

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 17TH DAY OF NOVEMBER 2021

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

O.P. No.285 of 2021

O.P.NO.124 OF 2021:-

In the matter of disputes pertaining to
Concession Agreement dated 05.12.2009
between GMR Chennai Outer Ring Road
Pvt. Ltd. And Government of Tamil Nadu
represented by Secretary, Highways and
Minor Ports Department, Government of
Tamil Nadu AND

In the Matter of Arbitration and
Conciliation Act, 1996, AND

In the matter of Arbitral Award dated
30.01.2020.

M/s. GMR Chennai Outer Ring Road Pvt. Ltd.,
Having its registered office at 25/1,
Skip House, Museum Road,Bangalore – 560 025.

...Petitioner

VS

Governor of Tamil Nadu,
Represented by the Secretary,
Highways and Minor Ports Department,
Fort St. George, Chennai-600 009.

...Respondent

Original Petition praying that this Hon'ble Court be pleased to partially set aside the award dated 30.01.2020 passed by the Arbitral Tribunal in respect of the refusal to grant pre-reference and pendentelite interest in terms of the Concession Agreement dated 05.12.2009, and award the same in favour of Petitioner or alternatively remand it back to the arbitration with a direction to grant pre-reference and pendentelite interest at the contractual rate.

This Original Petition along with O.P.No.124 of 2021 having been heard on 27.10.2021 in the presence of Mr.Ciccu Mukhopadhaya for Mr.R.Parthasarathy, Advocates for the petitioner herein and Mr.R.Shanmuga Sundaram, Advocate General, Asst. by Mr.EdwinPrabhakar, Government Counsel (CS), appearing for the respondent herein and upon reading the petition and the award dated 30.01.2020 filed herein and having stood over for consideration till this date and coming on this day before this court for orders in the presence of said advocates for the parties hereto and this court cannot modify the award while exercising power under section 34 of the Arbitration and conciliation Act, and the parties have agreed to specific rate of interest in the contract including pendentelite interest, substituting the same as per the contract cannot be construed as modification, **it is ordered as follows:-**

That the pendential interest at the rate of 9% alone, be and is hereby substituted.

2. That in respect of other aspects, the award, dated 30.01.2020 passed by the Arbitral Tribunal, be and is hereby confirmed.

WITNESS THE HON'BLE MR. JUSTICE M.DURAISWAMY, CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE 17TH DAY OF NOVEMBER 2021.

Sd./-

ASSISTANT REGISTRAR (O.S.II)

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments.

VSP
18/12/2021

O.P. No.285 of 2021

ORDER

DATED :17/11/2021

THE HON'BLE MR.JUSTICE
N.SATHISH KUMAR

FOR APPROVAL:04/01/2022

APPROVED ON:04/01/2022

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
27~10~2021	17~11~2021

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

ORIGINAL PETITION Nos.124 & 285 of 2021

The Governor of Tamil Nadu,
Represented by the Secretary,
Highways and Minor Ports Department,
Fort St. George, Chennai – 600 009.
&

... Petitioner in O.P.No.124 of 2021

respondent in 285 of 2021

.Vs.

M/s.GMR Chennai Outer Ring Road Pvt. Ltd.
Having its registered Office at 25/1, Skip House,
Museum Road, Bangalore – 560 025.

... Respondent in O.P.No.124 of 2021 &
petitioner in 285 of 2021

Prayer: Petitions filed under section 34 [2] [2-A] of the Arbitration and Conciliation Act,. 1996, O.P.No.123 of 2021 to set aside the impugned arbitral Award dated 30.01.2020 passed by the learned arbitrator and O.P.No.285 of 2021 has been filed to partially set aside the award dated 30.01.2020 passed by the Arbitral Tribunal in respect of the refusal to grant pre-reference and pendente lite interest in terms of the Concession Agreement dated 05.12.2009 and award the same in favour of the petitioner or alternatively remand it back to the arbitration with a direction to grant pre-reference

and pendentilite interest at the contractual rate.

For Petitioner in O.P.No.124 of 2021
& respondent in O.P.No.285 of 2021 : Mr.R.Shanmua Sundaram,
Advocate General
Asst.by Mr.Edwin Prabakar
Government Counsel [CS]

For respondent in O.P.No.124 of 2021
& petitioner in O.P.No.285 of 2021 : Mr.Ciccu Mukhopadhaya
for Mr.R.Parthasarathy

COMMON ORDER

As against the award of the three member arbitral tribunal allowing the claim for a sum of Rs.3,40,97,02,245/-, O.P.No.124 of 2021 has been filed challenging the unanimous award.

2. O.P.No.285 of 2021 has been filed by the claimant as against a portion of the award relating to the interest alone.

3. Since both the Original Petitions are arising out of the same award, this Court is inclined to dispose of both the original petitions by way of a common Order.

4. The parties are arrayed as per their own ranking before the arbitral tribunal.

5. The claimant is a successful bidder for the development of Chennai Outer Ring Road to a total length of 29.5 Kms and a Concession Agreement [CA] was entered between the parties on 5.12.2009 for design, Build, Finance, Operate and

transfer [DBFOT] basis and the claimant was to be paid annuities half yearly post the construction period. The appointed date for the purpose of commencement of construction work under the Concession Agreement is 03.06.2010. The construction period as per the Concession Agreement is 913 days with the planned completion period as per the Engineering procurement and Construction [EPC] Agreement, the Financing Agreements and the Financial Model fixed at 24 months. The planned project completion date was 02.06.2012 as per the agreement and the concession period is 20 months from the appointed date. The total project cost is INR 116.78,00,000/-. The investment of INR 1166.75 crores during construction [project cost] and about INR 425.89 crores estimated for doing O & M for the project [including taxes] apart from interest costs by the claimant was to be recovered through 35 regular annuity payments of INR 62,12,91.213 each in terms of Article 27 of the Concession Agreement apart from a promise of a Bonus payment equivalent to one annuity period as per Article 28 of the Concession Agreement. The claimant also entered into an EPC Agreement with the EPC Contractor in order to complete the construction within 24 months so that it could earn bonus as per the Concession Agreement. The claimant also mobilized requisite manpower and machinery for completing the project within 24 months. Besides submitted Master Construction schedule on 20.05.2015. Article 6 of the Concession Agreement set out the performance obligations of the claimant and reciprocal obligations by the respondent. However, the respondent has failed to

cooperate with the claimant and failed to discharge their obligations. There was delays and breaches attributable to the respondent. Therefore, it has affected completion of the project within 24 months. The claimant has periodically submitted representations to the independent Engineer not only for extension of time but also for compensation. Hence, for various circumstances and delays attributable to the respondents, the claimant has made the following claim :

