

**In the High Court at Calcutta
Ordinary Original Civil Jurisdiction
Commercial Division
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

AP-COM No. 381 of 2024

**Kolkata Metro Rail Corporation Limited
Vs
ITD-ITD Cem Joint Venture**

For the petitioner	:	Mr. Jishnu Chowdhury, Sr. Adv., Ms. Sreya Basu Mallick, Adv., Mr. Aritra Basu, Adv., Mr. Ankit Dey, Adv., Ms. Atri Mondal, Adv.
For the respondent	:	Mr. Jishnu Saha, Sr. Adv., Mr. Anal Kr. Ghosh, Adv., Ms. Neelina Chatterjee, Adv., Ms. Ahana Bhattacharyya, Adv.
Heard on	:	14.08.2024, 08.11.2024, 22.11.2024, 28.02.2025, 07.03.2025, 02.05.2025, 16.05.2025, 13.06.2025, 04.07.2025, 29.08.2025, 19.09.2025 & 26.09.2025
Hearing concluded on	:	26.09.2025
Judgment on	:	31.10.2025

Sabyasachi Bhattacharyya, J.:-

1. The present challenge under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”) arises out of a contract (containing an arbitration clause), granted on tender

basis by the Kolkata Metro Rail Corporation Limited (for short, “Metro Railways”) to M/s. ITD-ITD Cem Joint Venture (for short, “ITD”) for design and construction of underground section of the Metro Railways from the Central Station to Subhash Sarobar. Two Tunnel Boring Machines (TBMs) were deployed by ITD for undertaking such work, one operating East-West and the other in the converse direction. During operation of the West-bound TBM, an incident of water ingress and ground settlement occurred on August 31, 2019, causing serious damage to property above the surface. This led to several claims being made by the victims of such accident. Public Interest Litigations (PILs) were filed and certain directions were passed therein, upon which an expert body was formed and submitted its report. The Division Bench taking up the PILs ultimately directed, after initially granting of stay of operations, further work of the project to be recommenced upon taking precautionary measures.

- 2.** Disputes arose between the parties as to their respective liabilities for the said accident, upon which ITD initiated an arbitration proceeding before a three-member Arbitral Tribunal (AT), against Metro Railways. Metro Railways also filed a counter claim. The proceeding culminated in an award dated August 6, 2023, against which Metro Railways has preferred the instant challenge.
- 3.** Learned senior counsel appearing for the petitioner/Metro Railways argues that the impugned award is bad on several counts. It is contended that, while relying fully on certain reports authored by

expert bodies at the instance of ITD, all of which were pre-retrieval of the concerned TBM upon cutting the same into slices, for coming to the conclusions in the award. However, post-retrieval reports filed by renowned experts of Metro Railways was overlooked by the AT on flimsy pretexts. One of the premises of discarding the same was that those were tailor-made to prepare a defence for Metro Railways, since those were authored at the instance of the latter. The AT further found that the reports filed at the behest of Metro Railways were mostly authored about 900 days after the incident and, as such, could not be lent credence to. Moreover, it was held by the AT that the report filed by IIT, Madras relied on certain photographic evidence despite coming to the specific finding that such evidence was unreliable even as per Dr. Lee Blade, whose report was one of the bases of the IIT, Madras report.

4. Thus, it is argued that double standards were applied by the AT – on the one hand accepting reports produced by the claimants/ITD while on the other, rejecting the reports filed by Metro Railways, both sets of reports having been filed by the parties to substantiate their respective cases.
5. Thus, it is argued that the principle of equality, which is ingrained in the 1996 Act, as well as fundamental principles of Indian Law were violated, thereby subjecting the award to interference under Section 34 of the 1996 Act.
6. Learned senior counsel for Metro Railways, the petitioner, takes the court at length through the reports filed by both parties in support of

the contention that the expert reports filed by his client were all post-retrieval and, as such, gave the correct picture of what actually transpired at the juncture of the ground subsidence. Learned senior counsel submits that even in the report authored by Surbana Jurong, which was produced by ITD, it was indicated that the actual cause of the incident could only be ascertained after retrieval of the TBM and its records.

7. On the other hand, it is argued, the expert reports filed by ITD were all pre-retrieval, primarily based on newspaper reports of 200 years back, hearsay evidence and conjecture. The reports of ITD, it is contended, relied on discussions with unnamed people and newspaper articles, without having ascertained the actual ground conditions and the TBM records post-retrieval.
8. Learned senior counsel argues that no proof of “unforeseeable physical conditions”, as pleaded by ITD, which might have been a mitigating factor in its liability, was ever furnished, nor did the AT come to any conclusive finding thereon on the basis of actual evidence.
9. Learned senior counsel for the petitioner argues that the report of IIT, Madras independently assessed the soil conditions, analysed the ring alignment as well as TMB operation, tail brushes and grease consumption records to come to its findings. Dr. Lee Blade, whose photographs were observed to be inaccurate, was himself present at the site and physically examined the tail brushes of the concerned TBM

after retrieval. However, such vital document was totally omitted to be considered by the AT on frivolous grounds.

