(2026) 08 DEL CK 4489

In the Delhi High Court

Case No : O.M.P. (COMM) 521/2023, CAV 645/2023, I.A. 25503/2023, I.A. 2144/2025, I.A. 19095/2025 & I.A. 21812/2025

B4S Solutions Private Limited APPELLANT

Vs

ATC Telecom Infrastre Pvt. Ltd. RESPONDENT

Date of Decision : 03-08-2026

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9, 11(6), 21, 28(1)(a), 28(3), 31(3), 34
Indian Evidence Act, 1872 — Section 58, 91, 92, 101, 102, 115
Bharatiya Sakshya Adhiniyam, 2023 — Section 104
MRTU & PULP Act
Consumer Protection Act

Citation : 2024 INSC 403

Hon'ble Judges : Avneesh Jhingan, J

Bench : Single Bench

Advocate : Mr. Ankit Jain, Mr. Vivek Sharma, Mr. Mahesh Chandra Tiwari, Mr. Rohit Kumar, Mr. Gagan Kaushik, Mr. R.K. Sharma, Ms. Shweta Bharti, Ms. Sanjana Sachdev, Ms. Nikita Sharma

Judgement

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short ?the Act?) against the award dated 10.08.2023 (for brevity ?the award?).

BRIEF FACTS

2. The brief facts are that the petitioner, a private limited company is engaged in providing security/surveillance services for mobile towers. An agreement dated 18.04.2018 was executed with M/S Idea Cellular Infrastructure Services Limited (for short ?ICISL?) for providing surveillance/security services at the designated mobile tower sites in Maharashtra and Goa circle excluding Mumbai. Pursuant to a Share Purchase Agreement dated 13.11.2017, ICISL became a wholly owned subsidiary of ATC Infrastructure Services Pvt. Ltd. (for short ?AISPL?) with effect from 26.07.2018. *Vide*Addendum-2 dated 25.10.2018, the validity of agreement

dated 18.04.2018 was extended upto 31.12.2018.

2.1 ATC Telecom Infrastructure Pvt. Ltd. (for short ?the respondent?) and AISPL owned mobile towers across the country and executed an Agreement for Services dated 18.02.2019 (for short ?service agreement?) with the petitioner. The agreement provided for services at the designated sites in Maharashtra (for short ?sites?) and was effective from 01.01.2019 to 31.12.2020 but later was extended up to 31.03.2021. The scope of work and monthly rate per site per month were provided in Schedules I and II of the service agreement respectively.

2.2 During the currency of the service agreement, the parties to the *lis* entered into a Memorandum of Understanding dated 04.06.2019, whereby the petitioner was to undertake optimization of the manpower deployed. A MoU dated 01.08.2019 was also executed between the petitioner and AISPL which was *pari materia* with the MoU dated 04.06.2019 (collectively referred to as the ?MoUs?). The respondent paid Rs.60,000/- towards the full and final settlement for each manpower transition.

2.3 The invoices upto June, 2019 as per Schedule-II of the service agreement were raised for 978 sites at the rate of Rs. 12152/- per site per month. As pleaded by the petitioner, after the MoUs the format of the invoices was changed by the respondent and it was to facilitate the respondent in calculating the effect of the optimisation.

2.4 There was a dispute that payment from July 2019 onwards for 978 sites as per Schedule-II of the service agreement was not made. In the alternative, payment on the basis of the revised minimum wages was claimed. Clause 11 of the service agreement provided for dispute resolution through arbitration. On failure to reach an amicable settlement, the petitioner issued a notice dated 16.11.2021 under Section 21 of the Act seeking appointment of the arbitrator.

