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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ FAO(OS) COMM 122/2016

M/S TAMILNADU TELECOMMUNICATIONS LTD. ..... Appellant
Represented by: Mr.Ratan K.Singh, Advocate with Mr.Nikhilesh Krishnan, Mr.Raghav Alok, Mr.Nishank Tyagi, Ms.Aishwarya Tiwari, Mr.Abhishek Aiyer, Advocates

versus

BHARAT SANCHAR NIGAM LTD. ..... Respondent
Represented by: None

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE YOGESH KHANNA

O R D E R

% 18.11.2016

CM No.42673/2016 & CM No.42674/2016

Allowed subject to just exceptions

FAO(OS) COMM 122/2016

1. It is settled law that narrower becomes the skateboard as one travels up the hierarchy of Courts and therefore scope of an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 limits challenge to an award which has been upheld as a consequence of dismissal of objections filed thereto under Section 34 of the Arbitration and Conciliation Act, 1996. The reason being, that in appeal the focus shifts to the impugned order passed by the learned Single Judge.

2. In a well considered judgment passed by the learned Single Judge which is impugned before us the relevant facts have been noted and suffice would be for us to highlight that the challenge to the award by the appellant related to the awarded dated September 09, 2016 declining claims No.3.1, 3.2, 3.4 and 3.5 laid by the appellant and to the extent counter claim of BSNL was allowed permitting it to encash two performance bank guarantees as a result of being liquidated damages. The claims No.3.1 to 3.5 read as under:-

> *"3.1* ***Claim No.i*** *: Relief of declaration that performance subject Contract/P.O.No.CT/PO/08/2010-2011 dated 06.01.2011, for supply of balance quantity of 16,387.179 Kms became impossible and above subject contract/PO the said balance quantity got frustrated.*
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> *3.2* ***Claim No.ii :*** *Direction to the respondent to release two original Performance Bank Guarantees of ₹1.53 Crores and ₹1.23 Crores.*
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> *3.3* ***Claim No.iii :*** *Direction to the respondent to pay outstanding balance payment of around ₹42,81,474/- (Rupees Forty two Lakhs Eighty One Thousand Four Hundred Seventy Four only) with interest @ 18% per annum w.e.f. the date when said amount became due and payable in respect of supply of 1613 Kms against the subject PO.*
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> *3.4* ***Claim No.iv :*** *₹1,75,00,000/- (Rupees One Crore Seventy Five Lakhs only) towards cost of cable filling jelly (shelf life expired) and FRP procured and interest cost incurred for the past three years on cable filling jelly, FRP 3.0 mm which were procured for execution of BSNL 18000 Kms order, which are lying in stock as on date.*
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> *3.5* ***Claim v :*** *Claim on account of Legal Expenses"*

3. The backdrop facts are that the appellant, in collaboration with M/s Fujikura Ltd. (Japan), manufactures Optical Fibre Cables. On September 07, 2010, BSNL invited bids for supply of 60,000 Km 24F Optical Fibre Cables and as per technical specifications the jacket of the cable had to have a thickness of not less than 65 mm and the material had to be Polyamide-12/Nylone-12. Appellant submitted the bid and on November 24, 2010 was declared the lowest bidder and in terms of the tender, 30% of the tender quantity had to be awarded to it and thus the Advanced Purchase Order (APO) was placed on it on November 24, 2010, requiring it to supply 18,000 Km cable. In terms of the tender, two performance guarantees in sum of ₹1.53 crores and ₹1.23 crores were issued by the banker of the appellant in favour of BSNL. As per the APO dated November 24, 2010, supply had to be completed within eight months i.e. July 23, 2011, with two months as leave time, within which time it was permissible for the appellant to effect no delivery but at its option it was permitted to make deliveries. However, during the next six months the entire quantity had to be supplied, distributed evenly i.e. 3000 Km cable per month which is 750 Km per week.

4. Appellant's supplied only 1612.821 Km cable between March 17, 2011 till September 24, 2011 and we find that the learned Arbitrator has also noted that some invoice appears to have been raised in February 2012. Invoice at contract price, in sum of ₹4,94,92,773/- was raised and BSNL made part payment in sum of ₹4,52,11,439/-. The withheld sum of ₹42,81,474/- has been directed to be paid as per the award and the appellant has no grievance on said account. BSNL has not challenged the award in

respect of its counter claims being denied.

