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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.09.2026

DELIVERED ON : 08.10.2026

CORAM :

THE HONOURABLE MR. SUSHRUT ARVIND DHARMADHIKARI,
CHIEF JUSTICE

Arb.O.P.(Com.Div.) No.157 of 2026

BGR Energy Systems Pvt. Ltd,
Rep. by its Authorised Signatory,
Raghupathy, No.443, Anna Salai,
Teynampet, Chennai-600 018.

Petitioner

Vs

1.Tamil Nadu General and DistributionCorporation
6th Floor, TRANTRANSCO Building,
144, Anna Salai, Chennai-600 002.

2.The Chief Engineer/Projects-I,
Tamil Nadu Generation and Distribution Corporation,
5th Floor, Western Wing, NPKRR Maaligai,
No.144, Anna Salai, Chennai-600 002.

Respondents

PRAYER: Petition filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 to appoint a Sole Arbitrator to adjudicate the disputes that have arisen between the petitioner company and the respondents in the Contract Agreement executed between the two parties, signed on 28.10.2016.

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For Petitioner: Mr.P.H.Arvind Pandian
Senior Counsel
for Mr.A.Sarangan

For Respondent: Mr.T.Gowthaman
Addl. Advocate General
assisted by
Mr.D.R.Arun Kumar
Standing Counsel

ORDER

The petitioner has filed this petitioner to appoint a Sole Arbitrator under Section 11(5) of the Arbitration and Conciliation Act, 1996 ("*the Act*").

2.1. The facts in a nutshell are that the petitioner is a public limited company engaged in executing large projects, mainly in the power, oil and gas sectors. The first respondent, Tamil Nadu Generation and Distribution Corporation, is a government undertaking. The second respondent, the Chief Engineer/Projects-I, is its officer and signed the contract on its behalf.

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2.2. The respondents invited bids for the Balance of Plant (BoP) package, with allied civil works, for the 1 x 800 MW Coal-Based North Chennai Supercritical Thermal Power Project, Stage III. The petitioner's offer was accepted by a Letter of Intent. The firm contract price was Rs.2,600.02 crore. The petitioner furnished a bank guarantee of about Rs.77.80 crore, issued by the State Bank of India, as the Letter of Intent required. A contract agreement was then signed between the petitioner and the first respondent.

2.3. According to the petitioner, the respondents were late in handing over the site; several site fronts could not be cleared in time; engineering and other approvals were not given. It is also pleaded that payments were delayed and the legacy tax issues after the introduction of GST in 2017 were not settled. A stay by the National Green Tribunal on a bridge across the Kosasthalaiyar River added to the delay. The petitioner says it kept working through the COVID period, completed nearly 95% of the scope and that the plant started functioning after commissioning on 07.03.2025. It is added that the respondents invoked a bank guarantee from another project, the Ennore Thermal Power Station, which froze its

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accounts, and that the respondents gave its equipment to their O&M vendors without its consent, which damaged the equipment.

2.4. The petitioner wrote to the respondents on 12.11.2020 about the inflated costs and the changes in scope, but received no response. On 19.03.2024, the second respondent issued a notice alleging delay in completing the work, to which the petitioner replied on 25.03.2024. On 27.03.2024, the respondents invoked the bank guarantee for the project. The petitioner challenged that in W.P.No.8450 of 2024, which is pending. The petitioner also says the respondents did not terminate the contract, but floated a fresh tender for completing the project.

2.5. The petitioner then filed O.A.Nos.596 and 597 of 2025 and Arb.Appln.No.763 of 2025 under Section 9 of the Act. Those were closed on 09.09.2025 with liberty to file a fresh petition. The petitioner issued a notice under Section 21 of the Act on 01.11.2025. Relying on Clause 94 of the Letter of Intent, titled "*Settlement of Disputes*", it filed this petition. In paragraph 17, it pleads that the clause has all the essential elements of an

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arbitration agreement, viz., a written agreement, an intent to submit disputes to a party or tribunal who will adjudicate after giving the parties a chance to lead evidence, and a binding decision.

3.1. On the contrary, the second respondent has filed a counter affidavit asserting that the work had to be completed within 36 months, but it is still incomplete. The petitioner stopped work, including commissioning, and abandoned the site on 02.02.2024. A notice to resume work was ignored. A show cause notice was issued on 07.03.2025, the petitioner replied on 04.04.2025, and the contract was terminated by an order dated 18.07.2025. The bank guarantee was invoked on 20.03.2024.

3.2. The asseverations in the counter are to the effect that Clause 94 of the Agreement is only a contractual mechanism for settling disputes. The clause does not make the Chief Engineer's decision final and binding. He is an officer of the first respondent, one of the parties, and cannot be a judge in his own cause. The Clause shows no clear and mutual intention to go to arbitration. It

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sets up an internal departmental appeal. It covers only appeals against the Engineer's decisions, not all disputes under the contract.

