IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment delivered on: 27th October, 2021*

\+ **O.M.P. (COMM) NO. 379/2020**

TAMILNADU TELECOMMUNICATION LTD. ..... Petitioner

Versus

RAILTEL CORPORATION OF INDIA LTD. ..... Respondent

Advocates who appeared in this case:

For the Petitioner :Mr. Harish Vaidyanathan Shankar, Adv.

For the Respondent :Mr. Yaman Kumar, Adv.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter 'TTL') has filed the present petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereafter the 'A&C Act') impugning an Arbitral Award dated 03.10.2012 (hereafter the 'impugned award') rendered by the Arbitral Tribunal comprising of a Sole Arbitrator.

2. The impugned award was rendered in the context of disputes that had arisen between the parties in connection with the purchase of 559 kms of 24 Fibre Armoured Optical Fibre Cable. TTL is a manufacturer of Optical Fibre Cables (hereafter 'OFC') and supplies

the said product to various government and non-government agencies in India as well as overseas. It is stated that petitioner uses the Fujikura brand fibre to manufacture the OFC and, has supplied over 3000 kms. of OFC to the Railways since the past decade.

3. The disputes in the present case arise in connection with the Purchase Order dated 09.12.2005 (hereafter 'the PO') placed by the respondent (hereafter 'RailTel') on TTL for the supply of 559 kms. of 24 OFC conforming to Research Design & Standards Organization (RDSO) Specification no. IRS : TC-55/2000 with the fibre as per ITU G652D Spec.

4. RailTel had issued a Notice Inviting Tender (NIT) for the supply of OFC of the aforesaid specifications. TTL had submitted its bid pursuant to the said notice and was declared as the successful bidder. Thereafter, RailTel issued the PO for supply of OFC of the aforesaid specifications at a value of ₹2,06,83,000/- (plus octroi, as per actual).

5. TTL accepted the PO on 12.12.2005 and also submitted the Performance Bank Guarantee (hereafter the 'PBG') for a sum of ₹21,43,34,000/- being 10% of the PO value. The delivery period was first extended till 28.02.2006 and thereafter, to 07.03.2006.

6. The annexure to the PO setting out the material terms is reproduced below:

	"Tamilnadu Telecommunications Ltd.	**Annexure**
1	**Description of the**	24F Armoured Optical Fibre Cable

	item:		
2	**Specification:**	IRS-TC-55/2000 (latest) with Fujikara make of Fibre as per ITU G 652D specs. Fiber has been tested by RailTel.	
3	**Quantity:**	559 KM.	
4	**Rate**	Rs.37,000/- per Km. excluding Octroi & Entry Tax	
5	**Break up of rates:**		
i)	**Basic rate:**	Rs.29,965.41 per Km.	
ii)	**Excise duty:**	Rs.4,890.36@16.32% on basic price	
iii)	**Sales Tax/CST/VAT:**	Rs.1,394.23@4% against Form-C	
iv)	**Transportation charges:**	Rs.750/- per Km of OFC	
v)	**Insurance:**	Included	
vi)	**Octroi**	Maximum of 4% Bhusawal, Jalgaon & 3% for Manmad on Basic + ED + ST + Transportation + Insurance. Not applicable / payable for other areas.	
vii)	**Entry Tax**	Nil	
viii)	**Other charges:**	Nil	
6	**Total value:**	Rs.2,06,83,000/- (Rupees Two Crores Six Lacs & Eighty Three Thousand Only) excluding Octroi duty as per details in 5(vi) above.	
7	**Price variation clause:**	No variation in price shall be applicable	
8	**F.O.R**	Destination	
9	**Consignee particulars:**		
	Sections	**Consignee**	**Qty.**
i)	**Itarsi – Bhusaval**	Consignee details address to be informed by RGM/Western Region	332 Km
ii)	**Manmad – Jalgaon**	Consignee details address to be informed by RGM/Western Region	175 Km
iii)	**Kolkata Area**	Consignee details address to be informed by RGM/Western Region	52 Km
		Total	**559 Km**
10	**Inspection:**	RDSO Inspection charges shall be borne by RailTel, CO, New Delhi.	
11	**Delivery period:**	Within 60 days from the date of issue of	

		P.O.
12	**Warranty:**	12 Months
13	**Payment terms:**	90% on receipt of material at site and balance 10% on expiry of warranty period / submission of BG of equivalent amount to be submitted in the Regional Office where the bill is submitted for payment.
14	**Bill paying & passing authority:**	RGM/RailTel/Mumbai and Kolkata."

7. In terms of the PO, the OFC supplied was required to be inspected by RDSO prior to its dispatch. There is no dispute that such pre-dispatch inspection was carried out by RDSO and the supplies made by TTL were made after such inspection.