- 10.** Learned senior counsel next contends that the AT, on the premise that it was comprised of civil engineering experts (one of whom was apparently from IIT, Delhi), substituted its own opinion for actual tangible evidence, which is not permitted in Indian law.
- 11.** Learned senior counsel painstakingly takes the court through the respective reports relied on by the parties before the AT to argue that whereas the reports produced by ITD were superficial, the soil condition, as evident from the reports produced by Metro Railways, which were detailed and accurate and showed that there could not have been any unforeseeable physical condition, were overlooked.
- 12.** It is pointed out that Clause 4.23 of the General Conditions of Contract (GCC) provides that if there arises any unforeseeable physical condition, the Contractor (ITD) can approach the employer (Metro Railways) for additional costs. Not only was nothing of that sort done by ITD, the said Clause is not attracted in the present case at all in the absence of any evidence of such physical condition.
- 13.** Learned senior counsel places reliance on the relevant provisions of the GCC and the Special Conditions of Contract (SCC) to contend that the role of the Engineer (GC), appointed by the employer was merely supervisory in nature. Clause 4.9 of the GCC and the first part of Clause 5 of the SCC, it is contended, provides that the Contractor (ITD) was to carry out soil investigation before putting in its tender and it

would be deemed that the Contractor is satisfied by it before starting the project. In the present case, such exercise was actually undertaken by ITD, which obtained a report from Subarna Jurong, which prepared a GIR based on soil investigation by Constell, an agent engaged by the Contractor.

- 14.** Learned senior counsel for the petitioner/Metro Railways next argues that the AT re-wrote the contract between parties and ignored significant contractual provisions. Whereas as per Clauses 2 and 3.2 of the SCC and GCC respectively, the job of the GC was merely to watch and inspect the works, Clause 3.4 of the GCC, in its third paragraph, provides that no act or omission by the Engineer would relieve the Contractor of its contractual duties, responsibilities, obligations and liabilities.
- 15.** The second paragraph of Clause 4.1 of the GCC provides that the Contractor shall design, manufacture and execute the work. As per Clause 6.8 of the GCC, the Contractor is to provide the necessary superintendence during design, execution, etc.
- 16.** Most importantly, it is submitted, Clause 4.1 of the GCC, in its fourth and fifth paragraphs, clearly delineates that all the risks for any unfortunate incident or loss of life and/or property would be borne by the Contractor and the Contractor would be fully responsible for adequacy, stability, safety and site operations, as well as works, irrespective of approval or consent by the Engineer. Clause 4.16 reiterates that the Contractor is deemed to have satisfied itself before

submitting the tender as to all risks, liabilities, etc. involved in the project.

- 17.** Clause 14.5 of the GCC says that the Contractor is liable for all risks other than the Employer's risks under Clause 14.3 of the GCC, the latter Clause being not attracted to the present incident.
- 18.** Clause 15.3 of the GCC stipulates that there shall be insurance covering the injury to persons and damage to third parties, including damage, etc. to physical property, except things under Clause 15.2 of the GCC or to any person (except 'person injured' under Clause 15.4, GCC) arising out of the performance of the contract and occurring before issuance of performance certificate.
- 19.** Learned senior counsel for the petitioner argues that in Paragraph 112(c) of the award, the AT held that there is no proof that the Contractor had defied the instructions of the GC. It is submitted that it was nobody's case that the unfortunate incident happened due to the instructions of the GC.
- 20.** Thus, it is argued that the impugned award is one-sided and is in conflict with the fundamental principles of Indian Law.
- 21.** Hearsay evidence produced by ITD, it is argued, was considered by the AT in Paragraph 101(f) of the award. Expert evidence by way of reports produced by Metro Railways, permissible under Section 45 of the Evidence Act, was ignored, as were the relevant clauses of the contract between the parties.

- 22.** It is submitted that the AT placed reliance on the independent contract between the GC and Metro Railways, to which ITD is not a party. It is contended that such approach is hit by the doctrine of privity of contract. The independent contract of Metro Railways with the GC is entirely irrelevant for deciding the dispute between the parties, since the liabilities for the present dispute are covered only by the contract between the present parties, comprised of the GCC and the SCC.
- 23.** It is next argued that the award is partially against the insurance company, which is a third party to the agreement between the parties as well as the arbitration proceeding.
- 24.** It is also contended that the impugned award also has a component of a vague declaration of entitlement to money in favour of ITD regarding future claims, which are yet to arise and are not quantified.
- 25.** Learned senior counsel argues that the AT, while itself holding that there could not be any award on profit and overheads, went on to grant such components in respect of some of the claims.
- 26.** The calculation of the profit/overhead at the rate of 10 per cent and grant of 80 per cent of certain claims (C-13 and C-14) were the outcome of the *ipse dixit* of the AT and without any reason.
- 27.** Third party claims were also awarded, *de hors* the contract.
- 28.** Learned senior counsel for the petitioner relies on *Ssangyong Engineering & Construction Company Limited v. National Highway Authority of India (NHAI)*, reported at (2019) 15 SCC 131, where the

Hon'ble Supreme Court held that the view of the AT ought to have been fair-minded and reasonable.

