

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 22.04.2008

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IA.No. 14373/07 (u/O 39 R 1 & 2 CPC) in CS(OS) 2454/2007

M/S MOSER BAER INDIA LTD.

... Plaintiff

- versus -

**KONINKLIJKE PHILIPS
ELECTRONICS NV. & ORS.**

... Defendants

Advocates who appeared in this case:

For the Plaintiff	: Mr Harish N. Salve, Mr A.S. Chandhiok, Mr N.K. Kaul, Mr Sanjay Jain Sr Advocates with Mr Vijay Sondhi, Mr Sanjeev Kumar, Mr Ashish Prasad, Mr Abhinav Sanghi, Mr Amrban Bhattacharya, Ms Sweta Kakkar, Mr Madhukar Dhingra, Ms Abhiruchi Mengi, Ms Anu Bagai, Ms Enagoli Sema and Mr Bhuvan Mishra
For the Defendants	: Mr Dushyant Dave, Sr Advocate with Mr Praveen Anand, Mr Ravi Varma, Mr Ameet Dutta, Mr Himanshu Bagai, Mr Thomas George, Ms Milanka Chaudhary and Mr Sarojanand Jha

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

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| 1. Whether Reporters of local papers may be allowed to see the judgment ? | YES |
| 2. To be referred to the Reporter or not ? | YES |
| 3. Whether the judgment should be reported in Digest ? | YES |

BADAR DURREZ AHMED, J

1. Through this application under order 39 rules 1 & 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as “the CPC”), the plaintiff is seeking, as an interim injunction, essentially the same relief sought in the suit itself, which is to restrain the defendants from initiating any fresh proceedings against the plaintiff in a foreign court and from continuing with the suit - *Koninklijke Philips Electronics NV vs Moser*

Baer India Ltd – filed by the defendant no.1 at The Hague, The Netherlands, as well as from continuing with the third party claim and counter claim filed by the defendant no.1 against, inter alia, the plaintiff in the complaint [Civ.A. No. 07-3668 (DWF/AJB)] filed by Imation Corporation before the Minnesota District Court, USA. Briefly put, the plaintiff prays for an anti-suit injunction against the defendants (more particularly against defendant no.1) on the strength of interim orders passed by this court in the plaintiff's earlier suit [CS(OS) 2026/2006] and on the pleas of *forum non-conveniens* and that the proceeding before the foreign courts are vexatious and oppressive to the plaintiff. The defendants have resisted this application on *inter alia* the plea that this court lacks territorial jurisdiction and that the conditions precedent for the grant of an anti-suit injunction as determined by the Supreme Court in **Modi Entertainment Network v. W.S.G. Cricket Pte Ltd: (2003) 4 SCC 341** have not been fulfilled.

2. The plaintiff manufactures and sells optical and magnetic data storage media products. The defendant nos. 2 & 3 are alleged to be the Indian “arms” of the subsidiaries of the defendant no.1, with whom the plaintiff entered into 6 Disc Patent License Agreements (DPLAs) on different dates between 01.07.2001 and 10.02.2003 whereby the defendant no.1 licensed its patents in respect of the following types of discs – CD-R, CD-RW, DVD+R, DVD-R, DVD-RW and DVD+RW. The DPLAs were for 10 years from their respective effective dates and contained similar

terms with some differences with regard to, *inter alia*, the quantum of royalty payable by the plaintiff to the defendant no.1 in respect of each type of disc. Consequently, the plaintiff was liable to pay royalty to the defendant no.1 in respect of each disc manufactured and sold by it under the DPLAs. Each of these agreements also contained a jurisdiction clause which read as:-

“This Agreement shall be governed by and construed in accordance with the laws of the Netherlands. Any disputes between the parties hereto in connection with the Agreement (including any question regarding its existence, validity or termination) shall be submitted to the competent courts of the Hague, the Netherlands, provided always that, in case Philips is the plaintiff, Philips may at its sole discretion submit any such dispute either to the competent courts in the venue of Licensee’s registered office, or to any of the competent courts in the Territory. Licensee hereby irrevocably waives any objection to the jurisdiction, process and venue of any such court and to the effectiveness, execution and enforcement of any order or judgment (including, but not limited to, a default judgment) of any such court in relation to this Agreement, to the maximum extent permitted by the law of any jurisdiction, the laws of which might be claimed to be applicable regarding the effectiveness, enforcement or execution of such order or judgment.”

