



Arb.O.P (Com.Div.) No.311 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	10.03.2023
Pronounced on	15.03.2023

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P (Com.Div.) No.311 of 2022
and A.No.5751 of 2022

Simplex Infrastructures Limited,
Represented by its Assistant General Manager, Mr.R.Swaminathan,
having its Registered Office at 'Simplex House'
27, Shakespeare Sarani,
Kolkata 700 017.

Also at,
Unit C, First Floor, Heavitree Building,
47, Spurtank Road, Chetpet,
Chennai 600 031.

... Petitioner

Vs.

State Bank of India Officers' Association (Chennai Circle),
Represented by its Chairman,
State Bank Building,
84, Rajaji Salai,
Chennai 600 001.

... Respondent



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Arbitration Original Petition filed under Section 11(6)(a) of the Arbitration and Conciliation Act, 1996 to appoint a sole Arbitrator to adjudicate the differences and disputes between the parties hereto.

For Petitioner : Mr.Thriyambak J.Kannan
For Respondent : Mr.R.Shivakumar,
for M/s.K.M.Vijayan & Associates

ORDER

This Arbitration original petition was filed for requesting the appointment of an independent and impartial arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter called as “the Act”) for adjudication of disputes between the parties.

2. The learned counsel for the petitioner would submit that petitioner-company was incorporated under the provisions of the Companies Act, 1956 and it is a leading entity engaged in the business of providing engineering and contracting services for various infrastructures, industrial and housing projects all over India. The petitioner was awarded the work of construction of a Residential



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Township “Unity Enclave” consisting of 21 Towers, Club House, Commercial Buildings and Basements, including finishes, MEP works and external development at Mambakkam, Chennai by the respondent by way of Letter of Award dated 25.06.2014 bearing reference No.SBIOA/UNITYENCLAVE/CONS/LOA/01/2014-15. The said work was awarded to the petitioner pursuant to the petitioner's offer dated 23.04.2014, in response to the respondents' notice inviting tender dated 19.03.2014.

3. It was further submitted by the learned counsel for the petitioner that the petitioner and the respondent had entered into a Contract Agreement on 04.03.2015 for the execution and completion of the work at a value of Rs.547,88,09,797/-. The petitioner had completed the work as envisaged under the agreement on 07.08.2018, despite various constraints and subsequently, the respondent had issued a certificate dated 18.01.2019 confirming the virtual completion of the work on 07.08.2018.



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4. Further, he would submit that the defects liability period of 12 months in terms of the agreement commenced on 08.08.2018 and had expired on 07.08.2019. Subsequent to the expiry of the defects liability period, the respondent had unlawfully invoked the Bank Guarantee furnished by the petitioner towards retention for a sum of Rs.5 crore and received the said amount on 26.09.2020 by such unlawful invocation. Due to the said act of the respondent, especially after the expiry of defects liability period, the petitioner suffered irreparable damages and loss.

5. Under these circumstances, the petitioner submitted it's claims to the respondent on 28.09.2018 and 04.11.2020 for a net amount of Rs.93,43,93,381/-. Further on 25.11.2020, the petitioner submitted a claim for a sum of Rs.17,29,90,006/- to the respondent towards incremental quantity of wall putty work executed for ensuring the smooth surface for carrying out painting work. The learned counsel for the petitioner further submitted that another claim was made to the respondent on 02.12.2020 for a sum of Rs.4,45,90,305/- towards



additional cost incurred by the petitioner for diesel due to increase from time to time in the rate of excise duty levied by the Central Government and Value Added Tax levied by the State Government. In terms of Clause 6.10.9 of General Conditions of Contract (GCC) provides that on receipt of the running account bills, an ad-hoc payment of 70% of the net payable amount shall be made by the respondent to the petitioner within 7 days after preliminary scrutiny and the balance payment shall be made by the respondent to the petitioner within 3 weeks after verification of the bills. Even after the submission of claims by the petitioner on 03.02.2021 for a sum of Rs.6,36,88,443/- towards the balance amount due against the certified running account bills, certified material advance bills and certified miscellaneous bills, the respondent had failed to make payment of the said amount to the petitioner.

