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*A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022*

A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022

C.SARAVANAN,J.

By this common order, the above mentioned applications are being disposed. To avoid confusion, the parties shall be referred to as the plaintiff and the defendant in this order since both the plaintiff and the defendant have filed their separate applications for divergent reliefs at this interlocutory stage.

2. The defendant had also filed its written statement with an application to condone the delay in filing a written statement. It was allowed by an order dated 22.08.2022 in A.No.3491 of 2022. Thereafter, on 25.08.2022, the remaining applications namely O.A.Nos.198 to 201 of 2022 and 1600 of 2022 were listed.

3. The plaintiff has filed the suit under Order IV Rule 1 of the O.S Rules read with Order VII Rule 1 of the Code of Civil Procedure Code read with Sections 134 and 135 of the Trade Marks Act, 1999 read with



A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022

Sections 61 and 62 of the Indian Copyright Act, 1957, for the following

Judgment and Decree:-

- a) *Permanent injunction restraining the Defendant, their directors, men, agents, successors-in-business, assigns, representatives or any other person claiming through them or under them in any manner infringing the Plaintiff's **copyright in the artistic works in the Menu Command Hierarchy** placement and arrangement of features such as tables, pull down menu options, and the user interfaces in the **Plaintiff's software LMS** in any manner whatsoever;*
- b) *Permanent injunction restraining the Defendant, their directors, men, agents, successors-in-business, assigns, representatives or any other person claiming through them or under them from in any manner infringing the Plaintiff's **copyright in the literary works** in the LMS software such as Structure ID, Structure Name, Structure Priority, Execution Mode, Execution Frequency, Reversal Indicator, Failure Level, Multipass, Credit First, Group Sweep Details in any manner whatsoever;*
- c) *Permanent injunction restraining the Defendant, their directors, men, agents, successors-in-business, assigns, representatives or any other person claiming through them or under them from infringing the **copyright in the source***



WEB COPY



A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022

code of the software LMS in any other manner whatsoever;

- d) *Permanent injunction restraining the Defendant, their directors, men, agents, successors-in-business, assigns, representatives or any other person claiming through them or under them from in any manner **passing off or enabling others to pass off** their software products and services and business thereunder as and for the plaintiffs' products, service and business by use of the **similar trademarks and terms** including Multipass, Credit First, Group Sweep Details or any other trademark, which is identical Multipass, Credit First, Group Sweep Details or any other trademark, which is identical to and/or deceptively similar to plaintiffs' trademark and for providing software or services by wrongfully associating themselves with the Plaintiffs or in any other manner whatsoever;*
- e. *A preliminary decree be passed in favour of the plaintiff directing the Defendant to render a true and faithful account of all profits earned by them, using Plaintiff's software and a final decree be passed in favour of the Plaintiff for the amount of profits thus found to have been made by the Defendant after the latter have rendered accounts;*
- f) *For costs of the suit."*



*A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022*

WEB COPY

4. The plaintiff has filed the following two applications:-

A.No.1600 of 2022	A.No.4698 of 2022
To Pass an order appointing an Advocate Commissioner, directing her/him . a a.To visit the premises of the respondents at the following locations along with technical experts of the representatives of plaintiff and its counsels, break open the locks if the premises are found locked, with the assistance of police authorities if necessary; b b.To inspect the Hard Disks of the computers, compact discs and/or other storage/replicating media, with the help of technical experts of the plaintiff; c c.To prepare reports, summaries, inventories of the same, d d.To make mirror copies of the respondent's Hard Disks of the computers, compact discs and/or other storage/replicating media, seal them immediately in the presence of the respondent's representatives and produce the same before the Court, without tampering with them in any manner. E e.To seek from the respondent, their employees and agents password particulars of any computer system, if	To direct the experts to compare version 15.2 and all subsequent versions of the applicant's LMS software with the Respondent's LMS software from the period 2021 till 13.04.2022 in filing the report to this Court.