3. Earlier, in 1995, the defendant no.1 had entered into a Cross License Agreement (CLA) with Minnesota Mining & Manufacturing Company (3M company) of USA. Under the CLA, both, the defendant no.1 and 3M company were granted reciprocal royalty free licenses for each others patents relating to optical disc technology. Subsequently, 3M company assigned its rights under the said CLA to Imation Corporation. The plaintiff manufactured and sold the said products to, *inter alia*, Imation Corporation and its subsidiary Global Data Media FZ-LLC (GDM). Since,

Imation Corporation (including its subsidiary) was a licensee under the CLA, it was represented by Imation Corporation that no royalty was payable to defendant no.1 in respect of sales by the plaintiff to it. Such sales were allegedly reported to the defendant no.1, who, it is alleged, did not object initially. Subsequently, the defendant no.1 construed it as a breach of the 6 DPLAs and issued six default notices to the plaintiff on 18.10.2006 threatening cancellation of the DPLAs. Imation Corporation and the plaintiff were of the view that the defendant no.1 had no right to request for royalties in respect of sales made by the plaintiff to Imation Corporation, the latter be a licensee under the CLA.

4. This led to the filing of two separate actions, one each by the plaintiff and Imation Corporation. The Plaintiff filed a suit [CS(OS) 2026/06] in this court seeking a declaration and injunction against the defendants herein in respect of the said six default notices issued by the defendant no.1. Imation Corporation filed a declaratory judgment action [Civ.A. No. 07-3668 (DWF/AJB)] against defendant no.1 before the Minnesota District Court, USA. The plaintiff was not initially joined as a party in Imation's suit. The circumstances under which the plaintiff became a party in that suit will be indicated shortly. But, first, it would be appropriate to mention the relevant orders passed in the plaintiff's suit [CS(OS) 2026/06]. On 03.11.2006, the court, while issuing notice on the plaintiff's application (I.A. No. 11943/06) under order 39 Rules 1&2 CPC,

recorded the statement of the learned counsel appearing on behalf of the defendants as follows:-

“...that in the meanwhile defendants shall restore the plaintiff’s name as authorized licensee of the defendants on its official website *www.licenses.philips.com* and shall also indicate that the default notice of 18th October, 2006 is sub-judice before this Court. Learned counsel further states that the defendants will continue to issue to the plaintiff Licensed Status Confirmation Documents (LSCD) as per the procedure, being followed by the parties. It is also stated that the defendants shall not take any further precipitate action.”

(underlining added)

This order was subsequently confirmed by the Court on 23.07.2007 “*subject to variation if required by either of the parties*”. In the meanwhile, the defendant no.1 filed a counter claim and a third party complaint in Imation’s suit in the District Court at Minnesota, USA. The plaintiff was arrayed as party and the defendant no.1 claimed a sum of USD 655 million. In February, 2007, Imation Corporation and the defendant no.1 entered into a standstill agreement whereby they agreed to negotiate and resolve the disputes. During the pendency of the settlement talks, several adjournments were taken on this ground in the plaintiff’s suit [CS(OS) 2026/06] and the defendants sought extension of time for filing their written statements on the plea that “*[n]otwithstanding the defendants’ contentions and without prejudice to the stand to be taken by the defendants on jurisdiction and/or the merits of the matter, the defendants do not wish to prejudice/colour the settlement talks between the Plaintiff and defendant No.1 by filing its defence and objections during this period*”

[para 3, I.A. No. 12720/06 in CS(OS) 2026/06]. Extensions were granted from time to time.

