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IN THE HIGH COURT OF DELHI AT NEW DELH
VIBHU BAKHRU; J.
O.M.P. (COMM) 590/2020; 10.05.2022
MILLENNIUM SCHOOL *versus* **PAWAN DAWAR**

Arbitration and Conciliation Act, 1996 - Section 65-B of the Indian Evidence Act, 1872 does not apply to arbitral proceedings. Although the principles of the Evidence Act usually apply, sensu stricto, the specific provisions of the Act do not apply. An objection as to the non-compliance with the requirement of Section 65-B shall be raised at the earliest opportunity. Failure to take such an objection at the material time deprives the other party to take such an objection at a later stage.

For the Petitioner : Mr Abhijeet Sinha, Mr Archit Singh Gyani, Mr Aditya Shukla and Mr Amit Aggarwal, Advocates;

For the Respondent : Mr Pramod Kumar Sharma, Mr Prashant Bajaj Advocate.

J U D G M E N T

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the '**A&C Act**') impugning an arbitral award (hereinafter the '**impugned award**') dated 28.02.2020 delivered by an Arbitral Tribunal comprising of a Sole Arbitrator (hereinafter the '**Arbitral Tribunal**').

2. The impugned award was rendered in the context of disputes that have arisen between the parties in relation to the Agreement dated 01.04.2012.

Factual Context

3. Mr Pawan Dawar (hereinafter '**the respondent**') is engaged in the business of providing transport services and carries on his business under the name and style of his proprietorship concern M/s Genesis Enterprises (hereinafter '**GE**').

4. On 01.04.2012, the parties entered into an Agreement, whereby the respondent agreed to provide transport services to the petitioner. The petitioner owned twenty-two school buses, which the respondent agreed to operate and maintain. The respondent was required to provide conductors, drivers, supervisors, cleaners, full time mechanics and other personnel. In addition, the respondent also agreed to provide additional buses for the purposes of picking up and dropping off the students and the employees of the petitioner.

5. The Agreement was for a term of eight years, that is, from 01.04.2012 till 31.03.2020 with the first five years as a lock in period. Further, the respondent agreed to strictly abide by the obligations stipulated in the Agreement such as, adhering to the timing for transportation of students; regular maintenance of the buses, maintaining motorable conditions of the buses; complying with the safety guidelines issued by the Supreme Court of India; limiting the number of students transported in each bus to the

permissible limit; and, in the event of breakdown of buses, providing alternate vehicles etc.

6. Thereafter, by a communication dated 07.06.2015, the respondent requested the Principal of the petitioner school to release the outstanding payments in terms of the Agreement. He further stated that even though, the petitioner was collecting the transportation fee from the students well in advance, however, the petitioner was making payments to him in petty instalments after a delay of a substantial period.

7. The Principal of the petitioner school responded by an e-mail dated 05.08.2015 alleging deficiencies in the services provided by the respondent and further, informed him that the petitioner would be compelled to take strict action if the said deficiencies were not rectified within a period of seven-ten days. Thereafter, by a communication dated 03.09.2015, the petitioner terminated the Agreement.

8. Aggrieved by the termination of the Agreement, the respondent invoked the Agreement to refer the disputes to arbitration, in terms of Clause 36 of the Agreement. This Court, by an order dated 04.04.2018, passed in *O.M.P. (T) (COMM) 55 of 2017* captioned *Pawan Dawar v. Millennium School* directed the Delhi International Arbitration Centre (DIAC) to appoint an arbitrator to adjudicate the disputes between the parties. Thereafter, the Arbitral Tribunal entered upon reference on 07.06.2018.