*A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022*

A.No.1600 of 2022	A.No.4698 of 2022
required, in order to enable him to carry out the execution of the commission. f. f. To visit any other premises within the vicinity of the above mentioned addresses where such computer systems are kept which could be carrying copies of the Respondent's software which infringe upon the applicant's copyright in the artistic works, literary works and passing off their products and business as those of application by use of the said trademarks. g.To take the assistance of the police, within whose jurisdiction the respondent's premises and are to be visited, in order to carry out the aforesaid activities	

5. On 01.09.2022 an order came to be passed in A.No.1600 of 2022 by appointing two set of experts on behalf of each of the parties. However, subsequent to the aforesaid order dated 01.09.2022 in A.No.1600 of 2022, the experts nominated by the defendants namely, i)**Mr.Hazur Saran**, Professor, Department of Computer Science and Engineering , Indian Institute of Technology, Delhi; and ii)**Dr.Subodh**



A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022

Vishnu Sharma, Asst.Professor, Department of Computer Science and Engineering, IIT Delhi have expressed inability to act as the experts.

6. Therefore, only i) **Pricewaterhousecooper Services LLP**(PWC Services LLP), represented by **Mr.SangramGayal, Partner** and;ii) **Ms.Geetu Singh**, also a Partner of **Pricewaterhousecooper Services LLP**(PWC Services LLP) are available for giving a report regarding the alleged theft of Source Code of the plaintiff by the defendant. In this background, the defendant has now filed the following two applications:-

A.No.5010 of 2022	A.No.5012 of 2022
a.Consider the nomination of Mr.Professor Ashutosh Gupta (Associate Professor, Dept.of Computer Science and Engineering, Indian Institute of Technology, Bombay) for appointment as a Technical expert in the present suit for undertaking the scope of work set out in the order dated 26.08.2022 and further Orders of this Court;	a.Consider the nomination of Mr.Professor Ashutosh Gupta (Associate Professor, Dept.of Computer Science and Engineering, Indian Institute of Technology, Bombay) for appointment as a Technical expert in the present suit for undertaking the scope of work set out in the order dated 26.08.2022 and further Orders of this Court;
b.Reconsider the appointment of the PWC experts, who were nominated by the plaintiff as technical experts in the	b.Reconsider the appointment of the PWC experts, who were nominated by the plaintiff as technical experts in the captioned proceedings in view of



*A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022*

A.No.5010 of 2022	A.No.5012 of 2022
captioned proceedings in view of the facts and circumstances set out herein. d. Pass such further orders.	the facts and circumstances set out herein; c)Pass such further orders.

7. Along with the plaint, the plaintiff had also filed the following O.A.Nos.198 to 201 of 2022 and the above mentioned A.No.1600 of 2022 for interim orders. After an ex-parte order was passed by this Court on 13.04.2022, an interim order was passed in O.A.Nos.198 to 201 of 2022, for a period of two weeks. As far as A.No.1600 of 2022 was concerned, notice was ordered on the respondent returnable on 27.04.2022, on which date, the interim order granted in O.A.Nos.198 to 201 of 2022 was to expire on 27.04.2022. The interim order was extended to the next date of hearing to 28.04.2022 and thereafter, to 29.04.2022. The interim orders passed earlier in O.A.Nos.198 to 201 of 2022 have now been extended from time to time.

8. After hearing the parties, an order came to be passed by modifying the earlier restraining the defendant from using the menu



*A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022*

WEB COPY

command headings ‘structure details’ ‘instruction details’ and ‘structure summary’ shown at page 128 of the applicant/plaintiff’s typed set. In addition, the defendant was not to use the terms ‘multi-pass’, ‘credit first’, ‘create sweep’ and ‘structure priority’, separately or in combination, until the matter was heard next. Subject to the above restrictions, the respondent was not restrained from dealing with its software pending adjudication of these applications.