2.5 The respondent filed an application under Section 9 of the Act before this Court seeking handing over the complete surveillance operations of all the towers. The application was allowed on 29.11.2021 with a direction to the petitioner to hand over the operations. On an application filed under Section 11(6) of the Act, this Court appointed the sole arbitrator. The petitioner raised the following claims:

S. No.	Claim	Amount (Rs.)
1.	Amount due in respect of the security/surveillance services provided from 1.1.2019 to 31.3.2021 for various mobile towers owned by the Respondent in Maharashtra Circle	16,56,43,912/-
2.	Damages on account of loss of reputation, goodwill and business	5,00,00,000/-

3.	Amount towards interest on pendency of invoices from January, 2019 to March, 2021	5,57,16,595/-
4.	Amount due towards GST	To be??ascertained
5.	Amount due towards differential in the minimum wages of the manpower provided during the currency of the Agreement dated 18.02.2019 in Maharashtra, Haryana, Delhi/NCR and UP (West) circles	22,81,09,198/-
6.	Amount due and owned by the Respondent on account of Gratuity of Manpower provided during the currency of the Agreement dated 18.02.2019 in Maharashtra, Haryana,??Delhi/ NCR and UP (West) circles	88,14,330/-

2.6 The arbitrator framed the following issues:

> "1. Whether the number of sites for which security and surveillance was provided by the Claimant was progressively reduced to 90 by December, 2021, as is alleged by the Respondent and if so from which date, how many sites were reduced? OPR
>
> 2. To what amount if any the Claimant is entitled form the Respondent for the security / surveillance services rendered by it? OPC
>
> 3. To what amount, if any, the Claimant is entitled towards interest on the pendency of invoices from January, 2019 to March, 2021?
>
> 4. To what amount, if any, the Claimant is entitled as damages on account of the alleged loss of reputation, goodwill and business? OPC
>
> 5. Whether the Claimant, in the event of an Award being made in its favour is entitled to GST and if so to what amount? OPC
>
> 6. In the alternative, to what amount if any, the Claimant is entitled from the Respondent, towards differential in the minimum wages and (ii) gratuity of the manpower provided by it during the currency of the Agreement dated 18.2.2019?"

2.7 Issue Nos. 1 and 6 were decided against the petitioner. Issue Nos. 2 to 5 were dismissed in view of the findings recorded on Issue Nos. 1 and 6. The petitioner was directed to pay the costs of arbitration to the respondent, to be computed as per the bill of costs filed. Hence, the present petition.

SUBMISSIONS OF THE PARTIES

3. Learned senior counsel for the petitioner submits that the arbitrator erred in shifting the onus on the petitioner to prove that services were rendered at 978 sites. The argument is that while framing the issues, the onus was rightly placed on the respondent to prove that the number of sites for providing security and surveillance services were reduced to 90 by December, 2021. It is canvassed that the arbitrator discarded the handing over and taking over forms substantiating the handing over of 978 sites and erred in holding that the petitioner had failed

to prove that it rendered services at 978 sites.

3.1 The contention is that the arbitrator recorded contrary findings in the award. On one hand, it is held that the payment to the petitioner was to be made on-site basis while in the same breath, the claim for payment in accordance with Schedule II on-site basis was rejected. The submission is that award is patently illegal, perverse and passed by ignoring the relevant evidence. It is emphasised that the arbitrator recorded an admission of the respondent that initially the services were provided at 978 sites and there was no written intimation for reduction in the number of sites, yet the claim was rejected.

3.2 The submission is that the raising of invoices for a lesser number of sites was on the directions of the respondent and cannot be construed as an admission by the petitioner that the number of sites was reduced. The defence that the portal was not accepting invoices without the approval of the respondent was ignored. Contention is that after signing of the MoUs format of the invoices was changed by the respondent to reflect the reduction in manpower and its financial impact.

3.3 The learned counsel of the petitioner has not pressed the issue of rejection of the alternative claim for payment on the basis of revised minimum wages.

4. *Per contra*, the petitioner had set up a claim for payment on the basis of the difference in revised minimum wages and gratuity of the workmen as is evident from the statement of claim and the legal notice served. The submission is that the petitioner failed to prove that the payment was to be made on-site basis and for this reason a claim was raised for the difference in revised minimum wages.

