

E-file

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
INTERIM APPLICATION NO.18043 OF 2023
IN
ARBITRATION APPEAL NO.55 OF 2023

The State of Maharashtra,
Water Resources Department

.. Applicant
(Orig. Appellant)

Versus

Patel Engineering Ltd.

.. Respondent

...

Mr.Darius J. Khambata, Senior Advocate with Ms.Vidhi Shah
for the Applicant.

Mr.Venkatesh Dhond, Senior Advocate with Ms.Rashmi
Taghvan, Mr.Ajay Basutkar, Ms.Flavia Fernandes and
Ms.Shruti Bedekar for the Respondent.

...

CORAM: BHARATI DANGRE, J.
DATED : 27th February, 2024

P.C:-

1. Being aggrieved by the judgment and order dated 05/04/2023 passed by the District Court, Satara in Civil Misc. Application No.161 of 2018, the State of Maharashtra, Water Resources Department, represented through the Executive Engineer, Koyna Construction, Division No.1, has instituted the Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, "**The Act**").

The Appeal raise a challenge to the impugned judgment, which has dismissed the application filed by the State of Maharashtra under Section 34 of the Act, praying for setting aside the Arbitral Award dated 23/05/2018 alongwith the corrected Award dated 23/06/2018 passed by the Arbitral Tribunal.

The Respondent to the Appeal-Patel Engineering Ltd., Engineers and Contractors, having its office at Jogeshwari (W), Mumbai- 400 012, is a company registered under the Companies Act.

2. I have heard the learned senior counsel Mr.Khambata in support of the Interim Application No.18043 of 2023 taken out by the State of Maharashtra, Water Resources Department, seeking stay to the execution, operation and implementation of the impugned judgment as well as the Award dated 23/05/2018 alongwith the corrected Award dated 23/06/2018, till hearing and final disposal of the Appeal.

I have also heard the learned senior counsel Mr.Venkatesh Dhond, who is representing the Respondent.

3. In order to consider the Application, which has sought stay of the impugned judgment, it is necessary to refer to the brief factual background before I proceed to record the rival contentions advanced by the learned senior counsel representing the respective parties.

(a) The Koyna Hydro Electric Project was designed for the construction of the Koyna dam to generate power.

This project was executed in four stages; stage IV related to the construction of civil works from lake intake to emergency valve tunnel and lake tapping (ICB Contract No.1).

(b) The Project Works under first three stages were carried out by various contractors, including the Claimant and the contract for the works under stage IV was awarded in favour of the Patel Engineering(hereinafter referred to as “the claimant”) and the contract was entered on 10/03/1992.

(c) The Respondent (hereinafter referred to as “the WRD”) intended to tap the lake once again at a deeper point to use water below the initially tapped point (done under stage IV), which required the construction of another HRT from the deeper point of tapping to previously constructed HRT. This work being an extension of stage-IV works, was also awarded to the Claimant under Main Works of Stage IV contract as an extension of that contract but under a separate negotiated Agreement.

(d) Bill of Quantities (“**BoQ**”) of the Agreement No.1/B includes a list of items of the contracted works to be executed, item wise quantities, rate and amount. Footnotes below the BoQ lay down the rules for deriving rates for these items. In respect of BoQ Item No.5(a) Inverte concrete and Item No.5(b) Side Lining & Arch concrete, the Claimant demanded a rate of Rs.22,388.00 for M-20 concrete, Rs.22,725/0 for M-25 concrete, Rs.22,283/- for M-30 concrete and Rs.21,200/- for M-35

concrete. Against these rates, the Superintending Engineer approved a flat rate of Rs.7,163/-. This rate of Rs.7,163/-, which rate was not acceptable to the Claimant. On representation, the Chief Engineer reviewed and approved a rate of Rs.8,139/- for item No.5(a) and a rate of Rs.8,017/- for item No.5(b). Rates approved by the Chief Engineer were not acceptable to the Claimant, and hence the dispute arose.

The Claimant invoked the arbitration under the provisions of clause 66(b) of the contract, vide its letter dated 14/11/2008 and appointed Shri R. G. Kulkarni, Secretary (Retd.), Water Resources Department, Govt. of Maharashtra as their Nominee Arbitrator. The Respondent, Govt. of Maharashtra appointed Shri S. N. Sahasrabudhe, Executive Director (Retd.), WRD, Govt. of Maharashtra as their Nominee Arbitrator and the Central Water Commission, Govt. of India appointed Shri R.D.Soni, Secretary (Retd.) Govt. of Gujarat as Presiding Arbitrator. The Claimant filed the claim statement and other pleading/documents during proceedings and the Executive Engineer filed the copy of the contract documents and written statement in defence to the Statement of Claims and other pleadings/documents during the proceedings.

