On 20 April 2023, the Respondent requested an extension to file its comments until 26 April 2023, which the CAS Court Office granted on 21 April 2023, in accordance with the Article R32(2) of the CAS Code.

24. On 27 April 2023, the CAS Court Office informed the Parties that the Respondent had failed to submit any comments on the Appellant's submission of 8 April 2023 within the prescribed time limit.
25. On 28 April 2023, *i.e.* two days after the expiration of the deadline, the Respondent filed its comments on the Appellant's submission of 8 April 2023, and requested that its submission be taken on record even though it was filed late. On 1 May 2023, the CAS Court Office invited the Appellant to comment on the Respondent's request. On 1 May 2023, the Appellant objected to the admissibility of the Respondent's late submission.
26. On 8 May 2023, the CAS Court Office informed the Parties that the Sole Arbitrator had decided not to admit the Respondent's submission filed on 28 April 2023 to the record. The Parties were further informed that the Sole Arbitrator would address the issue of jurisdiction as a preliminary matter and that the proceedings would be bifurcated pursuant to the Article R55(5) of the CAS Code. The Parties were also invited to indicate to the CAS Court Office whether they would agree to the Sole Arbitrator deciding on the issue of jurisdiction solely on the basis of the Parties' written submissions.
27. On 8 May 2023 and 9 May 2023, respectively, the Appellant and the Respondent confirmed their agreement for the Sole Arbitrator to issue the decision on jurisdiction on the basis of the written record, without the necessity to hold an oral hearing.

IV. THE POSITIONS OF THE PARTIES ON THE ISSUE OF JURISDICTION

28. The following outline of the Parties' positions on the issue of jurisdiction is illustrative only and does not necessarily comprise every submission advanced by the Parties. The Sole Arbitrator confirms, however, that she has carefully considered all the submissions made by the Parties, whether or not there is specific reference to them in the following summary.

A. The Appellant's Position

29. The Appellant submits the following in substance:
 - The Athlete is an "international-level athlete" as defined in the FIBA Regulations ("FIBA IR"), Book 4, which entitled him to appeal the ADDP Decision directly to CAS in accordance with Article 13.2.1 and 13.2.3.1 of the INADA ADR.
 - "International Level Athletes" under the FIBA IR, Book 4 (Anti-Doping), are athletes competing in a "FIBA Event". The Appellant participated in various "FIBA Events", including:
 - in the 3x3 Pro Basketball League ("3x3 PBL") in India in 2022, for the team Bangalore Machas;

- in the SABA Championship in 2021, for the Indian National Men's Basketball Team;
- in further competitions since the year 2014, such as the "NBA Jam 2014", the "NBA Jam-Jaipur" in 2016, the "NBA Jam-Chennai" in 2016, the FIBA 3x3 World Tour in 2018 and the 3x3 Pro Basketball League in 2018.

30. The Appellant submits the following request for relief with regard to jurisdiction:

"That the Athlete's participation in various "FIBA Events" from 2014 to 2022 and the Athlete's participation in the Bangabandhu 6th Asian Basketball Championship be deemed sufficient to render him eligible so as to attract the provisions of Article 13.2.1. of the National Anti-Doping Rules which would subsequently validate his appeal at the CAS as an "International-Level Athlete".

B. The Respondent's Position

31. The Respondent objects to the jurisdiction of the CAS. It submits that the Appellant is not an "international-level athlete" under the INADA ADR, WADA Code, or the International Standard for Testing and Investigations ("ISTI"). Therefore, he should have appealed the ADDP Decision to the National Anti-Doping Appeal Panel.

32. The Respondent submits the following request for relief:

"Based on the above-mentioned grounds the respondent through this preliminary objection without prejudice to any of its legal rights and remedies submits that the Hon'ble CAS Lacks Jurisdiction in the aforesaid matter."

V. INADMISSIBILITY OF THE RESPONDENT'S BELATED SUBMISSION

33. The Respondent missed the (extended) time limit to provide comments on the Appellant's submission dated 8 April 2023. Such (extended) time limit expired on 26 April 2023, while the Respondent only filed its submission two days later, on 28 April 2023. The Respondent did not offer any explanation, let alone valid reasons, why its filing occurred late. Therefore, in light of the fact that (extended) time limits must be strictly respected in order to preserve the required speed and efficiency of CAS proceedings, and considering that the Appellant did not agree to accept the belated submission to the case file, the Sole Arbitrator decided to strike the Respondent's submission from the record and informed the Parties accordingly on 8 May 2023.

VI. JURISDICTION

34. As a preliminary matter, the Sole Arbitrator determined that she would bifurcate the proceedings and consider in the first instance whether CAS has jurisdiction to hear and determine this case. Based upon the written submissions and evidence provided by the Parties including the supplemental submissions specifically addressing the question of CAS jurisdiction, the Sole Arbitrator resolved that she was sufficiently well informed to be able to determine this preliminary matter without the necessity of a hearing.