4.1 It is argued that it is not a case where payment for the services rendered at the sites depicted in the invoices was not made. It is emphasised that the petitioner cannot seek payment for the sites where no services were rendered. Section 58 of the Indian Evidence Act, 1872 (for short ?the Evidence Act?) is relied upon to contend that the raising of the invoices tantamounts to an admission of having rendered services only at the sites shown in the invoices. It is vehemently contended that having entered into a new agreement on 30.04.2021 without insisting on the previous dues, the petitioner has waived the right to raise the dispute regarding payment for sites not included in invoices and is estopped from doing so.

4.2 Sections 91 and 92 of the Evidence Act are relied upon in support of the proposition that documentary evidence has precedence over oral evidence. The submission is that the arbitrator rightly has not relied upon the oral evidence stating that the surveillance services were rendered at the sites beyond those reflected in the invoices. It is argued that as per the MoU dated 04.06.2019, Rs.60,000/- per manpower transition were paid by the respondent towards final settlement and the reduction in manpower resulted in a reduction in the number of sites. The argument is that the execution of the MoUs was sufficient compliance of Clause 1.6 of the service agreement to reduce the number of sites.

4.3 Learned counsel relies upon the decisions of the Supreme Court in ***Kwality Manufacturing Corporation v. Central Warehousing Corporation***, (2009) 5 SCC 142, ***Navodaya Mass Entertainment Ltd. v. J.M. Combines***, (2015) 5 SCC 698 and ***Delhi Airport Metro Express (P) Ltd. v. DMRC***, (2022) 1 SCC 131 to contend that under Section 34 of the Act, there cannot be re-appreciation of evidence. The decisions of the Supreme Court in ***Associate Builders v. DDA***, (2015) 3 SCC 49 and ***Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran***, (2012) 5 SCC 306 are relied upon to buttress the contention that a plausible view taken by the arbitrator warrants no interference. ***Ssangyong Engineering and Construction Co. Ltd. v. NHAI***, (2019) 15 SCC 131, ***State of Chhattisgarh v. Sal Udyog (P) Ltd.***, (2022) 2 SCC 275 and ***Venture Global Engineering LLC v. Tech Mahindra Ltd.***, (2018) 1 SCC 656 are cited for the proposition that an erroneous application of law is not covered under patent illegality and the remedy under Section 34 of the Act is not that of an appeal and the merits cannot be re-examined.

5. In rebuttal, learned senior counsel for the petitioner submits that no plea of estoppel or waiver was raised before the arbitrator. Moreover, under Clause 15.3 of the service agreement the waiver could only be in writing and has to be signed by an authorised representative of the waiving party. It is submitted that the MoU dated 04.06.2019 did not reduce the number of sites.

6. Heard learned counsel for the parties at length and perused the relevant record with their able assistance. No issue other than those noted above was pressed.

RELEVANT CONTRACTUAL TERMS

7. Before proceeding further, it would be apposite to reproduce the relevant clauses of the service agreement and the relevant portions of Schedules I and II thereof:

> **"1. SERVICES - Scope & Purpose:**
>
> 1.1 In consideration of Service Provider agreeing to be bound by the covenants herein and discharging the obligations hereunder, ATC engages Service Provider to provide Services as per specifications and scope per Schedule 1 in such manner and on such terms and conditions as are contained herein.
>
> 1.4 This Agreement shall mean and include the main agreement and all the Schedules 1 to 6 appended hereto. However, in the event of any conflict between the main agreement and the schedules, the provisions of the main agreement shall prevail.
>
> 1.6 ATC shall be entitled to change the Scope of Work and/or the number of sites on which the Services are required vide a written intimation, at any time during the Term of this Agreement.
>
> **2. CONSIDERATION:**
>
> 2.1 In consideration of the Services to be provided by the Service Provider and performance of the terms and conditions contained in this Agreement, ATC shall pay to Service Provider all inclusive fees (unless otherwise stated) as detailed in Schedule 2

hereunder written.