6. Therefore, the learned counsel for the petitioner submitted that the petitioner submitted its total claim to the respondent for a sum of Rs.121,86,12,135/-. Despite the petitioner's persistent and close follow-up, the respondent had neither certified or processed these claims nor



have made any payment towards the said claim to the petitioner till date.

Therefore, the respondent's continued insistence on not processing the claims submitted by the petitioner and not making any payment to the petitioner towards the said claim without any reasonable explanation constitutes a dispute, which is required to be resolved in terms of the Dispute Resolution clause of the GCC.

7. The learned counsel for the petitioner further submitted that under these circumstances, on 07.04.2021, the petitioner issued a notice to the respondent invoking Dispute Resolution Clause contained in Clause 8.4 of the GCC. The said clause provides that the disputes in relation to the work shall, in the first instance, be brought to the notice of the Engineer-In-Charge (EIC), who shall thereupon give written instructions or decision within a period of fifteen days of such notice. The learned counsel for the petitioner submitted that on 12.04.2021, the petitioner submitted its claim to the EIC of the respondent by way of speed post and the same was received by the EIC on 16.04.2021. However, no decision was taken and no written instructions have been



given by the EIC till date. As per the Clause 8.4 of the GCC, if the EIC fails to give his instructions or decisions in writing within a period of 15 days after notice, the petitioner can prefer an appeal to the Chairman of Housing Project, SBIOA. Accordingly, the petitioner on 07.02.2022, preferred an appeal, before the Chairman of the respondent, requesting him to render his decision on the claims submitted by the petitioner. However, the Chairman of the respondent also failed to render his decision on the claims submitted by the petitioner.

8. Under the above circumstances and on account of the fact that there was no reply either to the petitioner's letter dated 12.04.2021 to the EIC of the respondent or to the petitioner's appeal dated 07.02.2022 to the Chairman of the respondent, the petitioner issued a notice dated 15.03.2022 to the respondent under Section 21 of the Act invoking the arbitration clause contained in Clause 8.5 of the GCC.

9. In the said notice dated 15.03.2022, it was indicated by the petitioner to the respondent that the said clause providing for



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appointment of sole Arbitrator from a panel of three names provided by the respondent is invalid in the light of the law laid down by the Hon'ble Supreme Court of India in its Judgement dated 26.11.2019 in the matter of *Perkins Eastman Architects DPC v HSCC (India) Ltd.*, reported in *SCC Online SC 1517*. Further, the learned counsel for the petitioner submitted that the judgement of the Hon'ble Supreme Court in the case of *Central Organisation for Railway Electrification v M/s ECI-SPIC-SMO-MCML (JV)*, reported in *(2020) 14 SCC 712* cannot apply to all arbitration proceedings but would have to be restricted only to the arbitration proceedings, where Railways is a party. The said notice dated 15.03.2022 issued by the petitioner was received by the respondent on 16.03.2022. The respondent had neither replied nor suggested the names of the arbitrator as per the Arbitration Clause 8.5 of the GCC. Hence, the present original petition is filed.

10. Per contra, the learned counsel for the respondent strongly refuted the submissions made by the learned counsel for the petitioner and submitted that the contract was executed between the petitioner and



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the Chairman, Housing Project “Unity Enclave”, State Bank of India Officers' Association, Chennai circle, in individual capacity. Further, he would contend that since SBIOA is a trade union, it has no authority to enter into any agreement. The respondent had only issued notice inviting tenders for the construction of Residential Township “Unity Enclave” and thereafter, they had not at all involved in this project. Only the Chairman, in his individual capacity, had entered into the agreement with the petitioner for the benefit of the members of the welfare society. Hence, he would submit that the issuance of notice, by the petitioner against the respondent under Section 21 of the Act for the appointment of Arbitrator, is without any jurisdiction. Further, he would contend that after the completion of the residential unit, it will be fully transferred to the SBIOA Unity Welfare Association. Therefore, the respondent is no way responsible for any liabilities as contended by the learned counsel for the petitioner.

