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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CS(COMM) 50/2024**

TECHFAB INTERNATIONAL PRIVATE LIMITED Plaintiff
Through: Mr. Nidesh Gupta, Sr. Advocate
alongwith Mr. Joby Varghese, Mr.
Shreesh Chadha, Mr. Divjot Singh
Bhatia and Mr. Aman Singh Bakshi,
Advocates.

versus

MIDIMA HOLDINGS LIMITED Defendant
Through:

CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER
19.01.2024

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I.A. No. 1300/2024

Exemption granted, subject to just exceptions.

Let requisite compliances be made within 01 week.

Application stands disposed of.

CS(COMM) 50/2024

By way of the present suit, the plaintiff seeks a decree of declaration to the effect that any orders passed or proceedings conducted by the learned Sole Arbitrator appointed by the Council for National and International Commercial Arbitration, Chennai ('CNICA') in PCA Case No. AA773 titled '*Midima Holdings Limited (Malawi) vs. Techfab International Private Limited (India)*' are null and void. The plaintiff also seeks an anti-arbitration injunction



restraining the defendant from proceeding with the said arbitration proceedings, apart from costs.

2. Mr. Nidesh Gupta, learned senior counsel appearing for the plaintiff submits that the arbitral proceedings being conducted at the instance of the defendant are completely contrary to the arbitration agreement between the parties comprised in Article 9 of the Agency Agreement dated 20.11.2015 ('Agency Agreement') from which the disputes are stated to have arisen.
3. In particular, Mr. Gupta draws attention to Articles 9.1 and 9.3, which read as under :

"9.1 In the event of any dispute or difference between the parties hereto on the subject matter or meaning or interpretation of any of terms either during the existence of this agreement or upon termination hereof, every effort shall be made by the parties to resolve the matter amicably. If the dispute has not been settled amicably within a period of 45 days of a party giving notice to the other of existence of the dispute, such dispute shall be finally settled through Arbitration in accordance with the UNCITRAL Arbitration rules. The parties agree that (i) the language to be used in the Arbitral proceedings shall be the English language and (ii) the number of Arbitrators & their appointing authority to be decided mutually (iii) the seat of arbitration shall be at India or any other UNCITRAL following countries to be decided mutually and the governing law will be of the country where arbitration will be conducted. The decision of the arbitration award shall be final and binding on each party.

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"9.3 Subject to the provisions of arbitration clause referred above, the court at New Delhi or the courts of capital of any UNCITRAL following county where arbitration is held, shall have exclusive jurisdiction."

(emphasis supplied)



4. Mr. Gupta also draws attention to notice of arbitration dated 02.09.2019 issued by the defendant (and received by the plaintiff on 18.12.2019), whereby, *inter-alia* in relation to the same disputes the defendant had sought to invoke arbitration in terms of Article 9.1 of the Agency Agreement, in which notice the defendant had admitted that the Agreement was to be governed by the substantive laws of the Republic of India; and that the place of arbitration would be in India. It is submitted, that though as per Article 9.1, the place of arbitration could also be in any other UNCITRAL¹ following country *to be decided mutually*, admittedly no such alternate country was ever agreed-upon between the parties. Mr. Gupta submits that, in fact, in keeping with the terms of the arbitration agreement, by the aforementioned notice, the defendant had nominated a former Judge of the Delhi High Court as the Sole Arbitrator, with an alternate nominee, also in Delhi; and the arbitration proceedings were proposed to be conducted in Delhi.
5. It is contented, that however, the defendant took no further action under the aforesaid notice invoking arbitration; until, after a long lapse of time, *vide* application dated 19.03.2020 made to the Secretary General of the Permanent Court of Arbitration ('PCA') at The Hague, Netherlands, the defendant requested that organisation to designate an appointing authority under Article 6.2 of the UNCITRAL Arbitration Rules (2010), *inter-alia* stating the following :

¹ United Nations Commission on International Trade Law



“2.2 Arbitral Panel

*We propose that the appointing authority selects a sole arbitrator pursuant to **Article 8.1** of the UNCITRAL Arbitration rules. The parties have agreed on a sole arbitrator. The Notice of Arbitration by Midima Holdings Limited proposes a sole arbitrator. The response by Techfab International Private Limited does not object to the appointment of a sole arbitrator [Paragraph 28 of the Response]. In the circumstances, the appointing authority should make the appointment of a sole arbitrator under Article 8.1 of the rules.*

We hope the foregoing is in order and that the necessary designations will be made promptly.”

6. It is pointed-out that pursuant to application dated 19.03.2020, *vide* communication dated 04.12.2023, the PCA has designated the CNICA, Chennai as the appointing authority under the UNCITRAL Arbitration Rules (2010); consequent whereupon, *vide* communication dated 19.12.2023, the CNICA has appointed the learned Sole Arbitrator at the Asian International Arbitration Center (‘AIAC’), Kuala Lumpur, Malaysia to adjudicate upon the disputes between the parties.
7. Thereafter, *vide* communication dated 23.12.2023, the plaintiff was informed that the Arbitral Tribunal has been constituted; and that a case management conference would be held virtually on 10.01.2024 (incorrectly written as 10th January 2023 in the communication). The court is informed that the plaintiff did not attend the case management hearing on that date.
8. Mr. Gupta submits that subsequently, the learned Sole Arbitrator has directed the plaintiff to be represented at a re-convened case management hearing on 22.01.2024 at 09:00 AM (Malawi Standard Time), failing which they would be proceeded *ex-parte*. The plaintiff



has also been directed to pay the purported outstanding advance towards Arbitrator's fees in the sum of USD 10,600/- inclusive of 6% Malaysian sales and services tax.