<i>Claim No.</i>	<i>Nature of claim</i>	<i>Amount upto claim statement in Rs.</i>	<i>Additional Claim</i>
1.	Financial Impact due to change in ground condition	144,03,21,479/-	--
2.	Financial Impact due to delay/non issuance of permits for borrow earth areas	92,93,61,985/-	--
3.	Financial Impact due to escalation in costs due to prolonged construction beyond 24 months	379, 70,00,237/-	--
3[i]	Additional interest on term loan and promoter's fund	43,39,42,888/-	71,83,99,817/-
3[ii]	Loss of Bonus	62,12,91,213/-	--
3[iii] [a to c]	Addl. Cost of plant, machinery & overheads	228,89,08,598/-	251,01,68,771/-
3[iii] [a]	Addl. Cost of plant & machinery	124,68,74,422/-	144,01,89,441/-
3[iii] [b]	Addl. Cost of overheads	81,20,00,000/-	82,21,50,000/-
3[iii] [c]	Addl. Time dependent cost	23,00,34,176/-	24,78,29,330/-
3[iv]	Material Escalation	45,38,57,538/-	53,11,39,568/-
Total of claims 1 to 3		616,66,83,701/-	675,06,82,833/-

Therefore, the claimant has claimed the following reliefs in their claim statement and updated/supplemental claim statement :

A] Direct the respondent to pay to the claimant a sum of Rs.675,06,82,833/- [Rupees six hundred and sevnty five crores, six lakhs, eighty two thousands and eight hundred and thirty three] as set out in the above table.

B] Direct the respondent to pay interest, both pendente lite and future interest at the rate set out in clause 47.5 of the Concession Agreement from the date the respective sums became due until the date of payment.

6. The main defence of the respondent is that the Concession Agreement is DBFOT in nature and the claims made by the claimants are not maintainable and the claims made by the claimant are barred by limitation. Further the final impact due to the change in alignment and ground condition is liable to be rejected since they are not attributable to the respondent. It is also denied by the respondent that the quality of earth work estimated at the time of bid and the levels before commencing the work had huge differences and therefore, the claimant had to procure extra borrow earth cannot be accepted. Further, since the project is DBFOT basis, the increase or decrease in earth quantities cannot be attributable to the respondent. It is their further contention that the responsibility of the claimant is to maintain a strict vigil over the site and ensure no encroachment takes place after handing over site as per Article 10.3.3 of the agreement and the claimant having failed to maintain a strict vigil cannot blame the respondent. It is his further contention that the obligation of the claimant is to procure all necessary permits from the Government instrumentalities and the obligation of the respondent is

confined only to provide reasonable support and assistance to the claimant in obtaining necessary permits. The respondent has taken necessary steps to provide reasonable support and assistance in this regard.

7. As far as the claim in respect of the prolonged construction beyond 24 months is concerned, the delay is not attributable to the respondent, but attributable to the claimant. The claimant only unilaterally fixed the period of 24 months for completing the project instead of 30 months specified by the respondent. There is no delay on the part of the Independent Engineer in approving drawings. It is the responsibility of the claimant to submit the detailed and correct drawings in accordance with the specifications of the agreement and respondent cannot be blamed for furnishing drawing that are not in confirmation with the specifications. The claimant is solely liable to obtain necessary permits, clearance and approval to facilitate land acquisition from National Highways Authority of India and the respondent has no obligation in this regard. Therefore, if there was any delay in getting approval, it shall be attributable to the claimant and not to the respondent. If there is delay in approval of railway drawings, it is attributable to the claimant since, it is the responsibility of the claimant to obtain approval from the railways. With regard to the delay in shifting utilities and removing encroachment, it is the responsibility of the claimant. Additional interest on term loan and promoters fund has to be borne by the claimant. Since, the delay is attributable to the claimant, additional cost on plant, machinery and overheads have to

be borne by the claimant and the same will apply to the material escalation cost also.

8. On the basis of the above pleadings, the learned arbitral tribunal framed the following issues :

1. Whether the claims are maintainable in view of the nature of the contract entered into between the parties?

2. Whether the claimant/respondent have complied with the respective obligation in respect of the contract entered into between them?

3. Whether the claimant is entitled to the claim made in its claim statement?

4. Whether the claimant is entitled to any interest and if so, what is the rate of interest?

5. Whether the claimant/respondent is entitled to any cost and if so, what is the costs?

6. To what relief the parties are entitled to?

Additional Issue framed by the Tribunal :

1. Whether the claim raised by the claimant is barred by limitation?

9. On the side of the claimant, C.W.1 and C.W.2 have been examined and Ex.C.1

to C.115 have been marked and on the side of the respondent, R.W.1 has been examined and Ex.R.1 to R.58 have been marked and Ex.X.1 to X.6 have also been marked by the tribunal.

10. Considering the various submissions and pleadings of the parties, the learned tribunal has passed following award :

“In the result, an award is passed directing the respondent to pay to the claimant a sum of Rs.340,97,02,2443/- within 3 months from the date of Award failing which the same shall be payable with interest at 18% p.a. from the date of Award till the date of realisation.”

The same is put into challenge in this petition under 34 of the Arbitration and Conciliation Act.

11. Though several grounds have been raised in this petition, the main grounds canvased by the learned Advocate General are that the claims are barred by limitation, since the arbitration was invoked after three years from the time, they were rejected by the independent Engineer. It is the specific contention of the learned Advocate General that the consolidated claim for Rs.506.46 crores made by the claimant on 17.09.2021 was forwarded to the Independent Engineer by TNRDC dated 21.09.2012 and the same was refused by the Independent Engineer on 24.12.2012. Hence, it is his contention that as per Article 23 and 44 of the Concession Agreement, the claim ought to have been referred to arbitration immediately. From the year 2010 to 2011 itself, issues have

been raised by the claimant with regard to change in alignment and change in earth quantity due to theft and the same was refused and refuted by the petitioner. Hence, it is his contention that Article 23.6 indicate that as against the decision of the Independent Engineer, the dispute shall be resolved in accordance with the Dispute Resolution Procedure as per Article 44 of the Concession Agreement. Therefore, it is his contention that the moment when the Independent Engineer has rejected the request made by the claimant in the year 2010 and 2011, within a period of three years, the matter should have been referred to the arbitration, which has not been done so. Hence, it is his contention that the arbitration invoked beyond the period of three years is not maintainable in the eye of law and the entire claim is barred by limitation which is overlooked by the arbitral tribunal.