In respect of the two items as Clause 52 of the Contract set out the valuation of variations, as also the manner in which the rates should be calculated for items/work, which are not already fixed in terms of the Contract. It clearly contemplated that for items/work for

which the rate is not already fixed, a suitable rate or price shall be agreed upon between the Engineer and the Contract and it further provided as under :-

“In the event of disagreement the Engineer shall fix such other rates or prices therefore as shall, in his opinion be reasonable and proper having regard to circumstances...”

Footnote 2(b) below the BoQ provided as under :-

*“2.b) **These rates are for items, where quantities exceed 125% ICB-1BOQ, and which are not covered in ICB-1 BOQ, to be finalized based on inputs prevailing at the time of execution, as per contractor’s letter No.110/180/EXT/1/2153 dt. 18.07.2001, which forms part of the agreement.”*

In the wake of the conditions stipulated above, which is to be applied by revising the quoted ad-hoc rates of the items, conditions stipulated under Clauses 52.1 & 52.2 are applicable to the extra or additional work done beyond the prescribed scope under the Contract and, accordingly, the rate has to be revised, based on inputs prevailing at the time of execution and it is expected to be reasonable and proper in the opinion of the Engineer.

(e) Accordingly, after the work was completed, the Claimant submitted its rate analysis to the Engineer. This analysis comprised of both direct and indirect costs. The State agreed to the direct costs. However, on the claim for indirect costs, it allowed a percentage lower than that claimed by the Contractor. Hence, disputes arose between the parties regarding the elements of

indirect costs used in the rate analysis, i.e., profits, overheads and hidden labour expenses.

4. Before the Tribunal, the Claimant projected three specific claims as under :-

(a) **Claim No.1 :**

Claim for the adoption of (i) Hidden Expenses at 150% on Direct wage of labour; (ii) Overheads at 20%; (iii) Funding Charges at 10% and (iv) Profit at 20% on the revised rates of Item Nos.5(a) & 5(b) of BOQ-HRT Concreting.

(b) **Claim No.2 :**

Pre-reference, Pendent-lite and Post award interest

(c) **Claim No.3 :**

Cost of Arbitration Proceedings.

5. The WRD/State raised a defence that the new Contract No.ICB/1-B is essentially an extension of Contract No.ICB-1 with certain modifications, essentially being; under the BOQ contract, rates are final for single star (*) items and for double star (**) items and those items are not covered by ICB-1. BOQ are to be finalized based on the inputs prevailing at the time of execution.

The State specifically asserted that the actual inputs pertaining to the direct tax were observed and adopted.

However, in absence of direct inputs, which cannot be observed distinctly at site, the standard provision of CWC or GOM, WRD were adopted and though at the time of finalization, both the parties were in agreement about the Direct Cost, the dispute crept in , when certain Indirect Costs like hidden cost on labour, overhead charges, funding charges and profit were to be decided upon and in absence of any proof of actual inputs/expenditure submitted by the Claimant, the WRD adopted the percentage of these charges as per CWC guidelines of March 1997 i.e. Hidden Charges for skilled labour at 80%, for unskilled labour at 55%, overhead charges and profit at 10% each and Funding charges Nil.

6. The Claimant's grievance before the Arbitral Tribunal was thus limited to the percentage adopted by the Chief Engineer under these four heads; Hidden expenses, Overhead charges, Funding charges and Profit, as the Claimant staked a claim of 150% for Hidden expenses on skilled and unskilled labour, Overheads at 20%, Funding charges at 10% and Profit at 20% and, hence, it was claimed that they are entitled to get 'Indirect Costs' at these percentages and it demanded a rate of Rs.11,582/- per cum for item No.5(a), as against approved rate of Rs.8,139/- and a rate of Rs.11,423/- for item No.5(b), as against approved rate of Rs.8,017/-.

In short, the dispute before the Arbitral Tribunal was limited to the considerations of four elements of the Indirect Costs in the rate analysis.

7. The Tribunal pronounced upon these four items, out of which it disallowed the claim of the Claimant under ‘Funding charges’, recording that there is no justification for consideration of the demand of the Claimant under this head and the Claimant has failed in proving the same.

Therefore, the present Appeal, filed by the State, restrict itself to only three heads of the Indirect Costs and the following tabular representation, would reflect upon the claim, percentage that is allowed by the State and what was allowed under the Award.

Indirect Costs	Contractor's Claim	Percentage allowed by State	Award
Profits	20%	10%	15%
Overheads	20%	10%	15%
Hidden Labour Expenses	150% of skilled and unskilled labour cost	80% of skilled and 55% of unskilled labour cost	125% of skilled and unskilled labour costs

“HIDDEN EXPENSES ON LABOUR”

I will deal with different components of Indirect Cost *in seritium*.

8. Coming to the first head of ‘Hidden Expenses on Labour’, the Claimant demanded it at 150% of the skilled and unskilled labour cost, as against 80% on cost of skilled labour and 55% on cost of unskilled labour, as considered by the Chief Engineer.