3. TERM

This Agreement shall be deemed to have come into force with effect from 1stJanuary 2019 (the "**Commencement Date**") and it shall be valid for a period of 2 (two) years (the "**Contractual Period**" or "**Term**") upto 31st December 2020 (the "**End Date**"). The parties may upon mutual agreement, renew the Agreement for such further term and on such terms and conditions, as the parties may deem fit and agree, subject to earlier termination in terms of Clause 10.

15.3 Waiver

No waiver of any breach of any provision of this Agreement shall constitute a waiver of any prior, concurrent or subsequent breach of that provision or any other provision of this Agreement. No waiver shall be effective unless made in writing and signed by an authorized representative of the waiving Party.

SCHEDULE 1

Scope of work (Services)

1. The Service Provider shall provide Surveillance Services (Services) at the designated ATC Sites, based on the information/request/requirements spelt out by ATC Circle O&M.

SCHEDULE 2

Prices and Validity

1. In consideration of the services to be provided by the Service Provider, ATC will pay the service provider fees as mentioned in the table below:

Sr No.	Basis	Site Count	Rate (INR) Per Site Per Month
1	Surveillance Services (Maharashtra)	978	12152/-
2	Surveillance Services (UPW)	27	42943/-
3	Surveillance Services (HP)	57	10257/-
4	Surveillance Services (Haryana)	3	39342/-
5	Surveillance	14	50781/-

Services

(Delhi/NCR)

The said fee shall be exclusive of GST."

ISSUE FOR DETERMINATION

8. The issue is whether the petitioner is entitled to payment for 978 sites in terms of the service agreement or the payment is to be restricted to the number of sites for which the invoices were raised?

ANALYSIS

9. The service agreement was for services to be provided in various States but

the present dispute pertains only to the Maharashtra Circle. The arbitrator proceeded to decide Issue No. 6 relating to the alternative claim at the first instance. Though the findings on Issue No. 6 rejecting the alternative claim are not under challenge, but have a bearing on the adjudication of Issue No. 1.

10. While rejecting the alternative claim for differential minimum wages and gratuity of the employees, the arbitrator held that the service agreement provided for payment of fixed monthly charges for the sites and the obligation to comply with labour laws including the liability arising from revision of minimum wages was of the petitioner. It was also observed that none of the invoices was raised by the petitioner on the basis of the minimum wages of the workers. The relevant observations in the award are reproduced below:

> "40. Thus, the Claimant has not pleaded any agreement between the parties making the Respondent contractually liable to pay the prescribed minimum wages to the workers.
> The Agreement Dated 18.2.2019 provides for payment of fixed monthly charges to the Claimant for the sites served by it and places the onus to comply with labour laws etc. upon the Claimant. None of the invoices was raised by the claimant on the basis of the minimum wages of the workers.The amount of the invoices does correspond to the computation based on the wages mentioned in the 2ndAddendum, but not to the computation based on the prevailing minimum wages. Therefore, any attempt to prove that the Respondent, while executing the Agreement Dated 18.2.2019 had agreed to pay minimum wages of the workers to the Claimant is liable to be rejected, the same being beyond the pleadings and otherwise hit by Section 91 / 92 of the Evidence Act, 1872….."

(Emphasis supplied)

11. The factual background would be pertinent. There was an agreement for providing surveillance and security services executed on 18.04.2018 between the petitioner and ICISL. By share transfer ICISL became a wholly owned subsidiary of AISPL. During the merger and taking over proceedings, the workers of various contractor including the petitioner raised an industrial dispute and *vide* order dated 18.06.2018, Labour Commissioner (Central) Pune noted that ICISL being the principal employer assured continuity of service of the workmen and payment of gratuity. The service agreement was executed between the petitioner, the respondent and AISPL. Subsequently, AISPL w.e.f. 27.09.2019 merged into respondent pursuant to a scheme of amalgamation sanctioned by the NCLT, Mumbai.