35. Article R47 para. 1 of the CAS Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.”

36. The INADA ADR, which is applicable to the procedural aspects of the present appeal, provides for the jurisdiction of the CAS against decisions by the Anti-Doping Disciplinary Panel as follows:

“13.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, Provisional Suspensions, Implementation of Decisions and Authority

A decision that an anti-doping rule violation was committed, a decision imposing Consequences or not imposing Consequences for an anti-doping rule violation, or a decision that no anti-doping rule violation was committed; [...] may be appealed exclusively as provided in this Article 13.2.

13.2.1 Appeals Involving International-Level Athletes or International Events

In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS.

13.2.2 Appeals Involving National Level Athletes or Other Persons

In cases where Article 13.2.1 is not applicable, the decision may be appealed to the National Anti-Doping Appeal Panel. The appeal process shall be carried out in accordance with the International Standard for Results Management.”

37. It follows from Article 13.2.1 of the INADA ADR that the ADDP Decision may only be appealed to the CAS if the appeal involves an “International-Level Athlete” or an “International Event”. In all other cases, the decision may only be appealed to the National Anti-Doping Appeal Panel (Article 13.2.2 of the INADA ADR), with the consequence that the CAS has no jurisdiction to hear such appeals.

38. Hence, the Sole Arbitrator must assess whether the Appellant’s case arose “from participation in an International Event”, or whether the Athlete qualifies as an “International-Level Athlete” for the purpose of the challenged doping control.

39. With respect to the first alternative, the Sole Arbitrator finds that the Athlete’s case has not arisen from his participation in an “International Event”, because the doping control was an out-of-competition control. At the time of the doping control, the Athlete was not yet competing in the 3x3 PBL, irrespective of whether or not such competition is an “International Event”. He played his first match on 8 March 2022, *i.e.* more than 4 weeks after the doping control. Similarly, his contract with Bangalore Machas, which formed the basis for his subsequent participation in the 3x3 PBL, was signed after the doping control. Hence, there is no room to argue that the relevant doping control – the Athlete’s

“case” in the sense of Article 13.2.1 of the INADA ADR – arose “from his participation” in the 3x3 PBL (or any other event).

40. As a result, the jurisdictional issue centres on whether the Athlete qualifies as an “International-Level Athlete” for the purpose of Article 13.2.1 of the INADA ADR.
41. In its section about the scope, the INADA ADR provides that if athletes “*are classified by their respective International Federations as International-Level Athletes then they shall be considered to be International-Level Athletes (and not National-Level Athletes) for purposes of these Anti-Doping Rules.*”
42. The relevant international federation in the case of the Appellant is the FIBA. The introductory section of the FIBA IR, Book 4 (Anti-Doping), provides the following definition of “International-Level Athletes”:

“Within the overall pool of Athletes set out above who are bound by and required to comply with these Anti-Doping Rules, the following Athletes shall be considered to be International-Level Athletes for the purposes of these Anti-Doping Rules, and, therefore, the specific provisions in these Anti-Doping Rules applicable to International-Level Athletes (e.g., Testing, TUEs, whereabouts, and Results Management) shall apply to these Athletes:

- a. Athletes competing in a FIBA Event; and*
- b. Athletes included by FIBA in a Registered Testing Pool or other Testing Pool(s) (when such Testing Pool is established by FIBA).”*

43. It is undisputed that the Appellant has not been included by FIBA into a Registered Testing Pool or other Testing Pools. Therefore, it is decisive whether (and when) the Appellant competed in a “FIBA Event”, which term is defined in the FIBA IR, Book 4, Appendix 1, as follows:

“FIBA Events:

- all Official Basketball Competitions of FIBA as defined in the FIBA Internal Regulations (currently Article 2-2) applicable at the time of the relevant Event; and*
- all international club Competitions, whether recognised by FIBA or not.”*

44. The FIBA IR, Book 2 (Competitions), Article 2-2 contains the following definition of the “Official Basketball Competitions”:

“The Official Basketball Competitions are:

- a. FIBA National Team Competitions;*
- b. FIBA Club Competitions;*
- c. FIBA 3x3 Competitions;*
- d. FIBA eSport Competitions;*

- e. FIBA-Recognised Competitions; and*
- f. FIBA Masters Competitions”*

45. “National Team Competitions” (Article 2-2 a) are defines as follows in the FIBA IR, Book 2, Article 3:

“The FIBA National Team Competitions are:

- a. The FIBA Basketball World Cup;*
- b. The FIBA Basketball World Cup Qualifiers and Pre-Qualifiers;*
- c. The FIBA Women’s Basketball World Cup;*
- d. The FIBA Women’s Basketball World Cup Qualifying Tournaments and Pre-Qualifying Tournaments;*
- e. The FIBA Continental Cups;*
- f. The FIBA Continental Cup Qualifiers;*
- g. The FIBA Women’s Continental Cups;*
- h. The FIBA Women’s Continental Cups Qualifying Events;*
- i. The Olympic Basketball Tournaments;*
- j. The FIBA Olympic Qualifying Tournaments, FIBA Women’s Olympic Qualifying Tournaments, FIBA Olympic Pre-Qualifying Tournaments and FIBA Women’s Olympic Pre-Qualifying Tournaments;*
- k. The FIBA U19 Basketball World Cup and the FIBA U19 Women’s Basketball World Cup;*
- l. The FIBA U17 Basketball World Cup and the FIBA U17 Women’s Basketball World Cup;*
- m. All FIBA Continental Cups for Youth Categories (e.g.U20, U18, U16 etc.); and*
- n. All qualifying games and tournaments for the above competitions.”*

