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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ O.M.P.(I) (COMM.) 70/2024 & I.A. 4923/2024

ESOPP ..... Petitioner

Through: Mr. Dayan Krishnan, Sr. Advocate with Mr. Nilava Bhandhopadhyay, Ms. Gunita Pahwa, Mr. Avnit Jha, Mr. Jagatjeet, Mr. Kumar Shashwat, Mr. Singh, Advocates.

versus

JPFL FILMS PRIVATE LIMITED & ANR. ..... Respondents

Through: Mr. Prashant Mehta, Ms. Ishita Choudhary, Mr. Sushil Bhatt and Mr. Raghav Marwah, Advocates.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

<u>O R D E R</u>

% **04.03.2024**

1. The petitioner, a company incorporated under the laws of France, has filed this petition under Section 9 of the Arbitration and Conciliation Act, 1996 ["the Act"], in anticipation of arbitration proceedings between the parties under an Agreement dated 07.10.2021, entitled "Supply Contract" [the "Contract"]. By the aforesaid contract, the petitioner was to supply quantities of Bi-axially Oriented Polypropylene Film and Bi-axially Oriented Polyethylene Film to the respondent.

2. The petitioner seeks an order of injunction, restraining the respondent from invoking two bank guarantees issued by HSBC Continental Europe, the petitioner's bankers in France, in favour of the

respondent. Although the bank guarantees are described in the petition as performance bank guarantees, it is the contention of Mr. Prashant Mehta, learned counsel for the respondent, who appears on advance notice, that they are in fact advance bank guarantees.

3. The Contract contains an arbitration clause, which provides for resolution of disputes by arbitration under the Rules of Arbitration of International Chamber of Commerce ["ICC Rules"]. The choice of proper law of the contract has been left to be determined by the Arbitral Tribunal. It is provided that the seat of the arbitration would be Singapore.

4. The petitioner has already invoked the jurisdiction of the Paris Commercial Court for interim relief, in similar terms, and has been granted an order of injunction. I am informed that the next date of hearing before the Paris Commercial Court is 25.04.2024.

5. In the meanwhile, the petitioner has also approached this Court, as the bank guarantee contains an exclusive jurisdiction clause, vesting jurisdiction in this Court.

6. The petition contains the following averment:

> *"68. It is humbly submitted that the Application dated 25.01.2024 before the President of the Paris Commercial Court under Article 875 of the French Code of Civil Procedure was filed by the Petitioner as an emergency measure. The appropriate jurisdiction is the present Hon'ble Court till the constitution of the Arbitral Tribunal. it is humbly submitted that the Petitioner undertakes to withdraw the Application before the Paris Commercial Court with respect to the Performance Bank Guarantees under the novated India Supply Contract if an interim relief sought by the Petitioner herein is granted by this Hon'ble Court."*

7. Mr. Dayan Krishnan, learned Senior Counsel for the petitioner, submits that the respondent has taken the position before the Paris

Commercial Court that the dispute with regard to invocation of the bank guarantee is not within the jurisdiction of that Court, but only within the jurisdiction of this Court. Be that as it may, he accepts that the averment in paragraph 68 of the petition is, in any event, misconceived to the extent that it offers that the petitioner undertakes to withdraw the Paris proceedings "*if an interim relief sought by the petitioner herein is granted by*" this Court.

8. Without going further into this question, the fact is that the petitioner has already invoked the jurisdiction of the Paris Commercial Court, the arbitration proceedings are seated outside India, and the bank guarantee is also issued by a French Bank, albeit in favour of an Indian entity. I entertain some reservation as to whether, in these circumstances, the matter falls within the scope of Section 9 of the Act, as applicable to foreign seated arbitrations, as there does not *prima-facie* appear to be any asset within jurisdiction, which this Court is called upon to protect. The bank guarantees have been issued by a foreign bank, and there is no suggestion that their invocation would affect any asset of the petitioner in India. This question is left open for consideration at a future stage, if required, as in the present case, there is already an injunction in place, and the petitioner has also invoked the arbitration clause on 30.01.2024.

9. Mr. Krishnan states that the ICC Rules also provide for interim measures to be granted by the Arbitral Tribunal and, in fact, the petitioner also has the option of approaching an emergency arbitrator. He, however, submits that the efficaciousness of these remedies would have to be considered, if a petition under Section 9 of the Act is required to be filed at a future stage.

10. Mr. Krishnan and Mr. Mehta, both state that they will cooperate in the expeditious constitution of the Arbitral Tribunal, in terms of the ICC Rules, so that an attempt can be made for the proceedings to commence prior to the next date before the Paris Commercial Court. They will also place the same submissions, alongwith this order, at the earliest, before the Paris Commercial Court for appropriate orders.

11. In view of the above factual position, I am of the view that no directions are required from this Court at this stage.

12. The petition, alongwith the pending application, is therefore, disposed of, leaving it open to the parties to move the Court if any interim measures of protection are necessary at a subsequent stage of proceedings.

PRATEEK JALAN, J

MARCH 4, 2024

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