12. It is also further submission of the learned Advocate General that mere fact that the claimant wrote letters starting from 2010 to 2015 raising some issues, the same cannot be a reason for the postponement of accrual of cause of action. Hence, it is his contention that the cause of action has already arose in this case when the Independent Engineer was approached. In other words, even according to him, the actual cause of action is on the date of constructive knowledge and not on any later dates. It is his further contention that when the Independent Engineer has rejected the claim of the claimant in the year 2011, when the claimant had constructive knowledge, he ought

have referred the dispute within a period of three years, which has not been done so. With regard to limitation aspect, the learned Advocate General had relied on the following judgments :

Panchu Gopal Bose Vs. Board of Trustees reported in [1993] 4 SCC 338

Inder Singh Rekhi Vs. Delhi Development Authority reported in AIR 988 SC
1007

Visa International Ltd. Vs. Continental Resources [USA] reported in [2009] 2
SCC 55.

English Judgment in Haward and others Vs. Fawcetts and another reported
in
[2006] UKHL 9

13. It is the further contention of the learned Advocate General that the entire claim is not maintainable since the contract is on the basis of Design, Build, Finance, Operate and Transfer [DBFOT] framework on Annuity basis. Hence, it is his contention that no claim for loss and compensation is maintainable. It is his further contention that the article 7.2 sub clause [h] and 8.1 makes it very clear that concessionaire acknowledges that prior to the execution of the agreement, the Concessionaire has, after a complete and careful examination made an independent

evaluation of the tender notice, scope of the project, specifications and standards, site, local conditions, physical qualities of ground, subsoil and geology, traffic volumes and all information provided by GOTN and in view of the above clause, as the contract is based on DBFOT, the claim is not maintainable. It is his further contention that the compensation provided under the Article 35.2 available to that claimant, only if there is any material breach in respect of which damage has been expressly specified in the agreement. When the contract itself restrain the claimant from claiming any compensation, the claimant is not entitled to any compensation which has not been taken note of by the learned arbitral tribunal.

14. In respect of change in alignment, it is the contention of the learned Advocate General that the claimant was informed regarding the alignment and it is his contention that the claimant was informed regarding the centre line coordinates and their corresponding ground levels and the site on which the work had to be commenced. However, they did not confirm to the centerline coordinates. It was the obligation on the part of the respondent/claimant to adhere to the same in order to fix the alignment for 72m wide strip that was to be used for construction of the 6-lane highway. Having agreed in the agreement, the claimant cannot now shift the blame on the petitioner to claim an exorbitant amount before the tribunal. Similarly, it is his contention that obtaining necessary permits is the obligation of the claimant. Therefore, the claimant cannot claim any compensation in respect of the above claim. The obligation of GOTN

pertain only to provide ROW as per co-ordinates towards centre line and the same has not been done by him without any flair. As per monthly progress report submitted 80% of the total area of the site has been obtained by the TNRDC.

15. The further contention of the learned Advocate General is that the contract is based on DBFOT basis and therefore the increase or decrease in earth quantities cannot be attributable to the petitioner. The claimant has made claims for additional earth quantity without producing the necessary evidence or proof for any reduction in earth quantity. Therefore, when the claimant has not established the exact quantity of earth that has reduced and has not adduced evidence for procuring extra earth quantities, therefore, any claims made on the basis of the same cannot be accepted. It is the obligation of the claimant to maintain strict vigil as per Article 23.2.3 of the Concession Agreement and having failed to perform their part of the obligation in the contract, the claimant cannot claim compensation on the ground of theft of sand. The other contention that removal of the earth at km 12+000 caused water logging cannot be entertained as respondent has already disclosed the said fact of water logging with the chainages of low level of earth. Therefore, the above claim has also to be rejected and the same is attributable to the claimant and the respondent cannot be fastened with the liability.

16. As far as the claim No.2 is concerned, the contention of the claimant that there was delay in issue of required permits for borrow of earth and hence, the material

breach is attributable to the petitioner. Whereas, it is the contention of the Advocate General that as per the Concession Agreement, it is the obligation of the claimant to procure all necessary permits from the government instrumentalities. The obligation of the petitioner is only to provide reasonable support and assistance to the claimant in obtaining the necessary permits. Hence, it is the contention of the Advocate General that the petitioner has given necessary support and assistance to the claimant to obtain permits for completing the project. It is his further contention that Ex.R.16 letters in this regard has not been considered by the arbitral tribunal. Further, there is no delay in handing over the site by the petitioner. The first monthly progress report in July 2010 itself clearly indicate that the total area of the site was handed over to the claimant as early on 02.06.2010 and the same has been admitted by the claimant. It is also the obligation of the claimant to submit the land acquisition proposals on time and to pursue the matter with various government departments as gathered from schedule B Article 8.1 in the agreement. Therefore, in this case, the claimant has failed to submit a consolidated proposal for land acquisition. Therefore, the delay cannot be attributable to the petitioner.

17. Similarly, there has been no delay in approval of drawings by the Independent Engineer, the allegation of the claimant is also denied. Further, the permit from the National Highways Department, clearance and approvals has to be obtained by the claimant. Therefore, the delay in getting approvals for the Government Department

cannot be attributable to the petitioner. Further additional interest on term loans and promoters fund cannot be claimed by the claimant. In the nutshell, it is the contention of the Advocate General that the escalation and any consequential costs as the previous sub claims namely, additional interest on term loans, additional cost of plant, machinery, bonus claims etc. are also not maintainable. Therefore, the claimant making the claim for using pond ash, as fly ash was not available near the project site is not maintainable. It is further contention that the petitioner's decision to grant extension of time without any financial implications has achieved finality and there cannot be any compensation. In support of his contentions, he relied on the following judgments :

Bharat Coking Coal Ltd. Vs. L.K.Ahuja reported in [(2004) 5 SCC 109

Rhodia International Holdings Ltd., Rhodia UK Ltd., Vs. Huntsman International LLC reported in [(2007) EWHC 292] [Comm]

J.C.Budhraja Vs. Chairman, Orissa Mining Corporation Ltd. and another reported in (2008] 2 SCC 444

State of Rajasthan and Another Vs. Ferro Concrete Construction Pvt. Ltd. reported in [2009] 12 SCC 1

Lion Engineering Consultants Vs. State of Madhya Pradesh and others reported in [2018] 16 SCC 758

18. In respect of O.P.No.285 of 2020, it is the contention learned counsel for the petitioner that the Apex Court in **Project Director, National Highways Authority of India Vs. M.Hakeem and another** reported in **2021 SCC OnLine SC 473** has held that award cannot be modified. Hence, prayed for dismissal of the Original Petition No.285 of 2020 by allowing O.P.No.124 of 2020.

