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

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Date of decision: 31.08.2017

+ **O.M.P. (COMM) 20/2016**

SOLAR SPORTSWEAR

..... Petitioner

Through

Mr.Jay Savla & Ms.Shilpi
Chowdhary, Advocates

versus

AERO CLUB

.... Respondent

Through

Mr.M.S.Vinaik & Mr.Deepak Bashta,
Advocates

AND

+ **O.M.P. (COMM) 23/2016**

SOLAR SPORTSWEAR

..... Petitioner

Through

Mr.Jay Savla & Ms.Shilpi
Chowdhary, Advocates

versus

AERO CLUB

..... Respondent

Through

Mr.M.S.Vinaik & Mr.Deepak Bashta,
Advocates

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

O.M.P. (COMM) 20/2016

1. The present petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'the Act'*) seeking to impugn the award dated 05.10.2015.
2. Brief facts are that the respondent is a partnership firm, dealing in the manufacturing and marketing of footwear, wearing apparel and accessories under the brand name, "Woodland". The petitioner and the respondent

entered into a Franchisee Agreement in respect of the five shops located in Mumbai on 10.02.2007. One of the agreements was a Franchisee Agreement in respect of Shop No. 4-10, Ruksana Terrace, Dr.Baba Rao Ambedkar Road, opposite Railway workshop, Parel, Mumbai, for a period of six years. According to the terms and conditions of the agreement, the respondent was to supply stocks on consignment basis to the petitioner for sale from the aforesaid showroom. The agreement also required that proceeds of the sale of stocks by the petitioner be deposited in the designated account of the respondent after deducting its commission @ 31% on the fresh stocks and 21% on discounted articles. The petitioner was to deposit the tax collected on the sale of the products with the concerned authority. The petitioner also furnished a bank guarantee of Rs.40 lacs to the respondent.

It is the case of the petitioner that disputes arose when the respondent addressed a letter dated 26.11.2008 to the petitioner requesting the petitioner to reduce its commission rate. It is stated by the petitioner that as a consequence of the refusal of the petitioner to accept the said request of the respondent, the respondent reduced supply of stock to the showroom from 02.03.2009 and suspended the supply on 25.04.2009. The petitioner on 29.05.2009 is said to have vide legal notice pointed out to respondent that it had committed a breach of contract by reducing of supply of stocks. The respondent was asked to remove the stocks and return the bank guarantee. The common case of the parties is that the Agreement stood terminated w.e.f. 31.8.2009. It is also the case of the petitioner that the respondent wrongfully encashed the bank guarantee of Rs.40 lacs on 22.08.2009. The petitioner has sent a communication dated 28.08.2009 through his Advocate protesting against the encashment of bank guarantee. On 08.09.2009, the

respondent sent a communication to the petitioner pointing out that unsold stocks as on 31.08.2009 of the value of Rs.67,58,000/- were lying with the petitioner which belonged to the respondent and a joint inventory may be made of the same and the stocks be handed over to the respondent.

3. It is further the case of the petitioner that to mitigate its losses and to ensure that the showroom is kept operational, the petitioner disposed of the balance stock lying at the showroom at a discounted price of Rs.33,19,222/- between 01.09.2009 to 15.09.2009.

4. The disputes having arisen between the parties, the parties are said to have approached this court for appointment of an arbitrator. This court appointed Justice Anil Dev Singh (Retd.) as the sole arbitrator. The arbitration has been held under the aegis of the Delhi International Arbitration Centre(*hereinafter referred to as 'the DIAC'*).

5. The learned arbitrator has now published his award dated 05.10.2015. The respondent/claimant had preferred the following claims against the petitioner before the learned arbitrator:

[a] Value of the unsold stock as on 31.08.2009.	Rs.67,58,000/-
[b] Towards vouchers, unrealised credit card sales and unaccounted stocks.	Rs.18,70,681/-
[c] For costs incurred in fixing, fitting and decorating the showroom.	Rs.6,04,104/-
Total	Rs.92,32,785/-
Less: Encashed bank guarantee	Rs.40,00,000/-
Balance:	Rs.52,32,785/-