9. Before the Arbitral Tribunal, the respondent filed its Statement of Claims. A tabular statement stating the claims made by the respondent are summarised below:-

Claim 1	Outstanding Contractor Fee	₹1,16,16,950/-
Claim 2	Interest payable on the delayed and outstanding contractor fee calculated upto 31.03.2016	₹50,65,242/-
Claim 3	Loss of Profits from the remaining period out of the lockin period i.e. 03.09.2015 till 31.03.2017	₹93,97,202/-
Claim 4	Contractor fee due and payable with respect to cabs	₹65,13,755/-
Claim 5	Interest payable on the delayed and outstanding contractor fee for cabs calculated upto 31.03.2016.	₹20,98,346/-
Claim 6	Contractor fee due and payable on account of transportation fee with respect to the wards of teachers and accountant Mr Satinder Dwivedi	₹2,91,758/-
Claim 7	Insurance Premium returnable by the School	₹3,63,980/-
Claim 8	Insurance claim amount returnable by School to the Claimant	₹22,250/-
	Total (₹)	₹3,53,69,483/-

10. The petitioner filed its Statement of Defence before the Arbitral Tribunal and also raised counter-claims. The counter-claims made by the petitioner are tabulated below:-

Claim 1	Exemplary cost due to loss of reputation	₹1,00,00,000 /-
Claim 2	Cost towards mental pain and agony suffered	₹5,00,000 /-

11. By the impugned award, the Arbitral Tribunal partially accepted the claims of the respondent. The Arbitral Tribunal awarded a sum of ₹1,16,16,950/- towards outstanding Contractor's fee along with interest at the rate of 18% per annum from 03.09.2015 till 20.05.2016 (Claim nos. 1 and 2); a sum of ₹3,38,150/- per month from 03.09.2015 to 31.03.2017 as loss of profit (Claim no.3); a sum of ₹65,13,755/- together with interest at the rate of 18% per annum from 03.09.2015 till the date of Statement of Claims as extra cab hire charges (Claim nos. 4 and 5); and, a sum of ₹3,63,980/- on account of insurance premium returnable by the petitioner (Claim no.7). The Arbitral Tribunal further awarded *pendente lite* interest at the rate of 18% per annum on the awarded amounts from the date of presentation of claims till the date of the award and, future interest at the rate of 18% per annum on the awarded amounts from the date of the award till the date of realization, if the amount was not paid within a period of three months from the date of the award. The Arbitral Tribunal also awarded costs, in favour of the respondent.

12. Aggrieved by the impugned award, the petitioner has filed the present petition.

Submissions

13. Mr Sinha, learned counsel for the petitioner, submitted that the Arbitral Tribunal erred in holding that notwithstanding a material breach of the Agreement, the petitioner could not terminate the Agreement within the lock-in-period. He referred to Clause 33 of the Agreement and submitted that the said clause expressly enabled termination of the Agreement on account of any material breach. Further, it was a *non-obstante* clause and therefore, had an overriding effect. He contended that the interpretation of Clause 1 of the Agreement by the Arbitral Tribunal was not reasonably possible after reading the Agreement as a whole and the said clause could not become a no-termination clause.

14. Next, he submitted that the Arbitral Tribunal wrongly rejected crucial evidence led by the petitioner including the complaints filed by parents of the students against the respondent on the ground that the Certificate under Section 65-B (4) of the Indian Evidence Act, 1872 (hereinafter '**Evidence Act**') did not conform to the statutory requirements. However, the Arbitral Tribunal failed to consider that the Evidence Act was not applicable to arbitration proceedings and this finding of the Arbitral Tribunal was contrary to Section 19 of the A&C Act and Rule 25.2 of the DIAC Rules, 2018. He further contended that the respondent had admitted to the receipt of various e-mails, which were yet ignored by the Arbitral Tribunal on the ground of insufficiency of certificate under Section 65-B of the Evidence Act.

15. Next, he submitted that the respondent had inflated the statement of accounts and the claim regarding outstanding Contractor's fee of ₹1,16,16,950/- was exaggerated. He further contended that the evidence showing reconciliation of accounts was overlooked and the respondent had given its consent to the balance confirmation certificate, which showed the balance amount of ₹32,59,414/- as on 30.06.2014 and the said amount was paid by the petitioner.

16. Next, he submitted that the excess cab charges of ₹65,13,755/- awarded to the respondent by the Arbitral Tribunal was, *ex facie*, erroneous as the respondent had restricted his claim to a sum of ₹53,13,755/-.

