

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.680 OF 2016

NOD Bearings Pvt. Ltd. ... Petitioner  
Versus  
M/s Bhairav Bearing Corporation ... Respondent

ALONG WITH  
ARBITRATION PETITION NO.500 OF 2016

|                                 |     |            |
|---------------------------------|-----|------------|
| M/s Bhairav Bearing Corporation | ... | Petitioner |
| Versus                          |     |            |
| NOD Bearings Pvt. Ltd.          | ... | Respondent |

Mr. Sarosh Bharucha a/w Ms. Zahra Padamsee and Ms. Aishwarya Singh I/b Vashi & Vashi for the Petitioner in Arbitration Petition No.680 of 2016 and for the Respondent in Arbitration Petition No.500 of 2016.  
Mr. Sandeep S. Sharma for the Respondent in Arbitration Petition No.680 of 2016 and for the Petitioner in Arbitration Petition No.500 of 2016.

**CORAM : S.C. GUPTE, J.**

**DATE : 7 FEBRUARY 2019**

(Oral Judgement)

Heard learned Counsel for the parties.

2        These cross arbitration petitions challenge an award passed by a sole arbitrator in a reference arising out of a dealership agreement. The facts of the case may be briefly noted as follows :-

NOD Bearings Pvt Ltd. (Petitioner), who was the respondent in the arbitration reference, is an authorized distributor of 'Koyo' brand of ball

bearings manufactured by JTEKT Corporation, Japan or its Indian arm, Koyo Bearings India Pvt. Ltd. ('KBIL'). By an agreement dated 26 July 2011, Bhairav Bearing Corporation ('Respondent'), who was the claimant in the arbitral reference, was appointed by the Petitioner as a non-exclusive authorized dealer of Koyo bearings for the period from 1 April 2011 to 31 March 2012. The Respondent was also issued a certificate of authorization of such dealership jointly by KBIL and the Petitioner, which was to have effect until 31 March 2012. In pursuance of this dealership agreement, the Respondent secured a bid floated by Central Railways for supply of ball bearings. It is the Petitioner's case that though extension was duly granted by Central Railways for supply of bearings under this purchase order, the Respondent failed to collect the goods and deliver the same to Central Railways. In the premises, Central Railways cancelled the order and encashed the Respondent's deposit of Rs.1,53,972 on account of non-delivery of ball bearings within the stipulated time. It is, on the other hand, the case of the Respondent that cancellation of the purchase order as also forfeiture of the amount, was incurred by the Respondent as a direct result of the Petitioner's failure to supply ball bearings in terms of the purchase order in time, as committed and undertaken by the Respondent whilst accepting the purchase order. The Respondent, accordingly, had claimed damages against the Petitioner for breach of the dealership agreement by non-delivery of bearings as required by the purchase order. There was another purchase order secured by the Respondent in response to tenders floated by South Central Railways. The Respondent supplied goods in response to this purchase order. In the course of inspection conducted by railways, it was discovered that several goods were fake and spurious. The Respondent was called upon to replace the entire quantity

supplied by it with original genuine bearings and also issued a show cause notice why no action should be taken in this regard. As a result of these supplies, which were found by KBIL to be spurious, KBIL withdrew its certificate of authorization to the Respondent with immediate effect. The Petitioner, in the circumstances, terminated the dealership agreement with the Respondent. It was the case of the Respondent before the arbitrator that this was no valid or proper termination in law. The Respondent raised a claim against the Petitioner in respect of this termination. The Respondent also claimed loss of business/profits against the Petitioner on the basis that Central Railways subsequently awarded the purchase order to one Collective Trade Links and it was the Petitioner, who had facilitated this transaction between Central Railways and Collective Trade Links. The loss in this behalf was crystallized in debit note dated 2 August 2013. The Respondent also claimed repayment of RDSO amount and refund of its security deposit. These claims were crystallized in debit notes dated 2 August 2013. The Respondent also claimed damages of Rs.5 crores over and above these claims.

3 On these claims, the main questions for the arbitrator's consideration were : (i) whether the Petitioner had committed any breach of the dealership agreement dated 26 July 2011, (ii) whether the Respondent was entitled, as a result of such breach, to the amount claimed by it in its particulars of claims, and (iii) whether the Petitioner had lawfully terminated the dealership agreement on account of breach on the part of the Respondent. There was an incidental issue as to mis-joinder of parties and non-maintainability of the reference as a result. The learned arbitrator, by his impugned award, rejected the incidental objections of the

Petitioner and considered the matter on merits. He did not find fault with the termination of the dealership agreement by the Petitioner. The learned arbitrator, however, found that so far as the cancellation of purchase order by Central Railways was concerned, non-supply of bearings by the Petitioner was in breach of the dealership agreement and the Respondent was entitled to be compensated for loss of actual principal amount of tender cost and forfeiture of its security deposit by Railways. The arbitrator not only awarded these two amounts, but also awarded loss of profits to the Respondent in respect of the purchase order. The arbitrator also awarded the Respondent's claim toward refusal of security deposit kept by it with a third party, whilst acting as a dealer under the agreement.