9. Mr. Gupta submits, that the appointment of an Arbitrator by the PCA at The Hague through CNICA in Chennai, of a person who will hold proceedings in Kuala Lumpur, Malaysia is completely contrary to the arbitration agreement between the parties.
10. That apart, it is submitted, that the same claim, namely the defendant's alleged claim against the plaintiff towards Agency Fee, has already filed by the defendant by way of a commercial suit titled '*Midima Holdings Limited (Malawi) vs. Techfab International Private Limited (India)*' before the Commercial Division of the High Court of Malawi, Republic of Malawi, as is evident from the statement of claim (which is in the nature of the plaint), a copy of which has been filed with the suit; which suit is pending in that court. Mr. Gupta submits, that the plaintiff has been participating in the proceedings before the High Court of Malawi, as can be seen from several orders of the proceedings, copies of which have also been filed alongwith the plaint.
11. Mr. Gupta also submits, that it is the plaintiff's contention, that on point of fact, claims relating to Agency Fee do not fall within the ambit of the arbitration clause under the Agency Agreement dated 20.11.2015 at all.
12. In the circumstances, it is argued that the entire proceedings before the learned Sole Arbitrator are *non-est*, since they have not been initiated in accordance with, and are not founded on the arbitration



clause contained in the Agency Agreement between the parties.

13. Upon a *prima facie* conspectus of the averments and allegations in the plaint, and the submissions, let the plaint be registered as a suit.
14. Issue summons in the suit.
15. Upon the plaintiff taking steps within 10 days, let summons be sent to the defendant by all permissible modes. Let the summons indicate that the defendant is required to file their written statement to the plaint within 30 days from the date of receipt of summons, alongwith affidavit of admission/denial of the documents filed by the plaintiff. The plaintiff may file replication to the written statement within 30 days thereafter, alongwith affidavit of admission/denial of the documents filed by defendant.
16. List before the learned Joint Registrar for completion of pleadings, for admission/denial of documents and marking of exhibits on 28th March 2024.
17. List before court on 02nd May 2024.

I.A. No. 1299/2024

18. By way of the present application filed under Order XXXIX Rules 1 & 2 read with section 151 of the Code of Civil Procedure 1908 ('CPC'), the plaintiff/applicant seeks an *ad-interim* injunction restraining the defendant from pursuing the arbitral proceedings before the learned Sole Arbitrator appointed by the CNICA, Chennai in PCA Case No. AA773 titled '*Midima Holdings Limited (Malawi) vs. Techfab International Private Limited (India)*'.
19. Issue notice.
20. Upon the plaintiff taking steps, let notice be sent to the defendant, by



all permissible modes, returnable 02nd May 2024.

21. Let reply to the application be filed within 30 days; rejoinder thereto, if any, be filed within 30 days thereafter; with copies to the opposing counsel.
22. On a *prima-facie* view of the matter, and in particular the narrative appearing from the record, it appears that the appointment of the learned Sole Arbitrator based in Kuala Lumpur (Malaysia), by the PCA at The Hague, through CNICA in Chennai, is contrary to the procedure agreed upon in the arbitration clause comprised in Article 9 of Agency Agreement dated 20.11.2015, which contemplated that the 'seat' of arbitration shall be in India; with the governing law being of the country where arbitration would be conducted *viz.* India; and further stipulating that the parties would be subject to the jurisdiction of the court at New Delhi.
23. Though the arbitration provision did say that arbitration *could* be conducted in any other 'UNCITRAL following countries', that was subject to a mutual decision of the parties, and there is nothing on record to show that any such decision was taken by mutual consent of the parties. If anything, notice dated 02.09.2019 issued by the defendant shows their acceptance and admission of the arbitration mechanism under Article 9.1 and 9.3, pursuant to which, in 2019 *the defendant had itself* nominated a former Judge of this court as the Sole Arbitrator, for proceedings to be conducted in Delhi.
24. Mr. Gupta has also re-affirmed, on instructions, that there has been no agreement between the parties for the appointment of an Arbitrator under the UNCITRAL Arbitration Rules in any other jurisdiction



outside of India.

25. It needs no re-articulation that one of the cardinal principles of arbitration is, that since arbitration is a remedy that is founded on consent of parties, the agreed procedure for appointment of an arbitrator must be scrupulously followed. This, however, does not appear to have been done in the present case.
26. In the circumstances, the defendant is restrained from proceeding further with arbitral proceedings before the learned Sole Arbitrator appointed by the CNICA, Chennai, in PCA Case No. AA773 titled '*Midima Holdings Limited (Malawi) vs. Techfab International Private Limited (India)*' as aforesaid, till the next date of hearing.
27. A copy of this order be given *dasti* under signatures of the Court Master.

ANUP JAIRAM BHAMBHANI, J

JANUARY 19, 2024

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