17. Lastly, he submitted that the awarded of interest was excessive and unsustainable.

Reasons and Conclusion

Re: Loss of profits for the remaining lock-in period

18. The first and foremost question to be addressed is whether the decision of the Arbitral Tribunal to award ₹3,38,150/- per month as damages for loss of profits for the period 03.09.2015 to 31.03.2017, is manifestly erroneous and vitiates the impugned award.

19. The said award is premised on the conclusion that the termination of the Agreement was illegal.

20. On the basis of the pleadings, the Arbitral Tribunal had, *inter alia,* framed seven issues including the following:

"1. Whether the termination of the contract dated 01.04.2012 executed between the Claimant and the Respondent is valid?

xx xx xx

4. Whether there was any deficiency in the services provided by the Claimant?"

21. Both the issues were interconnected and considered together. The said issues were decided against the petitioner. The Arbitral Tribunal held that the termination of the Agreement was illegal and invalid and accordingly, answered the first issue in the negative. The Arbitral Tribunal further found that the petitioner had failed to prove that there was any deficiency in the services provided by the respondent.

22. The Arbitral Tribunal found that the termination was not in accordance with the terms of the Agreement as it was not open for the petitioner to terminate the said Agreement during the lock-in period.

23. At this stage, it would be relevant to refer to the relevant clauses of the Agreement. Clauses 1, 30, 31, 32, 33, 34 and 35 of the Agreement are relevant and set out below:

"TERM:

1. This Agreement will come into force on and from April 1, 2012 ("Effective Date") and shall remain in force for a period of eight (8) years till March 31, 2020 ("Term") unless terminated earlier in terms of Clauses 30 and 31 below. This can be renewed at the time of expiry with mutual agreement. However, there shall be a lock-in period of five years commencing from the Effective Date (Lockin Period), during which neither Party to this Agreement shall be entitled to terminate this Agreement except that the (a) School may terminate the Agreement in the event of any fatal accident resulting in death of any student or staff; failure to maintain the Contractor Buses and School Buses (however, not under exceptional cases of body work and bus A/C) as stated in the Agreement ; and in the event of misconduct, hideous crimes such as those under section 354/375 of the Indian Penal Code committed by any Transport Personnel of the Contractor (b) Contractor may terminate the Agreement in the event the School defaults on its obligation to pay the Contractor Fee, subject to the Contractor providing the School with a prior written notice of two months.

xxxx xxxx xxxx

30. In the event any Transport Personnel is found or caught or reported to be misbehaving with the staff members, employees or the students of School or in an intoxicated state or not adhering

to the official rules and regulations of School or in the event of any other non-acceptable act, misconduct, theft, fraud, cheating or any other unlawful act including violence committed by the personnel provided by the Contractor, the Contractor agrees to take entire responsibility and liability of aforesaid acts and omissions and agrees to bear ail consequences, damages, losses and claims whether direct or indirect, monetary or otherwise, implied or explicit or of whatsoever nature due to this misbehavior and would immediately remove such person from the duty of School. The Contractor also undertakes to supervise and ensure that its drivers do not indulge in any rash, reckless or negligent driving and adhere to all traffic rules and regulations at all times.

31. The Contractor undertakes that the Transport Personnel provided by the Contractor would not resort to any undisciplined acts of strike, violent protests, rallies, or otherwise disrupt/interfere with the peaceful functioning of School and in the event of any such occurrence, the Contractor agrees to immediately remove the erring personnel and provide immediate replacements to School ensuring that business at/of School shall not be hampered under any circumstances due to any fault of the Contractor or its agents.

32. The Contractor shall withdraw/replace forthwith any of its Transport Personnel on receipt of a written request from School, who in the opinion of School are undesirable. The decision of School /School's representative in this regard shall be final and binding on the Contractor.