12. The MoUs for optimisation of the manpower deployed were executed between the petitioner and the respondent on 04.06.2019 and between the petitioner and AISPL on 01.08.2019. Another agreement was executed between the parties on 23.06.2020 for providing Operation and Maintenance Services (for short ?O&M agreement?). After the completion of term of the agreement in question the parties to the *lis* executed a fresh service agreement dated 30.04.2021. This agreement came into effect on 01.04.2021 and thereunder the payment was to be made on the basis of the personnel employed.

13. It would be apposite to note that the arbitrator recorded the admission of the

respondent that the number of sites for providing the services was not reduced by way of written instruction to the petitioner. The relevant portion is reproduced below:

> "54…. Admittedly, the Respondent did not specifically reduce the number of sites for which surveillance services were to be provided, by way of written instructions to the Claimant…."

14. It is undisputed that till June, 2019 the petitioner provided services for 978 sites and the payment was made in accordance with Schedule II of the service agreement. The case set up by the petitioner that the fixed amount agreed under the agreement was to be paid and could not be reduced, was rejected relying upon Clause 1.6 of the service agreement. Under Clause 1.6 of the service agreement the respondent could change the number of sites by a written intimation and this admittedly was not done.

15. Clause 2.1 of the service agreement provides that payment to the service provider shall be of all inclusive fee detailed in Schedule II. The number of sites in Schedule II are 978 and Rs.12,152/- per site per month is to be paid. Under Clause 1.6 of the service agreement, the number of sites can be reduced by the respondent by a written intimation.

16. From a reading of Clause 1.6, 2.1 and Schedule II of the service agreement, the only possible interpretation is that the petitioner was to provide services for 978 sites in the State of Maharashtra and was to be paid all inclusive amount of Rs.1,18,84,429/-, calculated at the rate of Rs.12,152/- per site per month. The respondent under Clause 1.6 of the service agreement could reduce the number of sites but only by a written intimation to the petitioner. The invoking of Clause 1.6 of the service agreement for reducing the number of sites would have altered Schedule II *vis-à-vis* the number of sites thereby affecting the amount payable.

17. The question that arises is whether the respondent reduced the 978 sites in the State of Maharashtra by invoking Clause 1.6 of the service agreement?

18. It is an admitted fact that the sites were not reduced by the respondent by written intimation to the petitioner. The case of the respondent is that by execution of the MoUs for optimization of deployed manpower the number of sites were reduced. From perusal of the MoUs, it is evident that there is no mention of reduction of the number of sites and it cannot be construed to be a written intimation to the petitioner for reduction in the number of sites. The contention of learned counsel for the respondent that consequent to reduction in manpower in compliance of terms of the MoUs, the petitioner was not in a position to render services at 978 sites, is noted to be rejected. The change in circumstance could have form the basis for invoking Clause 1.6 of the service agreement, which admittedly was not done.

19. The contention that the petitioner had not rendered services at all 978 sites does not enhance the case of the respondent. It is important to note that the

power to reduce the number of sites vested only with the respondent and there is no clause enabling the petitioner to reduce the number of sites.

20. Another aspect is that the respondent neither initiated any proceedings against the petitioner for not providing services at the sites mentioned in Schedule II of the agreement nor terminated the agreement for violation of its terms.

21. The argument of learned counsel for the respondent that full and final payment of Rs.60,000/- was paid per resource removed, is of no avail. The payment made was not for services rendered but for full and final settlement with the employee removed and had no impact on the consideration to be paid under the service agreement. The other aspect is that the arbitrator held that payment to the petitioner was to be made on-site basis and not for the manpower deployed and this is not challenged by the respondent.