5. The settlement talks broke down. Imation Corporation re-filed its complaint and the defendant no.1 filed the suit in The Hague claiming royalty from the plaintiff in respect of all sales of Philips patented CD and DVD discs to Imation Corporation and its subsidiaries including Global Data Media FZ-LLC. Thereafter, the present suit seeking an anti-suit injunction was filed by the plaintiff.

6. The law relating to anti-suit injunction has been spelt out by the Supreme Court in *Modi Entertainment Network (supra)*, a decision relied upon by counsel on both sides. After considering *Oil and Natural Gas Commission v. Western Co. of North America: (1987) 1 SCC 496*; *British India Steam Navigation Co. Ltd v. Shanmughavilas Cashew Industries: (1990) 3 SCC 481*; *SNI Aerospatiale v. Lee Kui Jak: (1987) 3 All ER 510*; *Spiliada Maritime Corpn v. Cansulex Ltd: (1986) 3 All ER 843*; *Airbus Industrie GIE v. Patel: (1998) 2 All ER 257*; *British Aerospace Plc v. Dee Howard Co.: (1993) 1 Lloyd's Rep 368*; *Donohue v. Armco Inc.: (2002) 1 All ER 749 (HL)*; *SABAH Shipyard (Pakistan) Ltd v. Islamic Republic of Pakistan and Karachi Electrics Supply Corpn Ltd: 2002 EWCA Civ 1643 (CA)*, the Supreme Court held:

“24. From the above discussion the following principles emerge:

(1) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:

(a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;

(b) if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and

(c) the principle of comity — respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained — must be borne in mind.

(2) In a case where more forums than one are available, the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens.

(3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case.

(4) A court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a *vis major* or force majeure and the like.

(5) Where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their

disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to the non-exclusive jurisdiction of the court of their choice which cannot be treated just as an alternative forum.

(6) A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot *per se* be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens.

(7) The burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same.”

7. The concepts of anti-suit injunction and *forum non conveniens* require some examination. An anti-suit injunction is granted by a court preventing the parties before it from instituting or continuing with proceedings in another Court. On the other hand, the doctrine of *forum non conveniens* is invoked by a court to not entertain a matter presented before it in view of the fact that there exists a more appropriate court of competent jurisdiction which would be in a better position to decide the *lis* between the parties. So, in a sense the principle on which an anti-suit injunction is invoked is just the reverse of the principle on which the doctrine of *forum non conveniens* is employed. To make it absolutely clear, an example would be appropriate. Assuming that there are two courts A and B at different places and both having jurisdiction in a particular matter, a party may approach court A for an anti-suit injunction

against the other party preventing them from instituting a suit or other proceeding in court B. Of course, while considering the grant of an anti-suit injunction, court A would take into account as to which of the two courts is the more convenient forum. However, when a party approaches court A and the defendants take up the plea that court A is a *forum non conveniens* and that the matter ought to be more appropriately dealt with by court B, then court A, invoking the principles of *forum non conveniens*, may refuse to entertain the matter presented to it and direct the parties to approach court B being the more convenient forum. Thus, it is seen that in an anti-suit injunction, one court grants an injunction restraining the parties from approaching another court. Whereas, in the case of the doctrine of *forum non conveniens*, the court before whom the matter is presented, itself refuses to entertain the same and directs the parties to approach the other court being the more appropriate and convenient forum. It must also be kept in mind that the court granting an anti-suit injunction must otherwise have jurisdiction over the matter. Similarly, the court rejecting a matter on the principle of *forum non conveniens*, must otherwise also have jurisdiction to entertain the same. This is so because if the court in either case does not have jurisdiction then, it cannot deal with the matter and, consequently, it can neither grant an anti-suit injunction nor pass an order refusing to hear the matter on the plea of *forum non conveniens*.