6. The petitioner had filed the counter claim seeking the following reliefs:

On account of encashment of the bank guarantee by the claimant	Rs.40,00,000/-
Interest on Rs.40,00,000/- @ 18% till 15.11.2009 (original language of the counter claim is slightly altered for sake of clarity)	Rs.1,49,918/-
Showroom Running Expenses from 01.09.2009 till 15.11.2009	Rs.15,68,649/-
Expenses towards Furniture & Fixture	Rs.8,00,000/-
Total	Rs.65,18,567/-
Less: Sales for the period 01.09.2009 to 15.11.2009	Rs.33,19,222/-
Balance:	Rs.31,99,345/-

7. The learned arbitrator in his award rejected the contentions of the petitioner that the claimant had failed to replenish and maintain the stocks. It further noted that as per the clause 4 of the agreement, the ownership of the stocks remained with the respondent and it is only during the currency of the agreement that the petitioner could sell the stocks. The petitioner was to store the stocks in the showroom as a trustee. The petitioner was not the owner of the goods. The award also concludes that once the agreement was terminated, the right of the franchisee, namely the petitioner to sell the goods came to an end as per clause 24 of the agreement. On termination of

the contract, the respondent was obliged to remove its unsold stocks from the showroom and in case it failed to do so, the petitioner was given liberty to dispatch the aforesaid unsold stocks to the respondent and bill the cost to the respondent. There was no liberty given to the petitioner to sell the goods. It also concluded that the petitioner has not made any cash remittances to the respondent during the months of April, 2009 to September, 2009.

On claim of the respondent for unsold stocks of Rs.67,58,000/- the award noted that as per clause 4(e) of the agreement any shortage of stocks was to be on account of the petitioner who will pay the respondent the cost of the said shortage which would be valued at 79% of the net retail price(*in short 'RP'*) in case of discounted stock and 69% of the net RP in case of fresh stocks. The stocks that were lying on 31.08.2009 with the petitioner for all intents and purposes were treated to be akin to shortage of the stocks in the showroom. Noting that the petitioner was holding the stocks of value of Rs.67,20,605/- and at 69% value a sum of Rs.46,37,217/- was payable by the petitioner. An award for the said amount was passed in favour of the respondent. On the claim of the petitioner that the taxes had to be deducted from this valuation, the award holds that since the petitioner sold the stocks without authorisation, the petitioner cannot ask for reimbursement on account of vat/sales tax, if any, paid by it. On the plea of the petitioner that it was also entitled to deduct commission to arrive at the value of goods payable to the respondent, the award holds that after the termination of the agreement, there was no question of any commission payable to the petitioner.

The award also notes that as per statement of account as on 31.08.2009, the respondent was having cash in hand to the tune of

Rs.13,75,395/-. The learned arbitrator passed an award in favour of the respondent for the said sum.

On the claim of credit card sales, the learned arbitrator awarded a sum of Rs.1,66,720/- to the respondent.

The award also granted refund of Rs.40,00,000/- of the bank guarantee to the petitioner. An award in favour of the respondent for Rs.21,79,332/- was passed after reducing the dues payable to the petitioner on account of encashment of the Bank Guarantee.

On the counter claim raised by the respondent regarding the expenses incurred for running the showroom, the award rejected the same.

8. I have heard the learned counsel for the parties.

9. The learned counsel for the petitioner has vehemently argued as follows to contend that the Award is liable to be set aside:

i) The petitioner was compelled to sell the goods which were lying in his custody as despite several communications, the respondent had failed to collect the said goods. He also pleads that as per market norms at best, the respondent could have claimed 50% of the value of the goods. It is pleaded that the valuation of the goods as done by the learned arbitrator which were in stock with the petitioner as on 31.08.2009 has been wrongly computed by the learned arbitrator.

ii) He further pleads that the reliance of the learned arbitrator on clause 4(e) of the Agreement to compute the value of the stocks which the petitioner had sold was misplaced. Even otherwise he stressed that the said clause 4(e) of the Agreement stipulates that the petitioner is liable to be pay 69% of net RP in case of fresh stocks. However, he points out that RP is less than the MRP and excludes tax component, as is evident from clause 7(f) of

the Agreement which shows that the RP is to be calculated after deduction of the tax from the MRP. Hence, he submits that even assuming that the award was correct in computing damages payable to the respondent under clause 4(e) of the Agreement, the computation is wholly incorrect and not as per clause 4(e) of the Agreement.

iii) He further submits that the award of Rs.13,75,395/- under the head of cash in hand is again misplaced. He stressed that in the claim petition filed by the respondent, no such claim has been made and hence, he pleads that thus the award is wholly contrary to the claim petition itself and is liable to be stuck down.

iv) He further submits that the counter claim of the petitioner has been wrongly rejected by the learned arbitrator.

