

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 11.11.2016

+ **O.M.P. (COMM) 430/2016 and IA Nos. 12069/2016 & 13150/2016**

M/S TAMILNADU TELECOMMUNICATIONS LTD.

..... Petitioner

versus

BHARAT SANCHAR NIGAM LTD.

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Ratan K. Singh, Mr Nikhilesh Krishnan,
Mr Raghav Alok, Mr Aishwary Tiwari,
Mr Abhishek Iyer and Mr Nishank Tyagi,
Advocates.

For the Respondent :

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. Tamil Nadu Telecommunications Ltd. (hereafter the 'TTL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'Act') impugning an arbitral award (hereafter 'the impugned award') dated 09.09.2016 passed by the Sole Arbitrator in relation to the Purchase Order dated 06.01.2011 (hereafter 'the PO') issued by the respondent (hereafter 'BSNL') for purchase of 18000 KMs of 24F metal free Optical Fibre Cables (hereafter the 'OFC').

2. The Arbitrator accepted TTL's claim that it became impossible for TTL to perform the contract in terms of Section 56 of the Indian Contract

Act, 1872. He also directed BSNL to pay the unpaid balance of the invoices accepted by BSNL. Although, the Arbitrator rejected BSNL's counter claim for recovering additional costs incurred by BSNL for procuring the material short supplied by TTL, he upheld BSNL's right to levy liquidated damages in terms of the Agreement and also permitted BSNL to invoke the two performance bank guarantees (hereafter 'the BGs') in the sum of ₹1.53 crores and ₹1.23 crores, furnished by TTL.

3. TTL has filed the present petition as it is, *inter alia*, aggrieved by the decision of the Arbitrator to permit the BSNL to encash the aforementioned performance bank guarantees and levy liquidates damages.

Facts

4. Briefly stated the controversy between the parties arises in the context of the following facts:-

4.1 TTL is, *inter alia*, engaged in the manufacturing of Optical Fibre Cables in technical collaboration with M/s Fujikura Limited of Japan. On 07.09.2010, BSNL invited bids for supply of 60000 KMs 24F OFC. As per Clause 3.8.9 of the technical specification, the jacketing of the OFC was to be made by Polyamide-12/Nylon -12 of the thickness not less than 65mm.

4.2 TTL participated in the above tender and on 24.11.2010, was declared the lowest bidder. Thirty percent of the tender quantity was awarded to TTL by the Advanced Purchase Order (APO) dated 24.11.2010.

4.3 In terms of the APO dated 24.11.2010, TTL had furnished two Performance Bank Guarantees in the sum of ₹1.53 crores and ₹1.23 crores aggregating the value of ₹2.76 crores. On furnishing of the Bank

Guarantees, BSNL issued the PO dated 06.01.2011 for supply of 18000 KMs of 24F metal free OFC. In terms of the PO, TTL was to complete the supplies within a period of eight months from the date of issue of APO, that is by 23.07.2011. TTL was given a lead time of 2 months and the delivery of the quantity to be supplied was to be evenly distributed over the balance period of six months. However, TTL was also permitted, at its option, to make deliveries during the lead time. Thus, TTL was not obliged to make any deliveries till 23.01.2011 but was to ensure monthly delivery of at least 3000 KMs of OFC (that is, 750 KM per week approximately). Admittedly, TTL could not supply the quantity of OFC as agreed. According to the TTL, it was unable to do so because of shortage of Nylon -12/Polyamide-12, which was required for the outer jacketing of OFC as per the tender conditions. The said material was to be procured from vendors approved by BSNL but those vendors were not in a position to supply the said raw materials. TTL states that it had certain stocks of the said raw material which were utilized in making the limited supplies. Further, on 11.03.2011 a massive earthquake occurred in Japan and TTL claimed that the earthquake destroyed the manufacturing facilities of M/s Fujikura Limited - which was TTL's main source of Optical Fibre - thereby disabling TTL from performing the contract.

4.4 Admittedly, TTL supplied 1612.821 KMs of OFC and raised invoices for an aggregate sum of ₹4,94,92,773/-. The said invoices were accepted by BSNL and it made a part payment of ₹4,52,11,439/- but withheld a sum of ₹42,81,474/-. TTL claimed that it sent several communications to BSNL pointing out that none of its approved vendors - five in number - were in a position to supply Nylon -12 for the outer jacketing of the OFC; however it did not receive any satisfactory reply.