The Claimant relied upon three statements showing their statutory and other liabilities towards labour beyond the wages payable in order to establish the hidden expenses/liabilities, which was pegged at 155%. Another statement produced by the Claimant reflected the total hidden expenses/liabilities at 175% and the third statement and as per the CWC report of 1981, as per the Claimant, total hidden expenses were computed as 174% of labour wages, whereas CWC had ascribed it 100% and it was the case of the Claimant before the Tribunal that 100% was exclusive of bonus, various kinds of leave, holidays including weekly off, Notice pay, accommodation including electricity fuel, medical, subsidised rations, workmen compensation, retrenchment benefits and statutory requirements etc., which would increase the actual component of hidden cost by 50%.

Contesting the above, the Chief Engineer submitted before the Tribunal that the copies of the Appointment Letters of few categories of skilled Foremen, Mechanic etc. for the period of 1996-97 did not establish the actual expenses incurred on hidden cost of labour and despite repeated demands, the Claimant did not submit actual cost paid to the labour alongwith perquisite such as bonus, medical facilities, retrenchment notice pay etc.

9. The Claimant relied upon the documents in form of several voucher statements, xerox copies of the salary registers as proof of expenditure and based upon this, the WRD re-worked the statement of "Details of Indirect [Hidden Expenses] Expenses on direct Salary/Wages" and this time it

was worked out at 69.44% of Direct Salary/Wages of skilled and unskilled workers, though the CWC's recommendation of 80% hidden expenses for skilled labours was pleaded to be reasonable and proper.

10. According to Mr.Khambata, the Tribunal extracted a table with 21 heads of which item Nos.1 to 7 provide for statutory requirements, for example, Public Holidays per year, Notice Pay per year, Sick Leave, Paid Holidays, Retrenchment Compensation etc., which was to be paid to every worker mandatorily. Item Nos.8 to 21 were the expenses like PF & family pension, medical reimbursement, bonus, gratuity, leave travel allowance, accommodation, free transport, subsidised mess/ration in respect of which the Claimant and the State separately provided percentage of Indirect Cost worked out by them.

What is relevant is the observations of the Tribunal in this regard to the following effect :-

“The Claimant harped on this demand all through the pleadings. Further under same column no.3, for items at sr.no.9 to 12 percentage provisions are considered by the Claimant which is supported by few of the appointment orders enclosed in support of their demand. However, no proof of payments under the sub heads at sr.no.9 to 12 is produced. For items at sr.no.13 to 21 percentages are assumed and not supported by any proof or evidence of having incurred expenditure to the extent of claimed percentage or any statutory support for having considered these percentages. We find that for meeting with the requirements under various statutory laws, percentage provisions are considered by the Claimant. The Claimant has not supported validity of such percentage provisions by way of evidence of having

incurred the expenses to the extent provided under each such sub-heads. Also, it is a fact that most of the applicable statutory laws do not stipulate or specify any such percentages to be considered while assessing the Indirect Cost. However, we consider that provision or assumption of such percentage must be fair, reasonable and proper but not excessive or exorbitant.”

11. Though the Respondent/State worked out the hidden cost at 69.44% and it fairly compared with that recommended by CWC i.e. 80% of the skilled labour, the Tribunal rejected the same on the ground that the figures are derived from the data, which is two years old and may or may not hold good for the project having long gestation period like Koyna Hydro-Electric Project and the judicious, reasonable and fair provision for hidden cost on labour wages has to be allowed. Thereafter, the Tribunal referred to the Profit & Loss Account produced by the Claimant for 2002-03 to 2010-11, which records the expenses on labour like salary, bonus, wages, notice pay, medical reimbursement etc. all under one group or a major head of accounts. The Tribunal pertinently observed that a project involving large number of activities practically does not apportion the cost- direct or indirect- to each item on work on day-to-day basis and the Claimant has to extend the benefits of welfare schemes.

Having accepted so, the Tribunal has arrived at a conclusion that it would reasonable, proper and judicious to allow hidden cost at 125% for both, skilled and unskilled labour wages against 150% claimed by it.

It is this finding, which according to Mr.Khambata is perverse, as there is no basis for deriving such an inference.

12. According to Mr.Dhond, the learned senior counsel representing the Claimant, the Award under this head is based on the calculation accorded for distinct heads involving the statutory disbursement in favour of labour and his claim was based on the calculations submitted. According to him, when it is not possible to collate actual data for years of each head and, since, the CWC had pegged it at 100%, the demand of hidden cost at 150% (100+50), of the wages, was justified one. According to him, the Arbitral Tribunal has estimated it by adopting a reasonable and judicious approach, when it was awarded at the rate of 150% of skilled and unskilled labour cost and, hence, there is no perversity in finding by the Tribunal, which is upheld by the District Judge.