- 29.** Learned senior counsel next cites *Associate Builders v. Delhi Development Authority*, reported at (2015) 3 SCC 49 which, in turn, relied on *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, reported at (2003) 5 SCC 705 and *Oil and Natural Gas Corporation Limited v. Western Geco International Limited*, reported at (2014) 9 SCC 263, holding that perversity in an award occurs when the same is based on no evidence or on irrelevant evidence or ignores vital evidence. In the present case, it is submitted, the said principle is squarely applicable and the provisions of Section 34 of the 1996 Act ought to be invoked. It was held in *Associate Builders (supra)*¹, it is argued, that if there is perversity, it comes within the contemplation of “patent illegality” as enumerated in Section 34(2-A) of the 1996 Act, introduced by the 2015 Amendment, although not under the “public policy”.
- 30.** In support of his arguments in respect of the scope of interference under Section 34 of the 1996 Act, learned senior counsel also cites *PSA Sical Terminals Private Limited v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and others*, reported at 2021 SCC OnLine SC 508, *Delhi Metro Railways Corporation Limited v. Delhi Airport Metro Express Private Limited*, reported at 2024 SCC OnLine SC

1. *Associate Builders v. Delhi Development Authority*, reported at (2015) 3 SCC 49

522 and *Board of Control for Cricket in India v. Deccan Chronical Holdings Ltd.*, reported at 2021 SCC OnLine Bom 834.

31. Learned senior counsel for the petitioner/Metro Railways, in support of the proposition that if an award is passed against the terms of a contract by an AT, the same would be set aside under Section 34 of the 1996 Act, cites the following judgments:

- (i) (2022) 2 SCC 275 [*State of Chhattisgarh v. SAL Udyog Private Limited*];
- (ii) (2020) 5 SCC 164 [*South East Asia Marine Engg. & Constructions Ltd. (SEAMEC LTD.) v. Oil India Ltd.*]; and
- (iii) (2022) 4 SCC 463 [*Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum Rajgurunagar*].

32. Lastly, it is argued that the award, for the aforementioned reasons, ought to “shock the conscience of the court”, which is a good ground for interference, as held in *Associate Builders (supra)*² and *HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Limited*, reported at (2018) 12 SCC 471.

33. While contradicting the above submissions, learned senior counsel for the ITD also takes the court at length through the impugned award as well as the contents of the reports filed by the parties, in particular ITD.

34. It is argued on behalf of ITD that two TBMs were deployed from opposite ends for the tunnelling work, with similar tail skin brush and

2. Associate Builders v. Delhi Development Authority, reported at (2015) 3 SCC 49

process of greasing. While the first, that is the TBM-in-question, was faced with unforeseen physical sub-soil conditions and lost huge number of the tail skin brushes which led to consumption of more grease than usual, the other TBM has been operating perfectly well. This itself, it is contended, shows that the defect lay not in the operation or function of the TBM but the ground conditions, which could not have been foreseen by either of the parties.

- 35.** Learned senior counsel submits that on the fateful day, that is August 31, 2019, the TBM had stopped at its pre-designated location at the pre-fixed time, which was well within the knowledge of the GC, for change of tail brushes, when the accident occurred. Thus, there was no fault of ITD in any manner.
- 36.** Learned senior counsel takes the court through various clauses of the independent contract between the GC and Metro Railways (the General Consultancy Services Contract), in particular Clause 7.0 and Clauses 3.4, 3.6, 3.10, 3.11 and specifically, sub-Clause 3.11.5, to highlight the role of the GC to monitor the operations and to carry out supervision of constructions/erections at all levels, including contract administration, safety, quality and other aspects. As per the said contract, it is the GC who is to supervise and monitor all the project activities, including ensuring desired quality and safety as well as to ensure adherence to standards prescribed by the Metro Railways on the part of the Contractor including safety of works, adjoining and overlying structures, workmen, public, etc. at the construction stage. Metro

Railways, as the principal employer, was to have overall responsibility as per the contract.