Further, TTL also informed BSNL of the disruption in the supplies caused by the earthquake and described the same as a *force majeure* event. It is stated that in the meantime, BSNL also changed the specifications for OFC by substituting Nylon -12/Polyamide-12 with another suitable material. TTL states that it offered to supply OFC with double HDPE sheath (changed specifications) at the same rates but with the suitable revision in the delivery schedule of the balance quantity.

4.5 TTL states that in view of the non availability of Nylon - 12/Polyamide-12 in sufficient quantities, BSNL changed the specification for the OFC mainly by changing the specification of the jacketing of OFC and adopted a new specification – double sheathed 24 F OFC with impregnated glass roving and HDPE jacket in place of Nylon jacket OFC. Although BSNL adopted new specifications, it did not amend the PO that was placed on TTL; it issued a fresh tender on 06.09.2011 for 32,000 KMs of OFC. Further, BSNL also floated another tender (through CGMTS, Kolkata) on 15.11.2001 for 10,000 KMs. TTL states that it also participated in the aforesaid tender and successfully supplied 3206 KMs of OFC to BSNL during 2012-13 and further 1602 KMs of OFC during 2013-14.

4.6 In the aforesaid circumstances, TTL sought release of the performance bank guarantees and also release of the amounts withheld by BSNL against supplies accepted by BSNL. Since BSNL did not comply with the aforesaid request, TTL invoked the arbitration clause under the PO pursuant to which BSNL appointed the Sole Arbitrator.

4.7 Before the Arbitral Tribunal, BSNL made the following claims:-

Claim No.1 – Declaration that performance of the contract/PO dated 06.01.2011 had become impossible and, therefore, the contract/PO for supply of the balance quantity of 16387.179 KMs stood frustrated.

Claim No.2– Direction for release of the performance bank guarantees in the sum of ₹1.53 crores and ₹1.23 crores furnished pursuant to the APO.

Claim No.3 – Release of the balance payment of ₹42,81,474/- against supplies made by TTL alongwith interest @ 18% p.a.

Claim No.4 - ₹1,75,00,000/- towards the cost of cable filling jelly, shelf life of which has expired due to non availability of Nylon -12.

Claim No.5 – Legal expenses.

4.8 BSNL disputed the aforesaid claims and filed the counter-claims. BSNL asserted that in terms of the tender, 30% of the tender quantity was to be awarded to the lowest bidder (L-1) and the balance quantity was to be distributed to between other 4 bidders (L02 to L05) at the price quoted by the lowest bidder. Since L-2 to L-5 declined to accept supply of quantities at the price offered by TTL, BSNL was entitled to place orders for the said quantity. However, BSNL stated that TTL had failed to supply OFC as per the PO and, therefore, BSNL was constrained to invite fresh tenders for procuring OFC. The PO as per the fresh tender were placed at ₹48,810 per KM which was significantly higher than ₹30,600 per KM as per the PO placed on TTL. BSNL claimed that it was entitled to additional costs at the rate of ₹18,210 per KM for 16,387 KMs short supplied by TTL aggregating to ₹29.48 crores.

4.9 In addition, BSNL also claimed the difference in cost for the balance quantity of 42,000 KM which it was entitled to procure from TTL as other bidders had declined to accept the price as quoted by TTL and in terms of the tender conditions, BSNL was entitled to place orders for the same on TTL. The said counter-claim was computed at ₹76.482 crores (42,000 x ₹18210). BSNL also claimed interest at the rate of 18% p.a. on the above sums. In addition, BSNL claimed that it was entitled to encash the Performance Bank Guarantees furnished by TTL and also to liquidated damages in terms of the Purchase Order.

5. The Arbitrator considered the claims and counter-claims made by the parties and passed the impugned Award. The findings of the Arbitrator are summarised below:-

- i) The Arbitrator held that TTL was responsible for procuring the raw materials for manufacturing of OFC and held that *"the TTL has not made serious efforts for timely arranging the Nylon -12/Polyamide-12 through existing or newly developed resources."*
- ii) That TTL had failed to perform the contract even prior to 10.03.2011, that is, prior to the earthquake in Japan. The Arbitrator held that in terms of the PO, TTL was obliged to supply atleast 4500 KMs of OFC prior to 11.03.2011 (for 45 days from 24.01.2011 to 10.03.2011) but it had only supplied 200 KMs of OFC upto 31.03.2011. This indicated that *"TTL had not mobilized the required resources for meeting committed targets to BSNL"*.
- iii) That non availability of Nylon -12/Polyamide-12 was brought to the notice of the BSNL by TTL for the first time on 21.06.2011 and by which time TTL ought to have supplied about 15000 KMs of OFC.
- iv) That TTL was not bound to procure Nylon -12/Polyamide-12 from the existing approved vendors; it could procure

the material from another source as well but would have to take approval from BSNL's Quality Assurance Cell.