4.1. Learned Senior Counsel for the petitioner pointed out that Clause 94 is headed "*Settlement of Disputes*" and Section 16(1) of the Act lets the Arbitral Tribunal rule on its own jurisdiction, including any objection to the existence or validity of the arbitration agreement and, therefore, the objection raised by the respondents is for the Arbitrator to decide and the dispute should be referred to arbitration.

4.2. Learned Senior Counsel further submitted that the dispute resolution clause need not be in clear terms and that the words "*arbitration*" or "*arbitrator*" are not essential. He relied on paragraph 8(ii) of the decision of the Supreme Court in *Jagdish Chander v. Ramesh Chander and others*[1], where the Supreme Court held that a clause can still be an arbitration agreement if it has the attributes, even without those explicit words. He added that when a

1 *(2007) 5 SCC 719*

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settlement of disputes involves an adjudicatory process, an arbitrator can be appointed.

5.1. Per contra, learned Additional Advocate General appearing on behalf of the respondents submitted that the petitioner is looking for a novel way to avoid paying court fee. A claim worth hundreds of crores has been valued at Rs.50/- for this petition. He added that the petitioner must go to the civil court to ventilate its grievance. There is no arbitration clause in the agreement.

5.2. Learned Additional Advocate General relied on paragraph 11 of the decision in *Jagdish Chander* (supra) to say that there is no arbitration agreement as defined under Section 7 of the Act. He also relied on paragraphs 46 and 47 of the decision of the Supreme Court in *South Delhi Municipal Corporation v. SMS Ltd*[2], to submit that none of the requirements set out there is found in Clause 94.

2 *(2026) 1 SCC 545*

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6. Before adverting to the merits of the case, it is apposite to refer to Clause 94 of the Letter of Intent entered into between the parties:

> *"94.1. If the Contractor considers any work demanded of him to be outside the requirements of the Contract or considers any drawing, records or ruling of TANGEDCO or his representative on any matter in connection with or arising out of the Contract or the carrying out of work to be unacceptable, he shall promptly ask TANGEDCO or his representative in writing, for written instructions or decision. Thereupon TANGEDCO or his representative shall give his written instructions or decision within a period of Fifteen (15) days of such request.*
>
> *94.2. Upon receipt of the written instructions or decision, the Contractor shall promptly proceed without delay to comply with such instructions or decision.*
>
> *94.3. If TANGEDCO or his representative fails to give his instructions or decision in writing within a period of Fifteen (15) days after being requested or if the Contractor is dissatisfied with the instructions or*

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decision of the Engineer, the Contractor may within Fifteen (15) days after receiving the instructions or decision appeal to the Chief Engineer. The Chief Engineer shall within Fifteen (15) days on receipt of the appeal afford an opportunity to the Contractor to be heard and to offer evidence in support of his appeal. The official shall give a decision within a period of Fifteen (15) days after the Contractor has given the said evidence in support of his appeal."

7. A petition under Section 11(5) of the Act can succeed only if the parties have an arbitration agreement within the meaning of Section 7 of the Act. If there is none, there is nothing the Court can enforce by appointing an arbitrator.

8.1. In *K.K.Modi v. K.N.Modi and others*[3], the Supreme Court has set out what an arbitration agreement must contain. It is seemly to refer to paragraphs 17 and 18 of the said decision hereunder:

3 *(1998) 3 SCC 573*

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"17. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:

(1) The ***arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement****,*

(2) ***that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration****,*

(3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(4) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,

(5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(6) the agreement must contemplate that the tribunal will make a decision upon a dispute

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which is already formulated at the time when a reference is made to the tribunal.

18. The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law."

[emphasis supplied]

8.2. In the aforesaid decision, the Supreme Court*, inter alia,* stipulates the attributes, such as (i) the arbitration agreement must contemplate that the decision of the tribunal will bind the parties; (ii) the tribunal's jurisdiction must come from the parties' consent; (iii) the tribunal must decide the rights of the parties in an impartial and judicial manner, with an equal obligation of fairness to both sides; and (iv) the parties' agreement must be meant to be enforceable in law.

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9.1. In this context, it is apposite to refer to the decision of the Supreme Court in *Jagdish Chander* (supra), wherein it is held thus:

> *"8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in K.K. Modi v. K.N. Modi [(1998) 3 SCC 573], Bharat Bhushan Bansal v. U.P. Small Industries Corpn. Ltd. [(1999) 2 SCC 166] and Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd. [(2003) 7 SCC 418]. In State of Orissa v. Damodar Das [(1996) 2 SCC 216] this Court held that* ***a clause in a contract can be construed as an "arbitration agreement" only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause.*** *We may at this juncture set out the well-settled principles in regard to what constitutes an arbitration agreement:*
>
> > *(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement.* ***If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their***

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disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. *Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.*

(ii) Even if the words "arbitration" and "Arbitral Tribunal (or arbitrator)" are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. ***They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between***

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them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. ***But where the clause relating to settlement of disputes, contains words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement.*** *For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or*

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requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word "arbitration" or "arbitrator" in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement.