19. The learned Senior Counsel appearing for the respondent submitted that the correspondence of the Independent Engineer relied upon by the petitioner for the plea of limitation for the purpose of claiming compensation are not matters which can be referred to arbitration under Article 23.6. It is the contention of the learned Senior Counsel that at the most the Independent Engineer's correspondence can be construed as a recommendation to TNRDC on which no decision has been taken by the TNRDC until February 2015. It is his further contention that the monetary claims were not the subject matter of the letters before the Independent Engineer. At any event, in respect of the monetary claims, the Independent Engineer is not competent to pass any award. Therefore, Article 23.6 relied upon by the applicant is not applicable. It is his contention that the decision to reject the claim was made on 24.09.2015. Only after such rejection, cause of action would arise and rightly arbitration was invoked within the period of limitation. It is his further contention that, the road construction works were completed only on 15.06.2013 and provisional completion certificate was issued on

08.04.2014. Therefore, it is his contention that the cause of action could not have arisen prior to the completion. Therefore, invoking arbitration within three years after rejection in the year 2015 is well within the period of limitation. The supplementary agreement was also signed on 14.03.2013 and a formal extension was granted for a period of 202 days which was acted upon. Hence, it is the contention of the learned Senior Counsel that the notice invoking arbitration was issued in the month of November 2015, which is well within the period of limitation. As the breach is a continuing one, fresh period begins to run every moment the breach continues. Therefore, submitted that the correspondence of the Independent Engineer is not in respect of any advice or instruction or decision and the direction of the award and does not relate to the claim made in the arbitration. Therefore, it is submitted that the claim made is within the period of limitation. In support of his submissions he relied on the judgment of the Delhi High Court in **Gammon IndiaLtd. Vs. NHAI** reported **2020 SCC OnLine Delhi 659**.

20. As far as the submissions of the learned counsel for the petitioner that the nature of the contract is DPFOT, which bars any claim for compensation, it is the specific contention of the learned Senior Counsel that Article 35.02 of the Concession Agreement expressly includes interest payment on debts, increase in capital cost and all other cost attributable to defaults. Similarly, article 42.1.2 of the Agreement also entitles the claimant to recover damages or loss on an indemnity basis. Therefore, it is his

contention that when the contract itself does not prohibit to claim damages and such prohibition is as submitted by the learned counsel for the petitioner, such term would be void in the light of the Section 55 and 73 of the Indian Contract Act. Hence, it is his contention that invocation of the Article 8.1 and 8.2 will also not apply. When the representation made by the claimant with regard to change in alignment is seen, the information provided in the invitation to bid was found to be incorrect. Therefore, the claim of loss and damages suffered as a result of the same is clearly maintainable and the tribunal has infact, factually found that there was change in alignment and the same cannot be assailed under section 34 of the Arbitration and Conciliation Act. Similarly, with regard to obligation, the tribunal has factually found that the petitioner herein has not performed their obligation and they have not obtained the statutory permits. As far as fly ash is concerned, it is his contention that such contention was never argued before the arbitral tribunal. Therefore, the same cannot be entertained. The learned arbitral tribunal factually recorded a finding which cannot be assailed. Hence, it is his contention that the applicant has not made out any ground to interfere the award under section 34 of the Arbitration and Conciliation Act.

21. It is also submitted by the learned Senior Counsel that as far as O.P.No.285 of 2021 is concerned, the arbitrator has ignored the contractual rate of interest in the agreement and on the other hand, awarded interest invoking discretion which is contrary to the Section 31 (7) (a) of the Arbitration and Conciliation Act. Therefore, the interest

portion has to be as per the contract. The same can be substituted by this Court and the same will not amount to modification, since it is only a substitution as per the contract. In other words, the portion of the award with regard to the interest alone has to be set aside and the matter has to be remitted to the arbitral tribunal for passing an order with regard to the interest alone.

22. It is an admitted fact that the Concession Agreement dated 05.12.2009 came to be executed for estimate construction cost of INR 1160.78 crores and annuity payable was INR 119.70 crores, every six months for 35 instalments i.e., INR 4189.50 crores and the total value of the contract is 5356.28 crores. Commencement date for construction is 03.06.2010. The scheduled date for completion is 02.06.2012. The Independent Engineer was notified on 17.09.2012 as per the contract. The Independent Engineer recommended to TNRDC to extend the construction by 202 days up to 20, June 2013. TNRDC recommends to GOTN to extend construction period by 202 days on 16.05.2013, which is available in volume 12 page 573 of the typed set of the petitioner. The construction completion certificate was issued 08.04.2014, which is available in volume Page 956 of the typed set. The provisional completion certificate was issued by the Independent Engineer with the date of completion on 15.06.2013. The Provisional Certificate was issued on 08.04.2013. A supplementary agreement was also entered between the parties on 04.06.2014. The monetary claims made by the respondent as per the supplementary agreement has been rejected by the Tamilnadu

Government on 24.02.2015 as per the recommendation of the Independent Engineer by letter dated 09.02.2015, which is available in volume 6 page 1648 of the typed set. Thereafter, a conciliation proceedings were invoked by the GMR, namely the claimant, which was failed and the same was also communicated by a letter dated 18.09.2015, which is available in volume 4 page 946 of the typed set. Notice invoking arbitration was issued on 19.11.2015. These facts narrated above are not in dispute.

23. Now, the main contention of the petitioner is that since the Independent Engineer rejected various issues from the year 2011 onwards, the arbitration should have been invoked within a period of three years. Much emphasis is made on Article 23.06 and Article 44 of the contract to buttress the submissions of the learned Advocate General. Article 23 .1 deals with appointment of the Independent Engineer. Article 23.2 deals with the duties and functions of the Independent Engineer appointed by the GOTN. Article 23.2.3 reads as follows :

“Notwithstanding any thing to the contrary contained anywhere in the Agreement Schedules or elsewhere, the Independent Engineer shall, up to the date of issue of Completion Certificate and if required upto 45 days thereafter, furnish/submit to TNRDC one copy of all the correspondences, Designs, Drawings, Document, reports, and such other Document as may be covered under Schedules and other communications/letters/notices etc.

being submitted to or required to be submitted to GOTN.”

The duties and functions set out in Article 23.2.3 is mainly with regard to furnishing of correspondences license, contracts, reports, etc. Article 23.6 deals with dispute resolution, which reads as follows :

If either party disputes any advice, instruction, decision, direction or award of the Independent Engineer, or, as the case, may be, the assertion or failure to assert jurisdiction, the dispute shall be resolved in accordance with the Dispute Resolution Procedure contained in Article 44.