11. The learned counsel for the respondent would further submit that the present petition is liable to be dismissed on the ground that the

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claim made by the petitioner has been discharged and arbitration clause is forfeited in accordance with Clause 8.5 of GCC. Further, he would contend that the present petition was filed without any documents and also without any proof for submission of the said claims. He would also submit that since the notice under Section 21 of the Act came to be issued by the petitioner after a period of 4 years without any cause of action, the present claim is barred by limitation. Hence, he would submit that the said notice issued in terms of the Clause 8.4 of GCC was not at all issued to the appropriate person and the said notice was also not received. Therefore, he would contend that the present petition is liable to be dismissed.

12. Further, it was contended by the learned counsel for the respondent that the appeal filed by the petitioner by virtue of letter dated 07.02.2022 is not reflecting any person or any designation in the letter pad by the petitioner-company. On the other hand, the affidavit filed in support of the petition reflects that one R.Swaminathan, Assistant General Manager of the petitioner-company is authorised by the Board



Resolution dated 10.12.2021. Therefore, he would contend that if that is the case, then the person, on whose instruction the notice issued by the counsel dated 15.03.2022, is invalid. Likewise, the appeal was also not made by the above referred person. Hence, he would contend that the provisions of the Clauses 8.4 and 8.5 of GCC have not been complied with. In support of his contentions, he referred to some of the judgements of this Court and the Hon'ble Apex Court and prayed for the dismissal of the present original petition.

13. I have given due consideration for the submissions made by the respective learned counsel and perused the materials available on record.

14. There is no dispute with regard to the notice inviting tenders issued by the respondent dated 19.03.2014 for the constructions of Residential Township in the name of “Unity Enclave” including finishers, MEP and infrastructures work for SBIOA, Chennai at Mambakkam, Kancheepuram District. The tender document was also



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issued by the respondent on 19.03.2014. Subsequently on 25.06.2014, the respondent also issued the Letter of Award. These are all the undisputed facts. After the above 3 events, an agreement was entered between the Chairman, Housing Project “Unity Enclave”, State Bank of India Officers' Association, Chennai Circle, and the petitioner. As per the said agreement, the terms and conditions of the GCC also would apply. The said agreement was witnessed by the president of SBIOA.

15. In terms of the Clause 1.1 of GCC, “the owner/client” means State Bank of India Officers' Association (Chennai circle) (the respondent), having its registered office at Chennai, Tamil Nadu and the legal successors in title to the owner/client who will employ the contractor. In terms of the GCC, the definition of owner referred to the respondent. Having issued notice inviting tenders on 19.03.2014, the tender document for the work was issued on 19.03.2014 and the Letter of Award was issued on 25.06.2014 by the respondent, at this stage, the respondent took a plea to disown its responsibilities, as if they are no way connected with the present project and by throwing the entire mud



on the Chairman of the residential project of “Unity Enclave”. By

referring the provisions of Trade Unions Act, 1926, the respondent wants

to absolve its liabilities. However, this Court is not in a position to

accept the contentions of the learned counsel for respondent to absolve

the liabilities of the respondent by taking a shield under the Trade

Unions Act after having entered into the above agreement with the

petitioner on behalf of to benefit its members. The Trade Unions Act

provide that the Union can provide all the welfare activities for the

benefit of the members. The execution of the housing project contract is

one of the welfare measures for its members. If they are constructing the

residential buildings and selling it to the outsiders, this would be bad in

terms of the provisions of Trade Unions Act. On the other hand, in the

present case, they have constructed the said residential township to

benefit its members and the said welfare activity is well within the scope

of the Trade Unions Act. Therefore, the respondent cannot take a plea

stating that the present activity is outside the scope of terms of Trade

Unions Act and hence, they can absolve its responsibilities, after issuing

the tender notice, awarding the tender work and issuance of Letter of



Award. Accordingly, this Court is of the considered view that since the respondent is a party to the said contract, they cannot take a shield of the Trade Unions Act and absolve their responsibility.