8. In **Jayaswals Neco Limited v. Union of India and Others:** **WPC 2103/2007** and other connected matters, in a judgment delivered on

02.07.2007, I had the opportunity to examine the doctrine of *forum non conveniens*. After considering *Sim v. Robinow: (1892) 19 K. 665*, *Tehrani v. Secy of State for the Home Department: [2006] UKHL 47*, *Gulf Oil Corp. v. Gilbert: 330 U.S. 501*, I had concluded that the doctrine of *forum non conveniens* can only be invoked where the court deciding not to exercise jurisdiction, has jurisdiction in the strict sense.

9. The plaintiff's prayer for an anti-suit injunction has to be examined in the backdrop of the aforesaid legal principles. It has been contended by the plaintiff that the proceedings at the Hague and before the District Court of Minnesota, USA are vexatious and oppressive and that the Court at the Hague and at Minnesota are both *forum non conveniens*. It has also been contended that although the plaintiff has presence in 82 countries and is a world leader in the manufacture of CD-R, the proceedings at the Hague and Minnesota would entail that the plaintiff has to incur avoidable financial expenses. It is also contended that most of the witnesses which are required to depose on behalf of the plaintiff would be from India and this Court is already seized of the issue relating to the validity of the default notices issued by the defendant No.1 in respect of the 6 DPLAs. It was also contended on the part of the plaintiff that the proceedings at the Hague and at Minnesota are clear examples of oppressive and vexatious actions aimed at somehow defeating the orders passed by this Court in CS(OS) 2026/2006. It was contended that the plaintiff is entitled to an anti-suit injunction also on the ground that the order dated 03.11.2006 passed in

CS(OS) 2026/2006 clearly restrained the defendants from initiating any further 'precipitate' action against the plaintiff. He submits that this was an undertaking given by the defendants to this Court and the said order had been confirmed on 23.07.2007. The filing of the suit at Hague and continuing with the proceedings at Minnesota would, according to the plaintiff, constitute 'precipitate' action and, therefore, would be a clear violation of the undertaking given to the Court and would amount to gross contempt of this Court. The defendants, on the other hand, have contended that they have done nothing to violate the statement or undertaking given by their counsel before this Court. They maintain that the said statement recorded on 03.11.2006 was only limited to the cause of action of that suit, i.e., the default notices and threatened cancellation of the said six DPLAs. It did not extend to the filing of any other suit or action or continuing with the proceeding at Minnesota. It was also contended that, in any event, this Court did not have jurisdiction over the matter in view of the specific jurisdiction clause contained in the DPLAs.

10. With regard to the statement that the defendants would not take any “precipitate” action, there could only be two possible views. Either the expression covered the filing of the suit at the Hague and continuing with the proceedings at Minnesota, or it did not. If it were the former then, a virtual anti-suit injunction has already been granted by the Court in CS(OS) 2026/2006 and no further suit for the same relief can be entertained. If there has been a violation of such an undertaking or order then, there is

remedy provided under the CPC as well as under the Contempt of Courts Act, 1971 to not only seek enforcement but also punishment of the defendants. That would be a course of action which can be pursued by the plaintiff either in CS(OS) 2026/2006 itself or by way of a separate contempt petition. A suit, such as the present, would not lie. On the other hand, if the expression 'precipitate action' did not include the filing of other proceedings by the defendants then, in any event, the present suit seeking anti-suit injunction, cannot be founded on the basis of the undertaking/ statement recorded on 03.11.2006 in CS(OS) 2026/2006. Thus, whichever way the matter is looked at, the statement / undertaking made by the counsel for the defendants on 03.11.2006 is irrelevant for the purposes of considering the present application and suit for anti-suit injunction.

