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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: March 25, 2009

Date of Order: April 29, 2009

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29.04.2009

Rajib Saha & Anr.

...Petitioners

Through : Mr. Sandeep Sethi, Sr. Adv. with Mr. Rajat Joneja and
Mr. Sindhu Sinha, Advocates

Versus

Paul Berkowitz

...Respondent

Through: Mr. Sachin Datta, Advocate

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

JUDGMENT

1. By this petition under Section 34 of the Arbitration & Conciliation Act, 1996 (for short, "the Act"), the petitioners have filed objections against the award dated 7th November 2008 given by the learned Arbitral Tribunal in favour of respondent awarding the respondent a sum of Rs.2,11,52,000/-.

2. Brief facts relevant for the purpose of deciding this petition are that respondent Mr. Paul Berkowitz was working as a salaried Director with the petitioner No.2 M/s. GISIL Designs Private Limited. Petitioner

No.1 was one of the shareholders of petitioner No.2 Company. The petitioner No.1 entered into a share purchase agreement with respondent on 8th August 2006 and petitioner No.2 was a party to the agreement. In terms of this share purchase agreement, petitioner No.1 had agreed for sale of his 16,27,043 shares of petitioner no.2 company at a rate of Rs.2.90 per share. The face value of a share was Rs. (1) one. It was agreed that total consideration of Rs.47, 18,424.70 shall be paid by respondent through foreign remittance to fulfill his part of obligation and on receipt of this remittance in US dollars from the bank abroad into the designated bank account of petitioner no.1, the petitioner No.1 shall obtain all approvals that may be required from government authorities for the purpose of implementation of the agreement. The necessary approvals were treated as conditions precedent. The respondent was also to be furnished a copy of shareholder agreement and Articles of Association of the Company. The obligations had to be performed on or before the closing date. The closing date was defined as five business days subsequent to the receipt of the last of the condition satisfaction notice. Vide another agreement dated 9th August 2006, the respondent had agreed to abide by the original shareholder agreement which contained an undertaking that the shareholder would not carry on an activity competitive in nature to the business of the company i.e. petitioner No.2. Thus, the respondent had undertaken not to carry on any business that would be adverse to the interests of the petitioner no.2 company.

3. It is not disputed that the petitioner No.1 received the amount as stated in the agreement through foreign remittance from respondent on 10th April 2007 and the parties executed necessary documents as contemplated by the share transfer agreement. Necessary permissions were applied by petitioner No.1 and were obtained by 15th September 2007. Despite getting requisite permissions for transfer of shares to foreign national (respondent) and despite receiving the consideration, petitioner No.1, who was to present to petitioner No.2 the necessary share transfer forms duly filed up and signed by the parties accompanied by necessary permissions, did not fulfill his part of the obligations of getting the shares transferred in the name of the respondent so as to enable him to be a shareholder of petitioner No.2 company. The petitioner No.2 company, therefore, did not recognize the transfer and did not correct the register of shareholders as petitioner No.1 did not do necessary last act of submitting share transfer form with the petitioner No.2. He did not even inform the claimant/ respondent about the formalities having been completed. On finding that the petitioners were not fulfilling their part of obligations under the agreement, respondent invoked the arbitration clause and the impugned award was passed by the learned Arbitral Tribunal.

4. The defence taken by the petitioner before the learned Arbitral Tribunal was that there was delay on the part of the respondent in remitting the sale consideration. The respondent had left petitioner No.2 company and was working with its business rival and under the

circumstances, it was not justified transferring the shares to the respondent. It was also contended that respondent had not issued conditions satisfaction notice as contemplated under the agreement on the closing date. The learned Arbitral Tribunal after taking into account the defence and the contentions framed following issues:-

1. Whether the respondent have committed the breach of the Share Purchase Agreement dated 8.8.2006 and if so to what effect?
2. Even if the above point of dispute is held in favour of the claimant, can there be no specific performance of the aforesaid agreement as contended by the respondent?
3. If these points of dispute are held in favour of the claimant to what amount of damages, if any, would the claimant be entitled to?
4. Whether the claimant is entitled to interest and if so on what amount and at what rate and for what period?
5. What relief?