24. It is to be noted that the correspondences relied upon the learned Advocate General is available in volume 4 page 863 of the typed set, when the various grievances raised, the Independent Engineer has recorded in para 6.2 as follows :

"6.2 As per the Concessionaire's submissions, the total delay in Consturction of works on account of various reasons not attributable to them/attributable to the GOTN works out to Rs.477.04 crores. The aforesaid delay is in terms of EPC cost and the progress of works compared with the master construction programme, which envisaged the completion of all works by 02nd June 2012.

However, as per the IE's review/analysis in Para 3 above, the financial delay attributable to the GOTN is only Rs.224/27 crores. The

balance delay remaining on the part of the Concessionaire themselves."

As per the above writings, the delay in construction on account of various reasons not attributable to the claimant which envisaged the completion of the works by the 2nd June 2012. However, as per the Independent Engineer's review analysis report in para 3 above, the final delay attributable to GOTN is only Rs.224.27 crores and the balance remaining on the part of Concessionaire themselves and in 6.3 the average rate of daily progress required in the project in terms of Capital Cost and EPC cost is assessed and finally in 6.4, it is held that the delay in Milestone-III not attributable to the Concessionaire comes to 202 days and recommended to extend the project Milestone-III up to 8th November 2012.

25. Though the letter dated 17.09.2012 sent by the claimant to the Independent Engineer complaining various delays on the part of the respondent which resulted in additional expenses which is accepted by the Independent Engineer on 24.12.2012 and the same is available in page 2676, the fact remains that vide letter dated 29.12.2012, extension has been recommended by the Independent Engineer. It is to be noted that a reading of Article 23.6. makes it clear that only when any party dispute any advice, instruction, decision, direction or award of the Independent Engineer, the dispute shall be resolved in accordance with the Dispute Resolution Procedure contained in Article

44 of the agreement. As far as rejection of the monetary claim is concerned, the same was never within the domain of the Independent Engineer. The duties and functions of the Independent Engineer referred above do not authorise him or empower him to deal with the monetary claim or pass an Order etc. Therefore, when the decision of allowing or rejection of the monetary claims was never in the domain of the Independent Engineer, such decision cannot be construed to mean that it gives cause of action for claiming monetary claims. The moment the Independent Engineer rejects any request, clause 23.6 or 23 in entirety does not empower the Independent Engineer to make an award with respect to the nature of the dispute made in the arbitration, i.e., the monetary claim arising out of the contract. Hence, the contention of the learned Advocate General is that Article 23.6 will come into play cannot be countenanced.

26. The learned arbitral tribunal in this regard has specifically recorded that the Independent Engineer is not a proper authority to reject any claims raised by the claimant. It is true that the issue is forwarded to Independent Engineer and the Independent Engineer denied the claim. It is the respondent, who is the competent authority, to take decision in this regard. There is no communication rejecting the claim which gave rise to cause of action to make claim immediately. As long as there was no decision taken by the respondent, it should be construed that the issue is under consideration by the competent authority, viz., the petitioner herein. Further, the tribunal has also held that the balance amount due to the claimant under various heads

can be finally assessed only after completion of the construction work and not after completion of each phase of work and any claim for recovery of amount due and payable can be quantified after completion of the work. In the present case, such stage arose only after expiry of the extension of period granted by the respondent. The tribunal has also held that the respondent granted extension of 202 days up to June 2014 for completing the work and correspondingly extended period for completing the other works. Hence, it has been held that the claims are not barred by limitation.

27. With regard to limitation, the judgment of the Delhi High Court in **Gammon India Ltd. Vs. NHAI** reported **2020 SCC OnLine Delhi 659** in para 35, the Delhi High Court has held as follows :

“35. It is the settled position in law that the principles of res judicata apply to arbitral proceedings. The observations of the Supreme Court in Dolphin (supra) also clearly show that principles akin to Order II Rule 2 CPC also apply to arbitral proceedings. The issue as to whether any claims are barred under Order II Rule 2 CPC or whether any claim is barred by res judicata is to be adjudicated by the arbitral tribunal and not by the Court. Keeping in mind the broad principles which are encapsulated in Order II Rule 2 CPC, as also Section 10 and Section 11 of the CPC, which would by itself be inherent to the public policy of adjudication processes in India, it would be impermissible to allow claims to be raised at any stage and referred to multiple Arbitral Tribunals, sometimes resulting in multiplicity of proceedings as also contradictory

awards. Thus, this Court is of the considered opinion that:

i. In respect of a particular contract or a series of contracts that bind the parties in a legal relationship, the endeavour always ought to be to make one reference to one Arbitral Tribunal. The solution proposed by the Supreme Court (Aftab Alam, J.,) in paragraph 9 of Dolphin (supra) i.e., to draft arbitration clauses in a manner so as to ensure that claims are referred at one go and none of the claims are barred by limitation, may be borne in mind. The said observation in Dolphin (supra) reads:

"9. The issue of financial burden caused by the arbitration proceedings is indeed a legitimate concern but the problem can only be remedied by suitably amending the arbitration clause. In future agreements, the arbitration clause can be recast making it clear that the remedy of arbitration can be taken recourse to only once at the conclusion of the work under the agreement or at the termination/cancellation of the agreement and at the same time expressly saving any disputes/claims from becoming stale or time-barred etc. and for that reason alone being rendered non-arbitrable."

ii. If under a contract, disputes have arisen and the arbitration clause is to be invoked, at different stages, the party invoking arbitration ought to raise all the claims that have already arisen on the date of invocation for reference to arbitration. It would not be permissible for the party to refer only some disputes that have arisen and not all. If a dispute and a claim thereunder has arisen as on the date of invocation and is not mentioned, either in the invocation letter or in the terms of reference, such claim ought to be held as being barred/waived, unless permitted to be raised by the Arbitral Tribunal for any legally justifiable/sustainable

reasons.

iii. If an Arbitral Tribunal is constituted for adjudicating some disputes under a particular contract or a series thereof, any further disputes which arise in respect of the same contract or the same series of contracts, ought to ordinarily be referred to the same Tribunal. The Arbitral Tribunal may pronounce separate awards in respect of the multiple references, however, since the Tribunal would be the same, the possibility of contradictory and irreconcilable findings would be avoided.

iv. In cases belonging to Category (iii) involving different parties and the same organisation, where common/overlapping issues arise, an endeavor could be made as in the IRCTC cases (supra) to constitute the same Tribunal. If that is however not found feasible, at least challenges to the Awards rendered could be heard together, if they are pending in the same Court.

v. At the time of filing of petitions under Section 11 or Section 34 or any other provision of the Arbitration and Conciliation Act, 1996, specific disclosure ought to be made by parties as to the number of arbitration references, Arbitral Tribunals or court proceedings pending or adjudicated in respect of the same contract and if so, the stage of the said proceedings.

vi. If there are multiple challenges pending in respect of awards arising out of the same contract, parties ought to bring the same to the notice of the Court adjudicating a particular challenge so that all the challenges can be adjudicated comprehensively at one go. This would ensure avoiding a situation as has arisen in the present case where Award

Nos.1 and 3 have attained finality and the challenge to Award No.2 continued to remain pending.

