

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Before:

The Hon'ble Justice Debangsu Basak
And
The Hon'ble Justice Aryak Dutt

FMAT No. 219 of 2021
Bharat Sanchar Nigam Ltd.
Vs.
Joysri Sengupta & Anr.

For the Appellants	:	Mr. Kallol Basu, Adv. Mr. Suman Banerjee, Adv.
For the Respondents	:	Mrs. Anupa Banerjee, Adv. Mr. Rohan Shaw, Adv.
Heard on	:	11.09.2026, 21.09.2026 29.09.2026
Hearing Concluded On	:	29.09.2026
Judgment Delivered On	:	07.10.2026

Aryak Dutt, J.:

1. This appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") is

directed against the judgment and order dated 16th March, 2020, passed by the learned Additional District Judge, 5th Court at Barasat, North 24-Parganas, in Misc. Case No. 181 of 2016. By that judgment, the learned Court below rejected the appellant's application on contest under Section 34 of the Act and declined to set aside the Arbitral Award dated 13th May, 2016, made by the learned Sole Arbitrator, Justice Chittatosh Mookerjee, former Chief Justice of this Court and of the Hon'ble Bombay High Court.

2. The appellant in the present case is Bharat Sanchar Nigam Limited (hereinafter referred to as the "BSNL") which was the respondent before the learned Arbitrator. The original claimant, Anjan Kumar Sengupta, died during the pendency of the proceedings and is now represented by his legal heirs (hereinafter referred to as "the respondent").

3. By a registered lease dated 5th September, 1997, the premises situated at 47 and 47/1/1, Basudebpur Road, Shyamnagar, P.S. Jagaddal, District North 24-Parganas, comprising an area of about 2,662 sq. ft. of covered space and 1,150 sq. ft. of open space, were let to the President of India

(Calcutta Telephones) for a term of 25 years for installation and maintenance of a telephone exchange. The lessee's interest came to vest in BSNL.

4. On 21st March, 2006, the Appellate Authority under the West Bengal Pollution Control Board permitted operation of the exchange only up to 31st August, 2006, after which BSNL shifted the active exchange to the adjoining premises. A diesel generator set and other equipment, however, remained in the demised premises.

5. On or about 16th March, 2006, BSNL notified the lessor that removal of the generator required the demolition of a wall of the generator room. The respondent objected and instituted a Title Suit No. 66 of 2006 before the learned Civil Judge (Junior Division), Barrackpore.

6. By a notice dated 23rd February, 2007, under Clause 7.1, BSNL sought to terminate the lease with effect from 23rd August, 2007 and offered vacant possession on 22nd August, 2007.

7. The respondent subsequently filed an application under Section 9 of the Act being Misc. Case No. 222 of 2007 and obtained an interim order of *status quo*, which was vacated and the application was dismissed on 13th February, 2008. The respondent thereupon preferred an appeal being F.M.A.T. No. 367 of 2008 and in the appeal therefrom, a Division Bench of this Court on 15th May, 2008, permitted BSNL to dismantle the wall to remove the generator on condition that the wall be reconstructed and no damage being caused to the upper floor or any other part of the building. BSNL's attempt to remove the generator did not succeed.

8. By an order dated 4th April, 2013, in A.P. No. 404 of 2012, this Court appointed the learned Sole Arbitrator. The order noticed the disputes as to whether the respondent was entitled to claim rent for the months in which BSNL had not been in effective occupation of the property, and whether he was entitled to withhold BSNL's generator set, and recorded that these disputes were "indicative and not exhaustive".

9. The learned Arbitrator framed four issues: (i) whether the lease was lawfully terminated by the notice dated 23rd

February, 2007, with effect from 23rd August, 2007; (ii) whether BSNL was liable to pay rent as demanded; (iii) whether BSNL was liable to pay damages for the condition of the premises and, if so, in what amount; and (iv) whether BSNL's counter-claim was maintainable and proved.

10. On 13th May, 2016, the learned Arbitrator passed his award.

11. Being aggrieved by the award, BSNL presented its application under Section 34 of the Act on 7th September, 2016 before the learned District Court, Barasat. The learned Court held that the points decided by the learned Arbitrator fell within the reference. The construction of the notice and the rejection of the plea of waiver disclosed no patent illegality on the face of the award. The delay in filing had not been sufficiently explained. The application was rejected without costs. Hence, this appeal.

