

\$~

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

Judgment reserved on 05.12.2018
Judgment pronounced on 30.07.2019

+ **OMP(EFA)(COMM) No. 2/2018 & I.A. Nos. 4269/2018, 4270/2018, 14422/2018**

NAVIG8 CHEMICAL POOLS INC Decree Holder
Through Mr. Arvind Nigam, Sr. Advocate with
Mr. O.P. Gaggar, Mr. Mikhil Sharda, Mr.
Mehtaab Singh Sandhu, and Mr. Prashant
Kaushal, Advocates.

versus

NU TEK INDIA LIMITED Judgment Debtor
Through Mr. Navaniti P.D. Singh, Sr. Advocate
with Mr. Sarthak Guru, Advocate.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.:

Prefatory Facts:

1. The captioned execution petition has been filed by Navig8 Chemical Pools Inc. (hereafter referred to as 'NCP') to seek enforcement of the final arbitration award dated 4 June 2015 as amended by arbitration award dated 23 July 2015 (hereafter referred to as 'subject award').

1.1 Interlocutory Application(I.A.)No.14422/2018 contains the objections preferred by the judgment debtor i.e. Nu Tek India Limited (hereafter referred to as 'Nu Tek India').

2. It may be relevant to state, at the very outset, that Nu Tek India resists the enforcement of the subject award on the ground that it has been wrongfully arrayed as a judgment debtor in the execution petition. The principal objection of Nu Tek India is that its wholly-owned subsidiary i.e. Nu Tek HK Private Limited (hereafter referred to as 'Nu Tek HK') was a party to the arbitration agreement and, that, the subject award was passed against Nu Tek HK and not against Nu Tek India.

2.1 In sum, the defence taken is that there was no privity of contract between NCP and Nu Tek India and that NCP invoked arbitration proceedings against Nu Tek HK and is now prohibited the under the principle of *dominus litus* to proceed in execution against it. Thus, the principal question that needs to be answered is: as to whether the instant execution petition for enforcement of the subject award would lie against Nu Tek India?

3. To adjudicate upon this issue, the following broad facts are required to be noticed.

3.1 Nu Tek HK was desirous of carrying "oily sludge" from Rabigh port in Saudi Arabia to Tianjin located in the People's Republic of China. For this purpose, the services of NCP were engaged. NCP chartered its vessel MT. Erin Schulte (hereafter referred to as 'vessel').

3.2 The terms and conditions agreed between Nu Tek HK and NCP were incorporated in the Tanker Voyage Charter Party dated 10 November 2012

(in short 'Charter Party'). Apparently, the Charter Party was amended and the amendment was executed on 10 December 2012.

3.3 As agreed NCP had its vessel anchored at the Rabigh port in Saudi Arabia on 1 December 2012. On that very date, a Notice of Readiness was tendered on Nu Tek HK. The vessel berthed on 11 December 2012. The loading of the cargo, oily sludge, commenced on 13 December 2012. The loading of cargo was completed on 25 December 2012.

3.4 Apparently, the Customs Authorities in Saudi Arabia did not give clearance to the vessel to sail as the necessary export licence had not been obtained. Consequently, the vessel remained anchored at Rabigh port till July 30, 2013.

3.5 It is NCP's case that to obtain clearance of the cargo, Nu Tek HK appointed Prince Abdullah Faisal Abdullah A'Al Saud as its agent. The cargo was partially discharged between May 18 and 23, 2013, pursuant to an order of a Saudi Court.

3.6 NCP claims that approximately 498 metric tons of solidified unpumpable cargo remained on the vessel. It appears that the vessel thereafter sailed from Rabigh to Suez Canal and discharged a part of the cargo that was on board. The remaining part of the cargo was removed from the vessel only upon its return to a place known as Fujairah on September 7, 2013.

4. It is in this backdrop that disputes arose between the charter parties. NCP claimed monies on account of freight, demurrage, damages and other charges. Consequently, on 7 March 2013 NCP in terms of the arbitration agreement contained in the Charter Party issued notice of commencement of

the arbitration and, resultantly, notified the appointment of its nominee-arbitrator.

