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VISHESHWAR SHRIVASTAV

SOLE ARBITRATOR
IN

www.swatchclub.in
between

SWATCH AG

SURESH KUMAR

AND

...COMPLAINANT

...RESPONDENT

**TERMINATION OF PROCEEDINGS UNDER SECTION 32 OF THE
ARBITRATION AND CONCILIATION ACT, 1996**

Statutory Alert:

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1. This Arbitral Tribunal was constituted by nomination of undersigned as the Arbitrator in the aforesaid proceeding vide communication by NIXI and accordingly this Tribunal issued notice to the parties on 10/07/2019. This Tribunal was in receipt of an email from the Complainant dated 11/07/2019 showing compliance to direction no.2 and email dated 12/07/19 showing the dispatch of the complaint vide DTDC Courier. On tracking the said courier this Tribunal found that "***Not Delivered(ADDRESS INCOMPLETE OR WRONG-(CIR))***". This Tribunal found that the complainant had tried their best to effect service of the complaint on the Respondent's last known address but without any success. Since, the Respondent was already in receipt of the soft copy of the complaint by email sent by NIXI as well as complainant hence, vide the aforesaid communication dated 16/07/2019 this Tribunal directed the Complainants to send their Evidence by way of Affidavit by 26/07/2019.



2. Pursuant to the order dated 16/07/2019 the Complainants vide email dated 26/07/19 filed both the soft copy as well as hard copy of their Evidence by way of Affidavit.
3. This Tribunal noted that :
 - a) The Affidavit in Evidence had not been notarized.
 - b) The complainant Company i.e., Swatch AG purportedly had executed a power of attorney (POA) in favour of Ms. Surbhi Bansal, Advocate a photocopy of which had been annexed with the affidavit of Mr. Arya. However, the said POA did not carry any date except "October __, 2015" and the same did not carry any common seal of the said company nor did it carry any resolution from the Board of Directors of M/s Swatch AG authorizing the signatories to execute the POA in question. Moreover, even if for a moment the POA was taken to be acceptable the POA only gives right to Ms. Surbhi Bansal to swear affidavit and depose on behalf of the Complainants. It does not authorize Ms Bansal to further delegate this power to anyone.

c) the NJSP [Non Judicial Stamp paper] for the POA of Mr.Arya has been purchased on 14/05/2019 but it carries an averment "..... signed on 13th May, 2019" which was self contradictory.

d) Hence, this Tribunal directed that the evidence in the present form could not be accepted and liberty was granted to the complainant to set right the said defects and file the same within the next three days ending on 31/07/2019.

4. In reply to the above the Ld. Counsel for the Complainants vide email dated 30/07/2019 stated that the Complainants have complied with objection no. a (*supra*). However, they required further time for compliance of objection no. b (*supra*) as the Clients are based in Switzerland. Regarding the Common Seal and Board Resolution the Counsel requested to waive this objection or give them further time. Hence, vide order dated 20/08/2019 and on 28/08/2019 extension of 1 week and further 2 days were granted respectively.



5. That the Complainants vide email dated 28/08/2019 requested for a personal hearing which was granted and on 02/09/2019 and a personal hearing took place in the registered address of this Tribunal.
6. The Complainants had also sent an email dated 30/08/2019 in support of their contentions which was followed by another letter even dated submitting the following:
1. *Copy of email dated 30/08/2019 from the Complainants to the Ld. Arbitrator;*
 2. *Notarized Evidence Affidavits from the Complainant along with enclosures including:*
 - a. *Copy of Notarized POA from Swatch AG;*
 - b. *Copy of rectified POA authorizing Mr. Anand Arya; and*
 3. *Copy of Judgments in support of Complainant's contentions*
 - a. *Baker Oil Tools(India) Pvt. Ltd. and Ors. V. Baker Hughes Ltd. and Ors., 2011(47)PTC 296(Del)*
 - b. *Jugraj Singh and Ors. V. Jaswant Singh and Ors. AIR 1971 SC 76.*
7. Meanwhile vide its order dated 03/09/2019 this Tribunal had extended this Arbitration Proceedings by 30 days as per INDRP Rule 5 c.
8. This Tribunal vide its order dated 08/09/2019 gave a summary of the personal hearing which is as under:

- "a. That on 02/09/2019 the complainants appeared before this Tribunal through Mr. Sudarshan Kumar Bansal who filed a photocopy of a fresh POA executed in favour of Ms. Surabhi Bansal Advocate & Associate of M/s United Overseas Trademark Company. It was assured to this Tribunal that original POA is in transit and the same would be furnished to this Tribunal for inspection. The same was complied on 06/09/2019 and a photocopy of original POA together with original POA were placed before this Tribunal by Mr. Ajay Amitabh (Ld.Counsel enrol:DL/1027/2002) . Post inspection the original POA was returned to Mr. Ajay Amitabh and an endorsement of OSR (Original seen and Returned) affixed by this Tribunal on the photocopy of the POA.
- b. Reverting to the hearing dated 02/09/2019 the Tribunal heard the Ld. Counsel for the Complainant Mr. Sudarshan Kumar Bansal who laid emphasis on the point that a POA which has a seal of a Notary ought to be taken as duly executed without going into the question of authority of the executants by calling for i) Memorandum and Articles of a Company or ii) Board Resolution. In support of his contentions the Ld. Counsel cited judgment of a Single Judge of Hon'ble Delhi High Court delivered in the case of Baker Oil Tools (India) vs. Baker Hughes Ltd. reported in MANU/DE/2279/2011 also reported as 2011 (47) PTC 296 (Del). For purposes of the order this Tribunal relies upon the said judgment as reported in PTC (supra). The Ld. Counsel for the complainants also relied upon two other judgments namely Jugraj Singh & Ors vs. Jaswant Singh & Ors. (MANU/SC/0413/1970) and United Bank of India vs. Naresh Kumar (MANU/SC/0002/1997. This Tribunal notes that in the case of United Bank of India the Hon'ble Supreme Court was deciding on a question under Order 29 Rule 1 CPC w.r.t. a Suit filed by a Bank and held that the case in question related to a public Corporation where public interest was involved and the same should not be defeated on technicality and on basis of a procedural irregularity which is curable.
- c. The second case referred to by the Ld. Counsel for the complainant was of Jugraj Singh & Ors. vs. Jaswant Singh in this case the Hon'ble Supreme Court held that the fact that Notary has endorsed on the document that ".....it has been subscribed

and sworn before him....." raises a presumption that the notary has satisfied himself in discharge of his duties that the person who was executing the in transit was a proper person which makes the POA valid and effective under Sec. 85 of the Evidence Act and Sec. 33 of the Registration Act.

- d. However, it was observed that while advancing his arguments the Ld. Counsel for the complainant laid lot of emphasis on the judgment of Baker Oil (supra)
- e. This Tribunal while appreciating the concerns raised by the Ld. Counsel perused the judgment of Baker Oil as reported at **2011(47)PTC 296(Del)** and finds that the Hon'ble High Court on page 302 para 14 has dealt with question on the validity of a constituted attorney wherein the two POAs which were in issue with respect to the locus of the person signing the plaint. A bare perusal of para 14 & 15 at page 302 and 303 show that the POAs recorded that the executants was duly authorized by a Resolution of the Board of Directors and that the executants had "personally appeared" before the Notary.
- f. Further in para 23 of the aforesaid judgment at page 307 & 308 the Hon'ble High Court has held that as per Section 291 of the Companies Act, 1956 a director can exercise power in accordance with the powers given to it under either by resolution of the Board of Directors or through the Memorandum and Articles of Association of the Company. The Hon'ble High Court at page 309 of the judgment referred to Chapter IV of the Delhi High Court (Original Side) Rules as well and has decided the issue against the plaintiff (page 310) on the point of non compliance of sec. 291 of the Company act and High Court Rules referred supra.
- g. Thereafter the Hon'ble High Court turned to the provisions of under Sec. 85 of the Evidence Act which is reproduced as under..