- v) TTL's claim that contract was frustrated in terms of Section 56 of the Act was held to be "*not substantiated*".
- vi) TTL was entitled for the entire amount of invoices accepted by BSNL; BSNL was directed to refund the unpaid amounts withheld from invoices for the supplies accepted by it.
- vii) That TTL's claim for cost of cable filling jelly (shelf life expired) was rejected as the Arbitrator held that BSNL was not responsible for the same.
- viii) The counter claims made by BSNL for the difference in cost of OFC subsequently procured by BSNL was rejected principally on two grounds:
 - a) That the specification of the OFC procured had been changed and, therefore, the difference in cost was not comparable and;
 - b) That TTL had repeatedly offered to supply OFC with the changed specifications at the same costs as tendered by TTL.
- ix) The Arbitrator accepted that non availability of 60000 KMs of OFC for over year (the delay caused due to non performance by TTL) would have had an effect on performance of BSNL and, therefore, TTL's contention that BSNL had not suffered losses was not acceptable.
- x) The Arbitrator further held that BSNL was entitled to levy liquidated damages for the supplies scheduled to have been delivered before the incidence of the earthquake in Japan, that is, prior to 11.03.2011.
- xi) The Arbitrator further held that TTL did not have the capacity for manufacturing 60000 KMs of OFC in six months which was part of the tender conditions. He further held the TTL's representation that it had complied with the aforesaid qualification was "false".

6. In terms of the findings, the Arbitrator passed the following Award:-

- “1- The claim of the petitioner that it became impossible to perform the contract in terms of section 56 of the contract is not substantiated.
- 2- As M/S TTL has failed to perform, M/s BSNL may encash the 2 PBGs of Rs.1.53 Crores and Rs.1.23 Crores.
- 3- The unpaid portion of passed amount of bill of Rs.4,94,92.773.00 is due to TTL. BSNL to refund all the left over amount of passed bill for this supply after set off of its other dues, if any, allowed in this award.
4. BSNL has nothing to do with the cable filling Jelly shelf life expired). M/s TTL only has to bear the consequences.
- 5- BSNL is not entitled for counterclaim of Rs.29.84 Crore against TTL.
- 6- BSNL may levy the liquidated damages for the supplies scheduled to be delivered before the incidence of earthquake in Japan as per provisions provided in clause 16 (Sub clauses 16.1 to 16.2(v)).
- 7- Both parties to bear their respective cost of litigation.”

Submissions

7. Mr Ratan K. Singh, the learned counsel appearing for the TTL contended that the impugned award is wholly perverse and unsustainable inasmuch as it had permitted BSNL to encash the performance bank

guarantees even though it had rejected BSNL's counter-claim for damages. He submitted that the performance bank guarantees were only for securing BSNL for due performance of the PO and for any loss that it may incur. However, since the claim for loss/damage claimed to have been suffered by BSNL had been rejected, there was no occasion for the arbitrator to permit BSNL to invoke the bank guarantees.

8. He further submitted that the conclusion that BSNL was entitled to levy liquidated damages for supplies to be made prior to 11.03.2011 was also wholly unsustainable and BSNL had failed to prove any loss or damage. He submitted that no damages could be awarded without the party claiming such damages, proving the same. He strongly relied on the decision of a Division Bench of this Court in **BSNL v. BWL Ltd.**: (2009) 160 DLT 489 (DB) wherein BSNL was restrained from levying liquidated damages without proving actual loss. He also relied on the decision of the Supreme Court in **Kailash Nath Associates v. Delhi Development Authority**: (2015) 4 SCC 136 in support of his contention and contended that even where parties had agreed for liquidated damages, the party claiming such damages was required to prove actual loss.

Reasoning and Conclusion

9. At the outset, it is necessary to observe that scope of interference with an arbitral award is very restricted and this Court may set aside an award only on the grounds set out in Section 34(2) of the Act. In the present case, there is no dispute as to the constitution of the Arbitral Tribunal or that the disputes adjudicated by the arbitrator were within the scope of reference. The only ground urged by TTL is that the impugned award is in conflict with the Public Policy of India as it is contended that

the decision to award liquidated damages without BSNL proving actual loss would violate the fundamental policy of Indian law.