- 37.** It is the GC who, as per the contracts between the parties and between the GC and the Metro Railways, was responsible for maintaining the full records relating to all aspects of work covered by the project, to certify the quantum of work done, its quality and the payments to different agencies as well as to coordinate and review/monitor the effects of all contractors, consultants, suppliers and manufacturers.
- 38.** The GC, in the present case, maintained the Daily Activity Reports and found no fault with the operation of the TBM contemporaneously. There was no qualm raised by the GC in respect of two replacements of tail skin in the month of August, 2019. No objection was raised by the GC as to the pre-determined stop or location on August 31, 2019 for replacement of two inner rows of tail skin brushes.
- 39.** Thus, it is argued that the present defence of Metro Railways as to incorrect operation of the TBM and inadequate greasing are afterthoughts.
- 40.** Learned senior counsel appearing for the ITD, the claimant, submits that no conclusive evidence was before the AT regarding the brushes or the greasing having caused the unforeseen inflow of water, grout and soil into TBM-1, the machine concerned, which might have resulted in ground settlement.
- 41.** The GC final report on findings of fact dated August 31, 2019, which was relied on by the AT, merely indicated that insufficient grease was

being injected to maintain performance and to stop ingress of ground water, grout, etc. However, there was no mention as to why the alleged erroneous operation of the TBM was never pointed out during regular course of operation and/or change of brushes at any point of time.

- 42.** Learned senior counsel for the claimant/ITD argues that all the reports of both parties were admitted into evidence, since the parties agreed that no oral evidence would be led in support of the said documents. The AT considered all the reports in detail, including analysis of facts, circumstances and events leading to the accident and the conduct of parties. It was concluded by the AT that the post-retrieval reports, obtained more than 900 days after the incident, could not be relied on. Learned senior counsel argued that it was the prerogative of the AT and within its jurisdiction under the 1996 Act to assess evidence and to place due weight on the evidentiary value of the materials before it. It is contended that it is not for the court, sitting under Section 34 jurisdiction, to substitute its own findings merely because another view might be possible, where the findings of the AT comprise of one of the plausible views.
- 43.** The AT, it is submitted, fully considered the role of the GC, its obligation and involvement in the operation and maintenance of TBM as per the contract between the GC and Metro Railways.
- 44.** Insofar as the IIT, Madras report is concerned, it is contended that by ITD that the same was arrived at without physical inspection of the

retrieved brushes. The said report merely relied on the pre-retrieval report of Dr. Lee Blade dated December 12, 2021.

- 45.** Insofar as the report of IEST, Shibpur, is concerned, learned senior counsel for ITD submits that the same is based on soil samples handed over by the Metro Railways itself on December 17, 2021, that is after about 900 days of the incident. No soil sample specimen was obtained from the site, nor was there any corroboration by the said experts with regard to soil from other stretches of the tunnel excavation route.
- 46.** ITD contends that the impugned award discloses clear, logical basis and reasoning for grant of each of the claims on assumption of actual loss suffered by ITD and, as such, cannot be faulted.
- 47.** Learned senior counsel for ITD also places reliance on *Ssangyong Engineering (supra)*³ and *Associate Builders (supra)*⁴ to reiterate that there cannot be any interference under Section 34 of the 1996 Act if one of the plausible views was adopted by the AT.
- 48.** Learned senior counsel further cites *OPG Power Generation (P) Ltd. v. Enxio Power Cooling Solutions (India) (P) Ltd.*, reported at (2025) 2 SCC 417, to bolster his arguments on that score.
- 49.** The claimant/ITD also relies on *Gayatri Balasamy v. ISG Novasoft Technologies Ltd.*, reported at (2025) 7 SCC 1 to elucidate the scope of modification of an award. It is submitted that since the award cannot

3. *Ssangyong Engineering & Construction Company Limited v. National Highway Authority of India (NHAI)*, reported at (2019) 15 SCC 131

4. *Associate Builders v. Delhi Development Authority*, reported at (2015) 3 SCC 49

be set aside as a whole in any event, there cannot be any modification, since the tests for doing so, as laid down in *Gayatri Balasamy (supra)*⁵, are not satisfied in the instant case.

50. In reply, it is added on behalf of Metro Railways that certain new documents were produced by ITD with its written notes before the Arbitral Tribunal, to rebut which no opportunity was granted to the petitioner. Thus, the said omission also constitutes a violation of the principle of equality.

51. Upon a careful consideration of the arguments of the parties, this Court comes to the following findings:

(i) Applicability of Section 45 of the Evidence Act

52. Section 19 of the 1996 Act clearly provides that the Arbitral Tribunal is not bound by the Evidence Act. As such, Section 45 of the said Act is, *per se*, not applicable in the present case. Here, the AT formulated its own rules of procedure, quite correctly, under Section 19(3) of the 1996 Act and proceeded to entertain all the reports filed by both parties without adduction of oral evidence and to come to its conclusion in its own way.

53. Thus, the said objection of the petitioner/Metro Railways cannot be entertained.

5. *Gayatri Balasamy v. ISG Novasoft Technologies Ltd., reported at (2025) 7 SCC 1*

(ii) Production of new document at argument stage

- 54.** It is contended by the petitioner that certain new documents were produced by the claimant with its written notes of arguments without any opportunity of rebuttal being given to the petitioner. However, it has not been enumerated exactly as to what are those documents. Be that as it may, the plinth of the considerations of the AT for passing the impugned award were reports filed by both parties and not any other document as such.
- 55.** Hence, the said ground is not one on which the entire award can be said to have been vitiated.