4.1 In response thereto, Nu Tek HK also notified the appointment of its nominee-arbitrator vide communication dated 26 March 2013. It is relevant to note that this communication was sent by the Nu Tek India's Group General Counsel.

4.2 As a result of the aforesaid development, on 7 November 2013 the two nominee-arbitrators appointed the third arbitrator to complete the constitution of the arbitral tribunal.

5. Upon the constitution of the arbitral tribunal, liberty was given to both NCP and Nu Tek HK to file their pleadings and witness statements. NCP filed its Statement of Claim (SOC) on 1 November 2013. Nu Tek HK filed its Statement of Defence (SOD) on 19 December 2013. NCP filed its witness statements on 12 December 2014 and 11 February 2015. On 12 December 2014, four witness statements were filed while on 11 February 2015 the remaining two witness statements were filed. On the other hand, Nu Tek HK on 12 December 2014 filed only one witness statement. Based on the consultation with the parties, the arbitral tribunal slated oral hearings in the matter between 2 March 2015 and 9 March 2015. However, on 16 February 2015, the arbitral tribunal received an e-mail from Dubai based solicitors of Nu Tek HK stating that the instructions given to them to represent Nu Tek HK had been withdrawn and, therefore, all future correspondence should be addressed directly to their client Nu Tek HK.

6. It appears that, thereafter, the arbitral tribunal made attempts at contacting Nu Tek HK directly and also via their counsel. Since no response

was received from Nu Tek HK, the arbitral tribunal proceeded against it *ex parte* in the exercise of powers conferred upon it under Section 41 of the English Arbitration Act, 1996. Finally, the arbitral tribunal published a unanimous final arbitration award on 4 June 2015 in favour of NCP. As per the final arbitration award, NCP has been awarded for repudiatory breach USD 5505921.30 and GBP 1790.00 together with interest at the rate of 4.5% per annum compounded at three monthly rests, commencing from 8 September 2013 till the date of payment.

6.1 Besides this, the arbitral tribunal has also awarded in favour of NCP recoverable costs of arbitration in the sum of GBP 313593.46 and USD 171850 and Euro 3000 along with interest at the rate of 4.5% per annum, once again, compounded at three monthly rests, commencing from the date of the final arbitration award to the date of payment. In addition, thereto, costs of the final arbitration award amounting to GBP 64935 together with interest at the rate of 4.5% per annum compounded at three monthly rests, commencing from the date of payment to the date of reimbursement is also awarded in favour of NCP. Since, according to NCP, certain mistakes crept in the final arbitration award, attention of the arbitral tribunal was drawn to this aspect of the matter, whereupon, the arbitral tribunal once again called upon Nu Tek HK to respond to the request for amendment. Since Nu Tek HK did not respond to the request of the arbitral tribunal, the arbitral tribunal on 23 July 2015 amended the final arbitration award. As a result, the amount crystallized in the final arbitration award *qua* repudiatory breach was enhanced to USD 6072971.10 from USD 5505921.30.

7. Concededly, proceedings were taken out by NCP for the execution of the subject award in the concerned court in Hong Kong. It appears that NCP

could not execute the subject award in the concerned court in Hong Kong in the usual and normal manner as Nu Tek HK had gone into liquidation and a liquidator had been appointed.

7.1 It is in this background that NCP decided to approach this Court via the captioned execution petition.

Submissions of the counsel:

8. Given this backdrop, the arguments on behalf of NCP were advanced by Mr. Arvind Nigam, Senior Advocate, instructed by Mr. O.P. Gaggar, Advocate, while those on behalf of Nu Tek India were advanced by Mr. Navaniti P.D. Singh, Senior Advocate, instructed by Mr. Sarthak Guru, Advocate.

9. Arguments advanced by Mr. Nigam can, broadly, be paraphrased as follows:

(i) Nu Tek HK is a wholly-owned subsidiary of Nu Tek India. Nu Tek HK acted as the agent for Nu Tek India. The Charter Party entered into between NCP and Nu Tek HK was through the agency of Nu Tek India. Nu Tek HK was a front company for Nu Tek India and this aspect came to light only when NCP was exploring the possibility of executing the subject award. In support of the aforesaid contention, reference was made to the fact that after the disputes had erupted between NCP and Nu Tek HK, the appointment of the nominee-arbitrator on behalf of Nu Tek HK was notified by the General Group Counsel and CS of Nu Tek India via communication dated 26 March 2013.