16. Further, with reference to the submission made by the learned counsel for the respondent that the Chairman, Housing Project is a different entity is concerned, this Court is also not in agreement with the said submission of the respondent for the reason that in an organisation there would be separate divisions/projects and each division/project would be headed by somebody else, which means those divisions/projects cannot be considered as not the division/project of the particular concern. In a similar way, in the present case, the housing project is a separate division of the respondent and it has been managed by the division Chairman. It does not mean that the residential section is no way connected with the respondent. Further, only for the purpose of convenient execution of the work, the respondent had separate divisions and thereby, enable the said division to execute the work in the timely manner, so as to pass on the real benefits to the members at the earliest



point of time. Therefore, the said submission of the learned counsel for the respondent is not sustainable.

17. Further, It was submitted by the learned counsel for the respondent that according to him, the person, who instructed the lawyer to send notice under Section 21 of the Act, is not authorised person. The person, who is authorised to file the present original petition and the person, who authorise the lawyer to send the notice under Section 21 of the Act is entirely different. Therefore, he has sent the notice under Section 21 of the Act, without any authority. As far as this submission is concerned, this Court is of the considered view that it is for the petitioner-company to appoint its representative to authorise anybody in the company to represent on behalf of the company and to give instructions. It is the contention of the learned counsel for the petitioner that upon proper authorisation only, the Representatives of the company had given their instructions and on that basis only, the notice under Section 21 of the Act was issued. Therefore, this Court is of the considered view that it is for the petitioner-company to nominate its representative to represent the company before Court and instruct the



lawyer to send notice. It is not necessary that the same person, who has instructed the lawyer, should represent the company for the purpose of filing this original petition before Court. It can be a different person. Therefore, the objection made by the respondent in this regard is not sustainable.

18. Now let this Court examine the compliance of Clauses 8.4 and 8.5 of the GCC. The Clause 8.4 of GCC states as follows:

“8.4 DISPUTE RESOLUTION

All disputes and differences of any kind whatever arising out of or in connection with the carrying out of the works, the Contractor shall promptly bring to the notice of EIC in writing. There upon EIC shall give his written instructions or decision within a period of fifteen days of such notice.

Upon the receipt of the written instructions or decisions the Contractor shall promptly proceed without delay to comply with such instructions or decisions. If EIC fails to give his instructions or decisions in writing within a period of fifteen days after notice, or if the Contractor dissatisfied with the instructions and decisions, he can appeal to CHAIRMAN, HOUSING PROJECT SBIOA (CC), which shall afford an opportunity to the Contractor to be heard and to offer evidence in support of his appeal, CHAIRMAN,



HOUSING PROJECT SBIOA (CC) shall give a decision within a period of thirty days after the Contractor has given the said evidence in support of his appeal.

If the Contractor is dissatisfied with this decision, the Contractor within a period of thirty days from the receipt of the decision shall indicate his intention to refer the dispute to Arbitration, failing which the said decision shall be final and conclusive."

19. A Perusal of the above clause makes it clear that if there is any dispute, the same has to be taken to notice of EIC in writing. In compliance of the same, the petitioner had sent a letter on 07.04.2021 thereby referred the dispute with regard to the sending of letter dated 07.04.2021 to the Chairman, Housing Project of the respondent. In order to prove the case of the petitioner about the receipt of the said document by the respondent, they have also filed the postal receipt. Subsequent to the 07.04.2021 notice, the petitioner had also sent a notice on 12.04.2021 to the EIC. However, there was a dispute with regard to the sending of notice and receipt of the notice by the appropriate person. However, a perusal of the document, the postal receipt and the acknowledgement filed by the petitioner, makes it clear that the petitioner in due



compliance of Clause 8.4 of GCC had sent appropriate notice. However, the EIC only had refused to act and perform his obligation in terms of Clause 8.4 of GCC. Thereafter, the petitioner was constrained to make an appeal to the Chairman, Housing Project in terms of the said Clause on 07.02.2022. The receipt and acknowledgement of the appeal dated 07.02.2022, which was delivered to the appropriate person, was also filed by the petitioner and even after the receipt of this appeal, the Chairman also had failed to act upon in terms of the agreement. Therefore, the petitioner was constrained to issue a notice under Section 21 of the Act, in terms of the Clause 8.5 of GCC, which reads as follows:

“8.5 ARBITRATION

Any disputes or differences not resolved amicably, of any kind whatsoever which shall at any time arise between the parties hereto touching to concerning the works thereof this contract or to the rights or liabilities of the parties or arising out of or in relation thereto whether during or after determination, fore-closure, or breach of the contract. (Other than those in respect of which the decision of any person is by the contract expressed to be final and binding) shall after written notice by either party to the contract to the other of them and to the Appointing Authority who shall to be



appointed for this purpose by the Employer (SBIOA) be referred for adjudication to a sole arbitrator to be appointed as hereinafter provided. For the purpose of appointing the sole arbitrator referred to above, the Appointing Authority will send within thirty days of receipt by him of the written notice aforesaid to the contractor a panel of three names of persons who shall be presently unconnected with the organization for which the work is executed. The contractor shall on receipt by him of the names as aforesaid, select any one of the persons named to be appointed as a sole arbitrator and communicate his name to the Appointing Authority within thirty days of receipt by him of the names. The Appointing Authority shall thereupon without any appointment the said person as the sole arbitrator. If the contractor fails to communicate such selection as provided above within the period specified, the Appointing Authority shall make the selection and appoint the selected person as the sole arbitrator. If the Appointing Authority failing to send to the contractor the panel of three names as aforesaid within the period specified, the contractor shall send to the Appointing Authority a panel of persons who shall all be unconnected with either party. The Appointing Authority shall on receipt by him of the names as aforesaid select any one of the persons named and appoint him as the sole arbitrator. If the Appointing Authority fails to select the person and appoint him as the sole arbitrator within 30 days of receipt by him of the panel and inform the contractor



accordingly, the contractor shall be entitled to appoint one of the persons from the panel as the sole arbitrator and communicate his name to the Appointing Authority

If the Arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason Whatsoever, another sole arbitrator shall be appointed as aforesaid. The work under the contract, shall however, continue during the arbitration proceeding and no payment due or payable to the contractor shall be withheld on account of such proceedings. The arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the first hearing. The arbitrator may from time to time. with the consent of the parties enlarge the time for making and publishing the award. The Arbitrator shall give a separate award in respect of each dispute or difference referred to him. The Arbitrator shall decide each dispute in accordance with the terms of the contract and give a reasoned award. The venue of arbitration shall be such place as may be fixed by the Arbitrator in his sole discretion. The fees, if any. of the Arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The costs of the reference and of the award including the fees, if any of the Arbitrator who may direct to and by whom and in what manner, such cost or any part thereof shall be paid and may fix or settle the amount of costs to be so paid. The award of



the Arbitrator shall be final and binding on both the parties. Subject to aforesaid the provisions of Indian Arbitration & Conciliation Act, 1996 or any statutory modification or re-enactment thereof and the rules made there under, and for the time being in force. shall apply to the arbitration proceeding under this clause. In all cases where the amount of the claim is in dispute is Rs.1,00,000/- (Rupees One lakh only and above, the arbitrator shall give reasons for the award It is also a term of Contract that if Contractor(s) do/does not make any demand for arbitration in respect of any claims within 90 days of receiving intimation from SBIOA/EIC that the bill after due verification is passed for payment of a lesser amount, or otherwise, the contractor's right under this agreement to refer to arbitration shall be deemed to have been forfeited and SBIOA/IC shall be relieved and discharged of their liability under this agreement in respect of such claim(s). Further. it is agreed that for the purpose of this clause, such notice is deemed to have been received by the contractor(s) within 2 days of posting of the letter by SBIOA/EIC or when delivered by hand immediately after receipt thereof by the contractor(s), whichever is earlier. Further, a letter signed by the officials of SBIOA/EIC that the letter was so posted to the contractor(s) shall be conclusive."

20. A Reading of the above clause would shows that the respondent would nominate three Arbitrators and out of the said three



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Arbitrators, the petitioner has to nominate a sole Arbitrator. However, the said clause appears to be against the law laid down by the Hon'ble Apex Court in the aforementioned *Perkins* judgement, which states that if a person is ineligible to be appointed as an Arbitrator, the said person is also ineligible to nominate any other person as Arbitrator. If the same analogy is applied in the present case, this Court is of the considered view that the petitioner has rightly filed this present petition for appointment of Arbitrator in order to avoid further conflicts and to appoint a neutral Arbitrator by this Court.