10. I will now deal with the submissions of the learned counsel for the petitioner. As already noted above, the learned arbitrator has already recorded a finding of fact that the petitioner through his Advocate has sent a notice dated 29.05.2009 to the respondent alleging reduction in supply of stocks from 02.03.2009 and suspended the agreement from 25.04.2009 on account of breach of agreement. The notice gave time to the respondent to restore the supply, failing which the agreement would stand terminated w.e.f. 30.08.2009. It is not in dispute that the Agreement stood terminated w.e.f. 30.08.2009. It is also not in dispute that after termination of the agreement, the petitioner has sold the entire stocks of Rs.67,20,605/-. The award records as a matter of fact that the allegation of the petitioner regarding reduction of stocks was a mere excuse as the contention was incorrect. It also notes that on the contrary, the petitioner had stopped making cash remittances to the respondent during April, 2009 to September,

2009. Hence the petitioner was found to have no right to complain against the respondent. It is not seriously disputed that the goods belonged to the respondent. This is evident from clauses 4 and 5 of the Agreement.

Clauses 4 & 5 of the Agreement read as follows:

“4. OWNERSHIP OF STOCK:-

During the continuance of this agreement the stock, product of the AERO CLUB shall not be removed from the various premises by the Franchisee and such stocks shall be and will always remain absolute property of the AERO CLUB. The Franchisee shall have no right title or interest of any kind whatsoever therein under any circumstances.

a. At present it is intended that the showrooms shall form a part of the chain of "WOODLAND". The Franchisee will be entitled to describe themselves as an authorised Franchisee Agent for "WOODLAND" and / or other trademarks and the brand names shoes and other products which AERO CLUB may directly or through AERO CLUB from time to time consign for display and sale at the showrooms under various trademarks, brand names and trademarks belonging to AERO CLUB or utilized by AERO CLUB.

b. The display of the "WOODLAND" or any other trade name(s), trade mark(s) or brand name(s) belonging to the AERO CLUB, or with respect of which AERO CLUB have acquired rights of user as license or otherwise shall not in any manner confer or create any right in respect of such trade names and shall on termination of this agreement/arrangement or the otherwise as and when required by AERO CLUB forthwith remove and cease use thereof and shall not undertake or commence at any time thereafter in or outside the showrooms or at any other place(s).

c. Acceptance of this present by the Franchisee shall constitute an irrevocable waiver and disclaimer of any and all rights which Franchisee may claim at any time in respect of any trade name, trade mark or brand name herein above referred to and an undertaking on Franchisee's part not to make or assert any time hereinafter, any right interest or claim therein or in respect

thereof and an acknowledgment so far as Franchisee in concerned of AERO CLUB exclusive proprietorship thereof and of exclusive right to use and permit use thereof.

d. The franchisee agent shall maintain records of stocks at their showrooms. AERO CLUB shall ensure continuous supply of stocks as per Solar Sportswear requirements at their showrooms, with excise duties, freight, octrol and other expenses duly paid by them.

e. Any shortage of stocks will be to the account of Solar Sportswear and Solar Sportswear shall be responsible to pay to AERO CLUB the cost of said shortage which would be valued at 79% of net RP in case of discounted and 69% of net RP in case of fresh stock.

5. STOCK HELD ON TRUST

The Franchisee shall store the stocks, the said goods entrusted by the AERO CLUB on consignment basis in the said showroom. The Franchisee shall not hypothecate or create a charge on the said stock or any part thereof.”

Hence title of the goods remained with the respondent. The issue is as to whether the petitioner could sell the goods, after termination of the contract. The contention of the petitioner is that despite several reminders the respondent did not lift the goods and hence goods worth Rs.67,20,605/- were sold at Rs.33,19,222/-.