(i)(a) In sum, the argument was that Nu Tek HK was a group company of Nu Tek India. To demonstrate that Nu Tek HK was a wholly-owned subsidiary of Nu Tek India, reference was made to an order passed by the Securities Exchange Board of India(SEBI) dated 26 October 2018.

(i)(b) In a nutshell, the submission was that this was a case in which the Court should realize the ground reality which is that the heart and mind of Nu Tek HK were controlled by Nu Tek India and, therefore, this Court should lift the corporate veil and allow for execution of the subject award against Nu Tek India.

(ii) In support of these contentions, reliance was placed on the following judgments:

- i. ***State of U.P. and Others versus Renusagar Power Company and Others***, AIR 1988 SC 1737;
- ii. ***Delhi Development Authority versus Skipper Construction Company (P) Limited and Another***, AIR 1996 SC 2005; and
- iii. ***New Horizons Limited and Another versus Union of India and Others***, AIR 1994 Delhi 126.

10. On the other hand, Mr. Navaniti P.D. Singh, Senior Advocate, submitted that Nu Tek India could not be proceeded against in the instant execution petition as it was neither a party to the arbitration agreement obtaining between NCP and Nu Tek HK nor was it arrayed as a party before the arbitral tribunal. The subject award, according to the learned senior counsel, had been passed against Nu Tek HK and, therefore, the satisfaction of the award, if at all, could take place, in law, by taking recourse to the

assets of Nu Tek HK. The assertion made on behalf of NCP that Nu Tek HK was an agent of Nu Tek India was baseless. In this behalf, it was emphasized that NCP at no stage of the arbitration proceedings asserted that Nu Tek HK was an agent of Nu Tek India. Therefore, quite logically, the subject award makes no reference to Nu Tek India.

10.1 Both in law and on facts, there is nothing to suggest that Nu Tek HK acted as an agent of Nu Tek India. The fact that Nu Tek HK was a wholly-owned subsidiary of Nu Tek India could not be used as a basis to dilute a well-established principle of law that a wholly-owned subsidiary is, in law, considered as a separate juridical entity that stands apart from its holding company.

10.2 It was emphasized that there was no privity of contract between Nu Tek India and NCP. It was, thus, contended that Nu Tek India had never been a party to the transaction, which was encapsulated in the charter party entered into between NCP and Nu Tek HK. Furthermore, assuming without admitting that Nu Tek HK was an agent of Nu Tek India, no steps were taken to array Nu Tek India as a party to the arbitration proceedings.

11. It was next contended that given these circumstances, NCP was prohibited from enforcing the award against Nu Tek India on the principle of *dominus litus*. NCP has not approached this Court with clean hands as it has suppressed the fact that in the first instance it chose to enforce the subject award against Nu Tek HK in the concerned court in Hong Kong. It was contended that only when NCP realized that its enforcement proceedings concerning the subject award could not proceed further given the fact that liquidation proceedings had been initiated against Nu Tek HK,

it took its chance of satisfying the decretal debt by approaching this Court via the instant petition.

Analysis and Reasons:

12. I have heard the learned counsel for the parties and perused the record. To my mind, what emerges from the record is as follows:

(i) On 29 October 2012 Nu Tek India had appointed M/s Arad Prakhsh Spadan Co. as a vessel chartering agent. Broad details as to the kind of cargo which had to be transported and the place from which the cargo had to be loaded and discharged were also set out in the letter of appointment. The capacity of the vessel and the minimum charter period was also indicated in the communication. The consideration agreed to be paid to the vessel chartering agent was also mentioned in the very same communication. Importantly, it was indicated that the vessel should have a capacity of 13000 tonnes.