OVERHEAD CHARGES

13. As far as claim for Overhead Charges is concerned, it is necessary to note that overhead costs are incidental expenses incurred on-site as well as off-site, for executing the contract work. Off-site expenditure includes overhead expenses of Head Office like rents, salaries of staff, Board's salary, Auditors fees and other expenses referable to the functioning of the Head Office and such expenditure is apportioned on pro-rata basis in regards to various works. It is an acceptable principle to consider Head Office overheads and load it in the rate analysis and, similarly, it is the prevailing practice that on-site expenses are loaded in the rate analysis on a percentage basis of the prime cost of the item.

The Claimant filed six statements certified by the Chartered Accountant (“CA”) for establishing overhead expenses, including the expenses of site offices, Head Office and office at Kolkata and America and pleaded before the Tribunal, that the CA had inspected Books of Accounts maintained at site and, thereafter, certified the amounts and the annually published reports of the company corroborate the amounts certified by the CA. According to the Claimant, the overhead expenses incurred are to be computed at 20% the Engineer, however, had considered it at 10%.

According to the State, the Claimant relied upon recommendation of Cost Control Committee of CWC (January 1981), which had recommended 20% as overhead and profit and the Claimant misunderstood it as 20% for overhead and 20% for profit, whereas the guidelines recommendation is to consider overhead and profit at 20% together. Further, CWC in their guidelines of March 1997, proposed overhead and profit together at 20% of the prime cost and the Department’s Schedule of Rates for all these years, has considered overheads at 10% and no profit. However, the State was generous enough to consider the percentage of the overheads and profits at 10%, as recommended by CWC. According to it, a small database of few years of only one project with large variations is grossly inadequate to review time-tested provision of 10% overheads as recommended by the CWC and used by the Department over many years. As the Claimant had refused to furnish any evidence in form of Books of Accounts maintained at the Head Office and site office to ascertain the actual expenses incurred on account of

overheads attributable to Koyna Project, the demand was opposed, as being vague and deliberately unsupported by factual evidence.

14. On the contest being raised under this head, the Tribunal, on the basis of the evidence produced and by substantiating its conclusion in the circumstances of the project and the general prevailing trade practice, decided that overheads shall be allowed at 15% and, accordingly, corrected the rate analysed on item Nos.5(a) and 5 (b).

When the discussion of the Tribunal in arriving at such a conclusion is perused, it is evident that the Claimant averred their overhead expenses by filing six statements, certified by the CA and this included the expenses of the site office, Head Office and offices at Kokata and America and its allocation for the Koyna Works for the period 1992-93 to 2003-04 and these statements were modified/updated by the Claimant upto 2005-06 and it is upon these latest statements, the Claimant staked its claim of average overhead work at 22.14% and claimed its entitlement for 20% overheads. The Claimant relied upon the four statements pertaining to expenses of overheads, which was strongly disputed by the Respondent in the wake of variations in the figures of gross receipts of Koyna Works and on the ground that the price escalation paid to the Claimant is not included in it and this has resulted in higher percentage of overhead costs. Apart from this, it was contested on the ground that the interest is considered in overhead cost, though there is a separate claim for Funding Charges and even donations are included in overheads.

15. According to Mr.Khambata, Award record that the Claimant had filed four revised statements during the 30th meeting of the Arbitral Tribunal and Tribunal noted with displeasure that the Claimant defied the directions and had not worked out the percentage of overheads with respect to total revenue of the Claimant and, thus, the Claimant had deliberately avoided calculation of percentage of overhead, considering Total Revenue and calculated it on Total Income (Koyna Works), after deducting the costs of sub-contractors just to reflect higher percentage of overhead cost and it was constrained to observe as under :-

“The Tribunal is unable to appreciate the stand of the Claimant and is of the firm opinion that percentage of overhead cost has to be calculated with respect to gross turnover or receipts of the company.”

According to Mr.Khambata, the State itself worked out the average percentage of overhead cost to the Claimant under different sub-heads for Koyna Office and Head Office and with respect to a sum arrived at after deducting miscellaneous expenses, donations and interest cost and projected two situations; statements before the Tribunal and based on this information of the actual expenses, the Tribunal record that the percentage of overhead cost works out in range of 8.79% to 11.56%, but without any justification, and according to Mr.Khambata, in a perverse manner, awarded it at the rate of 15%.

The learned senior counsel Mr.Dhond made an attempt to justify the same on the ground that the Tribunal deemed it generous, reasonable and proper to award it at 15%.

PROFIT

16. The third claim of the Claimant was as regards profit and as per the Claimant, due to uncertainties involved in the Hydro Project, the risk factor is high and profit reduced on account of the risk element, which is not covered under the insurance policy and, hence, it claimed the profit at the rate of 20% and it was specifically projected before the Tribunal that the State impliedly accepted the profit to be 25% in the price variation formula and even the CWC guidelines specify profit at 20%.