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Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

...

11. ***The existence of an arbitration agreement as defined under Section 7 of the Act is a condition precedent for exercise of power to appoint an arbitrator/Arbitral Tribunal, under Section 11 of the Act by the Chief Justice or his designate. It is not permissible to appoint an arbitrator to adjudicate the disputes between the parties, in the absence of an arbitration agreement or mutual consent. The designate of the Chief Justice of Delhi High Court could not have appointed the arbitrator in the absence of an arbitration agreement****."*

[emphasis supplied]

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9.2. In *Jagdish Chander* (supra), the Supreme Court reiterated that (i) the agreement must be in writing; (ii) the parties must have agreed to refer their disputes to a private tribunal; (iii) the tribunal must be able to decide impartially, giving both sides a fair chance to put forth their case; and (iv) the parties must have agreed that its decision binds them. It was further held that an arbitration agreement under Section 7 of the Act is a condition precedent to the power to appoint an arbitrator under Section 11 of the Act and that an arbitrator cannot be appointed when there is no arbitration agreement or mutual consent.

10. Section 7(1) of the Act defines an arbitration agreement as an agreement by the parties to submit to arbitration all or certain disputes that have arisen or may arise between them in respect of a defined legal relationship. The central idea is that the parties have agreed, and agreed to go to arbitration. A mere dispute settlement procedure does not meet that description.

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11.1. In *South Delhi Municipal Corporation* (supra), the Supreme Court restated the necessary ingredients of a valid arbitration agreement. It is apposite to refer to paragraphs 47 and 48 of the said decision hereunder:

> *"46. Considering the global position on the validity of arbitration agreements in tandem with the settled law that holds the field in India, we find that the existence of an arbitration agreement necessarily postulates the presence of the following ingredients:*
>
> ***(i) Clear intent to arbitrate***
> ***The agreement must reflect a definitive and mutual intention to refer disputes to arbitration, excluding the jurisdiction of civil courts in respect of such matters. Consensus ad idem or "meeting of the minds" of the respective parties towards settling any disputes that may arise between them through the process of arbitration must be made out from the form and substance of the legal agreement or contract.*** *This ideally entails the parties reducing their intention of entering into an arbitration agreement into some tangible medium.*

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(ii) Binding adjudicatory process

The arbitration agreement must contemplate a binding and enforceable resolution of disputes. The process must culminate in a final and conclusive award, not a non-binding recommendation or mediation outcome. In essence, the result of the arbitral process should be final and binding on both the parties*.*

(iii) Compliance with arbitration norms

While the statutory minimums do not universally require specification of seat, venue, or applicable procedural rules, best practices and several foreign jurisdictions encourage clarity in these respects to ensure legal certainty. ***The agreement should allow for party autonomy in the appointment of arbitrators and procedural conduct, subject to statutory safeguards.*** *The adversarial process, which inheres in the institution of arbitration, must also be given due credence via provision for an impartial adjudicatory body, whose decisions involve deference to the principles of natural justice.*

47. ***We may, however, hasten to add that the aforementioned elemental test is a conjunctive one, and not a disjunctive one. In other words,***

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all the elements identified hereinabove must co-exist, apart from being duly proven by the party which seeks to assert that an arbitration agreement subsists."

[emphasis supplied]

11.2. The Supreme Court, in the aforesaid decision, made it clear that a valid arbitration agreement must contain a clear intent to arbitrate, a binding adjudicatory process, and it should be in compliance with arbitration norms. Paragraph 47 of the said decision adds that the test is conjunctive. All three must exist together. A party who claims there is an arbitration agreement must also prove that all the three ingredients, alluded to supra, exist.

12. This Court now turns to assess Clause 94 in the light of the aforementioned established principles. Nothing in Clause 94 refers disputes to arbitration. The words "*arbitration*", "*arbitrator*", "*arbitral tribunal*" and "*award*" do not appear. The Clause does not say the parties agree that disputes shall be referred to a tribunal or to any independent person. Of course, there is dispute to the proposition that the absence of these words is not fatal in itself.

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However, that rule helps only when the clause otherwise has the attributes of an arbitration agreement. In the case at hand, such attribute does not exist. It is also apparent that the petition itself describes the clause as providing for submission of disputes "*to a party/tribunal who shall adjudicate*". Such wording does not point to any tribunal, because there is none in the Clause. Therefore, there is no clear intent to arbitrate.