12. Learned advocate appearing for the appellant has made the following submissions, which are also set out in the written notes of argument filed on its behalf.

13. The lease was granted for the specific purpose of installing and maintaining a telephone exchange, as the claimant admitted in paragraph 1 of his statement of claim. The direction of the Appellate Authority of the West Bengal Pollution Control Board to stop the exchange and shift it by 31st August, 2006, was binding on BSNL. This supervening impossibility frustrated the contract. BSNL could not defy that direction. The learned Arbitrator did not consider this aspect although it was taken in Ground XIV of the Section 34 application. In the written notes of argument the appellant has relied on ***Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India***, reported in ***(2019) 15 SCC 131***, to contend that the illegality goes to the root of the matter and calls for interference under Section 37.

14. It was further submitted by the learned advocate appearing for the appellant that the Clause 7.1 merely required six months' previous notice. It does not say that a shortfall of a few days rendered the notice void, nor that the lease would then continue indefinitely. By holding that the notice was ineffective because six full months had not elapsed between 14th March, 2007 and 23rd August, 2007, the learned Arbitrator took a hyper-

technical view. Both the learned Arbitrator and the learned Court at Barasat misconstrued the clause and in effect rewrote the contract. This is patent illegality.

15. It was then argued that BSNL made sincere efforts to deliver vacant possession, but the respondent resisted it. The respondent did not dispute the termination or sue for re-entry. Instead, the respondent instituted a Title Suit No.66 of 2006 and a Section 9 proceeding to keep BSNL in the premises and to prevent removal of its equipment. The claimant's witness admitted receiving BSNL's letters offering to vacate, hand over the keys and possession and remove its materials. He also admitted objecting because BSNL wished to dismantle the wall. BSNL's witness deposed that on the day fixed for removal the respondent prevented removal.

16. Under Section 34(3) of the Arbitration and Conciliation Act, 1996, time runs from receipt of the signed copy of the award. In a large public corporation such as BSNL, the relevant receipt is by the competent officer who knows of the proceedings and can take decisions. The signed copy reached the competent divisional office on 4th July, 2016, so the application was filed well within

time. Even if the time is being counted from 13th May, 2016, the three months expired on 13th August, 2016 and the further 30 days on 13th September, 2016. The application, presented on 7th September, 2016, was within the condonable period.

17. The learned section 34 Court relied on ***Tarapore & Co. v. Cochin Shipyard Ltd.***, reported in ***AIR 1984 SC 1072***, to hold that where a specific question of law is referred, the Court will not interfere even for an error of law apparent on the face of the award. That decision was rendered under the repealed Arbitration Act, 1940. After the 2015 amendment, Section 34(2A) expressly makes patent illegality appearing on the face of the award a ground for setting it aside.

18. The building was old and had been occupied since 1997. Faded plaster, damp and age-related cracks over sixteen years are normal wear and tear. No bills, vouchers or receipts proving actual expenditure were produced. The learned Arbitrator accepted a rough estimate of a sum of Rs. 8,00,000 and added 10 per cent for speculative future damages. The summary rejection of the counter-claim and the award for a sum of Rs. 3,00,000 as costs are arbitrary and perverse.

19. The appellant in order to advance its argument had relied upon a judgment of ***Delhi Airport Metro Express (P) Ltd. v. Delhi Metro Rail Corporation Ltd.***, reported in ***(2022) 1 SCC 131***, the appellant submitted that an award which ignores a vital contractual term, is founded on a perverse construction and shocks the conscience of the Court cannot be shielded, and that the Section 37 court must ensure that the Section 34 court acted within the statutory parameters. The appellant prayed that the appeal be allowed, the award and the impugned judgment be set aside, allowing its counter-claim.

20. Learned advocate for the respondent opposed the appeal and made the following submissions, which are also set out in their written notes on argument.