9. During the interregnum, A.Nos.2120, 2551 & 2552 of 2022 filed by the applicant/plaintiff and A.No.2464 of 2022 were filed by the applicant/defendant for the following relief:

1	2120 of 2022	<i>M/s.Intellect Design Arena Limited *</i>	<i>For amendment in para 25 of the plaint in C.S.No.71 of 2022</i>
2	2551 of 2022	M/s.Intellect Design Arena Limited *	For amendment in para 20 of the affidavit in A.No.1600 of 2022
3	2552 of 2022	M/s.Intellect Design Arena Limited *	For amendment in para 22 of the affidavit in O.A.Nos.198 to 201 of 2022
4	2464 of 2022	M/s.Mindgate Solutions Private Limited #	To prosecute the plaintiff and its authorized signatory Mr.K.Satish Kumar for the



WEB COPY



*A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022*

1	2120 of 2022	M/s.Intellect Design Arena Limited *	For amendment in para 25 of the plaint in C.S.No.71 of 2022
			offenses of Perjury under Sections 191 and 193 of I.P.C. r/w Section 340 of Cr.P.C.

*** Plaintiff
Defendant**

10. All the applications filed till then, referred to supra, were taken up for hearing on 05.07.2022. On 05.07.2022, A.Nos.2120, 2551 & 2552 of 2022 were allowed. Meanwhile, A.No.1600 of 2022 was filed for appointment of an Advocate Commissioner under Order 26 Rule 9 of CPC. Application No.2464 of 2022 was filed by defendant for perjury in O.A.Nos.198 to 201 of 2022. We are not concerned with the above application bearing A.No.1600 of 2022 filed for appointment of an Advocate Commissioner under Order 26 Rule 9 of CPC above with 3 other applications in Table – I and II.



A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022

WEB COPY

11. Earlier, the parties were persuaded to arrive at a consensus for appointment of an expert under Order 26 Rule 10(a) in A.No.1600 of 2022 filed by the plaintiff. On 26.08.2022, this Court passed the following orders:-

“The parties have not been able to arrive at a consensus with regard to the expert. Learned counsel for the plaintiff states that a more precise response with regard to capability can be elicited if the scope of reference is defined. The broad scope of reference is as under:-

i. Analyse, compare and provide an opinion on the plaintiffs and defendant's source code in relation to the respective LMS software, including by examining previous versions thereof.

ii. Provide visual representations of the graphical user interfaces and menu command structures, including previous versions thereof, so as to enable the Court to decide if there are copyright violations relating to the artistic work or trademark violations pertaining to terminology used.

2. Both parties are permitted to share the above scope of reference with the experts concerned and place the response, including the requirements to fulfil the above mandate, before the Court on the next hearing date so as to enable the Court to decide on the choice of expert. Both the experts are requested to copy correspondents to both parties through their respective counsel.



*A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022*

3. List the matter on 01.03.2022. The Interim Order granted on 29.04.2022 is extended until the next date of hearing.”

12. A reading of the above order makes it clear though the plaintiff and defendant were asked to identify an expert, the Court had reserved its right to choose one of the experts suggested either by the plaintiff or the defendant. Thus, both the plaintiff and the defendant proceeded to communicate with their choice of experts. However, on 01.09.2022, after hearing the learned counsel for the plaintiff and the defendant, following orders were passed:-

“2. Accordingly, the following two sets of experts are appointed to undertake tasks as per the broad scope of reference in the earlier order:

- i.Mr.Hazur Saran, Professor, Department of Computer Science and Engineering, Indian Institute of Technology (IIT), Delhi and Dr.Subodh Vishnu Sharma, Asst.Professor, Department of Computer Science and Engineering, IIT, Delhi.*
- ii. Pricewaterhousecooper Services LLP (PWC Services LLP), represented by Mr.SangramGayal, Partner and Ms.Geetu Singh, Partner.*