4 Learned Counsel for the Petitioner submits that dealership agreement, which gave rise to the Respondent's claim, was entered into by the Petitioner as an agent of KBIL. Learned Counsel submits that the Petitioner having disclosed in the dealership agreement its principal and its express authority to name a dealer whilst acting for the principal, namely, KBIL, the Respondent's dealership is not a sub-agency of the Petitioner, but an agency of the principal itself, namely, KBIL. Learned Counsel relies on Section 194 read with Section 230 of the Contract Act in this behalf. Based on this contention, it is further submitted that the claim being in respect of a contract of agency as between the Respondent and KBIL, the latter was a necessary party for any adjudication concerning the agreement. Learned Counsel relies on Supreme Court decisions in the cases of **Prem Nath Motors Limited Vs. Anurag Mittal**<sup>1</sup> and **Vivek Automobiles Limited Vs. Indian Inc.**<sup>2</sup>, decisions of our court in **The Punjab National Bank Ltd Vs.**

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1 (2009) 16 Supreme Court Cases 274

2 (2009) 17 Supreme Court Cases 657

**Firm “Ishwarbhai Lalbhai Patel and Co.”<sup>3</sup> and Midland Overseas Vs. M.V. “CMBT Tana”<sup>4</sup> and of Delhi High Court in the case of M/s RPP Constructions (P) Ltd Vs. Rites Ltd<sup>5</sup>, in support of his submissions.**

5 The learned arbitrator rejected the Petitioner's submissions on the ground that the dealership agreement between the Petitioner and the Respondent was on a principal to principal basis; though this agreement was in pursuance of its entitlement to appoint dealers under its main contract of distributorship with KBIL and this agreement conferred upon KBIL certain rights, in essence, it was an agreement between the Petitioner and the Respondent. The arbitrator considered various circumstances to arrive at this conclusion. The arbitrator *inter alia* observed that under the dealership agreement, the Respondent was required to place a purchase order on, and purchase bearings from, the Petitioner and prices were required to be separately agreed between the Respondent and the Petitioner from time to time. After considering various clauses of the dealership agreement (in particular, clauses 3(b), 5(a) to (c), 6(a), 7(a), (d), 10, 11(f) and 13 thereof), the arbitrator held that a holistic reading of the agreement did not show that the Petitioner was merely acting as an agent of KBIL, whilst entering into the dealership agreement with the Respondent. The arbitrator relied on the case of **Coats Viyella India Ltd Vs. India Cement Ltd<sup>6</sup>** in this behalf. In **Coats Viyella India Ltd.**, the Supreme Court, after considering the agreement as a whole, had held that under the agreement, a privity of contract of the appellant was only with the respondent and there was no liability on the other party, who was

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3 (1972) Bom L.R. 368

4 AIR 1999 Bom 401

5 (2017) 236 DLT 549

6 2000 9 SCC 376

claimed to be the principal, to make payment to the appellant; the agreement was on a principal to principal basis between the appellant and the respondent, the rights and liabilities of the appellant arising only under the agreement. Based on the material placed before the learned arbitrator and a reasonable interpretation of the dealership agreement and application of law, the arbitrator came to his conclusion that the Petitioner did not act merely as an agent on behalf of KBIL in entering into the dealership agreement and since the Respondent's case was that the Petitioner's acts had directly resulted in the Respondent suffering losses, the proceedings did not suffer from any mis-joinder or non-joinder of necessary party so as to vitiate the proceedings. This conclusion is clearly a possible view based on the material placed before the learned arbitrator. Construction of a contract is a matter strictly within the jurisdiction of the arbitrator, and so long as the arbitrator construes it on a reasonable interpretation and his construction denotes a possible view, there is nothing for the challenge court to interfere with under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act").

6 There is no denial of the proposition of law laid down by the Supreme Court or our court in the cases cited by learned Counsel for the Petitioner. **Prem Nath Motors Limited's** case (supra) basically considers the effect of Section 230 of the Contract Act. In that case, it was held that the agent had acted on behalf of a disclosed principal and there was no contract to the contrary placed before the court so as to make the agent liable for the act of the disclosed principal. Even in **Vivek Automobiles Limited** (supra), the court applied the same principle. The principle of law enunciated by the Supreme Court in these cases merely implies that an

agent is not responsible for the acts of a disclosed principal except in case of a contract to the contrary. The real question in the present case is whether, in so far as the agency agreement between the Petitioner and the Respondent is concerned, the Petitioner could be said to be merely acting as an agent of a disclosed principal, namely, KBIL, or was the agreement entered into by the Petitioner acting in its own rights as a principal. On a reasonable construction of the agreement, the arbitrator found that it was the latter case and not the former. The arbitrator held that the relevant clauses of the agreement indicated that the agreement of dealership was entered into by the Petitioner not as an agent of KBIL, but in its individual capacity on a principal to principal basis. That conclusion, as I have noted above, is a possible view based on a reasonable interpretation of the agreement.