21. Section 34 provides no appeal on facts or on law. Not merely because of an erroneous application of law or by re-appreciating evidence the award cannot be interfered with. The jurisdiction under Section 37 is confined within the same limits. In this regard in the written notes reliance was placed on ***Punjab State Civil Supplies Corporation Ltd. v. Sanman Rice Mills***, reported in ***2024 SCC OnLine SC 2632; Somdatt Builders-***

NCC-NEC (JV) v. National Highways Authority of India, reported in ***(2025) 6 SCC 757***; and ***Jan De Nul Dredging India (P) Ltd. v. Tuticorin Port Trust***, reported in ***(2026) 3 SCC 186***. The respondent argues that a still greater restraint is required while dealing with an appeal under Section 37.

22. The respondent further argues that it is not whether the Arbitrator's reading is the only possible one, but whether it is so irrational that no reasonable person could adopt it. The learned Arbitrator took the admitted date of service to be 14th March, 2007, compared it with the date of termination which was 23rd August, 2007, and held that the lessor had not received the six months' previous notice as required in the clause. That is at least a plausible construction. BSNL's grounds that the clause was "erroneously" construed only invite the Court to substitute its own reading which is impermissible.

23. The learned Arbitrator found that waiver had been neither pleaded in the counter-statement nor established by evidence. He refused to allow it to be raised for the first time at final argument. That is a finding on pleadings and evidence and is not patent illegality.

24. The learned Arbitrator considered the earlier proceedings, the order of this Court regarding demolition and reconstruction of the wall, and the evidence on the attempted removal. He accepted that the respondent had objected to the removal of the generator because it involved demolishing a wall. He did not accept that the respondent had obstructed removal of the other equipment. He also found that BSNL had admittedly kept the premises under its own lock and key. It did not determine that the tenancy had ended or that rent had ceased.

25. The learned Arbitrator did not mechanically allow the whole claim. He applied limitation and confined arrears from April 2009 onwards. The enhanced rent from May 2012 follows from the findings on the subsistence of the tenancy and continued possession. The counter-claim was rejected with reasons, including that a witness for BSNL had no personal knowledge and only produced office records.

26. In the memorandum of appeal, BSNL has for the first time contended that the lease is invalid and relied on Section 106 of the Transfer of Property Act, 1882. This was never its case in the arbitration and raised for the first time under Section 37. In

any event, Section 106 applies only in the absence of a contract to the contrary.

27. The respondents prayed that the appeal be dismissed, the impugned judgment affirmed, and BSNL directed to hand over possession of the leased premises forthwith.

28. We have considered the submissions and perused the materials on record. Since the Section 34 application was filed on 7th September 2016, after the Arbitration and Conciliation (Amendment) Act, 2015, the challenge is governed by Section 34 of the amended Act.

29. The Section 34 has been authoritatively explained in ***Ssangyong (supra)*** which is extracted and applied in ***Delhi Airport Metro Express (supra)*** on which the appellant itself relies.

30. In the same decision, the Supreme Court cautioned against "a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases". The case of ***Delhi Airport Metro Express (supra)***

therefore does not widen the jurisdiction as suggested by the appellant.

31. On the appellate jurisdiction, the Hon'ble Supreme Court in ***Somdatt Builders (supra)*** held that interference under Section 37 "cannot travel beyond the restrictions laid down under Section 34. In other words, the Court cannot undertake an independent assessment of the merits of the award and must only ascertain that the exercise of power by the Court under Section 34 has not exceeded the scope of the provision."

32. The decisions in ***Sanman Rice Mills (supra)*** and ***Jan De Nul Dredging (supra)***, relied on by the respondents in their written notes, are to the same effect as aforesaid. We need not multiply authorities.

33. The award here has been upheld by the Section 34 court. Our task is therefore limited. We must see whether the decision is beyond the reference, a construction no fair-minded person could adopt, a finding based on no evidence or one ignoring vital evidence, or a conflict with the public policy of India. If none is shown, the appeal must fail.

34. The award is dated 13th May, 2016. Three months from that date expired on 13th August, 2016, and the further period of thirty days under the proviso to Section 34(3) expired on 12th September, 2016. The application, presented on 7th September, 2016, was therefore within the outer limit even if time is counted from the date of the award. The learned Court below did not accept the appellant's claim that it received the signed award on 4th July, 2016, because the claim was not supported by any document, and held the delay unexplained. However, it also examined every ground on its merits. We have assumed, in the appellant's favour, that the application was maintainable and have tested the impugned judgment on merits.