46. “FIBA Club Competitions” (Article 2-2 a) are defines as follows in FIBA IR, Book 2, Article 4:

“The FIBA Club Competitions are all international club competitions organised by FIBA or its Regional Offices.”

47. “FIBA-Recognised Competitions” (Article 2-2 e) are defines as follows in the FIBA IR, Book 2, Article 6:

“FIBA-Recognised Competitions are all international leagues, cups, games and tournaments recognised by FIBA.”

48. The Athlete submits that he participated in at least two relevant competitions, the 3x3

PBL in 2022, and the SABA Championship in 2021.

49. As confirmed by FIBA in the FIBA Letter, the 3x3 PBL qualifies as a “FIBA Event”, because it is listed as an “Official Basketball Competition” in the FIBA IR (see Book 2, Chapter 1, para. 2).
50. As also confirmed by FIBA, the SABA Championship is not a “FIBA Event”. More specifically, it is not an “Official Basketball Competition” as defined in Book 2 (Chapter 1) of the FIBA IR (quoted above at para. 43). The SABA Championship is a national team competition organized by the South Asian Basketball Association and the Bangladesh Basketball Federation, but not by FIBA. Hence, it is not a **FIBA** National Team Competition (see the exhaustive list of FIBA National Team Competitions enshrined in the FIBA IR, Book 2, Chapter 1, para 3, quoted above at para. 44). The SABA Championship is also not a “FIBA Club Competition”, nor a “FIBA-Recognized Competition” (defined as “*all international leagues, cups, games and tournaments recognized by FIBA*”). The simple inclusion of the FIBA logo on the Athlete’s certificate of Participation relating to the SABA Championship does not make this competition “FIBA-Recognized”.
51. Having established that only the 3x3 PBL is a “FIBA Event” under FIBA’s definition, the next question is when and in which frequency the Appellant must have participated in the relevant FIBA Event, *i.e.* the 3x3 PBL. The FIBA Letter states that FIBA uses a “pragmatic approach” to this issue and considers all relevant circumstances relating to the case, including:
 - the time that elapsed since the player’s last participation in a FIBA Event;
 - the specific competitions to which the players participated, *i.e.* whether the player’s participations were in a main official competition of FIBA or other type of “FIBA Event” (e.g. FIBA Club Competitions, FIBA-Recognised Competitions);
 - The frequency with which the player has played in a “FIBA Event”.
52. The temporal scope of the FIBA ADR (including the qualification of the Appellant as an “International Level Athlete”) is a question of law and interpretation of the FIBA regulations. It is for the Sole Arbitrator to decide this issue, without being bound by any assessment by FIBA in this respect.
53. Notably, the Appellant’s participation in the 3x3 PBL postdated the doping control which produced the AAF. The games the Appellant played for the team Bangalore Machas in 2022 took place between 8-20 March 2022, *i.e.* after the relevant sample was collected on 5 February 2022. Other appearances of the Player in 3x3 competitions date back to the year 2018 and earlier, which is no longer in close enough temporal proximity to count for the determination of whether the Athlete competed in a FIBA Event (see CAS 2014/A/3670, para 60).
54. Previous CAS jurisprudence has confirmed that the relevant point of assessment of participation in International Competition(s) is whether the athlete participated in a

relevant competition at the time of the collection of the anti-doping sample (CAS 2019/A/6419, para 57; see also CAS 2009/A/1767, para. 5.27, 5.29). At the time of his doping test, however, the Athlete had not yet played in the 3x3 PBL, and had not even signed his playing contract with the team Bangalore Machas. As a result, the Appellant's mere participation in some FIBA Events *after* sample collection and *more than 3 years before* the day of the doping test cannot lead to qualify him as an "International-Level Athlete".

VII. CONCLUSION

55. Considering all the foregoing, the Sole Arbitrator finds that she has no jurisdiction to hear the appeal brought by the Appellant against the decision of INADA ADDP dated 11 October 2022, due to the fact that the Appellant is not an international-level athlete under the applicable FIBA Regulations.

VIII. COSTS

(...).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Court of Arbitration for Sport has no jurisdiction to decide upon the appeal brought by Mr. Shashank J Rai on 2 November 2022 against the decision of the Anti-Doping Disciplinary Panel of the National Anti-Doping Agency of India dated 11 October 2022.
2. (...).
3. (...).
4. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Date: 17 July 2023

THE COURT OF ARBITRATION FOR SPORT

Annett Rombach
Sole Arbitrator