22. The respondent failed to prove reduction in the number of sites and the arbitrator erred in shifting the onus on the petitioner to prove that services were rendered at all 978 sites. The law is well settled that the party raising an assertion bears the burden of proving it and a negative burden cannot be cast upon the opposite party. Reference in this regard be made to the following decisions:

22.1 The Supreme Court in ***Bonatrans India (Pvt.) Ltd. v. Bonatrans Employees Union***, MANU/SC/0430/2026 held:

> "7. Ei incumbit probation qui dicit, non qui negat translates to 'the burden of proof lies on the one who asserts, not on the one who denies'. Section 104 of the Bharatiya Sakshya Adhiniyam, 20237 (former Section 101 of the Indian Evidence Act, 18728) embodies this principle by ordaining on whom the burden of proof lies. Although the BSA, or for that matter the Evidence Act, does not strictly apply to adjudication under the MRTU & PULP Act, he who asserts must prove is the cardinal rule of evidence which admits of no exception and extends to all forms of adjudication."

22.2 The Supreme Court in ***Shriram Chits (India) Pvt. Ltd. earlier known as Shriram Chits (K) Pvt. Ltd. v. Raghachand Associates***, 2024 INSC 403 held:

> "20……The onus of proving that the person falls within the carve out must necessarily rest on the service provider and not the complainant. This is in sync with the general principle embodied in Section 101 and 102 of the Evidence Act that ?one who pleads must prove?. Since it is always the service provider who pleads that the service was obtained for a commercial purpose, the onus of proving the same would have to be borne by it. Further, it cannot be forgotten that the Consumer Protection Act is a consumer-friendly and beneficial legislation intended to address grievances of consumers. Moreover, a negative burden cannot be placed on the complainant to show that the service available was not for a commercial purpose."

22.3 The Division Bench of this Court in ***Indian Oil Corpn. Ltd. v. Standard Casting (P) Ltd.***, 2025 SCC OnLine Del 8393 held:

> "37. It is a settled principle of law that a party claiming damages must, at the very least,

lay the foundational pleading and provide some evidence to show the occurrence of loss or the basis for claiming compensation. IOCL has failed to discharge even this elementary obligation. The absence of any such pleading or proof renders its claim wholly speculative. The law does not permit a party to seek damages as a matter of course or to cast a negative burden on the opposite party to prove that no loss was caused.

38. Unless the claimant first establishes a prima facie case of loss, no question arises of calling upon the other side to disprove it.Therefore, in the absence of even the minimal factual foundation or supporting evidence, IOCL's claim for damages stands on untenable grounds, and the learned District Court was fully justified in setting aside the Arbitral Awards."

(Emphasis supplied)

23. The raising of invoices from July, 2019 onwards for progressively lesser sites was treated as an admission by the petitioner that services were rendered only at those sites, *albeit* the same was agitated by the petitioner. The reliance of the respondent upon Section 58 of the Evidence Act to contend that the invoices issued was an admission of the petitioner that the services were rendered at such sites only, has no merit. The payment to the petitioner was to be made on a site basis and Schedule II of the service agreement specified 978 sites which admittedly were not reduced in terms of Clause 1.6 of the service agreement. The invoices will not dispense with the obligation of the respondent to prove reduction of sites in accordance with Clause 1.6 of the service agreement.

24. Sections 91 and 92 of the Evidence Act relied upon for the proposition that documentary evidence prevails over oral evidence is not applicable to the facts of the present case. The petitioner was not required to adduce evidence to substantiate that it had provided services at 978 sites, especially when the respondent had failed to discharge the initial onus of proving that the number of sites were reduced.

25. The reliance placed by learned counsel for the respondent on Sections 58, 91 and 92 of the Evidence Act is of no help. It is settled law that the rigours of the Evidence Act do not strictly apply to arbitral proceedings. Even otherwise, this is not a case of admission and the onus was not on the petitioner to prove that it had provided services at 978 sites, rather the respondent had to discharge the onus of proving that the number of sites were reduced.