The claim of profit at 20% is opposed by the State on the ground that the Claimant was provided with good infrastructure, roads, staff colonies, water supply, dispensary, either free of costs or at nominal charges, which help them to increase the profit percentage and any undue increase in the percentage of profit would tantamount to unjust enrichment of the Claimant.

The statement of the Claimant that the Respondent had impliedly accepted the profit to be 25% was denied as misleading statement, by submitting that there is no correlation between the margin percentage and the profit percentage.

Under this head, the Tribunal referred to two non-binding guidelines i.e. CWC guidelines and CPWD rate analysis, which suggest that the profits and overheads should be computed together at 20% or 15% respectively. The Tribunal referred to the consolidated Profit & Loss Account of the contractor from the year 2004 to 2010 and noted that the consolidated profit varies from 6.12% to 9.992%. It is noted

that the contractor's standalone Profit & Loss Account of Koyna Works from 2002-11 reflect the percentage of profit to be higher on account of inclusion of substantial income from other sources other than construction such as amount from interest and dividend from banks, machinery hire charges and other miscellaneous receipts.

It is with this reasoning, the Tribunal has considered 15% profit as reasonable provision.

17. This conclusion is strongly contested by the State, by submitting that there is no basis in deriving such an inference.

Mr.Khambata is extremely critical about this conclusion and once again submit that the finding rendered by the Tribunal amounts to perversity, since there is no justification offered by it, in pegging the profit at 15%, with no supporting material to derive such a figure.

18. The Tribunal, however, rejected the claim of funding charges and by determining the three elements of indirect costs; hidden costs of labour at the rate of 125% on wages of skilled and unskilled labour, overhead charges and profit at 15%, determined the rate analysis of the item No.5(a) and 5(b) held that the claimant is eligible to receive from the Respondent/State an amount of Rs.14,64,21,865/- (Rs. Fourteen Crore Sixty four Lakh Twenty one Thousand Eight Hundred and Sixty five only) with the following computation being drawn :

BoQ Item No.	Final	Rate Claimed	Rate	Rate as	Difference	Amount
	Quantity cum	by the Claimant C-23/1 & 23/2 Rs/cum.	Approved & paid by the Respondent Rs./cum	Decided by the Tribunal Rs./cum	of Rate Payable to the Claimant Col.5-Col.4 Rs./cum	Payable to the Claimant Col.2 x Col 6 Rs.
1	2	3	4	5	6	7
Item5(a)						
1.Pay-line	17,662.522	11,582.00	8,139.00	9,487.00	1,348	23,809,080
2.Over break	5,440.329	9,266.00	6,511.00	7,590.00	1,079	5,870.115
Item 5 (b)						
1. Pay-line	66,835.078	11,423.00	8,017.00	9,284.00	1,267	84,680.044
2.Over break	31,651.161	9,138.00	6,414.00	7,422.00	1,013	32,062,626
						146,421,865

The Tribunal , though did not make any order as to costs, but directed the above amount to be paid to the Claimant with Simple Interest at the rate of 12% for the pre-reference period i.e. 05.11.2007 to 13.11.2008 and pendent lite from 14.11.2008 to 23.05.2018. The Claimanta was also held entitled for post-award interest at the rate of 12% as laid down by the Apex Court in case of Hyder Consulting UK Ltd. vs. Governor, State of Orissa through Chief Engineer.

This Award came to be corrected by the Tribunal on 23.06.2018 and the correction is directed to be read as part of the Award.

19. This Award was challenged by the Water Resource Department of the State of Maharashtra in Appeal under Section 34 of the Arbitration and Conciliation Act, 1996, before the District Judge, Satara, on the following grounds :

i] Claim for indirect costs is beyond the scope and purview of the Contract;

ii] the Tribunal has failed to consider Clause 52.2 of the Contract

iii] The Award is perverse since the Tribunal had adjudicated the claims without actual evidence being produced by the claimant;

iv] The Tribunal has acted Ex Aequo Et Bono and applied the principles of equity without authorization;

v] The Award is unreasoned.

20. The District Judge, Satara, by his Judgment dated 05.04.2023 dismissed the Miscellaneous Application and upheld the Award by holding that the indirect costs, though not expressed in the contract, are in the nature of implied conditions of the contract and it forms part of the Contract.

While dealing with the three heads on which the Tribunal had pronounced, the learned District Judge held that it is the Arbitral Tribunal which is the authority to consider the quality of evidence and it was not open for him to exercise the power of Appellate Court, since Arbitral Tribunal had rest

his findings and conclusions on consideration of the entire evidence on record, while it decided the issue and hence there is no scope for interference.

As far as the hidden cost is concerned, it is recorded by the District Judge that the Contractor had to comply with the provisions of Labour Law and statutory provisions and he also was duty bound to provide for the cost in compliance of all legal and statutory requirements, and even CWC has provided for hidden costs on labour at the rate of 100% and hence the award of hidden costs at 150%, by the Tribunal cannot be faulted with and since the power exercised under Section 34 was not power of the Appellate Court, the evidence could not be re-appreciated.