10. In terms of clause 8 of the PO, the parties had agreed that liquidated damages as specified under clause 16.1 and 16.2 of Section III of the bid document - General Commercial Conditions of the Contract - were applicable. The relevant sub-clauses of clause 16.2 are reproduced below:

"16.2 (i) Should the supplier fails to deliver the store or any consignment thereof within the period prescribed for delivery. the purchaser without prejudice to other remedies available to the purchaser shall be entitled to recover as agreed liquidated damages for breach of contract, a sum of equivalent to 0.5% of the value of the delayed supply and/or undelivered material/supply for each work of delay or part thereof for the period up to 10 (TEN) weeks and thereafter at the rate of 0.7% of the value of delayed supplies and/or undelivered material/supply for each work of delay or part thereof for another Ten weeks of delay.

XXXX XXXX XXXX XXXX

(iv) Quantum of Liquidated damages assessed and levied by the purchaser and decision of the Purchaser thereon shall be final and binding on the supplier. Further the same shall not challengeable by the supplier. Either before Arbitration Tribunal or before the court. The same shall stand specifically excluded from the purview of arbitration clause, as such shall not be referable to arbitration. However when the supply is made to the ultimate consignee within 21 days of QA clearance in the extended delivery period, and the goods were dispatched within this period, the consignee may accept the stores and in such case the LD shall be levied up to the date of QA clearance only.

- (v) The total value of the liquidated damages as per above sub-clauses shall be limited to a maximum of 12% (Twelve percent) ie LD shall be levied up to 20 weeks only as per the provision at para(1)."

11. In the present case, the Arbitrator has found that TTL was in breach of the contract in question. First of all, the Arbitrator has not accepted TTL's claim that the performance of the contract in question was frustrated on account of the earthquake in Japan and on account of non-availability of Nylon-12/Polyamide-12; he has held that TTL was responsible for ensuring material resources required for execution of the contract tendered by it. TTL's contention that the raw material in question was to be sourced from the approved vendors, which had declined to supply the said raw material in sufficient quantity, was also rejected. The Arbitral Tribunal held that it was always open for the TTL to source the raw material from any other source after seeking approval from BSNL's Quality Assurance Cell. The Arbitrator's finding in this respect cannot be faulted. It is relevant to note that by a letter dated 11.04.2011, TTL had informed BSNL about the earthquake in Japan and sought extension of the delivery period. Thus, the contention advanced that the performance of the contract stood frustrated by the *force majeure* situation in Japan cannot be accepted. This also does not appear to have been the main thrust of TTL's argument before the Arbitrator. The principal contention advanced was that the contract could not be performed for non-availability of Nylon-12/Polyamide-12 which was required for the manufacture of OFC.

12. TTL had relied upon the several emails from approved manufacturers to substantiate its claim that Nylon-12 was not available. Most of the emails produced by the TTL are e-mails sent/received in the

month of June 2011 or thereafter. A perusal of the emails indicates that the manufacturers had indicated that they have already booked their supplies and, therefore, were unable to commit to the quantities as required by TTL. This clearly indicates that any person requiring Nylon-12/Polyamide-12 was required to tie up its resources much in advance; in this case, it would have been necessary for TTL to make arrangements at the time of submission of the tender. The Arbitrator, thus, rightly rejected TTL's contention that TTL stood discharged of its obligations as the contract stood frustrated by impossibility.

13. In view of the aforesaid finding, it could hardly be disputed that BSNL was entitled to claim damages on account of failure on the part of TTL to perform its obligations. BSNL had admittedly invited tenders for supply of 42,000 KM of OFC and had placed purchase orders at the rate of 48,810 per kilometre. BSNL claimed that it was entitled to ₹18,210/- per kilometre of OFC being the difference between the price payable to TTL (₹30,600) and ₹48,810 being the price at which subsequent purchase orders dated 13.04.2012 had been placed. The Arbitrator rejected the aforesaid counter claims for damages principally on two grounds. First, that TTL had offered to supply the material at the same rate as it had quoted and, therefore, BSNL could not impose extra cost incurred on its own on TTL. Secondly, the Arbitrator noticed that the specifications of the sheath of OFC under the new tender had been revised and, therefore, held that imposition of extra cost on TTL was unjustified. Although, Arbitrator rejected BSNL's counter claim on account of extra cost incurred by it he, nonetheless, accepted BSNL's contention that it had suffered losses on account of non-supply of OFC by TTL.