TERMINATION AND CONSEQUENCE OF

TERMINATION:

33. Notwithstanding anything contained herein, School reserves the right to terminate the services of the Contractor, as School may deem proper, for reason of Contractor not carrying out its obligations set-out in this Agreement and/or for reason of any material breach of this Agreement, and Contractor agrees to pay School the damages resulting out of disruption of Transport Services in case of such termination. The Contractor shall be said to materially breach the Agreement if it fails to provide the level of services prescribed in this Agreement including but not limited to the following defaults:

a. Failure to maintain a 99% success rate at adhering with the timelines as per the rosters provided by School to pick up and drop the students. For these purposes, the performance of the Contractor will be assessed every quarter.

b. Failure to maintain the Buses (i.e. Contractor Buses and School Buses) as stated in this Agreement;

c. In the event of any accident resulting in injury or death of any student or employee of School;

d. In the event the Buses are overloaded beyond the legally permissible capacity of the buses;

e. In the event the Transport Personnel engaged by the Contractor do not fulfil the 'Minimum Conditions for Transport Personnel' set out in the Agreement;

f. In the event of breach of any other 'Conditions of Service' set out in this Agreement;

g. Any failure to comply with any and all statutory obligations; and

h. Failure to maintain insurance.

34. This Agreement can be terminated by the School by giving two months written notice to the Contractor. The Contractor can terminate this Agreement only in the event the School is in breach of its obligation pertaining to payment of Contractor Fee subject to the Contractor providing prior two months written notice to the School.

35. Upon termination for any reason whatsoever, Contractor shall be liable to refund outstanding amount of advance received from School."

24. The Arbitral Tribunal examined the said clauses and concluded that the petitioner was not entitled to terminate the Agreement during the lock-in period of five years except on the grounds as stated in Clause 1 of the Agreement. The Arbitral Tribunal was of the view that recourse to Clause 33 of the Agreement was not available to the petitioner during the lock-in period. The Arbitral Tribunal rejected the contention that Clause 33 being a *non-obstante* clause, would override the other clauses of the Agreement and therefore, the same would entitle the petitioner to terminate the Agreement, even during the lock-in period, on account of any material breach on the part of the respondent. The Arbitral Tribunal also held that the petitioner had terminated the Agreement on account of the alleged deficiencies in the services and not on the ground as set out in Clause 1 of the Agreement. The relevant extract of the impugned award is set out below:

"80. ….. In my considered opinion Clause 1 providing for lock-in period as well as exceptional situations under which there can be termination even during lock-in period is a special provision distinct from Clauses 33 to 35 under the heading "Termination and Consequences of Termination". I am therefore of the view that Clause 33 cannot prevail over Clause 1 merely because it starts with a nonabstante clause.

81. It is necessary to add that the non-abstante clause used in Clause 33 indicates that Clause 33 should prevail despite anything to the contrary in the said clause. Clause 33 nowhere provided that the Respondent reserves the right to terminate the contract "at any time". But it states that the school reserves the right to terminate for the reasons specified therein in which event the contractor shall pay the damages resulting out of disruption of transport services. The emphasis in Clause 33 is on the grounds for termination by the school and the obligation of the contractor to compensate the damage. Clause 1 did not provide anything contrary to Clause 33 either with regard to the grounds for termination or the liability of the contractor to compensate the damage. Hence the only conclusion that can be reached is that the Respondent may take recourse to clause 33 only after completion of the lock-in period of five years. The termination, if any, during the lock-in period shall be only for the reasons specified in Clause 1 but not on any other ground.

82. As rightly submitted by the Ld. Counsel for the Claimant none of the grounds specified in Clause 1 is made out in Ex.CW1/11 and Ex.CW1/12 dated 03.09.2015. At any rate the specific case of the Respondent is that the termination was ordered invoking clause 33 of the Agreement but not clause 1.

83. As expressed above, the Respondent cannot invoke Clause 33 for termination during lock-in period. Therefore, the impugned termination dated 03.09.2015 under Clause 33 of the Agreement is contrary to the upon and illegal."

25. In the present case, the Arbitral Tribunal's decision that the termination of the Agreement is illegal rests on two findings. First, that the Agreement cannot be terminated under Clause 33 of the Agreement during the lock-in period of first five years. And second, that the grounds on which the Agreement was terminated fall within Clause 33 of the Agreement and not under Clause 1 of the Agreement.