On the aspect of overhead charges and profits also, the Court record that, it was not open for it, being the Appellate Authority to interfere in the findings of the Tribunal.

21. The impugned Judgment is heavily criticized by the learned Senior counsel Mr. Khambata representing the State by submitting that the answer of the District Judge to every ground of challenge is that in exercise of power under Section 34, he could not have interfered as it was the exclusive prerogative of the Tribunal to consider the quality and quantity of the evidence and, therefore, it refused to interfere with the Award. However, it is the submission of Mr. Khambata, that the Tribunal had rejected the evidence produced by the State, specifically as regards the hidden charges, but still the District court refused to interfere on the ground that it could not have re-appreciated the evidence.

According to him, in exercise of power under Section 34, it was open for the District Judge to correct the patent illegality appearing on the face of the Award, though the embargo was restricted to the effect that an Award may not be set aside on the ground of an erroneous application of law or by re-appreciation of evidence. However, according to him, when the Award, was challenged on the ground of patent illegality and perversity, the District Judge failed to look into the challenge and, therefore, the Appeal is preferred, since the District Judge has failed to set aside the Arbitral Award under Section 34 and has failed to exercise the jurisdiction available with it, when it ought to have been interfered on noticing patent illegality and perversity and by not doing so, it has resulted in gross illegality.

Apart from this, it is the contention of the State that the District Judge has materially relied upon the Award passed by other Tribunal in cases of disputes between the parties, which as per its own finding were on a completely different footing as they relate to different claims and, therefore, the Award as well as the impugned Judgment passed under Section 34 deserve to be set aside.

It is, in this background, the Interim Application is taken out by the State for grant of stay to the impugned Judgment which suffers from gross perversity.

22. The Application is vehemently opposed by Mr. Dhond by submitting that what the Award has allowed is the indirect costs, and in doing so the Tribunal was guided by CWC guidelines. Apart from this, the submission of Mr. Dhond is

that the composition of the Tribunal must be focused upon, since it comprises of experts in the field, being the technical persons and they did not merely rely upon the documents, but as the Award indicate, the members of the Tribunal had even visited the site on several occasions, to apprise themselves of the technical details and they were witness to the activity of lake tapping.

Mr.Dhond has also placed on record the snap shot of various Koyna cases which were decided by the District Court under Section 34 and provided the details of the cases filed under Section 37 before the Bombay High Court.

The chart reflect that in relation to Contract No.1 of 1992, as far as three Awards are concerned, which includes the Award dated 11.02.2000, where the indirect costs of labour was awarded at the rate of 150% with overhead and profits being awarded at 20% on the approved rate of extra items and valid items in respect of such IV works. The money has been paid by the State, and the Award is not even challenged.

In respect of two other works, where the Award is granted for the indirect costs, stage IV and which was upheld by the District court on 21.01.2019, an Appeal is preferred before this Court, in which an IA was allowed with a direction to deposit 50% of the amount by an order passed by Justice Chagla.

Apart from this, in ARA No.9/2020, ARA 12/2020, ARA 10/2020 and ARA 8/2020, where Interim Applications are filed before this Court, they are disposed off with direction to deposit 50% of the amount. As far as the present proceedings

are concerned, which arise out of the Award dated 23.05.2018 alongwith the additional Award (corrected) dated 23.06.2018, there is no reason to deviate from the orders passed by this Court in connected Appeals.

In support of his argument that there can be no unconditional stay in favour of the State Government without deposit of any amount, particularly when there is an Award in from of money decree, he would press into service the decision in case of *Pam Developments Pvt. Ltd. vs. The State of West Bengal, (2019) 8 SCC 112*.

23. On perusal of the impugned order of the District Judge, and the Award by the Tribunal, which proceeded on a footing that the provision for indirect costs is as per the prevailing trade practice, however, while deciding the the disputes regarding the percentage of three elements of indirect costs to be considered in the analysis, the Tribunal has clearly deviated from the alleged trade practice as reflected in the CWC report, wherever it was relied upon. As far as the hidden expenses are concerned, though the CWC recommendation was of 80%, the Tribunal in fragrant violation has deemed it appropriate to Award it at 125% of both skilled and unskilled labour wage. Similar is the case of overhead charges and the profits, where the same has been granted at 15% each.

While dealing with the head “overhead charges” the Tribunal referred to the rate analysis of Government of Maharashtra, Irrigation Department for the period 2007-2008, standard Data Book for analysis of rates published by Indian Road Congress (IRC), CWC guidelines and CPWD rate

analysis and recorded that the Government of Maharashtra, Irrigation Department has specified overhead at 10%, whereas, standard book of analysis had specified it at 8% of the project costs, whereas, CWC guidelines recommended 20% for overhead and profits put together, and similar is the case of CPWD rate analysis. However, the Tribunal, without any justification, determined overheads at 15% by simply stating that it is 'judicious, reasonable and proper'.