3. The following directions are issued in relation thereto:



WEB COPY



A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022

- i. *All the experts shall sign confidentiality undertakings in the form mutually agreed to by the parties before receiving any confidential information or documents pursuant to this order. All persons who are provided access to confidential information by the experts shall also sign such confidentiality undertakings prior to receipt of information.*
- ii. *Both sets of experts are directed to submit a preliminary report indicating the amount of time required to complete the assignment and providing details of any additional persons who would be engaged in the task.*
- iii. *The experts are directed to indicate the remuneration in relation to the assignment in the preliminary report. Such remuneration shall be paid on 50 : 50 basis by the two parties.*
- iv. *The parties are directed to provide to the Partners of PWC Services LLP the information and documents specified by PWC Services LLP in the letter dated 30.08.2022 along with any other supplementary information or documents that may be required. Similarly, as regards the experts from IIT, Delhi, parties are directed to provide the information and documents called for in the letter dated 31.08.2022 along with any other supplementary information or documents that may be required.*
- v. *Subsequently, the confidentiality club may require expansion. At the relevant time, similar undertakings of confidentiality shall be obtained from the additional members of*



A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022

14. Thereafter, several other orders came to be passed on 29.09.2022, 10.10.2022 and 26.10.2022.

15. As mentioned above, during the course of the above, the experts identified by the defendant namely **Mr.Hazur Saran**, Professor, Department of Computer Science and Engineering, Indian Institute of Technology (IIT), Delhi and **Dr.Subodh Vishnu Sharma**, Asst.Professor, Department of Computer Science and Engineering, IIT, Delhi withdrew their consent vide their letter dated 11.10.2022.

16. Therefore, on 26.10.2022, this Court passed the following order:

“Mr.M.S.Bharath, learned counsel of M/s.Kria Law (Law Firm) for the plaintiff and Ms.Anusha Peri, learned counsel for the sole defendant are before this Commercial Division.

2. Adverting to earlier proceedings made in the previous listings, learned counsel submit that two of the experts (Professors of Indian Institute of Technology, Delhi) who were brought in/Hot Tubbing technique on behalf of the defendant have since withdrawn their consent citing other responsibilities. Learned counsel for plaintiff submits that he has moved



WEB COPY



A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022

a simple application under Order XXVI to bring on board expert information.

3. Learned counsel for defendant requests for a short accommodation to file an application qua new experts on the side of the defendant and bring it on Board. It is also submitted that compromise confidentiality club could not be completed as between the parties and an attempt to do the same will be done between the parties between today and next listing if that not be so, this Commercial Division will have to look at the matter from other perspectives. As regards earlier proceedings dated 15.09.2022, more particularly paragraph 7 thereat, the comparison qua operating version from January 2021 to 13.04.2022 would essentially mean comparison of plaintiff's version 15.2 is learned plaintiff's counsel say. All this will be considered when the applications are taken up in the ensuing listing/s."

17. It is in this background, the defendant has filed Applications in A.Nos.5010 and 5012 of 2022. The defendant has submitted that the experts identified by the plaintiff from PriceWaterhouseCooper Services LLP, particularly Ms. Geetu Singh, is not an expert and was merely a Chartered Accountant and therefore incompetent to assist the Court.



*A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022*

WEB COPY

18. It is further submitted that the presence of the said officer raises a suspicion, as to whether, the expert identified by the plaintiff would give an unbiased report to this Court, regarding the alleged copyright theft of the Source Code of the plaintiff by the defendant.

19. It is submitted that even if the, A.No.5012 of 2022, for nominating the experts from IIT Mumbai, is to be dismissed, it would be fair to appoint a neutral person due to perceived proximity between the plaintiff and expert nominated by the plaintiff.

20. That apart, it was submitted that the plaintiff has filed only Version-1 Source Code, but is now seeking to include the Version 15.2 and therefore the application for appointment of an expert is to be recalled as ordered by an order dated 26.08.2022.