(iii) Imposition of personal knowledge of the members of the AT

- 56.** In Paragraph 121 of the impugned award, the AT observed that it was there to judge the issues from the “engineering point of view”. While admitting that engineering is not a pure science but an applied science with a lot depending on design constants and coefficients based on past experience, the AT held that it is possible that after the present incident also, some of the coefficients and constants could stand modified like the additional modifications in carrying out the work after the incident. The AT further observed that those are preponderances of probabilities with improvements to cover any further unforeseeable physical condition. It admitted in Paragraph 121 of the award that these improvements have no end and no one can be sure if these could have contributed to the safe passage of TBM-2 (the other TBM deployed from

the reverse end) or were just superfluous additional safeguards. However, thereafter it held that none of the theories could put a definite blame on the claimant's conduct on the date of accident. While discarding the IIT, Madras report, in sub-clause (ag) of Paragraph 112 of the impugned award, the AT observed that since all the three Arbitrators are civil engineers with more than 40 years of experience and one of them has a post-graduate degree in geo-technical engineering from IIT, Delhi, such "professional knowledge" made them differ with the report as SPT values can be misleading and in case of saturated silty soils, even when the soil is weak, SPT values obtained can be quite high and should not be relied upon in isolation unless corroborated with other tests. It was suggested that internal erosion cannot be ruled out.

- 57.** The premise of the said consideration is entirely *de hors* the fundamental policy of Indian Law. It is well-settled that a Judge cannot impute his personal knowledge into the adjudicatory process. The moment personal knowledge comes in and replaces material evidence presented by the parties, the objective consideration of the body of evidence, irrespective of the biases and prejudices of the Judge (read 'AT' in the present context), are excluded.
- 58.** Merely having experience in general civil engineering and/or one of the AT members being an alumnus of the IIT, Delhi did not confer any special status on the AT members insofar as the dispute involved in this particular arbitration proceeding is concerned. In their capacity as

members of the AT, which is a quasi-judicial body, the individual expertise of the AT members cannot supplant tangible evidence produced by the parties. It might very well be that the technical qualifications of the AT members earned them a spot in the Tribunal in the first place, but once the members assumed the role of Arbitrators, they were statutorily duty-bound to undertake a *quasi-judicial* exercise and could not hold any individual opinion or pre-conceived notion but were duty-bound in law to adjudicate solely on the basis of the materials produced by both parties and the terms of the contract between them.

- 59.** The moment the personal opinions, professional or otherwise, of the Judge or Tribunal comes into play, one of the fundamental policies of Indian Law is hit, being that one cannot be the Judge in his own cause. The “cause”, in the present case, is the opinion of the AT members as professionals, the authenticity, relevance and worth of which was decided by the AT members themselves while deciding the contentious issues before them. Such approach on the part of the AT was clearly against the fundamental policy of Indian Law as well as contrary to basic principles of justice and judicial morality, thereby bringing the award within the fold of Section 34(2)(b)(ii), Explanation I, sub-clauses (ii) and (iii).

(iv) Whether the AT violated principles of equality by discarding the expert reports produced by Metro Railways while accepting those produced by ITD/Claimants

- 60.** Section 18 of the 1996 Act provides that the parties shall be treated equally and each party shall have full opportunity to present its case. It is rather obvious that the best evidence on behalf of both the parties, in a case of highly technical nature as the present one, depended primarily on expert reports produced by both the parties.
- 61.** There is not an iota of pleading or proof assailing the integrity, independence and expertise of the authors of the reports produced by either party, nor did the AT come to any such finding. The primary premise of discarding the expert reports produced by the Metro Railways was that those were prepared subsequent to the commencement of the arbitration proceeding, much after the fateful incident, for the purpose of preparing the defence of Metro Railways.
- 62.** However, none of the said premises are valid in law. The obvious reason for the delay in issuance of the said reports, about nine hundred days after the incident, was that the experts who authored those waited for the retrieval of the concerned TBM, which had to be cut into pieces over a long period of time spanning almost three years and recovered from underground, along with soil samples. Even in the report authored by Subarna Jurong, which was relied on by ITD itself, it was clearly stated that the actual cause of accident could be ascertained only after the

retrieval of the TBM, thus lending justification to the waiting period for retrieval of the TBM.