Similar is the case of profit, though reference was made to this material and particularly when the rate analysis (civil works) providing profits at 10%, CWC recommended overhead and profits together at 20% and CPWD rate analysis considered 15% towards contractors profit and overhead together. The Arbitral Tribunal chose to decide the entitlement under this head to 15% as "a reasonable provision".

24. This aspect goes to the root of the matter as the Tribunal has arrived at a conclusion without the material being placed before it and has ignored the relevant material in form of the guidelines placed before it, resulting into perversity.

It is worth to note that it is not open for the Arbitral Tribunal, which is a creature of a Contract between the parties to rewrite or create a new contract, but it must restrict itself to the agreement, as understood between the parties. In terms of the express language of the Contract in from of Clause 52, the parties have consented to confer a final right on the Engineer to fix rates or prices, which in his opinion, is proper and reasonable for the items in the given circumstances.

The Tribunal was therefore bound to act in terms of the Contract under which it is constituted, but if it failed to act as per the terms of the contract and chose to wander outside the Contract, then, its outcome i.e. the Award suffers from patent illegality.

The Tribunal has failed to act and apply Clause 52 and instead it has assumed the role to determine the contractual rates, which is in complete violation from the terms of the Contract, as Clause 52.2 confer the discretion on the Engineer and it contemplate that it is the opinion of the Engineer as to the rate or the price contained in the Contract for any item of the work, if by reason of its omission or addition, rendered unreasonable or inapplicable, then a suitable rate or price shall be agreed between the Engineer and the Contractor. In the event of any disagreement, it is the discretion of the Engineer to fix such other rate or price, as shall “in his opinion be reasonable and proper having regard to the circumstances”.

However, the Arbitral Tribunal, without any sufficient justification has substituted the percentage for the rates under the three heads, in deviation to what was fixed by the Engineer and has prima facie misguided itself, resulting into a patent illegality.

The District Judge has gone ahead to conclude that the indirect costs are in the nature of implied conditions of Contract, which is not a finding rendered by the Arbitral Tribunal and apart from this, and this finding is rendered by the District Judge, without making reference to the law revolving around implied contractual terms, as set out in ***Nabha Power Limited vs. Punjab State Power Corporation***

Ltd. , 2018 (11) SCC 508.

The Penta principles to satisfy the test of implied contractual terms including the business efficacy being set out as reasonable and equitable; necessity ; capable of clear explanation; not contradicting express terms of the Contract and the official standard test.

Though it is open for the Court to presume understanding of commercial terms by the Parties, if they are explicit in their expression, but when it intend to deal with the implied terms, it shall definitely apply penta principles and in its absence, the conclusion rendered by the District Judge in the impugned Judgment, as rightly referred to by Mr. Khambata is anethema to the the power to be exercised under Section 34.

25. The finding recorded by the Tribunal while determining the percentage of 15% profit as reasonable provision, prima facie, is *absentia* of any evidence, to the effect that the State promised profits to the contractor of any evidence produced by the Contractor to demonstrate loss or profits. Similarly, while determining the percentage of overhead expenses, the Tribunal clearly noted that the overhead cost worked out by the parties was in the range of 8.79% to 11.56%, but still it chose to award overheads at 15%, by justifying that it was 'judicial, reasonable and proper'. As far as hidden labour expenses are concerned, the Tribunal rejected the determined percentage by the State i.e. 80% for skilled and 55% of unskilled labour cost as per the CWC guidelines 1997, on the ground that for the past 20 years, there is substantial change

in the scenario, and therefore, it has deemed it proper to allow hidden cost at 125% in both categories, on the specious ground that it is 'reasonable, proper and judicious'. Nonetheless, the percentage so arrived is not based on any working submitted by either party.

The distillate of all the grounds raised in the Appeal filed u/s.37 by the State is, the impugned order and award, are perverse, as the findings recorded therein is based on no evidence and it has taken into consideration extraneous considerations and also on the ground that the award in favour of the claimant on the three counts i.e. hidden labour expenses, overhead expenses and profits, is without reasoning.

It is a trite position of law that a decision rendered would amount to perversity, if the finding is based on no evidence, or if it take into consideration, something irrelevant to the decision, which it arrives at, or ignores vital evidence in arriving at a decision.

While awarding the profits @ 15%, the Tribunal has considered the profit and loss statement produced by the claimant and by its own, recorded that the consolidated profits for the years 2004-2010 of the claimant, vary from 6.12% to 9.992%. However, the Tribunal record that profits for Koyna project are higher and deemed it reasonable to grant 15% profits without alluding to the profit percentage arrived under the contractors statements for the Koyna project, and surprisingly, there is no clarity reflected on the range of profits under the Koyna project.