26. The accounting method adopted by the petitioner and failure to reflect the outstanding amount in books of account would not be fatal to the claim raised. The claim is to be determined in terms of the service agreement and not on the basis of the outstanding amount reflected in the books of account.

27. The reliance on the O&M agreement to contend that there was reduction in the manpower is of no avail. The agreement was for operation and maintenance services and not for surveillance. The scope of the agreement was to undertake preventive maintenance, breakdown maintenance and fault management of the electrical infrastructure equipment listed therein and the payment was to be made on the basis of per diesel generator set at the site.

28. There are contradiction in the impugned award. The arbitrator held that the payment was to be made on-site basis and at the same time observed that the petitioner was conveyed by the respondent vide email dated 27.08.2019 that the payment would be made on the basis of the manpower retained after optimisation of the resources in terms of the MoUs.

29. The arbitrator took into account that the amount claimed by the petitioner was increasing with every passing month yet the parties executed the O&M agreement dated 23.06.2020 and a fresh service agreement dated 30.04.2021, without the petitioner insisting upon clearance of the outstanding dues. The conduct was taken into consideration to hold that the petitioner had no grievance with the payment received. The arbitrator had to go by the terms and conditions agreed between the parties and cannot judge the business prudence of the petitioner.

30. The argument of learned counsel for the respondent that the petitioner had waived the right to raise the dispute and was estopped from doing so was not pressed before the arbitrator.

31. Be that as it may, the principles of waiver and estoppel cannot be invoked merely on failure or omission to raise the issue. For invoking estoppel there has to be a representation with the intention that it be acted upon by the other party; the representation must be relied upon and the other party should alter its position. Reference be made to the following decisions of the Supreme Court:-

31.1 In ***Kalpraj Dharamshi v. Kotak Investment Advisors Ltd.***, (2021) 10 SCC 401 it was held:

> "121. It has been held, that a waiver cannot always and in every case be inferred merely from the failure of the party to take the objection. Waiver can be inferred, only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question. The waiver or acquiescence, like election, presupposes, that the person to be bound is fully cognizant of his rights, and that being so, he neglects to enforce them, or chooses one benefit instead of another.
>
> 122. As such, for applying the principle of waiver, it will have to be established, that though a party was aware about the relevant facts and the right to take an objection, he has neglected to take such an objection.
>
> *** *** *** ***
>
> 127. Thus, for constituting acquiescence or waiver it must be established, that though a party knows the material facts and is conscious of his legal rights in a given matter, but fails to assert its rights at the earliest possible opportunity, it creates an effective bar of waiver against him. Whereas, acquiescence would be a conduct where a party is sitting by, when another is invading his rights. The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant. Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege. It is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them."

31.2 In ***Chhaganlal Keshavlal Mehta v. Patel Narandas Haribhai***, (1982) 1 SCC 223 it was held:

> "23. To bring the case within the scope of estoppel as defined in Section 115 of the Evidence Act : (1) there must be a representation by a person or his authorised agent to another in any form — a declaration, act or omission; (2) the representation must have been of the existence of a fact and not of promises de futuro or intention which might or might not be enforceable in contract; (3) the representation must have been meant to be relied upon; (4) there must have been belief on the part of the other party in its truth; (5) there must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position to his prejudice or detriment; (6) the misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice; (7) the person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel; (8) only the person to whom representation was made or for whom it was designed can avail himself of it. A person is entitled to plead estoppel in his own individual character and not as a representative of his assignee."
>
> (Emphasis supplied)

32. The existence of pre-requisites of estoppel were neither pleaded nor proved.

33. Every failure to raise an objection or to assert right cannot lead to an inference of waiver. It must be established that the petitioner was aware of its right to object yet consciously chose not to raise the issue. The party pleading waiver has to prove it but no evidence was produced by the respondent in this regard.