- 63.** In fact, the premise of the defence of Metro Railways was that the TBM was operated unprofessionally and incorrectly, as well as that there was severe inadequacy of greasing on the part of the ITD personnel operating the same.
- 64.** The said factors were taken into consideration and elaborately discussed in the post-retrieval reports produced by Metro Railways. The huge quantity of grease consumed at the relevant juncture, coupled with the erroneous alignment of rings laid by TBM in its route of boring, which deviated about eighty-eight per cent from the correct alignment as per the said reports, were sufficient proof that the TBM was not being manoeuvred properly and there was excessive wear and tear on the tail skin brushes aligning the TBM, which stood between the unwarranted influx of soil, grout, etc. into the machine from outside.
- 65.** The excessive requirements of grease and frequent change of tail brush clearly indicated that the tail brushes were being worn off much more frequently than would be normal, which is borne out by the other evidence produced by Metro Railways in respect of the second TBM deployed at the opposite end of the project.

- 66.** One of the other reasons for discarding the reports produced by Metro Railways, all of which were authored by technical experts of some repute, by the AT was that as per the initial report of Dr. Lee Blade, at the inception of the retrieval of the TBM in pieces, that the photographic evidence could not be relied on for a specific purpose. However, the reports issued by the IIT Madras as well as IEST, Shibpur did not rely merely on the photographic evidence. It is borne out by the said reports that physical examination of the recovered parts of the TBM and its records as well as the soil conditions was undertaken by the experts who authored the report. Not only that, although the initial photographs taken by Dr. Lee Blade might not have been vivid or graphic, fact remains that those at least indicated that there was excessive tearing off of tail skin brushes.
- 67.** Even Dr. Lee Blade, who had stated that the photographic evidence was unreliable, himself was present at the site of recovery of the TBM and did not rely solely on the photographic evidence to form his opinion.
- 68.** These aspects of the matter were not gone into by the AT at all, which discarded the entire body of expert evidence filed by Metro Railways at the stroke of a pen, holding that such reports were not independent reports, since they were prepared subsequent to the commencement of the case for the purpose of defending the case and also that those were belated. As observed earlier, the delay in furnishing the reports corresponded with the delay in retrieval of the TBM and those were filed

at the earliest thereafter. The TBM was completely recovered only after commencement of the arbitration proceeding, which was the reason for belated submission of the post-retrieval reports.

69. The logic that the said post-retrieval reports were prepared at the behest of the respondent/petitioner-Metro Railways for preparing their defence equally applies to the reports furnished by the claimant/ITD. It is quite obvious that both parties filed reports in support of their respective cases for the obvious reason that expert reports would be the best evidence to resolve the dispute. However, the integrity, independence and professional acumen of none of the experts/expert bodies who/which authored the reports was even challenged, let alone being tarnished by evidence. Thus, the said logic could not have been a valid or rational ground for discarding the post-retrieval reports filed by the Metro Railways altogether while accepting the pre-retrieval reports produced by the claimant/ITD.

70. It has be borne in mind that the reports were all authored by experts in their field, which view was even reiterated by the AT in different places of the award. However, the AT proceeded to junk Metro Railways' reports on frivolous grounds while accepted those of the claimant/ITD, by applying different parameters, hence depriving one of the parties of level playing ground.

- 71.** Thus, the application of double standards attracts the violation of Section 18 of the 1996 Act and tantamounts to perversity, which, according to *Associate Builders (supra)*⁶, comes within the purview of “patent illegality” as introduced under sub-section (2-A) of Section 34 of the 1996 Act by the 2015 Amendment, which is applicable to the present *lis*.
- 72.** That apart, an element of bias and partiality comes into play in the instant case in treating the parties unequally, which hits at the very root of the trust which both parties placed on the AT. Trust in and impartiality of the Arbitrator form the cornerstone of party autonomy in a consent jurisdiction, which is the very premise and plinth of an arbitration process. The same having been violated, the impugned award cannot but be held to be perverse.
- 73.** Another ingredient of perversity is that the post-retrieval reports filed by the respondent/Metro Railways were of utmost importance and the best evidence in assessing the veracity of the claim of Metro Railways as to the ground subsidence having occurred due to errors in operation of the TBM-both on the counts of improper manoeuvring and inadequate greasing of the tail skin brushes. Vital evidence was contained in the reports, which is clear from a plain reading of those, without even assessing their evidentiary value. Hence, germane

6. *Associate Builders v. Delhi Development Authority*, reported at (2015) 3 SCC 49

evidence was overlooked while irrelevant evidence such as the own “engineering experience” of the members of the AT and their qualifications were taken into consideration. This is a clear case of perversity, which vitiates the award as a whole. In fact, the non-consideration of the reports filed by Metro Railways on frivolous and flimsy grounds itself is shocking to the conscience of the court.