28. Admittedly, in this case, on the basis of recommendation of the Independent Engineer, the TNRDC has rejected the claim only on 24.02.2015. The work was completed on 15.06.2013. The Provisional completion certificate was issued on 08.04.2014. Further, the subsequent agreement was also executed between the parties on 04.06.2014. At any event, even as per the Concession Agreement dated 05.12.2009, completion of work will be the starting point for limitation or the date of extension of time, will be the cause of action. Admittedly, in this case, notice of invocation issued on 19.11.2015 is well within the period of three years. Therefore, it cannot be said that the claim is barred by limitation. The contention of the learned Advocate General in this regard cannot be countenanced. No doubt in the judgment relied upon the learned Advocate General in Panchu Gopal Bose V. Board of Trustees reported in [1993] 4 SCC 338 in para 11 the Honourable Apex Court has held that the period of limitation commences from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in this case of actions the claim is not be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the cases of arbitration, the claim is not be put forward after the expiration of the specified number of years from the date when the claim accrued.

Absolutely, there is no dispute with regard to the above judgment. Whereas, in the given case, as indicated above the very contract has been completed in the year 2013 and the arbitration has been invoked within a period of three years. Similarly, the Independent Engineer was never empowered to deny the monetary claim to show that the claim is totally barred by limitation. In a judgment relied upon by the Advocate General in **Haward & Ors V. Fawcetts & anr.** reported in [2006] UKHL 9 to the effect that the constructive knowledge also gives rise to cause of action is also no help to the Government. In the judgment in **Inder Singh Rekhi Vs. Delhi Development Authority** reported in **AIR 1988 SC 1007** in paragraph No.4, it has been held that the parties cannot postpone the accrual of cause of action by writing reminders. Absolutely there is no dispute over the above judgment. In this case, though the parties have rightly invoked Article 44 for conciliation after rejection by TNRDC on 24.02.2015 and conciliation was invoked on 20.03.2015 and on 18.09.2015 conciliation failed between the parties. Therefore, it cannot be said that the claim is barred by limitation. Accordingly, the contention of the learned counsel for the learned Advocate General in this regard is rejected.

29. As far as the other contention of the learned Advocate General that the claimant is not entitled for the claim of compensation, since the contract is based on DPFOT. Article 7.1 deals with representations and warranties of the Concessionaire and 7.2 deals with representations and warranties of GOTN Clause 7.2 [h] has been

relied upon much which reads as follows :

“All information provided by it in the Tender Notice and invitation to bid in connection with the Project is, so the best of its knowledge and belief, true and accurate in all material respects.”

Clause 7.3 relates to disclosure of any occurrence or of circumstance comes to the attention of either party with regard to the representations or warranties as untrue or incorrect, which can bring to the notice of either side etc. Clause 8.1 deals with disclaimer which reads as follows :

8.1 Disclaimer

8.1.1 The Concessionaire acknowledges that prior to the execution of this Agreement, the Concessionaire has, after a complete and careful examination, made an independent evaluation of the Tender Notice, Scope of the Project, Specifications, and Standards, Site, local conditions, physical qualities of ground, subsoil and geology, traffic volumes and all information provided by GOTN or obtained, procured or gathered otherwise, and has determined to its satisfaction the accuracy or otherwise thereof and the nature and extent of difficulties, risks and hazards as are likely to arise or may be faced by it in the course of performance of its obligations hereunder. Save as provided in Clause 7.2, GOTN or any other

person, entity, agency or TNRDC or authority etc., either acting through or for on behalf GOTN make no representation whatsoever, express, implicit or otherwise, regarding the accuracy and/or completeness of the information provided by it and the Concessionaire confirms that it shall have no claim whatsoever against GOTN or any other person, entity, agency or TNRDC or authority etc., either acting through or for or on behalf of GOTN in this regard.

8.1.2. The Concessionaire acknowledges and hereby accepts the risk of inadequacy, mistake or error in or relating to any of the matters set forth in Clause 8.1.1. above and hereby acknowledges and agrees that GOTN shall not be liable for the same in any manner whatsoever to the Concessionaire, the Consortium Members and their Associates or any person claiming through or under any of them.”

30. The above clauses sought to be used as against the claimant from claiming any compensation. A perusal of the above clauses makes it very clear that the above clauses deal only with regard to the representation of the accuracy and completeness of the information. Therefore, only for inaccuracy and incompleteness in providing information Concessionaire confirms that it shall have no claim whatsoever against GOTN. These clauses cannot be used as a total bar for claiming any monetary bar on

account of breach of the contract of the parties. Whereas Article 35.2 provides for compensation for material breach. Therefore, it cannot be said that on the basis of the disclaimer clause, which is meant for different aspect, the parties are barred from claiming any compensation. If such meaning was given to disclaimer clause to prevent a person from claiming compensation for material breach, certainly the same is not enforceable under section 28 of the Indian contract Act. Similarly, claiming damages for material breach is statutory right as per Section 55 and 73 of the Indian Contract Act. The same cannot be taken away lightly. Therefore, the contention that merely because GOTN provided information put in all material aspects, it cannot be a ground to deny the compensation when the alignment including the levels were not properly given and the representation found to be wrong at a later point of time. Therefore, claim for loss suffered is certainly maintainable. Therefore, the contention of the learned Advocate General in this regard that the claims are not maintainable also cannot be sustained.

31. With regard to the other submissions, namely the change in alignment and borrowal of earth and use of fly ash instead of pond ash, the submission are made against the factual finding of the learned arbitral tribunal. As far as the change in alignment is concerned, the main cause of breach and cause of delay is on the part of the respondent. The complaint made by the claimant attributed following on the part of petitioner :

7. According to the claimant the following are the acts of breaches and acts of delay on the part of the respondent GOTN

[i] Delay in acquiring the land

[ii] failure to hand over encumbrances free land

[iii] Delay in handing over land, diversion of utilities, approval of designs and drawings for interchanges

[iii] Change in alignment and change in ground condition due to theft and removal of earth by private 3rd parties including brick kiln owners at a number of locations prior to handing over of site and other hindrances in the form of abandoned quarry and water bodies resulting in increase in quantity of earth work in comparison to the earth or quantity calculated on the basis of the original earth level which in resulting in huge additional cost for extra earth purchased from alternate sources on commercial basis.