(ii) A Tanker Voyage Charter Party “ASBATANKVOY” dated 10 November 2012 was executed between NCP and Nu Tek HK for engagement of the vessel for transporting the cargo from ISBP Rabigh port in Saudi Arabia to Tianjin, China. Pertinently, the Charter Party in Part I against placitum E stated the following:

*“Cargo: MIN 15,00 MT UP TO VESSEL FULL CAPACITY IN
CHOPT BASIS 8.7 M SWDRAFT-EXPECTED INTAKE ABT
15,00 MT 1 GRADE CST 180 FUEL OIL”*

13. This Charter Party bore the signatures of the authorized representatives of the owner and Nu Tek HK. Furthermore, in Part I placitum K it was indicated that arbitration proceedings would be held in

London. The arbitration agreement is incorporated in Clause 24 of Part II of this very Charter Party. As indicated in the narration of prefatory facts, this Charter Party was amended on 10 December 2012 with the execution of Addendum No. 1. The amendments essentially pertained to the description of the cargo and the substitution of the word 'shippers' in Clause 25 of the Bill of Lading with the word 'charterer'. In Addendum No. 1, the cargo which was required to be transported by the vessel was shown as "oily sludge". Addendum No. 1 also bore signatures and seal of the authorized representatives of NCP and Nu Tek HK. Concededly, in the final arbitration award dated 4 June 2015 and the amending award dated 23 July 2015 Nu Tek HK has been shown as the defendant in its capacity as the charterer of the vessel. There is, concededly, no reference to Nu Tek HK having acted as the agent of Nu Tek India. NCP has chosen for some strange reason not to place on record its SOC. Therefore, there is nothing to show that the communication dated 29 October 2012 whereby Nu Tek India supposedly engaged M/s Arad Prakhsh Spadan Co. as the vessel chartering agent was placed before the arbitral tribunal or that an averment to that effect was made in its SOC. Since the pleadings have not been placed before the Court by NCP, it would be safe to presume that no such assertion was made by NCP before the arbitral tribunal. A perusal of the subject award would show that Nu Tek HK after filing its witness statements chose not to appear before the arbitral tribunal. Consequent thereto, Nu Tek HK was proceeded *ex parte* and the subject award came to be passed against Nu Tek HK.

14. Given this backdrop, the submission advanced on behalf of NCP is that it should be allowed to enforce the subject award against Nu Tek India and, therefore, in effect, be permitted to take recourse to the assets of Nu

Tek India to satisfy the decretal debt. To support this contention, reference was made to the fact, as noticed above, that Nu Tek HK had acted as the agent of Nu Tek India. In support of this plea, two documents were principally relied upon on behalf of NCP. The first was the communication dated 29 October 2012, to which I have made a reference above, whereby Nu Tek India appointed Arad Prakhsh Spadan Co. as the vessel chartering agent and, second, was the communication dated 26 March 2013 whereby the General Counsel of Nu Tek India had given the name of the nominee-arbitrator, *albeit*, on behalf of Nu Tek HK.

14.1 Given these facts, the submission advanced by Mr. Nigam was that Nu Tek HK was a 100% subsidiary of Nu Tek India and that it was not only a group company but was also a front for Nu Tek India and, therefore, this Court should lift the corporate veil for enforcement of the subject award against the assets of Nu Tek India.

15. In support of this submission, reliance was placed on the following judgments:

- (i) *State of U.P. and Others versus Renusagar Power Company and Others*, AIR 1988 SC 1737;
- (ii) *Delhi Development Authority versus Skipper Construction Company (P) Limited and Another*, AIR 1996 SC 2005; and
- (iii) *New Horizons Limited and Another versus Union of India and Others*, AIR 1994 Delhi 126.

16. To my mind, the facts obtaining, in this case, are such that I am not persuaded to rule that this is a fit case in which the corporate veil ought to be

lifted. The age-old principle that the company, in law, is separate from those who subscribe to its Memorandum of Association i.e. its shareholders, is enunciated in *Salomon versus A. Solomon and Co. Limited*, [1897] Appeal Cases 22-HL. Over the years, there has not only been a criticism of this principle enunciated by the House of Lords in *Salomon*'s case but Courts have also, where required, pierced the corporate veil. While it appears that there has been over the years no consistency as to the cases in which corporate veil has been lifted, the authors in *Farrar's Company Law, Third Edition, at Page 74* have adverted to nine categories in which corporate veil has been lifted: (i) agency; (ii) fraud; (iii) group enterprises; (iv) trusts; (v) tort; (vi) enemy; (vii) tax; (viii) companies legislation; and (ix) other legislation.