8. In terms of the PO, 509.19 kms. of OFC was supplied at the RailTel's Western Region during the period from 24.12.2005 to 05.03.2006 and 52 kms. of OFC was delivered to RailTel at Kolkata on 13.02.2006. RailTel accepted the aforesaid deliveries and also released 90% of the consideration against the deliveries. Subsequently, RailTel also released the remaining 10% of the consideration in terms of the PO without insisting on a bank guarantee. On 04.07.2006, RailTel released the PBG.

9. RailTel claims that shortly after the supplies were made, certain defects were noticed in the OFC supplied by TTL under the PO. TTL had also supplied OFC under another contract, which was being executed by another agency (IRCON). RailTel claims that certain defects were also noticed in the material (OFC) supplied under that contract (856 kms. of 24F armoured optical fibre cable for Malda-

Rajgram, Barauni-Hajipur-Muzaffarpur, Salem-Banglore and Ballarshah-Kazipet-Bibinagar sections).

10. RailTel brought the said defects to the notice of TTL by its letter dated 11.10.2006 and, called upon it to replace the defective cables.

11. RailTel claims that while blowing the OFC in the duct in the Eastern Region, it was found that the outer sheath of black colour had developed major cracks at several places. The outer sheath/PVC cover was broken and kept peeling off while in storage. It further claims that as per RDSO Specification no. IRS-TC-55/2000, the armouring was required to be made of stainless steel and, the same was found to be rusted within in a short span of time.

12. RailTel claims that it had also sent 14 mtrs. of OFC received from Regional General Manager, Kolkata and three other samples of 12 inches each to RDSO, Lucknow for detailed examination and analysis.

13. RailTel claims that four drums of 12 kms. of OFC were sent from Kolkata to Siliguri and while laying the OFC from the first drum, defects as mentioned above were noticed. On observing the said defects, laying of OFC was stopped immediately and the said drums (bearing drum nos. 3030,3036,3087 & 3192) were not used and stored at Siliguri. According to the agreed specifications, the life of the OFC was required to be for a minimum twenty five years and RailTel claims that the supplies made by the petitioner did not have the

requisite life. Similarly, RailTel claims that supplies were taken from other drums (bearing drum nos. 0114,0115 & 12349) and the said defects were noted, which included longitudinal cracks, separation of outer jacket and poor quality of armour. RailTel claims that similar samples were also taken from other supplies made by the petitioner. The said samples were also analyzed by RDSO and were found to be defective.

14. In the aforesaid context, RailTel sent a letter dated 27.08.2007 calling upon TTL to take immediate steps for replacing the entire 559 kms. of defective OFC irrespective of whether the same had been laid or remained unused. RailTel had also invited the petitioner to jointly identify the defective OFC drums and immediately replace the same. RailTel further put TTL to notice that in the event appropriate action was not taken by TTL within a period of 15 days of the said letter, it would resort to contractual provisions and take the necessary steps. TTL did not agree to replace the entire supplies made by it but by its letter dated 08.09.2007, offered to replace the drums of OFCs that were found defective.

15. On 31.10.2007, RailTel sent a letter inviting TTL to engage in discussion for resolution of disputes in terms of Clause 23 of the tender documents.

16. It is stated that the representatives of the parties met for amicable settlement of the disputes, however, they were unable to resolve the same. By a letter dated 03.12.2007, TTL informed RailTel

that it was not agreeable for replacement of the cables and for paying any compensation for the OFC already laid. TTL claimed that defects had developed in the OFCs on account of mishandling on the part of RailTel. RailTel disputed the aforesaid claim as according to it, the defects noticed in the OFC were manufacturing defects and could not have developed if the OFC manufactured by TTL was of the requisite specifications.

17. Since the disputes between the parties could not be resolved, RailTel invoked the agreement to refer the said disputes to arbitration. And, the disputes were referred to the Arbitral Tribunal.

18. The claims made by RailTel in its Statement of Claim are summarized below:

Claim No.1:

RailTel claimed that 220 kms. out of 559 kms. of OFC supplied by the petitioner was lying unused in its stores. It claimed the consideration paid by it for the said unused OFC quantified at ₹81,41,000/- (220 kms. of unused OFC * ₹37,000/- per km. as per the Schedule of Rate given in the Purchase Order dated 09.12.2005).

Claim No.2:

RailTel claimed interest at the rate of 15% per annum on the aforesaid amount of ₹81,41,000/-.

Claim No.3:

RailTel claimed that it had procured 107 kms. of OFC from M/s Teracom (another supplier) at the cost of ₹41,55,880/- [at ₹38,840/- per km.] Accordingly, it claimed the difference between the price of the cables agreed to be supplied by the petitioner (₹37,000/- per km. and ₹38,840/- per km.) quantified at ₹1,96,880/-.