11. This takes us to the discussion of whether this Court has jurisdiction in the matter. It has already been noted above that each of the DPLAs, which govern the relationship between the plaintiff and the defendants, contains a jurisdiction clause. The first part of the jurisdiction clause states that the agreements would be governed by and construed in accordance with the laws of the Netherlands. The second part of the clause stipulates that the disputes between the parties shall be submitted to the competent courts of the Hague, the Netherlands. There is a proviso to this and that is that in case the defendant No.1 is the plaintiff, it may at its sole discretion, submit such dispute either to the competent courts in the venue of the plaintiff's registered office or to any of the competent courts in the

Territory as defined in the agreements which, *inter alia*, includes India and such other place, with the approval of the defendant No.1, where the licensed products are manufactured by the plaintiff. The plaintiff also, by virtue of the said clauses, waived any objection to the jurisdiction, process and venue of any such court and to the effectiveness, execution and enforcement of any order or judgment of any such court in relation to the said agreements. The learned counsel for the plaintiff had submitted that this jurisdiction clause did not grant exclusivity to the courts of the Hague, the Netherlands, because words such as “solely”, “only” and “exclusively” are absent. Reliance was placed on the Supreme Court decision in the case of **A. B. C Laminart v. A. P. Agencies: (1989) 2 SCC 163** wherein the Supreme Court considering the scope of an ouster clause observed as under:-

“21. From the foregoing decisions it can be reasonably deduced that where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like “alone”, “only”, “exclusive” and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim “*expressio unius est exclusio alterius*” — expression of one is the exclusion of another — may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed.”

What the Supreme Court decided in *A. B. C Laminart (supra)* is that in case an ouster clause contained the words “alone”, “only”, “exclusive” and the like, there would be difficulty in construing the same as restricting jurisdiction to one court and excluding jurisdiction with regard to other courts. But this does not mean that a clause which does not contain the words like “alone”, “only”, “sole” or “exclusive” would not, under any circumstance, amount to an ouster clause or grant exclusivity of jurisdiction to a particular court or courts. In fact, the Supreme Court noted that even without such words, in appropriate cases, the maxim “*expressio unius est exclusio alterius*” — expression of one is the exclusion of another — may be applied. The jurisdiction clause in the present case clearly stipulates that the disputes between the parties in connection with the DPLAs 'shall' be submitted to the competent courts of the Hague, the Netherlands. This is coupled with the proviso that in case the defendant No.1 (Philips) is the plaintiff, it may at its sole discretion submit such a dispute either to the competent courts in the venue of the plaintiff's registered office or to any of the competent courts in the Territory as defined under the agreements.

12. Reading the proviso along with the main portion of the clause, it is apparent that in cases where the licensee (Moser Baer India Limited) is the plaintiff, the dispute can be submitted only to the courts of the Hague because while an exception has been carved out in respect of cases where the defendant No.1 is the plaintiff, no exception has been made from the general rule that the cases shall be submitted to the competent courts of the

Hague, in cases where Moser Baer India Limited is the plaintiff. The present suit has been instituted, not by the defendant No.1, but, by Moser Baer India Limited as the plaintiff. Consequently, it has to be held that the institution of the present suit by Moser Baer India Limited as a plaintiff is contrary to the jurisdiction clause contained in each of the DPLAs. A suit with respect to a dispute relating to the DPLAs could only have been instituted, where Moser Baer India Limited is the plaintiff, in the competent courts of the Hague, the Netherlands. The argument to the contrary submitted on behalf of the plaintiff cannot be accepted for the aforesaid reasons. It is, therefore, clear that this Court would not have jurisdiction to entertain the present suit. That being the position, there is no question of granting an anti-suit injunction. It is also reiterated that the argument of *forum non-conveniens* can only be raised where the court before whom such an argument is raised, does otherwise have jurisdiction in the strict sense. It could, if at all, be raised in the courts at the Hague.

13. It was contended that this Court would be a Court of natural jurisdiction inasmuch as the DPLAs were executed in Delhi and part of the cause of action arose in Delhi. In this regard the principles set out in ***Modi Entertainment Network*** (*supra*) need to be examined. It was pointed out by the Supreme Court in paragraph 24 (4) of the said decision that a court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in

regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a *vis major* or force majeure and the like. Examining the said observations of the Supreme Court in the light of the facts and circumstances of the present case, I do not find any such exceptional case made out by the plaintiff for the grant of an anti-suit injunction. The non-grant of an anti-suit injunction would not relieve the defendants of the burden of the contract. Moreover, there is nothing to show that it is impossible for the plaintiff to prosecute its case in the court of choice because of the reason that essence of the jurisdiction of the Court of choice does not exist any more. No case of *vis major* or force majeure and the like has been pleaded by the plaintiff. On the contrary, it is an admitted position, as noted above, that the plaintiff has presence in 82 countries and also has a full-fledged office in the Netherlands. In paragraph 24 (6) of the Supreme Court decision in ***Modi Entertainment Network*** (*supra*) it is observed that a party to the contract containing a jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract. It is further observed that when one of the parties to the jurisdiction clause approaches the court

of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot *per se* be treated as vexatious or oppressive nor can the court be said to be *forum non-conveniens*. Clearly, insofar as suits filed by the plaintiff are concerned under the DPLAs, the competent courts of the Hague, the Netherlands, would be the courts of choice and in such a situation the defendant No.1 cannot be prevented, normally, from approaching the courts in the Hague as it would amount to aiding breach of the contract. Moreover, the fact that the defendant No.1 has filed a suit in the Hague, the proceedings in that court cannot *per se* be treated as vexatious or oppressive nor can the court be said to be *forum non-conveniens*. As pointed out further in the Supreme Court decision in ***Modi Entertainment Network*** (*supra*), the burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same. The plaintiff has been unable to show in the facts and circumstances of the present case and has not discharged this burden of establishing, even *prima facie*, that the courts at the Hague, the Netherlands, is a *forum non-conveniens* or that the proceedings therein are oppressive or vexatious. Consequently, on the principles laid down in ***Modi Entertainment Network*** (*supra*) for the grant of an anti-suit injunction, the plaintiff is not entitled to the order that it seeks. As regards the action in the District Court of Minnesota also no anti-suit injunction can be granted. First of all, as noted above, this court does not have jurisdiction in the matter. Secondly, the action was brought by Imation

Corporation against the defendant No.1. It is primarily not an action brought by the defendant No.1. But, an action instituted by a third party (Imation Corporation) in which the plaintiff herein was, initially, not even a party.

14. While considering the question of jurisdiction and a jurisdiction clause it would also be important to note that, as observed in ***Modi Entertainment Network*** (*supra*), it is a well settled principle that by agreement parties cannot confer jurisdiction, where none exists, on a Court to which CPC applies, but this principle does not apply when the parties agree to submit to the exclusive or non-exclusive jurisdiction of a foreign court. In such international contracts, the parties may agree to have their disputes resolved by a foreign court which may be a neutral court or a court of choice creating exclusive or non-exclusive jurisdiction in it although such court may not otherwise have jurisdiction. This settled position eliminates any argument that may be advanced claiming that the courts of the Hague, the Netherlands, do not have jurisdiction and the parties could not by agreement confer jurisdiction on it.

15. Before concluding, I must also deal with the arguments advanced on behalf of the plaintiff that the defendants and, particularly, defendant No.1 cannot be permitted to raise the issue of jurisdiction when it had submitted to the jurisdiction of this court in CS(OS) 2026/2006. It has been mentioned above that on account of the settlement

talks following the standstill agreement between Imation Corporation and the defendant No.1, the latter moved an application for extension of time to file a written statement. In that application, it was indicated that the defendants proposed to, *inter alia*, take the plea of jurisdiction but were not doing so because it may have an impact on the settlement talks. The learned counsel for the defendants also submitted that they had not given up the plea of jurisdiction in CS(OS) 2026/2006. It is true that the defendant No.1 could waive the requirement under the jurisdiction clause that the suit be filed by Moser Baer India Ltd only at the Hague. Waiver being contractual could alter the jurisdiction clause contained in the DPLAs. But, waiver would have to be established. And, that is an issue which may require resolution in CS(OS) 2026/2006. In the present suit, there is no waiver of the jurisdiction clause, the defendants having objected to the territorial jurisdiction of this court at the very outset.

16. For all the above reasons, this application is liable to be dismissed. It is ordered accordingly.

**BADAR DURREZ AHMED
(JUDGE)**

**April 22, 2008
SR**