11. We may look at clause 24 of the Franchise Agreement, which reads as follows:

“24. BREACH AND TERMINATION.

In case breach of any the terms and conditions contained herein, the aggrieved party will give three months notice in writing to the defaulting party to rectify the breach and compensate the aggrieved party for the damaged caused., if any. The aggrieved party will have a right to terminate the agreement, if the defaulting party fails to rectify the breach in addition to their claim for compensation for damages, on termination and

settlement of accounts the franchise shall forthwith.

- a. Hand over the unsold stock of the AERO CLUB products to the AERO CLUB.
- b. The franchisee shall ask the AERO CLUB remove from the showroom all the property AERO CLUB including display, ads and materials, hoarding signboards provided by the AERO CLUB. However, if the AERO CLUB fails to remove from the showroom all its material the Franchisee shall be at liberty to send the property of AERO CLUB to their address at their cost.
- c. On termination the franchisee shall submit a complete statement of accounts upto the date of termination towards his commission and other dues and shall provide proper receipts as and when required.”

12. Clearly in terms of the above clause of the agreement, the petitioner was to hand over unsold stock to the respondent after termination of the Agreement. If for some reasons, the respondent did not pick up the stock, the petitioner had the option to send the property to the respondent at their address at their cost.

13. On an interpretation of the above clause, the learned arbitrator has held that the petitioner had an obligation to dispatch the goods to the respondent in case the respondent failed to remove the said property and bill the cost to the respondent. The award holds that the petitioner had no liberty to sell the property. Hence, the award holds that the petitioner is liable to pay the respondent the value of the goods sold by it contrary to the terms of the agreement. Clearly the said interpretation of the agreement by the learned Arbitrator cannot be faulted with.

14. The next issue that arises is the compensation payable to the respondent for the illegal sale of goods by the petitioner. The award based

on the statement of account computed the value of the stock as Rs.67,20,605/-. The entry to that effect had not been disputed by the petitioner before the learned arbitrator.

15. The learned arbitrator for computing the amount payable to the respondent for the stock sold has relied upon clause 4(e) of the Agreement, which reads as follows:

“4(e). Any shortage of stocks will be to the account of Solar Sportswear and Solar Sportswear shall be responsible to pay to AERO CLUB the cost of said shortage which would be valued at 79% of net RP in case of discounted and 69% of net RP in case of fresh stock.”

16. As the goods were fresh stocks, 69% of the MRP has been considered. As per the criteria laid down in clause 4(e) of the Agreement, value of the stocks for which the petitioner has to compensate the respondent has been valued at Rs.46,37,217/- ($\text{Rs.67,20,605} \times 69/100 = \text{Rs. 46,37,217}$). The award also held that as goods have been wrongly and illegally sold by the petitioner without authorisation, it would be liability of the petitioner to pay sales tax and vat tax etc.

17. The computation of the value of the stock by the learned arbitrator is a question of fact. The valuation of the stock as done by the learned arbitrator relying upon clause 4(e) of the Franchisee Agreement with some modification is a plausible mechanism to assess the value of the goods for the purpose of quantification of the damages suffered by the respondent due to illegal sale of the goods by the petitioner.

18. The plea of the petitioner is that the learned the arbitrator has taken into account MRP for the purpose of computing the value of the stock as payable to the respondent instead of RP. The plea is that clause 4(e) of the

Agreement which is relied upon by the learned arbitrator gives the valuation at 69% of RP and not 69% of MRP as has been wrongly done by the learned arbitrator. RP is arrived at by deducting the tax payable from the MRP. The award holds that the petitioner has wrongly and without authorisation of the respondent sold his stock which belonged to the respondent after termination of the agreement. Hence, the award holds that the petitioner cannot now seek reimbursement of the vat/sales tax, if any, paid on the sale of the said stock and must bear such liability for the sale for the period after 31.08.2009 i.e. after termination of the Agreement. As noted above in the facts and circumstances of the case, the method adopted to value the stock illegally sold by the petitioner is a plausible method. The learned Arbitrator has taken assistance of Clause 4(e) of the Agreement with some modification to value the damage payable to the respondent. The reasons for tweaking Clause 4(e) have been given i.e. that the sale has been made after termination of the Agreement and hence the petitioner should bear the liability for sales tax/vat. Hence out of the admitted market value of the goods of Rs. 67,90,605/-, the petitioner has been asked to pay Rs.46,37,217/-. There is no merit in the plea of the petitioner that the valuation has been done erroneously.