21. As far as the plea took by the respondent that the present claim is barred by limitation is concerned, a perusal of the claims made by the petitioner makes it clear that according to the petitioner, the work was completed on 07.08.2018 and the virtual completion certificate was issued to him on 08.12.2019 confirming the virtual completion of the work on 07.08.2018. In terms of Clause 2 of the terms and conditions of the Letter of Award, the defect liability period in respect of work is 12 months from the date of virtual completion. Therefore, the defect



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liability period in respect of work had expired on 07.08.2019. The respondent had also invoked Bank Guarantee subsequent to the defect liability period on 26.09.2020. The Claim Nos.1 and 2 were submitted on 28.09.2018 and 04.11.2020, the Claim No.3 was submitted on 25.11.2020, Claim No.4 was submitted on 02.12.2020 and the Claim No.5 was submitted on 03.02.2021. All those aspects makes it clear that the claims were made within the period of limitation. Further the Hon'ble Apex Court in '*Re Cognizance For Extension of Limitation [Miscellaneous Application No. 21 of 2022 in Miscellaneous Application No. 665 of 2021 in Suo Motu Writ Petition (C) No. 3 of 2020 dated January 10, 2022]*', restored its earlier order in order to exclude period starting from March 15, 2020 till February 28, 2022, for the purposes of limitation prescribed under any general or special laws in respect of all judicial or quasi judicial proceedings, in view of the spread of the new variant of the COVID-19 and the drastic surge in the number of COVID cases across the country. The same extension of limitation would apply for the present case as well and to that extent, the limitation will be saved. However, even without looking into that aspect, this Court



feels that present claim is also well within the period of limitation.

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22. Further, the learned counsel for the respondent contended that only the residential project was completed and with regard to the commercial project, the same has not yet been completed, which shows a running account have been maintained by the respondent and in the present case, the cause of action is a continuous cause of action, in which case, everyday, a fresh period of limitation would start. Hence, as far as the submission that the present claim is barred by limitation is concerned, the same is not sustainable and I reject the same.

23. Since this Court decided the dispute on the facts, the very many case laws referred by the learned counsel for the respondent may not necessary to be considered, in view of the above decision arrived by this Court. In such view of the matter, this Court is of the considered view to adjudicate the present dispute it it necessary to appoint a sole Arbitrator as pleaded by the petitioner to adjudicate the disputes *inter se* the parties.



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24. Accordingly, this Court feels it appropriate to pass the following order:

i) Hon'ble Mr.Justice F.M.Ibrahim Kalifulla, Former Judge, Supreme Court of India, Plot No.158-B, Door No.22, Sivananda Salai, Gill Nagar Extension, Choolaimedu, Chennai 600 094, Mobile No: 94449 48928 is appointed as sole arbitrator to enter upon reference and adjudicate the disputes *inter se* the parties.

ii) The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of one year from the date of receipt of the Order.

iii) The learned Sole Arbitrator appointed herein shall be paid fees and other incidental charges, fixed by him and the same shall be borne by the parties equally. In the event of non-appearance of the respondent/petitioner or any of the parties, the petitioner/respondent shall bear the entire remuneration and other expenses and thereafter, the petitioner/respondent can recover the same directly from the respondent/petitioner.



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25. This Arbitration Original Petition is ordered accordingly, leaving the parties to bear their own costs. Since this Court has appointed an Arbitrator, the parties are at liberty to raise disputes with regard to all other claims including limitation, if so advised once again before the Arbitrator and the learned Arbitrator is also directed to decide all the claims without influenced by any of the observations made by this Court in the present order.

26. In view of the order passed in the present original petition, no further order required in the implead application in A.No.5751 of 2022 and hence the said application is closed.

15.03.2023

Speaking/Non-speaking order

Index : Yes / No

Neutral Citation : Yes / No

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KRISHNAN RAMASAMY.J.,
nsa

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