5. The learned Arbitral Tribunal noted that the parties relied upon the documents, most of which were admitted by each other. During pendency of proceedings, the petitioner No.1 made an application before the Arbitral Tribunal seeking permission to deposit the purchase price paid by the respondent. This application was declined. It was insisted upon by the petitioners that respondent was not entitled for relief of specific performance. The petitioner had also submitted that

respondent had left the petitioner No.2 company and was working for a rival concern viz AMSOFT, so the petitioners had lost confidence in him and the respondent was not entitled for specific performance of the agreement.

6. The respondent, who in his claim petition had insisted for specific performance, in the rejoinder contended that in any event he was entitled to compensation in lieu of the specific performance, in addition to the damages as claimed by him. He pointed out that he was entitled to claim compensation at the rate of Rs.15.75 per share since this was the price of share at the relevant time and he was entitled to recover value of the shares from the petitioners on that rate, if Tribunal comes to conclusion that it was not a case fit for specific performance.

7. After considering entire evidence and contentions of both the parties, the learned Arbitral Tribunal came to conclusion that under the terms of the agreement, the obligation of the claimant was to tender purchase price as agreed and he had done so. Though, it was done after about 8 months of the entering into the agreement, but the purchase price was accepted by petitioner No.1, the seller and petitioner No.1 agreed to take steps and to have necessary permissions obtained for completion of transaction of sale. The steps as contemplated in paragraph 4.2 of the agreement were completed by the parties. However, petitioner No.1 refused to actually get the shares transferred in the name of the respondent by deliberately not applying

to the company or by enabling respondent to apply to the company by not making the necessary papers available to him. The learned Arbitral Tribunal found no force in the plea of the petitioner that the respondent had joined the rival business company namely AMSOFT and came to conclusion that there was no material placed before the Tribunal showing that AMSOFT was a business rival of the petitioner No.2 company. The Tribunal also found that no occasion arose for the respondent of sending 'condition satisfaction notice' since all the conditions had been satisfied to the knowledge of petitioner No.1 and after satisfaction of these conditions, necessary transfer form had also been executed by the parties. The transfer form could have been executed only after 'conditions satisfaction notice' had been given by the respondent. Since the transfer documents had been executed that implied that all conditions had been met and the all necessary steps had been taken by respondent. Therefore, no further obligation was left to be complied with by the respondent. Under the agreement, the only obligation of the respondent was to pay the purchase price and he had already done that. The Arbitral Tribunal concluded that it were the petitioners who committed breach of the share purchase agreement by not actually transferring the shares in the name of the respondent and by not rectifying the books of the company. The petitioner No.1 had obviously to fulfill his obligations of forwarding the necessary forms to petitioner No.2 to enable petitioner No.2 to recognize transfer of shares and to give effect to transfer by making necessary entries in the share register. When the question of relief arose, the Tribunal considered the

arguments of the petitioners that it was not just and equitable to grant decree of specific performance and agreed to this for the reasons that the petitioner No.2 was a closely held company and in view of the souring of relations between the petitioner No.1 and respondent, the actual transfer of shares to respondent, that too a miniscule percentage of total shares, would only result in further disputes between the parties and possibly resulting into further litigation leading to impediment in proper working of the company. The Tribunal observed that grant of specific performance was discretionary and considering the petitioner's contention that it was not a fit case for specific performance and considering the circumstances, the Tribunal did not award the relief of specific performance and considered it a fit case for awarding damage/ compensation in lieu of specific performance. The Tribunal thereafter considered as to what should be the fair value of a share and considered the evidence led before it and the admission made by the petitioner No.1 during cross examination that the shares of petitioner No.2 had been offered to others on enhanced rates and on 5th September 2007, the price for transfer was received as Rs.13.26 per share. The Tribunal observed that it would be appropriate to award to the respondent compensation in lieu of specific performance by awarding him the price at Rs.13 per share in lieu of the shares and the petitioner No.1 to retain shares agreed to be sold. Calculating at this rate, the Tribunal awarded a sum of Rs.2,11,52,000/- to the respondent. The Tribunal also allowed Rs.10 lac to the respondent on account of cost of arbitration and observed that in case

the amount was paid within three months, the respondent would not be entitled to any interest on the same award amount but in case the amount is not paid within three months, the respondent would be entitled to interest @ 18% per annum on the amount awarded, till realization.