[iv] Delays/deliberate failure/wilful inaction in issuing earth permits by the concerned authorities despite adequate steps taken by the claimant to obtain necessary permits

[v] The failure of the respondent to fully support and assist the claimant in obtaining various permits and approvals on time from the concerned authorities who were the functionaries of the respondent despite

repeated notification made to the Independent Engineer/respondent and

[vi] Misrepresentation on material particulars”

32. The arbitral tribunal in para 7 of the finding have culled out the various breaches and causes of delay on the part of the respondent namely the petitioner herein. The arbitral tribunal considering the various clauses including para 14 of the finding, has adverted to the various aspects and according to them delays and material breaches of legal and contractual obligations were on the part of the petitioner herein. What is contended on the side of the petitioner before the arbitral tribunal is that commissions and omissions are not material breaches as contemplated under Concession Agreement. It is the responsibility of the claimant to avoid the same and no obligation or responsibility was cast on the respondent to act in the manner as expected by the claimant to avoid such delays and to make good the loss, if any, sustained by the claimant as held in para 15 of the award which reads as follows :

“The respondent side has not denied various events pointed out by the claimant side, which according to the claimant, amounting to material default, delays and breaches of legal and contractual obligations of the respondent. What is contended on the respondent side is the act of commissions and omissions are not material in nature as contemplated under CA and it is the responsibility of the claimant to avoid the same and

no obligation, responsibility or liability is cast on the respondent to act in the manner as expected by the claimant to avoid such delays and to make good the loss, if any, sustained by the claimant on account of such delays. As a matter of fact, the Independent Engineer of the respondent has, to greater extent, accepted the grievance of the claimant about the delays. The IE having accepted that the delays, by reason of which extension of time by 202 days for completion of the project. The respondent side has also not made any counter claim against the claimant by attributing the reason for the delays to the claimant. That being the nature of the claim and the objections, the same being viewed in the light of the specific clauses in the CA and in the light of the Delhi Division Bench Judgment cited above, it will lead to an irresistible conclusion that the claims are very well maintainable before the Arbitral Tribunal. However, the question as to whether the claimant is entitled to recover any compensation as claimed under various heads from the respondent has to be independently dealt with in the separate issue framed by the Tribunal. The objection regarding maintainability of the claims is hence rejected.”

33. In the additional issue, in para 10, it is specifically recorded by the arbitral tribunal that the respondent, namely the petitioner herein that the claimant has communicated in written to the respondent regarding various issues such as change in

alignment, change in ground condition, theft of earth, reasons for such change, the party responsible for the same, the delay in obtaining permits, excess quantity of earth purchased and used and the additional cost incurred etc. After interpreting Articles 3.1, 4.1, 6, 7.2, 7.3, 8.1, 8.12, 11, 11.2, 11.4, 12, and 14 and after analyzing oral and documentary evidence and relying upon the minutes and meeting on 11.02.2010, wherein, RWO issue was taken after analyzing the various documents right from para 9 in the above issue till para 22, the arbitral tribunal has concluded that the change in alignment was due to factual incorrect statement about the actual ground condition in RFP is the default on the part of the respondent/petitioner. These findings have been arrived on the basis of the factual matrix after appreciating all the documents. Once, the tribunal has thoroughly analysed various documents and also took note of the various contractual conditions, such a finding cannot be assailed merely on the ground that it went against the other party. Unless it is shown that such finding is a result of perversity or a result of ignoring vital documents or relying upon only the irrelevant documents, the factual finding recorded by the arbitral tribunal cannot be interfered. The learned arbitrators are the final judge of facts. They have considered various clauses of the contract and analysed the documentary evidence and recorded a factual finding. Though the learned Advocate General has tried to argue that the such a finding is against the contract, this Court is unable to find any perversity in the finding of the arbitral tribunal.

34. With regard to the submissions of the borrowal of earth and obtaining the permits, the tribunal has infact considered Article 6.1.2, which deals with obligations of GOTN which reads as follows :

“GOTN agrees to provide support to the Concessionaire and undertakes to observe, comply with and perform, subject to and in accordance with the provisions of this Agreement and the applicable laws, the following :

[a] Upon written request from the Concessionaire, and subject to the Concessionaire complying with applicable laws, provde ll reasonable supportand assistance to the Concessionaire in procuring applicable permits required from any Government Instrumentality for implementation and operation of the project.

[b] Upon written request from the Concessionaire, assist the Concessionaire in obtaining access to all necessary infrastructure, facilities and utilities, including water and electricity at rates and on terms no less favourable to the Concessionaire that those generally available to commercial customers receiving substantially equivalent services.”

35. The tribunal has infact has held that mere writing few letters requesting to

perform is not sufficient when the contral was entirely within the power of GOTN, the contract permits to issue of permits on a timely basis. In para 23, the learned arbitral tribunal considered various documents and has dealt with the every claim and factually recorded that from 2010 onwards, various correspondences by Ex.C.66, the claimant has repeatedly making to the respondent Government about the excess quantity of earth required. The respondent has also been confronted in this regard and each claim has been analysed on the factual basis. It is also to be noted that though the contract provides for obligation on GMR, as condition precedent, it is an admitted fact that Government of Tamilnadu itself has not supplied the earth at the relevant point of time. When the earth is mines and mineral, the Government has absolute control over it, cannot direct the party to the contract to get permission and permit which is beyond their control, cannot be put against them. In the judgment of the Appex Court in **MD, Army Welfare Housing Organisation V. Sumangal Services Pvt. Ltd.** reported in **2004 [9] SCC 619**, the Apex Court has held that there cannot be an obligation on a party to obtain a statutory permission since obtaining the same is beyond the control of a private party. The above judgment is applicable to facts of this case. When Government itself have control over mines and minerals and the ownership vests with the Government and entire issue permits vest with the Government authorities, in para 56, 57, 58 and 60, the learned arbitral tribunal has made thread bear analysis and found that there was material breach on the part of the GOTN. All the documents have been

analysed by the arbitral tribunal. Hence, on appreciation of evidence, when the arbitral tribunal after interpreting the contract and arrived at a conclusion, the same cannot be interfered by reappreciating the evidence.

36. Similarly, with regard to the permission to be obtained from the State and National Highways authority the tribunal has discussed from para 53 and in para 54, the tribunal has considered various documents and correspondences between the parties from the inception and finally concluded that the delay in obtaining permit from the National Highways is attributable to the respondent.