- 74.** There are both objective and subjective elements in “perversity”. ITD has argued that it was the prerogative of the AT to lend proper weight to the pieces of evidence before it. This court is fully aware of its limited jurisdiction under Section 34 of the 1996 Act, which is not akin to an appeal under Section 96 of the Code of Civil Procedure. Thus, within the limited constraints of Section 34, this court definitely cannot re-assess the worth of the evidence contained in the reports filed by Metro Railways or ITD.
- 75.** However, the question here is not whether the appreciation of the evidence on record on the part of the AT was improper, but whether the AT was justified in discarding the expert evidence produced by the respondent/Metrorail altogether. In examining the said issue, it would be essential to ascertain as to whether the grounds for such rejection were valid in the eye of law and rational. A fair and reasonable consideration is a pre-requisite of an arbitral process, as highlighted in

*Associate Builders (supra)*⁷ as well as *Ssangyong Engineering (supra)*⁸ OPG (supra). The principle of perversity as laid down in *Western Geco International Limited (supra)*⁹, was incorporated in *Associate Builders (supra)*⁷ under the heading of “patent illegality” as incorporated under Section 34 (2-A) of the 1996 Act, as Amended in 2015.

76. Tested on such anvil, the impugned award is perverse, having omitted to examine altogether the post-TBM retrieval expert reports filed by the Metro Railways on merits, the AT having thrown them out either on frivolous reasons or by applying diametrically opposite yardsticks *inter partes*.

77. Thus, this issue is held in favour of the petitioner Metro Railways.

(v) Whether the relevant Contractual clauses were overlooked and/or the AT re-wrote the Contract.

78. A bare perusal of the clauses of the GCC as well as SCC between the parties shows that the AT turned the contract on its head.

79. The defence of the Contractor/ITD was that it was confronted with ‘unforeseen physical condition’ which is allegedly recognized as an

7. *Associate Builders v. Delhi Development Authority*, reported at (2015) 3 SCC 49

8. *Ssangyong Engineering & Construction Company Limited v. National Highway Authority of India (NHAI)*, reported at (2019) 15 SCC 131

9. *Oil and Natural Gas Corporation Limited v. Western Geco International Limited*, reported at (2014) 9 SCC 263

alleviating factor in respect of liability under Clause 4.23 of the GCC. However, the said clause does not absolve the burden of liability of the Contractor even in case of an unforeseen physical condition but merely provides that in such a case, it is to be reported immediately in writing by the Contractor to the GC. The effect of such condition would merely be that additional costs incurred for overcoming such physical condition by the Contractor has to be borne by the employer, i.e., the Metro Railways.

- 80.** Apart from the fact that no such report by the contractor to the employer has been brought on record by ITD, even if such report were to be produced, the same would not absolve the risk and liability of the ITD of the Contractor.
- 81.** As per Clause 4.9 of the GCC and Clause 5 (first paragraph) of the SCC, the Contractor was to carry out soil investigation and it would be deemed that it was satisfied of the same, before putting in the tender itself.
- 82.** In the present case, a GIR was prepared by Subarna Jurong on the basis of Constell's report, which was preceded by a soil investigation at the instance of the Contractor through its agents. Thus, the presumption is, as per the contract between the parties, that the Contractor was duly satisfied of the soil condition before entering into the Contract.
- 83.** The next important condition of the contract between the parties is encapsulated in Clause 3.4 of the GCC, in the third paragraph of which

it is provided that no acts/omission of the Engineer (GC) shall relieve the Contractor of its contractual duties, responsibilities, obligations and liabilities.

- 84.** Clause 4.1 of the GCC, in its fourth and fifth paragraphs, casts full responsibility and risk on the Contractor for the adequacy, stability, safety of site operations, works, *irrespective of approval or consent of the Engineer* (emphasis supplied).
- 85.** The second paragraph of Clause 4.1 of the GCC provides that it is the Contractor which is to design, manufacture and execute the work.
- 86.** Thus, the very premise of the impugned award, to the effect that Metro Railways did not prove that the GC's instructions were not followed by the Contractor, is an entirely irrelevant and extraneous consideration for deciding the present dispute.
- 87.** It is clear from the above clauses that, irrespective of any act or omission of the Engineer, the Contractor has the contractual obligation to bear the liabilities for any damage caused to third parties during the project, irrespective of approval or consent of the Engineer. Since the dispute relates to stability and safety of the site operations and the works, the contract casts complete responsibility on the Contractor, which is admittedly a known commercial entity specialized in the field of work involved in the project-in-question and, thus, obviously entered into the contract with its eyes open, taking calculated commercial risks.
- 88.** The commercial nature of the transaction itself shows that the Contractor took a commercial risk upon assessing and taking into

account the soil conditions and other aspects involved and cannot now resile from such position.