17. Insofar as the instant case is concerned, Mr. Nigam has tried to slot his case under the heading agency and group enterprises. In order to appreciate as to whether or not this case would fall under the category of agency/group enterprise and, thus, allow for piercing of the corporate veil, it needs to be appreciated that even if one were to assume that Nu Tek HK was acting as an agent of Nu Tek India, this fact had to be laid bare before the arbitral tribunal. This assertion was required to be followed by an attempt to array Nu Tek India as a party to the arbitration proceedings in its capacity as the alter ego of Nu Tek HK. Further, even if it is assumed that such steps were not taken as NCP did not acquire the requisite knowledge of this fact during the course of the arbitration proceedings, it ought to have made the relevant assertions in the instant execution petition supported by requisite material which would show that Nu Tek HK, a subsidiary of Nu Tek India,

was, in effect, carrying on the business of the parent company i.e. Nu Tek India.

17.1 For this purpose, it ought to have been asserted and demonstrated, in the very least, that the persons who were managing the affairs of Nu Tek HK were appointed by Nu Tek India. In other words, Nu Tek India was the head and brain *qua* the business transactions undertaken by Nu Tek HK. That the profits earned by Nu Tek HK were the profits of Nu Tek India and were a product of the skill and the direction of the parent company i.e. Nu Tek India. In effect, Nu Tek India was in constant control of the affairs of Nu Tek HK (See *Smith, Stone and Knight Limited versus Birmingham Corporation*, [1939] 4 AER 116 CA). None of these assertions are found in the execution petition.

17.2 There is no material accompanying the execution petition, which would establish that the business of the parent company i.e. Nu Tek India, was the business of the 100% subsidiary Nu Tek HK.

17.3 The two documents brought on record i.e. the letter dated 29 October 2012 whereby Arad Prakhsh Spadan Co. was appointed as the vessel chartering agent and the communication dated 26 March 2013 which emanated from the General Counsel of Nu Tek India whereby he notified the nominee-arbitrator of Nu Tek HK does not meet the standard of proof which is required to establish that the parent company i.e. Nu Tek India, was acting through the agency of its 100% subsidiary Nu Tek HK. Therefore, given these glaring deficiencies, the corporate veil of Nu Tek India, as suggested by Mr. Nigam, cannot be pierced.

18. This brings me to the other argument, which is that Nu Tek HK and Nu Tek India are group companies and, therefore, the corporate veil of Nu Tek India ought to be pierced. Once again, I find that no such plea has been made in the enforcement petition. Even if I were to relax the rigour that pleadings are required to maintain when such pleas are advanced, I find that in the petition there is nothing to suggest that it is the case of NCP that there was some kind of partnership between the two entities i.e. Nu Tek HK and Nu Tek India, or that the execution of the charter party between NCP and Nu Tek HK was a mere sham or a facade. A bald pleading that Nu Tek was a front for Nu Tek India, to my mind, would not suffice.

18.1 The piercing of corporate veil under group enterprises category is usually permitted where it is sought to be demonstrated that the group companies are acting in concert i.e. as one economic unit. One of the possible ways of showing the same is to place on record the financial statements where disclosure of group accounts is made on account of statutory stipulations. In the instant case, there is neither such an assertion nor is any material placed on record for me to conclude that it is a fit case to pierce the corporate veil of Nu Tek India on the ground that this entity along with Nu Tek HK formed part of a group.