19. The Supreme Court in the case of *Associate Builders vs. DDA, AIR 2015 SC 620* held as follows:

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

1. a finding is based on no evidence, or

2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or
3. ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In **H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons**, 1992 Supp (2) SCC 312 at p.317, it was held:

7.It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

In **Kuldeep Singh v. Commr. of Police**, (1999) 2 SCC 10 at para 10, it was held:

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon

when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R.Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.(2012) 1 SCC 594, this Court held:

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

.....”

Quantification of the damage payable to the respondent due to illegal sale of goods is a question of fact. Hence, there is no merit in the said plea of the petitioner on the valuation of the stock/quantification of the damage.

20. The next plea raised by the learned counsel for the petitioner pertains to the award of Rs.13,75,395/- for the cash in hand to the respondent. It is

claimed that no such amount has been claimed by the respondent in the claim petition and hence no such amount could be awarded.

21. There is no merit in the said contention of the petitioner. A perusal of the claim petition filed by the respondent shows that in para 14 the respondent has mentioned the claim of about Rs.18,70,681/- towards expenses paid by the respondent, unrealized amounts on credit card sales and sales of stocks of the said products. Similarly, an averment is made in para 17 (b) of the claim petition that the respondent is entitled to recover the said amount of Rs.18,70,681/-, the details of which is given in Annexure C-7. A perusal of the annexure C-7 shows that full details of the expenses/ sale amount etc. have been given totalling Rs.18,70,681/-. Hence, there is no merit in the plea of the petitioner that this amount which has been awarded to the respondent by the award has not been claimed in the claim petition. The said amount has been rightly awarded.

22. Regarding counter claim of the petitioner, the same pertains to expenses incurred for running showroom and expenses towards furniture and fixtures for the period after termination of the Agreement. The award rejects the said claim pointing out that the petitioner has been himself running the showroom from 01.09.2009 to 15.11.2009, though the franchisee agreement stood terminated on 30.08.2009. There is hence no basis for the said counter claim and the same was rightly rejected.

23. There are no reasons to set aside the award. There is no merit in the present petition and the same is dismissed. All the pending applications, if any, are also dismissed.

O.M.P. (COMM) 23/2016

24. The facts and issues of the present petition are somewhat identical to the above noted petition being O.M.P. (COMM) No.20/2016. The present petition pertains to a Franchisee Agreement dated 03.09.2002 for the shop at 3/3A, Rajesh Shopping, S.B.Road, Andheri, Mumbai. The terms and conditions of the Franchisee Agreement are more or less identical. The disputes that have been raised by the parties are somewhat identical and the only claim value is different. In the present case, the respondent has filed the following claims:

(a) Value of the unsold stocks as on 31.08.2009	Rs.37,01,585.00
(b) Towards vouchers, unrealized credit card sales and unaccounted stocks.	Rs.65,979.00
(c) For costs incurred in fixing fitting and decorating the showroom	Rs.8,00,000.00
Total	Rs.45,67,567.00
Less: Encashed Bank Guarantee	Rs.27,50,000.00
Balance	Rs.18,17,564.00;

25. Based on the conclusion of the learned arbitrator in the award, which is a subject matter of the above petition being O.M.P. (COMM) No.20/2016, the learned arbitrator in the present award also awarded a sum of Rs.22,20,951.00 to the respondent on account of the stocks sold after termination of the Franchisee Agreement; a sum of Rs.65,979.00 is awarded on account of the unrealized credit card sales and unaccounted stocks. The

bank guarantee for Rs.27,50,000.00 had been encashed by the respondent, which is adjusted against the award in favour of the respondent. The counter claim of the respondent was rejected. Hence, a sum of Rs.4,63,070.00 had been awarded in favour of the respondent and against the petitioner alongwith interest @ 8% from the date of filing of the claim till the date of the award and thereafter till realisation.

26. Hence, on the same grounds on which the O.M.P.(COMM) No.20/2016 has been dismissed, the present petition is also dismissed.

AUGUST 31, 2017/v

JAYANT NATH, J.