- 89.** On the other hand, the role of the GC (the Employer-appointed Engineer) in the project is merely supervisory in nature. Clause 3.2 of the GCC and Clause 2 of the SCC provide that the GC is merely to watch and inspect the works. Clause 15.3 of the GCC stipulates insurance in respect of third-party damages. Clause 14.5 of the GCC is clear in that the Contractor is liable for all risks other than the employer's risks, as enumerated in Clause 14.3 (which are not attracted in the present case).
- 90.** The above-discussed vital clauses of the contract between the parties, which were most germane for the resolution of the dispute between the parties, were completely overlooked by the AT, thus tantamounting to perversity, attracting Section 34 (2-A) of the 1996 Act and giving rise to patent illegality.
- 91.** Also, Section 28(3) of the 1996 Act provides in no uncertain terms that while deciding and making an award, the Arbitral Tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.
- 92.** The AT re-wrote the contract by reversing the burden and liability of risks, shifting the same, without any reasonable basis and contrary to the contract, on the Employer from the Contractor.
- 93.** Hence, the award is vitiated by patent illegality.

(vi) Grant of future claims

- 94.** The declaratory component of the impugned award, with due respect, is “futuristic” in nature, but in a sarcastic sense. Future claims which have not yet arisen at all could not have been adjudicated upon in a blanket manner by casting entire liability on the employer for the same. Thus, the said component of the award is also vitiated by perversity.

(vii) Other discrepancies in the award

- 95.** Although in paragraph 132, preceded by 128 of the award, the AT proceeded on the premise that no machinery costs, overhead and/or profit would be granted, such components were incorporated in some of the claims, in the operative portion of the award.
- 96.** Secondly, in respect of some of the claims ,in particular C-13 and C-14, eighty per cent of the claimed amount was granted without any reason whatsoever.
- 97.** More importantly, the AT looked into the provisions of the independent Contract between the GC and the employer (Metro Railways), which is completely *de hors* the law. Since ITD, the Contractor, is not a party to the said Contract but is only bound by its contract with the employer, the consideration of such contract is hit by the doctrine of privity.
- 98.** Again, the independent contract between the GC and the employer merely enumerated the jural interrelationships between the said two parties and had nothing to do with the liabilities of the Contractor under the GCC and the SCC entered into between the present parties.

- 99.** Thus, the provision of Section 34(2)(a)(iv) of the 1996 Act is hit, since the arbitral award contains decisions on matters beyond the scope of the submission to arbitration. As the said component of the consideration cannot be segregated from the rest of the award, since such consideration is interspersed in the very fabric of the reasoning for the award, there is no scope, even otherwise, to set aside the said part of the award and retain the rest.
- 100.** Thus, the impugned award attracts Section 34(2)(b), Explanation-I, sub-clauses (ii) and (iii), being in contravention of the fundamental policy of Indian law and most basic notions of morality and justice in so far as the doctrine of privity and relevance as embodied in the law of evidence, were given a complete go-by.
- 101.** Moreover, the award is vitiated by patent illegality under Section 34 (2-A) of the 1996 Act on the said count as well.
- 102.** The AT also passed a declaratory award regarding certain monetary entitlements, which is a contradiction in terms.
- 103.** Hence, the award is even otherwise vitiated by patent perversity and patent illegality.
- 104.** Even going by the principles of law as laid down in *Ssangyong Engineering (supra)*¹⁰, *Associate Builders (supra)*¹¹, *OPG Power*

10. *Ssangyong Engineering & Construction Company Limited v. National Highway Authority of India (NHAI)*, reported at (2019) 15 SCC 131

11. *Associate Builders v. Delhi Development Authority*, reported at (2015) 3 SCC 49

*Generation (P) Ltd. (supra)*¹² and *HRD Corporation (supra)*¹³, the impugned award in the present case is vitiated by patent illegality, for coming to which finding no appreciation or re-appreciation of the evidence on merits is required at all, thereby taking such consideration outside the exception carved out in Explanation-2 of sub-Section (b) of Section 34(2) of the 1996 Act, since a review on the merits of the dispute are not required to come to the above findings at all.

105. The reliance of ITD, the claimant, on *Gayatri Balasamy (supra)*¹⁴ is not relevant in the context, in view of the aforesaid finding that the entire award is vitiated as a whole due to contravention of the fundamental policy of Indian law and patent illegality. Thus, the impugned award, in its entirety, cannot survive judicial scrutiny under Section 34 of the 1996 Act and considerations as to partial modification do not arise.

CONCLUSION

106. In view of the above findings, AP-COM No. 381 of 2024 is allowed on contest, thereby setting aside the impugned arbitral award dated August 6, 2023, passed in the arbitration proceeding between the

12. *OPG Power Generation (P) Ltd. v. Enxio Power Cooling Solutions (India) (P) Ltd.*, reported at (2025) 2 SCC 417

13. *HRD Corporation (Marcus Oil and Chemical Division). v. GAIL (India) Limited*, reported at (2018) 12 SCC 471

14. *Gayatri Balasamy v. ISG Novasoft Technologies Ltd.*, reported at (2025) 7 SCC 1

present parties, under Section 34 of the Arbitration and Conciliation Act, 1996.

107.There will be no order as to costs.

108.Urgent certified copies, if applied for, be supplied to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)