At 34 stage, the District Judge has attempted to

supplement the reasons to justify the grant of profit, by recording that the contractor's profit is reduced on account of the risk elements, not covered under insurance, and since the nature of work is uncertain, the contractor was entitled to reasonable profits, which is again unsupported.

26. Prima facie, for the aforesaid reason, the Appeal filed by the State, deserve deeper consideration as the findings rendered by the Tribunal as well as the District Judge, are perverse and suffer from patent illegality. However, this shall wait for a detailed hearing of the Appeal.

27. While considering grant of stay to an award, the parameters under the Arbitration and Conciliation Act, 1996, are to be found in Section 36 and sub-section (3) set out the circumstances, when the Court may stay the operation of the arbitral award and it is this provision which is pressed into service by Mr. Khambatta while seeking the reliefs in the Interim Application.

Sub-section (2) of Section 36 reads thus :-

“(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.”

Since I am satisfied that the award by the Arbitral

Tribunal and the impugned judgment deciding the Application/ Appeal under Section 34 of the Arbitration Act, suffer from patent illegality, I deem it necessary to grant stay during the pendency of the present Appeal.

28. The only question now arises is whether the State shall be directed to deposit the amount awarded under the Award which is upheld by the District Judge, as Mr.Dhond has relied upon *Pam Developments Pvt Ltd* (supra), and has submitted that merely because the appellant is the State, it cannot be exempted from directing deposit of the amount having regard to the provisions for grant of stay of a money decree under the Code of Civil Procedure.

29. Mr.Dhond has invited my attention to the order passed by Justice Chagla in Interim Applications taken out in Arbitration Appeals filed against an Award in favour of *Patel Engineering Ltd and ors*, and on 16/11/2021, stay of the award is granted subject to deposit of 50% of the amount under the Award, with liberty to the respondents to withdraw the said amount, upon furnishing solvent security to the satisfaction of the Registrar.

Justice Chagla has relied upon the decision in case of Pam Developments (supra) and expressed an opinion that Government do not deserve any special and exceptional treatment and while considering an application for stay filed by the Government, the parameters for its grant, shall equally apply to it. On consideration of the order passed by Justice

Chagla on 16/11/2021, no arguments have been advanced on merits by the counsel representing the State Government, but the Interim Application is decided purely on the parameters of hardship, which shall be caused to the State in depositing the entire sum under the Award, as against the principle laid down in *Pam Developments Pvt Ltd (supra)* dealing with Section 36 of the Arbitration and Conciliation Act, 1996. It may be true that while considering whether the award deserves to be stayed, and particularly, an award which is a money decree, an application under sub-section (2) of Section 36 for staying the operation of the arbitral award, the Court, may grant the same, as it may deem fit by recording reasons in writing, with a proviso to the effect that while considering the application for grant of stay in case of arbitral award for payment of money, due regard shall be paid to the provisions of grant of stay of money decree under the provisions of the Code of Civil Procedure.

Justice Chagla has pronounced upon this aspect and by relying upon the decision in *Pam Developments (supra)* concluded that the parameters for grant of stay to a money decree, shall apply with equal force, even when the appellant is the State Government.

30. However, since the merits of the Appeal were not at all argued by the State, and since I am of the specific view that the State Government has *prima facie* established its case of patent illegality and perversity, which will be duly considered while the Appeal is being heard and since *prima facie* case is made out for interference of the award and the order under

Section 34, since the award is contrary to the evidence on record and the reasoning of the Arbitrator is perverse, as the Arbitrator has completely ignored the vital clauses in the agreement, and by that itself, the award is foul of sub-section (3) of Section 31, which require to disclose reasons upon which it is based and even if the award is by technical experts, the reasoning aspect of it, so as to fulfil the test of an 'award' under section 31 of the Act of 1996, cannot be ruled out.

For this argument of the State, on the face of it, there is no justiceable answer, though the respondent may be in a position to exhaustively provide an answer when the Appeal is heard, I am inclined to stay the impugned award and the judgment of the District Judge, Satara dated 5/4/2023 passed under Section 34 without directing deposit of any money, since the appellant is the State Government and upon determination of challenge to the award, if the State fails, it shall always be duty bound to make the payment under the Award. In any case, the contractor can avail the benefit under the award upon the proceedings reaching finality and it shall be rest assured that since the award is against State Government, it shall be assured of its enforcement.

Since, the State has made out a prima facie case in its favour, and balance of convenience also weigh in its favour, since if the amount under the Award is paid, directed to be deposited and permitted to be withdrawn, it will be difficult for the State to recover the same.

I am, therefore, of the opinion that if the Appeal itself is finally heard in near future, no loss shall be caused to the Contractor/Claimant.

31. For the aforesaid reason, Interim Application is allowed in terms of prayer clause (a).

Arbitration Appeal No.55/2023 is admitted.

It is directed to be listed for final hearing in the week commencing from 10/6/2024.

(SMT. BHARATI DANGRE, J.)