7 Even the cases of **Punjab National Bank Ltd** and **Midland Overseas** (supra) proceed on an admitted footing that the contract was made by an agent for sale or purchase of goods after disclosing the identity of the principal on whose behalf such contract was made. In **Midland Overseas** case, our court noted that it was an admitted case in the plaint that the third defendant had acted as an agent of the second defendant and the goods were accepted by the third defendant on behalf of the second defendant. The court noted that, in the circumstances, where a principal was disclosed and even impleaded as a party defendant, no action could lie against the agent, who had admittedly acted only as an agent of the former. That was an obvious application of Section 230 of the Contract Act. In **Punjab National Bank Ltd** case, what the court held was that by usage of trade or business, the defendant bank had an implied authority to

name or authorise another bank to collect amount deposited by the plaintiff with the defendant bank and such other bank would then be a substitute agent for collection and there would be a privity of contract between the plaintiff and such other bank; the defendant bank could not be held responsible if such other bank had failed to pay the amount. This was again on a footing that the substitute agent was appointed by the defendant under an implied authority, and therefore, under Section 194 of the Contract Act, the other bank could not be held as a sub-agent of the defendant bank, but an agent of the plaintiff itself. This again was on the footing that the agency was created by the agent in pursuance of an authority given to him by his principal to name another person "*to act for the principal*". That is not the case here.

8      Coming now to the purported breach of the dealership agreement on the part of the Petitioner for non-supply of bearings on time, the arbitrator, on construction of the agreement (clause 5), held that the Respondent was required to place an order with the Petitioner; such order was infact placed by the Respondent; but the Petitioner could not make the bearings available within the time stipulated under the purchase order. The arbitrator observed that since bearings could not be made available within time, the Petitioner not only wrote to the Office of the Controller of Stores of Central Railways for extension of time but undertook to deliver the bearings in terms of the purchase order by October 2011 and requested the Controller not to purchase the required bearings from any other stores, but from the Respondent alone. The arbitrator observed that in view of this assurance of the Petitioner, Central Railways had granted extension of time to the Respondent for delivery of goods. The arbitrator held that

admittedly, the Petitioner was unable to live upto its commitment and delivery could not be effected within even the extended time, and that led to Central Railways formally canceling the purchase order and forfeiting the security deposit of the Respondent and calling upon it to pay a sum named in its termination letter. The arbitrator held that this chain of events showed that the cancellation of the purchase order as also forfeiture of money and liability to pay the amount referred to above incurred by the Respondent, were a direct result of the Petitioner's failure to supply the bearings in time in terms of the purchase order as committed and undertaken under the terms of the dealership agreement read with the acceptance of the purchase order. The arbitrator, in the premises, accepted the legitimacy of the debit note raised by the Respondent for loss of actual principal amount of tender cost and forfeiture of security deposit. No fault can be found with either the assessment of the learned arbitrator in this behalf or the conclusion arrived at by him on the basis of such assessment. The arbitrator's view on this aspect is a possible view. The award in this behalf is supported by evidence. It cannot be termed as an award based on no evidence. The view expressed by the arbitrator cannot be said to be a view which no fair or judiciously minded person would take or a view which would shock the conscience of the court. In the premises, no interference is warranted with this part of the award under Section 34 of the Act.

9 The arbitrator, however, did not stop at awarding the claims of loss of actual principal amount of tender cost and forfeiture of the security deposit, but also went on to award the Respondent's claim for loss of profit in this behalf. There is no discussion in the award on this aspect of the

matter. Infact the arbitrator appears to have proceeded on an erroneous impression of the two debit notes referred to in this behalf (at pages 33 and 34 of the compilation of documents, as part of Exhibit C-15), which, according to the arbitrator, crystallized the Respondent's claims for tender cost and forfeiture of security deposit. He allowed both debit notes on the ground that the Petitioner, having been liable for cancellation of the purchase order by Central Railways, was liable to compensate the Respondent towards the loss of actual principal amount of tender cost and forfeiture of the security deposit, being unmindful of the fact that one of the debit notes was actually for loss of profit and thus, in the process, he infact ended up awarding the Respondent's claim for loss of profit. (Debit note at page 34, was actually a debit note for loss of profit.) As noted above, there is no discussion in the impugned order on loss of profit. This part of the award, in the premises, which is severable from the rest of the award, cannot be sustained and deserves to be set aside. It is a fundamental policy of Indian law that any adjudication by a legal or quasi-legal forum must indicate, in the minimum, application of mind. It is also our fundamental policy and a legal requirement that an award, unless the parties have agreed to the contrary, must be supported by reasons. There being no suggestion of application of mind and no disclosure of reasons in support of the award, the award on loss of profit deserves to be set aside.