Claim No.4:

RailTel claimed interest at the rate of 15% per annum from the date of payment, that is, from 18.12.2006 on the aforesaid amount of ₹1,96,880/-.

Claim No. 5:

RailTel claimed that it had procured 35 kms. of OFC from M/s Sterilite at the rate of ₹44,150/- per km. and it claimed difference in the cost of the said OFC quantified at ₹2,50,250/- (35 kms. * ₹7,150/-).

Claim No. 6:

RailTel also claimed interest at the rate of 15% per annum from the date of payment, that is, from 29.09.2007 on the aforesaid amount of ₹2,50,250/-

Claim No. 7:

RailTel sought the costs for 197 kms. of OFC already laid along with its laying costs at the rate of ₹1.13 lakhs per km. quantified at ₹222.61 lacs (197 kms * 1.13 lakhs).

19. The Arbitral Tribunal considered the aforesaid claims. The Arbitral Tribunal did not award the claims in monetary terms, however, it allowed RailTel's Claim No.1 by directing the parties to conduct a joint inspection of the entire unutilized OFCs subject to a maximum of 220 kms. lying in full drum lengths and on original drums at RailTel's depots within thirty days from the date of the award and to be replaced by TTL within two months from the said date of inspection.

20. Mr. Harish Vaidyanathan Shankar, learned counsel appearing for TTL contended that the impugned award was vitiated by patent illegality as it was beyond the scope of the contract entered between the parties. He submitted that the decision of the Arbitral Tribunal to direct TTL to replace the entire stock of unused OFCs lying at RailTel's warehouse without ascertaining whether the same was defective was perverse and the impugned award was, thus, liable to be set aside. He submitted that the contract between the parties provided for pre-dispatch inspection of OFC and it is admitted that the OFC supplied by the petitioner had been duly inspected prior to the dispatch. He submitted that the Arbitral Tribunal also did not consider whether the warranty period had expired. He submitted that the petitioner could not be asked to replace the unused cables on the assumption that the same were still within the warranty period.

21. Mr. Shankar also pointed out that RailTel had released the balance 10% payment without insisting on the PBG and, this also indicated that it was satisfied with the OFC supplied. He pointed out that the Arbitral Tribunal had dismissed the aforesaid contention by stating that the same was an administrative lapse. He submitted that the said assumption was without any basis. In terms of the PO, the balance 10% consideration was payable only after the expiry of the warranty period and therefore, it must be presumed that the warranty period had expired.

22. A plain reading of the impugned award indicates that the Arbitral Tribunal had held that the evidence on record clearly established that the OFC supplied by the petitioner did not meet the requisite specifications in respect of stainless-steel armouring and the outer sheathing. The PO expressly indicated the warranty period to be twelve months. The Arbitral Tribunal found that RailTel had raised objections with regard to the material supplied by the petitioner within the warranty period. The relevant extract of the impugned award is set out below:

> "Claimant's contention that vide its letter dated 10.11.2006, it had asked TTL (well within the contractual warrantee period) to replace all the defective cable (covered by its PO dated 09.12.2005) is accepted, as these very defects (cracking of outer sheathing and rusting of the stainless steel armouring), pointed out vide its letter dated 11.10 2006, were later upheld/confirmed on a sufficiently large scale during subsequent tests conducted by ROSO on samples taken in March & August 2007 from the OFC supplied under RaiTel's PO dated

> 09.12.2005. Also, the claimant had kept pursuing this complaint. Even if there may be some doubt on the issue, I give the benefit of doubt to the Claimant in view of the above.
>
> ROSO's subsequent tests, referred to in the previous Para, clearly established that the OFC supplied by the respondent didn't meet the contract specifications' in respect of the stainless steel armouring and the outer sheathing."

23. The findings of the Arbitral Tribunal that the OFC supplied by the petitioner did not conform to the requisite specifications and that RailTel had asked the petitioner to replace the same within the warranty period, are findings of fact. This Court does not find any of the said findings to be patently illegal or without any basis. Undisputedly, there is material on record to support such findings. The evaluation of sufficiency or the persuasive value of such material falls within the exclusive jurisdiction of the Arbitral Tribunal and, it is far too well settled that this Court cannot reappreciate the evidence and supplant its opinion over that of the Arbitral Tribunal in proceedings under Section 34 of the A&C Act. Thus, no interference with the said conclusion is warranted.

24. In view of the above, the present petition is unmerited and is accordingly, dismissed.

VIBHU BAKHRU, J

OCTOBER 27, 2021
'gsr'