***85. Presumption as to powers-of-attorney**

The Court shall presume that every document purporting to be a power-of- attorney, and to have been **executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, ⁶²[Indian] Consul or Vice- Consul, or representative ⁶³[---] of the ⁶⁴[Central Government], was so executed and authenticated."**

- h. The Hon'ble High Court after going through various judgments have held in para 31 (page 320) that in order to attract presumption under Sec. 85 of the Indian Evidence Act the execution and authentication of the POA by Notary Public is to be proved by the party taking shelter under Sec. 85.
- i. In the light said decision of the Hon'ble High Court this Tribunal was required to see whether there is a proper execution of the POA which was filed on 06/09/2019.
- j. In this connection it is seen that said POA has been executed by one Dr. Thierry Kenal and Mireille Koenig purportedly on behalf of Swatch AG. It is further noticed that the said POA has been executed on 28th of August, 2019 whereas it has been certified to be signed in the office of the Notary on 29th of August, 2019 which shows that the POA was not executed before the Notary Public. The Notary Public too is silent on the factum of presence of the said persons for execution of the said POA.
- k. Moreover, there is no mention of any authority given to such persons by the complainant Company by any Board Resolution or Memorandum and Articles of Association as the Notary is silent on the said aspect. It is seen that the Notary has only affixed his seal and signatures on the said POA. In this connection this Tribunal refers to a decision of the Hon'ble Delhi High Court **30 (1986) DLT 525 DB** wherein the Hon'ble DB was dealing with similar question where a Board Resolution was not produced and the Court's attention was invited to Sec. 85 of the Evidence Act, 1872. The Hon'ble DB in para 9 has observed that ".....As the POA shows the seal was affixed on 27.11.1973 and the attestation is on 13.12.1993 it does not seem that it was executed before the Notary Public."
- l. In para 11 the Hon'ble DB held that in order to draw presumption under Sec. 85 two contentions are to be satisfied **"Firstly it must be executed "before a Notary Public" and secondly it must be authenticated by him. In this case, there is no authentication at all. There is no statement of the facts by Notary Public regarding manner of execution or the person executing the document."** Further, their Lordships have held in para 14 **".....It is therefore, very essential to stress that two**

ingredient which contained in para 85 of the Evidence Act viz., Execution before Notary Public and authentication of Notary Public. The "words are "executed before, and authenticated by" both these conditions must be satisfied". This observation is also reflected in the case of Jugraj Singh & Ors. vs. Jaswant Singh as well where it has been held that a document must display ".....it has been subscribed and sworn before him..." – him stands for Notary Public.

- m. Now turning to Baker Oil's case it can be seen that Hon'ble High Court in the said case had remanded the appeal back to the trial court so as to afford the respondent an opportunity to cure the technical defects.
- n. At this stage this Tribunal cannot ignore the decision of the Hon'ble Court as given in para 46 of the judgment of Baker Oil(Supra) wherein the Hon'ble High Court has held and observed ".....Hence there can be no divergent view on the legal preposition that an Advocate cannot act in dual capacity, that of a constituted attorney and an Advocate"
- o. Hence, keeping the above judgments/pronouncements this Tribunal again gave a last and final opportunity to the complainant to cure the defect(s) in their POA and file fresh POA within one week expiring on 15th September, 2019."

- 9. That on 14/09/2019 vide its email the Complainant sought further time to cure the defects in their POA on the grounds that their clients were based in Switzerland. Hence, this Tribunal vide its order dated 16/09/2019 gave them another 10 days time to file the fresh POA. However, vide their email dated

25/09/2019 the complainants again sought time of 2 days and again this Tribunal granted them 3 days time in the interest of justice. But inspite of all the time granted the complainants could not file the fresh POA and finally by email dated 28/09/2019 withdrew the complaint.

10. In view of the above withdrawal of the complaint this Tribunal terminates the present Arbitration proceedings. However, it is made clear that this order of termination of proceedings is purely on the aforesaid reasons and nothing stated in this order shall affect the merits and/or rights of the parties to settle their disputes before any *fora*. Hence, this Tribunal passes a NIL Award in the present matter.
11. The original copy of this order of Termination of Proceedings under section 32 of the Arbitration and Conciliation Act, 1996 is being sent along with the records of this proceeding to National Internet Exchange of India (NIXI) for their record and a copy of this NIL Award is being sent to both the parties for their records.

Signed this 1st day of October, 2019.

NEW DELHI
01/10/2019



V. SHRIVASTAV
ARBITRATOR