14. BSNL had specifically pleaded that "*non-compliance on the part of the claimant had led to huge losses and on account of utter failure on the part of the claimant. Various projects of the respondent got hampered and could not be completed. It has further led to loss of goodwill and reputation of the respondent (BSNL).*"

15. The aforesaid contention was accepted and, therefore, the Arbitrator rejected TTL's contention that BSNL had not suffered any loss. In view of the aforesaid findings, the Arbitrator had upheld the BSNL's claim that it was entitled to levy liquidated damages as provided under the contract. However, the Arbitrator restricted the BSNL's right to liquidated damages only in respect of supplies that ought to have been made prior to the incidence of earthquake in Japan, that is, supplies required to be made by TTL prior to 11.03.2011.

16. Mr Singh's contention that the impugned award is perverse as it was incumbent upon BSNL to prove actual loss for claiming liquidated damages, is unsustainable. It is to be noted that BSNL is a public utility and the Arbitrator's finding that delay in supply of OFC by TTL would have had an adverse effect on BSNL's performance cannot be faulted.

17. In **ONGC Ltd. v. Saw Pipes Ltd.**: (2003) 5 SCC 705, the Supreme Court had held as under:-

"64. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This Section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides

that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre- estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him.....

67. ...In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Section 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the tribunal not

to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods...."

18. In the present case, TTL had agreed that the liquidated damages would be payable for delay in supply of contracted quantities. TTL has not led any evidence to indicate that the measure of damages was unreasonable and not a genuine pre-estimate of damages. It is also relevant to bear in mind that BSNL is a public utility and it would not be easy for BSNL to articulate the loss suffered by it for delays in execution of various projects. Undoubtedly, the failure on the part of the TTL to supply OFC would have caused a corresponding delay in BSNL providing services to its customers. It is difficult to prove with any exactitude actual loss suffered by BSNL. However, that does not mean that TTL is absolved from its liability to compensate the BSNL. The decision in the case of **BSNL v. BWL Ltd.** (*supra*) is also not applicable in the facts of the present case. In that case, the Arbitrator had found that BSNL had breached the contract for purchase of material from BWL Ltd. and, accordingly, awarded loss of profits at the rate of 20% on the value of the contract to BWL Ltd. The learned Single Judge had scaled down the measure of loss of profits to 15% of the contracted value. The Division Bench of this Court held that the finding of the Arbitrator that BSNL had breached the contract, was not sustainable and further held that there was no basis for awarding damages either at the rate of 20% or at the rate of 15% on the cost of material to be supplied. The main controversy involved was whether a seller could claim damages from buyer in breach of the contract, without proving that the market price of the goods contracted to be purchased had dropped. However, the Division

Bench also held that BSNL was not entitled to encash and forfeit the bank guarantee amount towards the liquidated damages. The Court had specifically observed that there were no pleadings by BSNL to the effect that it had suffered a loss of revenue that it would have earned from its customers after laying of cables. The counsel appearing for BSNL had also conceded to the above position. It is in the aforesaid context, the Court had held that "*it was a sin qua non for appellant to plead and prove actual loss and damages by showing that the prices of cables had in fact gone up as compared to the contracted prices and consequently it has suffered a loss.*"

19. In the present case, BSNL had expressly pleaded that it had suffered loss on account of delay in its projects and had also suffered loss of goodwill. As noticed above, it is difficult to reasonably estimate the damages suffered on the aforesaid account; this coupled with the fact that TTL has not led any evidence to indicate that the liquidated damages are unreasonable and, therefore, the finding of the Arbitrator that BSNL is entitled to recover liquidated damages cannot be held to be perverse or contrary to the fundamental policy of the Indian Law.

20. Before concluding, it would be necessary to observe that the Arbitrator has restricted the liquidated damages only to supplies that ought to have been made by TTL prior to 11.03.2011. Arbitrator has not indicated any particular reason for restricting the liquidated damages. It also *prima facie* appears that the question of levy of liquidated damages was outside the scope of arbitration clause as indicated in sub-clause (v) of clause 16.2 of the General Commercial Conditions of Contract. However, BSNL appears to have accepted the award as it has not filed a petition under

Section 34 of the Act. In the circumstances, it is not necessary to examine the aforesaid aspects.

21. The petition and all applications are, accordingly, dismissed. Interim orders stand vacated.

VIBHU BAKHRU, J

NOVEMBER 11, 2016
MK/RK