21. It is further submitted that the plaintiff cannot keep changing the goal post from one version to another. In this connection, a reference was made to the decision of the Hon'ble Supreme Court in ***Bachhaj Nahar vs. NilimaMahndal and Another***, (2008) 17 SCC 491, wherein, it



*A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022*

was held that no amount of oral evidence can be considered contrary to the readings.

22. That apart, it is submitted that it is the plaintiff who has copied the source code and has accessed to the source code of the defendant and is therefore not entitled for the relief sought for in all the applications filed by the plaintiff. As far as Graphical User Interface (GUI) is concerned, the requirements were made in the architecture of the defendant's source code based on the requirements of the clients and that in any event has been altered.

23. That apart, it is submitted that the plaintiff has filed suit based on false averments and therefore, the plaintiff and its officers are liable to be punished for perjury in terms of application filed under A.No.2464 of 2022.

24. That apart, it is submitted that the Source Code of the defendant is different from the Source Code of the plaintiff. Though, there could be a similarity in the purpose for which they exist. It is



*A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022*

submitted that the plaintiff Source Code is apparently based on the JavaScript, whereas, the defendant's Source Code is on Angular Script and therefore, even on this count, the application filed for appointment of expert cannot be countenanced.

25. The case of the plaintiff is that the plaintiff is a company which was incorporated in the year 2005, and is engaged in providing Liquidity Management Services (LMS) to various banking companies and that it has developed unique Liquidity Management Software which is protected under the Copyrights Act, 1962.

26. It is submitted that some of the former employees of the plaintiff were poached by the defendant and serious attempt was made to wean away some of the important customer/Clients of the plaintiff and that in the course of said attempt, according to the plaintiff, the defendant who has entered in this domain of software solutions for banking companies in the context of Liquidity Management Software has copied not only the Graphical User Interface (GUI) but also the source code of the plaintiff.



*A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022*

WEB COPY

27. It is submitted that whether the defendant has used JavaScript or any other Software Language different from the plaintiff is of no significance, as long as the Source Code of the plaintiff has been copied by the defendant.

28. It is further submitted that when the plaintiff filed a suit, the plaintiff only knew that the defendant was weaning away some of its clients/customers. Using Graphical User Interface (GUI) of the plaintiff. Later it has come to light that the Source Code was copied by the defendant which has come to its knowledge during the pendency of the suit.

29. It is further submitted that the Source Code will reveal that the defendant had copied a source code of the plaintiff which the plaintiff was unaware as to which of the version of the plaintiff was copied by the defendant when it was filed the present suit.

30. It is submitted that since the defendant stated that they have entered the business only in 2021, the plaintiff was constrained to file an



A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022

Application No.4698 of 2022 to compare with version 15.2 of the Source Code of the plaintiff with the Source Code of the defendant.

31. Learned Senior Counsel for the defendant submitted that the plaintiff cannot insist on appointment of an expert of its choice simply because plaintiff is a *dominus litis*. As a *dominus litis*, the plaintiff is only entitled to relief **and the parties whom the plaintiff choose to initiate action. The relief which plaintiff seeks for and the parties to the proceedings.** However, the concept of *dominus litis* cannot be extended for appointment of an expert either Order 26 Rule 9 or Order 26 Rule 10(a) of C.P.C.

32. I have considered the arguments advanced by the learned counsel for the applicant and the learned for the respondent.

33. Two out of four persons appointed as experts two have have withdrawn their consent on 11.10.2022. Thus, only persons nominated by the defendant are available. Two applications in Table-II of this order have been filed by the defendant with an imagined fear that the



*A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022*

remaining two experts nominated by the plaintiff are likely to give a biased report infavour of the plaintiff.

34. Merely because two experts nominated by the defendant have expressed their inability to assist the court any longer would not necessarily mean that the other two experts appointed who were nominated by the plaintiff cannot assist the court.