26. A plain reading of Clause 1 of the Agreement does indicate that neither party could terminate the Agreement during the lock-in period of five years except on the grounds as stated in the said clause, namely, (i) fatal accident resulting in death of any student or

staff; (ii) failure to maintain the contractor buses and school buses; and, (iii) event of misconduct, hideous crimes such as those under Sections 354/375 of the Indian Penal Code, 1860. In addition, the respondent could terminate the Agreement, in the event, the petitioner defaulted in its payment obligations subject to a prior notice of two months. However, Clause 33 of the Agreement also provides that the Agreement could be terminated on account of any material breach of the Agreement. It sets out the defaults, which would constitute material breach.

27. A plain reading of the grounds as set out in Clause 33 of the Agreement indicates that the same are not mutually exclusive to the grounds as set out in Clause 1 of the Agreement. Failure to maintain buses, accident resulting in injury or death of a student or an employee of the petitioner school are also referred to in Clause 1 of the Agreement.

28. Thus, the contention that the Agreement could not be terminated during the lock-in period on account of any of the grounds as set out in Clause 33 of the Agreement is, *ex facie*, erroneous.

29. Clause 1 of the Agreement specifies the term of the Agreement. Whereas, Clauses 33, 34 and 35 of the Agreement fall under the heading "*Termination and Consequence of Termination*".

30. In terms of Clause 34 of the Agreement, the Agreement could be terminated by the petitioner by giving two months' notice to the respondent. The petitioner was not required to give any reasons for such termination. Clearly, recourse to this clause would not be available during the lock-in period.

31. However, this Court finds it difficult to accept that Clause 33 of the Agreement could not be available to the petitioner during the lockin period. First of all, Clause 33 of the Agreement commences with the *non-obstante* provision. Thus, it would override the other clauses of the Agreement. There is little reason to curtail the full import of the *nonobstante* clause. Second and more importantly, is the nature of grounds as set out in Clause 33 of the Agreement. If the interpretation as provided by the Arbitral Tribunal is accepted, it would imply that notwithstanding that the respondent fails to adhere to the timelines for picking up and dropping the students; overloads the buses beyond legally permissible capacity; fails to perform the "minimum conditions for transport personnel"; fails to comply with the statutory obligations; and results in an injury to any student or any employee of the petitioner, the petitioner would not be entitled not terminate the Agreement.

32. The Agreement was for providing timely services, in accordance with law. In this context, it is difficult to accept that the petitioner would not be entitled to terminate the Agreement on account of any fundamental breach on the part of the respondent.

33. The second aspect to be examined is whether the grounds for termination as stated in the Termination Letter dated 03.09.2015 were the grounds, which were relatable only to Clause 33 of the Agreement. The relevant grounds for termination as set out in the Termination Letter are reproduced below:

"1. The first unsatisfactory ground is that in clause 8 of the agreement you have ensured timely pick up and drop off the students and employees of the School however You failed to adhere to the

timings which caused lot of inconvenience to the School. The clause is read as “The Contractor agrees that time is the essence of the Agreement and failure to adhere to the timings shall be regarded as failure to provide the Transport Services in terms of this Agreements”. We never asked you to pick up or drop off the students from their door step. We agreed pick-up and drop-off points meant the most convenient pick-up and drop-off point to the student or employee, nearest to the residence of the student or employee where the bus can reach conveniently considering the size of the bus.

2. The second unsatisfactory ground is that in clause 10 & 12 of the Agreement you have ensure that the School Buses and the Contractor Buses will always be properly maintained in good, motorable and road worthy condition and will be serviced /refueled regularly and tires / tubes will be repaired as and when require. However, you failed to maintain the Contractor buses as well as School buses. There are frequent punctures of Tires and tubes which are not regularly maintained that have been causing inconvenience to our students as well as the employees of the school.