37. It is also to be noted that merely taking advantage of the fact that only reasonable efforts and assistance to be provided by the state in obtaining the permission and the State exercising the sovereign power cannot escape from its responsibilities to see that the project is completed within the time. When the state has control over the statutory authorities there was no need for the contracting party to be directed to go for permission from each and every department. If the State provides such permission in a single window system, there would be no delay and the contractor would not have been driven from pillar to post and the delay would have been avoided. Further, escalation in price and damages could have been avoided for a certain extent. Therefore, when the state is not able to show that they have acted as per the contract to alleviate damages or acted to avoid damages in true spirit of the contract, mere

writing letters to the concerned department is not at all sufficient. Therefore, the arbitral tribunal cannot be found fault in this regard.

38. With regard to fly ash, though the contention has been raised by the Government before this Court, such plea was never raised before the arbitral tribunal. It is the contention of the petitioner that the power plant needs to supply the same free of cost by the Central Government notification. The notification dated 25.01.2016 issued in this regard was relied upon by the learned Advocate General. The notification issued in the year 2016 cannot be relied upon, since the dispute is only in respect of the period of construction of the project, which was completed in the year 2013 itself. Though clause 3.3 in appendix –II schedule DS.YCA was relied upon, it deals (apply) and shall be raised in accordance with the MOSRT&H and the parties have never raised any issue in this regard before the arbitral tribunal. Whereas, the total cost of transportation including all claims are based on the completion and computation as to the transportation and the expenses incurred in transportation has not been disputed. Therefore, when the plea has not been raised in the counter statement, such contention cannot be entertained under section 34 of the Arbitration and Conciliation Act. A perusal of the entire award, the tribunal has analysed all the documents filed by both sides and found that the material breach was on the part of the petitioner herein. Therefore, when the tribunal has factually recorded a finding appreciating the entire evidence, the same cannot be assailed merely because some other view is possible

which is settled in the judgments of the Apex Court in **Navodaya Mass Entertainment Vs. J.M. Combines** reported in [2015] 5 SCC 598, **Associate Builders Vs. Delhi Development Authority** reported in [2015] 3 SCC 49 and **Ssangyong Engineering & Construction Co. Ltd., Vs. NHAI** reported in [2019] 15 SCC 131.

39. As far as O.P.No.285 of 2020 is concerned, the arbitral tribunal has granted interest for the post award period at the rate of 18% per annum. The learned arbitrator has recorded a reason that such a claim has been claimed as compensation and that the amount cannot be treated as an admitted claim to award contractual claim and granted interest at the rate of 18% per annum. The same has been put in challenge on the ground that such a finding of the tribunal that it has discretion to award interest is contrary to the Section 31[7] [a] of the Arbitration and Conciliation Act. Hence, it is the contention of the learned counsel appearing for the petition that the article 47.5 deals with interest for the delayed payment. Therefore, when there is an agreement and the same provides for interest at the RBI PLR -1, 3% for any other amount due borrowed from others. Hence, it is his contention that the tribunal has no discretion and is bound to follow the contractual rate of interest. Hence, even in respect of damages, pendente lite interest is payable. In support of his submissions, he relied on the judgment of the Apex Court reported in **State of Rajasthan and another Vs. Ferro Concrete Construction Pvt. Ltd.** reported in [2009] 12 SCC 1, wherein the Apex Court has held

as follows :

“60. The appellants contend that there was no provision in the contract for payment of interest on any of the amounts payable to the contractor and therefore no interest ought to be awarded. But this Court has held that in the absence of an express bar, the arbitrator has jurisdiction and authority to award interest for all the three periods – pre-reference, pendente lite and future [vide decisions of the Constitution Bench in **Irrigation Deptt., Govt. of Orissa v. G.R.Roya, Dhenkanal Minor Irrigation, Division V. N.C. Budhraj and the subsequent decision in Bhagawati Oxygen Ltd. V. Hindustan Copper Ltd.**]. In the present case as there was no express bar in the contract in regard to interest, the arbitrator could award interest.”

Further, it is his contention that the Apex Court has held that only modification of award is not permissible. Whereas, there is no bar to substitute the contractual interest as per the contract. In other words, this Court is of the view that same is not permissible and the matter may be sent back to arbitral tribunal. Whereas, the learned Advocate General submitted that when the claim itself is not based on the contract, interest is not

permissible. It is relevant to note that Section 31 [7] [a] reads as follows :

“Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.”

40. The above section makes it clear that when there is an agreement in respect of the interest, the tribunal is bound by the contract while awarding the interest. Article 47.5 reads as follows :

Delayed payments :

The parties hereto agree that payments due from one Party to the other Party under the provisions of this Agreement shall be made within the period set forth therein and if no such period is specified, within 15 [fifteen] days of receiving a demand along with the necessary particulars. In the event of delay beyond such period, the defaulting Party shall pay interest for the period of day calculated as a rate equal to 3% [three per

cent] above the Bank Rate and recovery thereof shall be without prejudice to the rights of the parties under this Agreement including Termination thereof.”

The above clause makes it clear that the interest need not be confined to the some adjudged. When the parties have agreed in the contract, while awarding interest, the tribunal is bound by the contract between the parties. There is no discretion vested with the tribunal in view of Section 30 [7] [a] of the arbitration and Conciliation Act.

Similar view is also held in the judgment of the Apex Court in **Sree Kamatchi Amman Constructions V. Divisional Railway Manager** reported in **2010 [8] SCC 767**. In the above judgment, the Apex Court has held that the tribunal is bound by the terms of the contract as far as the interest is concerned. Hence, such a finding of the tribunal is not according to law. As the parties are governed by clause 47.5 of the contract which provides 3% above the Bank rate, this Court is of the view that instead of remitting the matter to arbitral tribunal or setting aside a portion of the award in respect of interest, the Court awards pendente lite interest at the rate of 9% from the date of petition till the date of award, thereafter at 18% as ordered by the tribunal. This Court is also aware of the fact that this Court cannot modify the award while exercising power under section 34 of the Arbitration and Conciliation Act. However, taking note of the fact that the parties have agreed to specific rate of interest in the contract

including pendente lite interest, substituting the same as per the contract cannot be construed as modification. Accordingly, the pendente lite interest alone is substituted and in respect of other aspects, the award is confirmed.

41. Accordingly, the Original Petition in O.P.No.124 of 2021 challenging the entire award of the tribunal is dismissed and Original Petition in O.P.No.285 of 2021 is allowed and pendente lite interest at the rate of 9% is substituted.

Sd./-N.S.K.J
17.11.2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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