35. However, with a view to bring absolute neutrality in identifying the expert to assist the Court, this Court made an attempt to scout for other experts from reputed institution in the absence of a Panel for Experts. To balance the interest of the parties, **Dr.G.S.Mahalakshmi**, Associate Professor, Dept.of CSE, College of Engineering Guindy, Anna University, Chennai is appointed as an Expert to give a report.

36. Court also appoints **Mr.Arun Kurian**, (Enrollment No1011/2002) having office at No.21, Mahatma Gandhi Road, Kothari Bagh, Nungambakkam, Chennai 34, as an Advocate Commissioner to ensure easy transmission of all information between the parties and the Expert and the Court.



*A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022*

WEB COPY

37. The fees to be paid to the these expert and the Advocate Commissioner shall be borne by the plaintiff in terms Order XXVI Rule 15 of the Code of Civil Procedure.

38. The terms of reference for the expert are as under:-

- a. The Expert shall liaise with the authorised representatives of the plaintiff and the defendant with the help of the Advocate Commissioner and obtain necessary information and explanations from them regarding the Source Codes of the plaintiff and the defendant to understanding the scope of work to be undertaken by the Expert pursuant to the order of this Court.
- b. To facilitate the above, both the plaintiff and the defendant shall file two set of Source Codes in a sealed cover with a required identification, in hard disk or such number of hard disks as follows:-
 - i)for the purpose of Court Record to be stored safely at the Court Registry as material object; and
 - ii) another set to be handed over to the Expert for examination and for giving



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*A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022*

Report.

- c.Both the plaintiff and the defendant shall provide visual representations of the graphical user interfaces and menu command structures, including previous versions thereof, as above for the expert/Court decide where there are any copyright violations relating to the artistic work or trademark violations pertaining to terminology used.
- d.Both the plaintiff and the defendant shall provide to the Expert in sealed cover through the Advocate Commissioner all other supplementary information or documents that may be required after the expert gets the above information.
- e.If desired, the Expert may also visit the place of business of the plaintiff and the defendant wherever Source Code in server and other IT peripherals are available and stored for giving the report.
- f. The Advocate Commissioner shall act as an interface to facilitate such meetings.
- g.The meeting and discussion with the authorised representatives of the plaintiff and the defendant shall be either at the office of



WEB COPY



*A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022*

both the Advocate Commissioner and the Expert for apply to the additional remuneration depending upon quantum of work and time taken.

- n. Registry is directed to issue two Warrants to the Advocate Commissioner and Expert who shall transmit the Warrant and the order of this Court to the Expert for completion of work. After completing the work, the Advocate Commissioner shall collect the Warrant from the Expert and return before the Warrants to this Court.

39. The report of the above Expert can be subjected to scrutiny during trial and final argument. The said experts can also be summoned to give evidence as Court witness and to explain the report during trial. The Expert can be also cross-examined by either of the parties with the leave of the Court.

40. If the Expert so desires, the Expert may visit the plaintiff and the defendants place of business after due notice to plaintiff and defendant as mentioned above.

41. The Expert and Advocate Commissioner shall file a memo for



*A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022*

their final fees for undertaking the task and for examination of the Source

Code etc and for giving their report through Advocate Commissioner.

The Court shall pass order on the same.

42. In the result, A.No.1600 of 2022 stands allowed, A.No.4698 of 2022 stands allowed as above. A.Nos.5010 and 5012 of 2022 stand dismissed with the above observation.

43. The case shall be listed on the **2nd of March, 2023** for the experts to file their expert report in a sealed cover. Parties shall thereafter apply for certified copy of the same from the court records.

02.02.2023

Index ; Yes/No

Internet : Yes/No

Speaking : Non-speaking Order

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WEB COPY



*A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022*

C.SARAVANAN,J.

kkd

Pre-delivery Common Order in
A.Nos.1600, 4698, 5010 & 5012 of 2022
in C.S.(Comm Div) No.71 of 2022

02.02.2023