3. The third unsatisfactory ground is that in Clause 11 of the Agreement you have ensured that the air conditioner in all School buses and Contractor Buses will be regularly serviced. However, no such servicing is done to the air conditioners hence cooling is not at all effective. The air conditions in the buses were also found to be switched off during the transit and since there are no windows in the bus, the atmosphere becomes very suffocating, and this problem has been facing by the students and the employees since long time.

4. The fourth unsatisfactory ground is that in Clause 16 You ensured that if any the Contractor or the School bus goes for repair and maintenance or in the event of any break down, you would provide alternate bus or similar specification free of charge. However, there were frequent breakdowns and no such alternative means were provided by you and the students and the employee has to travel on their own irrespective of any weather which caused a great hindrance.

5. The fifth unsatisfactory ground is that in Clause 30 You have ensured that transport personnel will adhere to official rules and regulations of the school. However, there are many events where your transport personnel were caught in an inebriated condition by our transport in charge and when the concerned person was pulled up, he was extremely abusive to both the transport supervisor as well as to the school transport incharge.

6. The sixth unsatisfactory ground is that in Clause 31 You have undertaken that the transport personnel provided by you would not resort to any undisciplined acts of strike, violent protest, rallies, or otherwise dispute/interfere with the peaceful functioning of School but there are many times your transport personnel have conducted multiple strikes which hampered the transportation services and eventually hampers the peaceful functioning of the school.

7. The seventh unsatisfactory ground is that the Parents have complained that students were asked to push the buses when there was breakdown.

8. The parents wanted to continue their pupils education in The Millennium School but because of poor transport services the parents have withdraw their pupil from The Millennium Schools which is a great loss to the school.”

34. It is apparent from the above that the second and third ground also fall within the exception as provided in Clause 1 of the Agreement. As stated above, Clause 1 of the Agreement expressly enabled the petitioner to terminate the Agreement on account of failure on the part of the respondent to maintain the buses.

35. Thus, the conclusion of the Arbitral Tribunal that none of the grounds as specified under Clause 1 of the Agreement were made out in the Termination Letter is, *ex facie*,

erroneous. The petitioner had also produced several e-mails as evidence that the buses were not being maintained properly.

36. The next question to be examined is whether the decision of the Arbitral Tribunal that the petitioner has failed to prove deficiency of service, is manifestly erroneous.

37. Mr Sinha had contended that the Arbitral Tribunal had erred in rejecting the evidence on the ground that requirements under Section 65-B of the Evidence Act were not satisfied.

38. The Arbitral Tribunal had rejected several e-mails (RW1/3 to RW1/63) on the ground that the requirements under Section 65-B of the Evidence Act were not complied with. The Principal of the petitioner school had issued the said certificate (Ex.RW1/64), in support of the said e-mails sent from the petitioner.

39. It is material to note that there was no objection to the certificate under Section 65-B of the Evidence Act at the time when the same was produced. It was also duly exhibited and marked as Ex. RW1/64. Notwithstanding the same, the Arbitral Tribunal held that the said certificate was inadmissible as it was defective. And, an objection to admissibility of evidence could be taken at any stage.

40. In ***R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple And Anr.: (2003) 8 SCC 752***, the Supreme Court held that an objection with regard to a certificate of Section 65-B of the Evidence Act is not available if it is not taken at the material time. The court had also explained the distinction regarding evidence that is inherently not admissible and a defect in the manner of proving the same. The requirement of Section 65-B of the Evidence Act relates to the mode and manner of leading evidence and if no objection as to the same is taken at the material time, it would not be open for a party to raise it at a later stage. The relevant extract of the said decision is set out below:

"*20*. … Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes : (*i*) an objection that the document which is sought to be proved is *itself inadmissible* in evidence; and (*ii*) where the objection does not dispute the admissibility of the document in evidence but is directed towards the *mode of proof* alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons : firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of

the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior court."

(emphasis supplied)

41. In ***Sonu v. State of Haryana: (2017) 8 SCC 570*****,** the Supreme Court referred to its earlier decisions and held as under:

"32. It is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the trial court without a certificate as required by Section 65-B(4). It is clear from the judgments referred to supra that an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency. It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements under Section 161 CrPC, 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65-B(4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof."