13. Clause 94.1 deals with a contractor who finds a work demand, a drawing, a record or a ruling of TANGEDCO unacceptable. His remedy is to ask for written instructions or a decision. Clause 94.3 then lets him appeal to the Chief Engineer if the Engineer does not decide, or if he is unhappy with the Engineer's decision. The Clause is about challenging decisions taken during the work. It is an appeal within the department. It is not an agreement to have all disputes under the contract decided by a private tribunal. Ergo, there is no binding adjudicatory process.

14. Moreover, Clause 94.3 says the Chief Engineer "*shall give a decision*" within fifteen days. It does not say that the decision is

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final, or that it binds both parties. It does not say that the contractor gives up his right to go to a civil court.

15. Learned Senior Counsel relied on the Chief Engineer's duty to give the contractor a hearing and let him lead evidence. Affording a hearing is a fair process and that does not turn an internal appeal into arbitration. The Supreme Court observed in *South Delhi Municipal Corporation* (supra) that expert determinations, departmental adjudications and administrative reviews do not become arbitration even when their results are final and binding. What makes arbitration different is the independence of the decision-maker and the parties' agreement to be bound by the decision. Neither is present here.

16. Clause 94 is headed as "*Settlement of Disputes*". A heading cannot supply what the text of the Clause lacks. What matters is what the Clause actually provides, and that is beyond any cavil an internal appeal procedure.

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17. Evaluated on the touchstone of the law laid down by the Supreme Court in *K.K.Modi*, *Jagdish Chander* and *South Delhi Municipal Corporation* (supra), Clause 94 fails the test. It shows no clear intent to arbitrate. It does not provide for a binding adjudication. It does not provide an independent adjudicator. It is, therefore, not an arbitration agreement under Section 7 of the Act.

18. The main plank of the argument advanced by learned Senior Counsel for the petitioner rests on Section 16(1) of the Act. He contended that the Arbitral Tribunal can decide its own jurisdiction, so the Court should appoint an Arbitrator and let the Arbitrator decide whether there is an arbitration agreement or not.

19. This court is unable to accept such submission. Section 16 of the Act empowers an Arbitral Tribunal that already exists. It assumes that there is an arbitration agreement under which a tribunal has been constituted. It cannot be used to bring a tribunal into being where the parties never agreed to arbitrate. The Supreme Court in *Jagdish Chander* (supra) held that the existence of an arbitration agreement under Section 7 of the Act is a condition

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precedent for exercising the power under Section 11 of the Act. The Court must, therefore, be satisfied, on the face of the document, that an arbitration agreement exists. When a clause is clearly not an arbitration agreement, sending parties to arbitration just to let an arbitrator state the obvious wastes everyone's time and money.

20. The next submission of learned Senior Counsel for the petitioner that if the dispute resolution process involves adjudication, an arbitrator can be appointed cuts no ice. Adjudication alone is not enough. The agreement must be to arbitrate, and the adjudicator must be independent of the parties. Paragraph 8(ii) of decision in *Jagdish Chander* (supra) postulates that the clause should have all the attributes of an arbitration agreement. It does not say that any clause with some adjudicatory feature qualifies.

21. Learned Senior Counsel for the petitioner placed weight on the fact that its petitions under Section 9 of the Act were closed with liberty to file a petition under Section 11 of the Act and it is based on such liberty granted that the petitioner has filed this

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petition. The said submission does not merit consideration, in as much as such liberty granted, by itself, does not create an arbitration agreement, that this Court has already ruled does not exist.

22. For the aforegiven reasons, this Court holds that Clause 94 of the agreement is not an arbitration agreement within the meaning of Section 7 of the Act and in the absence of an arbitration agreement, this Court cannot appoint an Arbitrator under Section 11(5) of the Act. The petition is, therefore, not maintainable.

23. As a sequel, the Original Petition is dismissed. The petitioner is at liberty to approach the competent court to pursue its claims and remedies in accordance with law. If the petitioner claims the benefit of Section 14 of the Limitation Act, 1963, for the time spent in these proceedings, that question will be decided by the court concerned.

It is made clear that this court has not gone into the merits of the dispute and nothing in this order will affect the pending

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proceedings in W.P.No.8450 of 2024, or any right or defence of either side on the merits in any proceeding the petitioner may file.

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(SUSHRUT ARVIND DHARMADHIKARI,CJ)
08.10.2026

Index : Yes
Neutral Citation : Yes
sasi

To

1.The Assistant Registrar,
Madras High Court Arbitration Centre,
Chennai-600 104.

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Arb OP (Com.Div) No.157 of 2026

THE HON'BLE CHIEF JUSTICE

(sasi)

Pre-delivery Order in
Arb.O.P.(Com.Div.) No.157 of 2026

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