18.2 The judgments cited on behalf of NCP are distinguishable on facts. ***Renu Sagar Power Company Limited***'s case (supra) dealt with an issue where the Supreme Court pierced the corporate veil of an entity by the name Hindustan Aluminium Corporation Limited (in short 'Hindalco') and allowed it to take benefit of a lower rate of electricity duty by holding that the power plant which was established by its wholly-owned subsidiary i.e. Renusagar Power Company Limited (in short 'Renusagar') was to supply power and

adhere to the requirements of the former i.e. Hindalco. On facts, the Court found that Hindalco had established the power plant via the agency of Renusagar and that its alter ego image was recognized by the Government of U.P. inasmuch as when power cuts occurred, Hindalco suffered the consequences of the same. Furthermore, the Court also noticed that in the impugned order which was assailed by Hindalco (whereby it had not been given the benefit of reduced electricity duty on the ground that it was generating electricity from its own source), the profits of Renusagar were treated as the profits of Hindalco. It is in these circumstances that the Court agreed to lift the corporate veil and thereby proceeded to treat Hindalco and Renusagar as one concern. Consequently, the Court ruled that Renusagar's power plant should be treated as Hindalco's source of generation of power and thus Hindalco should be amenable to payment of electricity duty based on this premise.

19. Likewise, the *Skipper Construction*'s case is distinguishable on facts as that was a matter in which the Supreme Court in exercise of its power under Articles 129 and 142 of the Constitution had, *inter alia*, directed sale of valuable immovable property which on paper was owned by the company which had on its board as directors the son and daughter-in-law of the main contemnor i.e. Tejwant Singh. This direction was issued by the Supreme Court to repay the monies of investors to whom space had been sold by Tejwant Singh in violation of the orders passed by the Supreme Court. While reaching this conclusion, the Court noted the principle enunciated in *Salomon*'s case and the exceptions carved out *qua* the said principle over time by Courts in various jurisdictions across the world. The observations

made in paragraph 28 of the judgment in a sense encapsulate the principle.

These observations are noted hereafter:-

“..28. The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The fact that Tejawant Singh and members of his family have created several corporate bodies does not prevent this Court from treating all of them as one entity belonging to and controlled by Tejawant Singh and family if it is found that these corporate bodies are merely cloaks behind which lurks Tejawant Singh and/or members of his family and that the device of incorporation was really a ploy adopted for committing illegalities and/or to defraud people...”

20. As would be evident from the aforementioned extract that the Supreme Court upon appraising the material placed before it concluded that the contemnors had defrauded the purchasers by selling space in the proposed building in respect of which they were involved in a dispute with the DDA. To add insult to injury, the contemnors had continued to sell the space even after the licence issued in their favour stood determined. In the instant matter, no such case has been set up by NCP.

21. The other judgment cited on behalf of NCP i.e. ***New Horizons Limited and Another*** (supra) involved a challenge to a contract which was awarded by the official respondents (represented by the Union of India, Chairman, Telecom Commission and General Manager, Department of Telecommunications) in favour of an entity for printing, binding and supply of telephone directories. The petitioners had approached the Court by way

of a writ petition under Article 226 of the Constitution to seek direction in the nature of Writ of Certiorari for quashing the award of the contract in favour of one of the parties. The petitioner before the Court sought lifting of the corporate veil to demonstrate that it met the eligibility criteria. Towards this end, petitioner No. 1, which was a limited company by the name New Horizons Limited, relied upon the experience of its shareholders to demonstrate that it met the eligibility criteria. The Court rejected the plea and, in that context, ruled that it was not part of the duty of the official respondents to look at what was behind the corporate personality, and rather the only obligation which was cast on the official respondents was to examine the experience of the petitioner No. 1 company (i.e. New Horizons Limited) and then conclude as to whether or not it satisfied the eligibility condition. In this case, the Court made some observations concerning holding and subsidiary companies on which reliance is sought to be placed by counsel for the NCP. To my mind, the ratio of the judgment is against the case set up by NCP in this petition.

22. Thus, for the foregoing reasons, I am not inclined to entertain the captioned execution petition against Nu Tek India. Consequently, I.A. No. 14422/2018 is allowed. As a result of this direction, the main execution petition i.e. OMP(ENF.)(COMM) No. 2/2018, would have to be dismissed. It is ordered accordingly. I.A. Nos. 4269/2018 and 4270/2018, preferred by NCP, shall stand closed. There shall, however, be no order as to costs.

(RAJIV SHAKDHER)
JUDGE

JULY 30, 2019
VKR