35. Under Section 34(2)(a)(iv) of the Act, the question is whether the award decides a dispute not contemplated by, or not falling within, the submission to arbitration.

36. Clause 7.1 of the agreement required "six month's previous notice to the Lessor in writing". The learned Arbitrator held that a notice which must be given to the lessor operates only when it is communicated to him. On that view, the lessor

received less than six months' notice. This view is a possible and plausible view. We will not substitute our view.

37. Waiver is the intentional relinquishment of a known right. The learned Arbitrator found that BSNL had pleaded no waiver, or relinquishment of the six-month requirement, in its counter-statement, and that its witnesses had led no evidence to establish it. On that basis he refused to entertain the plea when it was raised for the first time at final argument. That is a conclusion on the pleadings and evidence before him of which he is the final judge.

38. The direction of the Appellate Authority of the West Bengal Pollution Control Board required BSNL to stop operating, and to shift the exchange. BSNL complied by moving the exchange to adjoining premises. That was its case before the learned Arbitrator. The Transfer of Property Act, 1882, deals separately with a lessee's right to avoid the lease where the property is rendered substantially and permanently unfit for the purpose for which it was let out. No such case was made out by the appellant.

39. It is also clear that the Board's order did not prevent BSNL from surrendering the premises. It is for continued occupation of premises under a subsisting tenancy. We find no illegality, much less one going to the root of the matter.

40. The learned Arbitrator considered the earlier proceedings, the order of this Court and the oral and documentary evidence. He accepted that the respondent objected to removal of the generator because it involved demolition of a wall. He did not accept that the respondent had obstructed removal of the other equipment. He also found that BSNL had at all times kept the premises under its own lock and key.

41. Re-appreciation of evidence looked into by the Arbitrator is impermissible in a challenge under Section 34. It is equally impermissible in an appeal under Section 37 of the Act.

42. The award therefore does not hold BSNL liable for rent for the period around the attempted removal in September 2008. The interim order of this Court in F.M.A.T. No. 367 of 2008 permitted removal of the generator on conditions. That appeal was dismissed for default in May 2010. Yet BSNL has retained the premises under its own lock and key ever since.

43. Section 73 of the Indian Contract Act, 1872, permits compensation for loss naturally arising from a breach. Whether the damage exceeds normal wear and tear within Clause 7.2, and what the cost of repair will be, are questions of fact and assessment for the Arbitrator which he has done.

44. The learned Arbitrator accepted an estimate on evidence. The quantification may not be precise, but it rests on evidence and a stated reason. It does not shock the conscience of the Court. Interference with it would require exactly the reassessment of evidence which is not permissible.

45. The counter-claim depended on BSNL proving deterioration of its equipment and its loss of revenue. The learned Arbitrator gave reasons for rejecting it. One of BSNL's witnesses had no personal knowledge and only produced office records, and that obstruction in respect of the other equipment was not established. The finding is not perverse. The award for a sum of Rs. 3,00,000 as costs to the substantially successful party was well within the discretion of the Tribunal.

46. In the memorandum of appeal, the appellant has questioned the validity of the lease and relied on Section 106 of the Transfer of Property Act, 1882. This plea was not raised before the learned Arbitrator. As far as the impugned judgment shows, it was not raised before the learned Court below. A new plea which depends on facts cannot be raised for the first time in an appeal under Section 37 to impeach an award.

47. The appellant asks this Court to reassess the damages, and to allow its counter-claim. These are matters within the domain of the Arbitral Tribunal. The award has been upheld by the Section 34 Court. The appellant has not shown that the award decides a matter beyond the reference, adopts a construction no reasonable person could adopt, rests on no evidence, ignores vital evidence, or conflicts with the public policy of India.

48. In view of the above, **F.M.A.T. No. 219 of 2021** is **dismissed**.

49. The judgment and order dated 16th March, 2020, passed by the learned Additional District Judge, 5th Court at

Barasat, North 24-Parganas, in Misc. Case No. 181 of 2016 is affirmed, and the arbitral award dated 13th May, 2016, is upheld.

50. All other pending applications, if any, stand disposed of.

51. There shall be no order as to costs.

(ARYAK DUTT, J.)

52. I Agree

(DEBANGSU BASAK, J.)