42. In ***Om Prakash v Central Bureau of Investigation: 2017 SCC Online Del 10249***, a Coordinate Bench of this Court held as under: -

"25….Thus if a document is admissible in evidence and no objection to the mode of proof is taken thereof at the stage of tendering the same in trial, the party is estopped to challenge the same before the Appellate Court or thereafter, however if the document is per-se inadmissible then even if marked as an exhibit the same cannot be read in evidence."

43. It is also relevant to note that by virtue of Section 1 of the Evidence Act, it does not apply to arbitration. Although, the principles of the Evidence Act are usually applied in arbitral proceedings, *sensu stricto*, the said Act is not applicable. Section 65-B of the Evidence Act is not applicable to arbitral proceedings, yet the Arbitral Tribunal has disregarded the entire evidence led by the petitioner regarding deficiency of service solely on the ground that the certificate under Section 65-B of the Evidence Act was defective.

44. It is material to note that the receipt of several communications relied upon, on behalf of the petitioner, were admitted. Notwithstanding the same, the said communications were rejected as not admissible on the ground that the certificate under

Section 65-B of the Evidence Act was not furnished. In the circumstances, the decision of the Arbitral Tribunal to completely ignore the said e-mails, is manifestly erroneous.

45. The Arbitral Tribunal has not addressed itself as to whether in fact, there was any deficiency of service warranting termination of the Agreement.

46. In view of the above, the finding of the Arbitral Tribunal that the termination of the Agreement, is illegal cannot be sustained.

47. The Arbitral Tribunal has awarded loss of profits after 30.09.2015 solely on the basis that the termination of the Agreement was illegal and invalid. Consequently, the award of ₹3,38,150/- per month as damages for loss of profits for the period 03.09.2015 to 31.03.2017, is also liable to be set aside.

Re: award of Outstanding Contract's fee

48. The next question to be examined is, whether the Arbitral Tribunal has erred in allowing the respondent's claim for payment for services rendered. The Arbitral Tribunal had awarded a sum of ₹1,16,16,950/- as the amount outstanding and payable for services rendered prior to 03.09.2015. In this regard, the Arbitral Tribunal examined the extensive evidence produced on record and concluded that the respondent had established its claim that the aforesaid sum remained outstanding and payable. The respondent had produced various bills and also details of the amounts received during the relevant quarters.

49. Mr Sinha contended that the Arbitral Tribunal had overlooked the evidence, which established that the parties had reconciled their accounts as on 30.06.2015 and the respondent had confirmed that the balance outstanding on that date was ₹32,59,414/-. He submitted that the claims made by the respondent were inflated and exaggerated. He referred to an e-mail dated 13.08.2014 (Ex. CW 174) and submitted that the respondent had affirmed the said balance. The said e-mail was sent by the respondent in response to an e-mail from the accountant of the petitioner seeking a balance confirmation certificate till 30.06.2014. In response, the respondent had stated that he was "*OK with ledger*" and the balance amount of ₹32,59,414/- was reflected in the said e-mail. The respondent had also asked for release of the said balance. It was contended on behalf of the respondent that the said e-mail was for the purposes of seeking release of the amount, which was reflected and did not convey that the respondent had given up any of its claims.

50. The Arbitral Tribunal had noted that the petitioner had not produced any details or records to show the amount that was due and paid to the respondent. On the other hand, the respondent had produced extensive evidence, to establish the amount invoiced and received. The Arbitral Tribunal also considered the petitioner's contention that the accounts were reconciled as on 30.06.2014 and had rejected the same. First, the Arbitral Tribunal noted that neither such a plea was taken by the petitioner in its Statement of Defence nor any record was produced to establish the same. The Arbitral Tribunal also noted that the petitioner was in possession of all the relevant records to ascertain the amounts due to the respondent, but had failed to produce the same.