10 The Respondent's claim for refund of security deposit (debit note at Pg.37 of the Claimant's compilation) was awarded on the basis that Nishant Overseas, to which the security deposit was originally made and Nishant Overseas Distribution, to which it was later transferred, were nothing but alter ego of the Petitioner. The arbitrator went into the

evidence of the parties and circumstances of the case to hold that the three entities, i.e. the Petitioner, Nishant Overseas and Nishant Overseas Distribution, were not different entities, but were one and the same. In doing this, the arbitrator appears to have lifted the corporate veil and tried to find out who the parties really were. This, I am afraid, is not permissible to an arbitral forum. It may be appropriate in a given case for a court of plenary jurisdiction to lift the corporate veil and find out the true perpetrator of the act and hold him responsible for its consequences. Even in such a case, lifting of a veil can only occur in certain specified circumstances, particularly, where a question of fraud is involved and it is necessary to ascertain who the real perpetrator of the fraud was. Other cases where corporate veil has been lifted on judicial grounds have been to detect the enemy character of a company in times of war, to find out the substance of a transaction involving tax evasion or economic offences or other improper conduct or improper purpose. An arbitral forum, on the other hand, is bound by the contract of the parties, which creates it and the terms of submission through which the reference is made to it. Third parties, who are not parties to the contract, the arbitration agreement being a part of such contract, cannot be either arraigned to a cause or made liable for the same. In **Sudhir Gopi Vs. Indira Gandhi National Open University**<sup>7</sup>, Delhi High Court has held that an arbitral tribunal has no power to lift the corporate veil. Only a court has a power to lift the corporate veil of a company if a strong case is made out. The mere fact that a party is an alter ego of another would not predicate an agreement to refer the disputes to arbitration by that party under an arbitration agreement of the other. Corporate veil cannot by that reason alone be lifted

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7 2017 SSC OnLine Del 8345

so as to make a party, who was not party to an arbitration agreement, a party to the reference. So also, there is no case of fraud or other special circumstance of the kind referred to above in the present case so as to lift the corporate veil and find out who the real party was with a view to enforce the liability.

11 As far as RDSO amount is concerned, the arbitrator held that the claim was barred by the law of limitation, since it pertained to amount spent by the Respondent from 1993 to 2003. The arbitrator held that the Respondent had not adduced any evidence about any part payment or acknowledgment. The arbitrator held that the claimant had been unable to show that the claim in this regard arose not more than three years prior to invocation of the arbitration agreement. (The invocation was as of 28 March 2014.). This is a pre-eminently possible view and merits no interference.

12 The loss in respect of order placed by South Central Railways on Collective Trade Link was claimed by the Respondent on the basis that it was the exclusive dealer in the territory and no order could be placed on any other dealer. The arbitrator found that the agreement had clearly stated (clause 1) that the engagement of the Respondent was as a non-exclusive dealer. The arbitrator observed that clause 6(e) of the agreement contemplated a situation where an authorized dealer could, in the circumstances set out in that clause, supply bearings to a customer/territory allotted to another dealer. Based on a reasonable construction of the agreement, the learned arbitrator held that there was no vested right in the Respondent for continuation of the agreement when

it specifically provided for termination and the Respondent, being a non-exclusive dealer, could not seek any damage for non-placement of any particular order on it. The award on this claim thus does not call for any interference.

13 The Respondent's claim for damages of Rs.5 crores over and above its claims referred to above for loss of business, goodwill and reputation was denied by the arbitrator for want of any pleading or evidence in that behalf. Such denial exhibits a possible view. It is supported either by evidence or is based on a reasonable interpretation of the dealership agreement. The views expressed on this aspect of the matter, accordingly, do not merit any interference under Section 34 of the Act.

14 Accordingly, the petition, namely, Arbitration Petition No.680 of 2016 succeeds partly. The impugned award dated 12 January 2016 is set aside to the extent it relates to the Respondent's claim of loss of profits (debit note dated 2 August 2013 for Rs.12,28,657) and the debit note dated 2 August 2013 to the extent it relates to refund of deposit of Rs.1,00,000 and interest thereon. Rest of the award is sustained. No order as to costs.

15 For the reasons discussed, the companion petition, namely, Arbitration Petition No. 500 of 2016 is dismissed. No order as to costs.

**(S.C. GUPTE, J.)**