5. The claim of the appellant was premised on the reasoning that Polyamide-12/Nylone-12 was in short supply and the vendors approved by the BSNL could not supply said raw material i.e. Polyamide-12/Nylone-12, and that on March 11, 2011 a massive earthquake took place in Japan destroying the manufacturing facility of M/s Fujikura Ltd. i.e. the contract became impossible of performance during the contract period due to force majeure condition.

6. Concededly, on account of appellant not supply the cables and also a few other tenderers not doing so, BSNL issued a fresh tender on September 06, 2011 for 32000 Km cable and another tender on November 15, 2011 for 10,000 Km cable.

7. The impugned award shows that the learned Arbitrator has taken into account that as per the contract the appellant could procure the raw material from any approved source with the approval of the Quality Analysis Wing of the respondent and thus as regards shortage of Polyamide-12/Nylone-12 with the approved vendors, the appellant having failed to lead evidence to establish any effort made to source the material from other vendors for fabricated the jacket of the cable has held said justification to be not a ground for the contract to be frustrated.

8. The learned Single Judge has rightly held the same to be a finding within the power of the learned Arbitrator. The learned Arbitrator has noted that as per the APO, excluding two months period as leave time, which would come to an end on January 23, 2011, till when the earthquake took place in Japan on March 11, 2011, for 45 days 4500 Km of cable

had to be supplied and from this has concluded that the appellant had not mobilize the required resources. Now, these are simple mathematical calculations and suffice it to highlight that commencing from January 24, 2011 weekly supply of 750 Km cable had to start meaning thereby in the preceding two months not only the appellant had to mobilize the raw material from Japan from its collaborator to commence supplies from January 24, 2011 on weekly basis but a flow of inventory sufficient to make weekly supplies of 750 Km cable till the entire supply was made. The liquidated damages have accordingly been levied by the respondent and upheld by the learned Arbitrator restricted to as aforesaid and the learned Single Judge has rightly highlighted that the same have been restricted to the supply which ought to have been made but was not made before the earthquake took place. Para 20 of the impugned order brings out the same.

9. Thus, the declaration qua the contract being rendered impossible of performance, the subject matter of claim No.i and the consequence thereof qua claim No.iv need not be discussed by us any further. It becomes irrelevant whether the learned Arbitrator has not discussed this aspect adequately. As regards supply by the collaborating partner we have already highlighted above that the issue of raw material for the jacket of the cables with respect of shortage in the market has been adequately discussed by the learned Arbitrator and the discussion is with reference to the contract and the evidence led. The said finding is immune from challenge.

10. To put it with clarity. The appellant pleaded two facts on which the contract being impossible of performance was urged. The first was non-

availability of Polyamide-12/Nylone-12. The second was the earthquake in Japan on March 11, 2011. On the first, a finding of fact has been returned by the learned Arbitrator that apart from the five approved vendors who could supply Polyamide-12/Nylone-12, but did not have the same with them, there were others in the market who could supply the chemical and the appellant did not take steps to obtain samples from them for quality control analysis test. Therefore, on this count the impossibility to perform the contract could not be urged. As regards the earthquake the learned Arbitrator has noted that by the time the earthquake took place, as per the contract 4500 Km cable had to be supplied and thus said event could not be linked to the non-performance till said date. This reasoning is not perverse.

11. On the issue of damages, the learned Single Judge has rightly held that in contracts pertaining to public utilities where services have to be provided to the public damages occasioned due to breach of contract cannot be established and thus the agreed reasonable pre-estimate of the loss suffered as per the contract would be the measure of the damages.

12. Obviously, the facts pleaded by the appellant its claim No.iv was ex-facie not tenable.

13. Before terminating our discussion we note that the claim of BSNL except for liquidated damages have been rejected and qua the liquidated damages today, very surprisingly, learned counsel for the appellant urges that it was an accepted matter and urges further that therefore the learned Arbitrator could not have gone this issue. The argument overlooks that the appellant itself made said issue as arbitrable, and if the argument today is

that issue of liquidated damages was an accepted matter, that would be the end of argument because the respondent proceeded to levy liquidated damages.

14. The appeal is dismissed in limine.

15. No costs.

CM No.42672/2016

Dismissed as infructuous.

PRADEEP NANDRAJOG, J.

YOGESH KHANNA, J.

NOVEMBER 18, 2016
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