51. It is seen that the Arbitral Tribunal had examined the evidence on record produced by the parties. Given the extent of evidence produced by the respondent, it is difficult to accept that an e-mail dated 13.08.2014 would be dispositive of the respondent's claim. The Arbitral Tribunal had examined the evidence brought on record and its conclusion that the respondent had established a sum of ₹1,16,16,950/- was due and payable by the petitioner for the services rendered prior to 03.09.2015, cannot be interfered with. The scope of examination under Section 34 of the A&C Act does not entail re-appreciation and reevaluation of the evidence. The Arbitral Tribunal had examined various bills and details of payments received to accept the respondent's claim for the amount due till 03.09.2015.

52. In view of the above, the Arbitral Tribunal's decision regarding quantification of the amounts due to the respondent is not amenable to challenge on the grounds as set out under Section 34 of the A&C Act.

Re: Claim for extra cab charges

53. It was contended on behalf of the petitioner that the Arbitral Tribunal erred in awarding a sum of ₹65,13,755/- towards charges for extra cabs hired. Mr Sinha had pointed out that in compliance of the order dated 12.12.2019 passed by the Arbitral Tribunal, the respondent submitted a breakup of the amounts claimed as Contractor's fee and 'extra cab charges' by an e-mail dated 20.12.2019. A perusal of the said e-mail indicates that the respondent had reduced its claim to ₹53,13,755/- as it acknowledged the receipt of a sum of ₹12 lakhs. The tabular statement sent by the respondent to the Arbitral Tribunal in compliance with the order dated 12.12.2019, is reproduced below: -

"**Quarter-Wise Detail of Amounts claimed towards Cab Hire Charges**

Quarter	**Amount Claimed in Quarter**	**Amount Received in Quarter**
April 13 to June 13	5,95,166	0
July 13 to Sept. 13	10,36,421	0
Oct. 13 to Dec. 13	8,97,050	0
Jan. 14 to Mar. 14	4,54,568	0
April 14 to June 14	5,19,817	0
July 14 to Sept. 14	5,92,916	12,00,000 (inclusive of TDS@1%)
Oct. 14 to Dec. 14	7,32,172	0
Jan. 15 to Mar. 15	7,47,674	0
April 15 to June 15	4,15,139	0
July 15 to 3rd Sept. 15	5,22,832	12,00,000
Total	**65,13,755**	**12,00,000**

Total Amount Claimed towards Cab Hire Charges Rs. 65,13,755
Total Amount Received towards Cab Hire Charges Rs. 12,00,000
Total Amount Outstanding towards Cab Hire Charges Rs. 53,13,755"

54. The above statement clearly indicates that the respondent had reduced its claim for the amount outstanding towards cab hire charges to ₹53,13,755/-. The learned counsel appearing for the respondent has not disputed the said e-mail.

55. In view of the above, the impugned award to the extent it awards an amount in excess of ₹53,13,755/- as cab hire charges, is liable to set aside.

Re: award of interest

56. The petitioner has also impeached the impugned award in regard to the interest awarded by the Arbitral Tribunal. It is pointed out that the Arbitral Tribunal has awarded pre-award interest at the rate of 18% per annum on the amount due to the petitioner from the date when the amount became due to the date of filing the Statement of Claims.

57. The petitioner's challenge to award of interest is two pronged. First, it is contended that the rate of interest awarded, that is,18% per annum, is excessive and manifestly erroneous. Second, it is contended that Arbitral Tribunal erred in awarding *pendente lite* interest on the preaward interest.

58. Insofar as the award of interest is concerned, it is now well settled that the Arbitral Tribunal has wide discretion in awarding interest and this Court is unable to accept that the award of interest at the rate of 18% is manifestly erroneous and warrants any interference in these proceedings. [See: ***Punjab State Civil Supplies Corporation Limited (PUNSUP) and Anr. v Ganpati Rice Mills: SLP (C) 36655 of 2016, decided on 20.10.2021***]

59. In view of the above, the impugned award to the extent it allows the respondent's claim for loss of profits and cab charges to the extent of ₹12 lakhs, is set aside.

60. The petition is, accordingly, disposed of in the aforesaid terms.