34. There is no quarrel with the propositions propounded, supported by the case laws cited by learned counsel for the respondent that under Section 34 of the Act there cannot be re-appreciation of evidence, court cannot sit in appeal to correct every factual or legal error and a plausible view cannot be interfered. However, it is trite law that an award passed by ignoring the relevant clauses or beyond the terms and conditions agreed between the parties suffers from patent illegality and is a ground for interference under Section 34 of the Act. Following decisions of the Supreme Court are referred to:

34.1 In ***Delhi Metro Rail Corporation Ltd. V. Delhi Airport Metro Express Pvt. Ltd.***, 2024 INSC 292 it was held:

> "38. In Associate Builders vs. Delhi Development Authority, a two-judge Bench of this Court held that although the interpretation of a contract is exclusively within the domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible. A patent illegality arises where the arbitrator adopts a view which is not a possible view. A view can be regarded as not even a possible view where no reasonable body of persons could possibly have taken it. This Court held with reference to Sections 28(1)(a) and 28(3), that the arbitrator must take into account the terms of the contract and the usages of trade applicable to the transaction. The decision or award should not be perverse or irrational. An award is rendered perverse or irrational

where the findings are (i) based on no evidence; (ii) based on irrelevant material; or (iii) ignores vital evidence. Patent illegality may also arise where the award is in breach of the provisions of the arbitration statute, as when for instance the award contains no reasons at all, so as to be described as unreasoned. A fundamental breach of the principles of natural justice will result in a patent illegality, where for instance the arbitrator has let in evidence behind the back of a party. In the above decision, this Court observed:

"31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) **ignores vital evidence in arriving at its decision**, such decision would necessarily be perverse. ...

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside."

(emphasis supplied)

*** *** *** ***

40. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view.A ?finding? based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of ?patent illegality?. An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within his jurisdiction or violating a fundamental principle of natural justice."

34.2 In ***Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum Rajgurunagar***, (2022) 4 SCC 463 it was held:

"43. An Arbitral Tribunal being a creature of contract, is bound to act in terms of the contract under which it is constituted. An award can be said to be patently illegal where the Arbitral Tribunal has failed to act in terms of the contract or has ignored the specific terms of a contract.

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45. The Court does not sit in appeal over the award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation made by the Arbitral Tribunal of a contractual provision, unless such interpretation is patently unreasonable or perverse.
Where a contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot interfere with the arbitral award, only because the Court is of the opinion that another possible interpretation would have been a better one."

34.3 In ***SAL Udyog (P) Ltd.*** (supra) it was held:

"26. ………. We are, therefore, of the view that failure on the part of the learned sole arbitrator to decide in accordance with the terms of the contract governing the parties, would certainly attract the "patent illegality ground", as the said oversight amounts to

> gross contravention of Section 28(3) of the 1996 Act, that enjoins the Arbitral Tribunal to take into account the terms of the contract while making an award. The said "patent illegality" is not only apparent on the face of the award, it goes to the very root of the matter and deserves interference……"

34.4 In ***Bharat Coking Coal Ltd. v. Annapurna Construction***, (2003) 8 SCC 154 it was held:

> "22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction.Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record."

(Emphasis Supplied)

Conclusion

35. In view of the above, it is concluded:-

i) The respondent failed to prove that the number of sites was reduced in terms of Clause 1.6 of the service agreement and the arbitrator erred in shifting the onus upon the petitioner to prove that services were rendered at all 978 sites.

ii) The MoUs pertained to optimisation of manpower and were not written intimations for reduction of sites under Clause 1.6 of the service agreement.

iii) The reliance upon the e-mail dated 27.08.2019 to hold that the petitioner was conveyed that payment would be based on manpower deployed after optimisation of the resources in terms of MoUs is contrary to the finding of arbitrator that payment was to be made on-site basis

iv) The pre-requisites for invoking estoppel and waiver were neither pleaded nor proved moreover, these issues were not raised before the arbitrator.

v) The impugned award travels beyond the terms of the service agreement and is patently illegal.

36. The petition is allowed. The impugned award is set aside. All pending applications are disposed of.