8. In the objections, the petitioners have mainly assailed the award on the basis of facts. It is submitted that the Tribunal failed to appreciate that the respondent would have been entitled only to amount of Rs.47,18,424/- which was the amount transferred by him and the Tribunal did not adopt transparent and reasonable mechanism while arriving at the amount of Rs.2,11,52,000/- as a compensation. The award of the Tribunal was, therefore, perverse. It was also stated that the Tribunal failed to take into account the documents placed before it by the petitioners and since the documents of the petitioners were not considered, the award was bad in law. The other ground is that the Tribunal failed to consider that the transfer of share as per schedule had to be in consonance with the stipulation laid down in A.P (DIR Series) Circular-16 dated 4th October 2004 issued by RBI. The guidelines laid down the manner of determining price at which the shares of Indian companies can be transferred. The guidelines stipulate that the prices of shares of unlisted company shall not be less than the price arrived at by a fair valuation of shares carried out by the Chartered Accountant. The additional guidelines provide the manner in which the shares are to be valued. The compliance of guidelines was

mandatory. Since the Tribunal failed to consider these guidelines and the prices issued by RBI, the award passed by the Tribunal was bad.

9. During arguments, counsel for the objectors/petitioners offered that the petitioners were agreeable to specific performance of agreement i.e. they were now prepared to transfer the shares in the name of respondent, to which respondent did not agree and pleaded that from the time of dispute till date the petitioners have deliberately eroded the value of the company and the value of share has thereby reduced and the petitioners deliberately made the company a defunct company in order to take this plea. Moreover, the petitioners had opposed tooth and nail the specific performance of the agreement and had pleaded that the specific performance of agreement be not given in favour of the respondent, now the petitioners cannot be heard to say that Court should allow specific performance.

10. I consider that there is considerable force in the arguments of the respondent in this case. The petitioners had not agreed for specific performance of the agreement in September 2007 and compelled the respondent to invoke arbitration clause. Thereafter, when the arbitration clause was invoked and matter was before the Arbitral Tribunal, the petitioners opposed the grant of relief of specific performance. It was admitted by the petitioners' witness that the value of the shares of the petitioner No.2 company had increased considerably in August-September 2007 when the performance of the

agreement was to be done and the share price was between Rs.13 to 15. The present value of the share according to the respondent, is almost at par with face value and that is the reason that the petitioners were now agreeable for specific performance. I consider that the petitioners cannot now compel the respondent to agree to the specific performance of the agreement instead of awarded amount. The amount has been awarded by the Arbitral Tribunal after taking into account the contentions of parties and evidence. The petitioners now seem to be ready for specific performance after eroding the worth of company.

11. The other argument advanced by the petitioners/ objectors is in respect of valuation of share. It is submitted by the counsel for the objectors that as per the share purchase agreement dated 8th August 2006, the 'valuation certificate' has been defined as a certificate provided by a Chartered Accountant concerning valuation of the share of the company as per the prescribed guidelines. The counsel for the objectors submitted that the value of the shares could only be ascertained on the basis of valuation certificate and the learned Arbitral Tribunal has wrongly assessed the value of the shares at Rs.13/- per share.

12. It is not the case of the petitioners that the petitioners produced before the learned Arbitral Tribunal a valuation certificate from a Chartered Accountant showing the value of the shares of petitioner

No.2 company during the period September 2007 when the petitioner No.1 failed to fulfill its obligation of transferring shares in the name of respondent. The Tribunal could have decided the value of the shares only on the basis of evidence produced before it and the Tribunal has taken into account the entire evidence produced before it. The guidelines of RBI referred to by the petitioners itself show that RBI's guidelines have been made to ensure that the share of unlisted company are not transferred to foreign nationals at a price less than the one ascertained by a Chartered Accountant. There is no bar put by the RBI on transferring of shares for the price more than the one given in valuation certificate of a Chartered Accountant. The RBI guidelines are there to secure the financial interest of the country and not to secure the financial interest of one individual company. These guidelines are applicable to Transferor Company while transferring shares. The guidelines do not bind an Arbitral Tribunal in determining compensation in lieu of shares and Tribunal was free to determine value of share on the basis of evidence adduced. Where an individual had entered into a share transfer agreement and failed to fulfill its obligations the valuation of shares in terms of RBI guidelines would not be relevant. I consider that the Arbitral Tribunal had rightly come to conclusion as to what will be the just compensation to be given to the respondent.

13. I find that the challenge made to the award by the petitioners is baseless. The petitioners failed to make out a case for setting aside the

impugned award. The petition is hereby dismissed. No orders as to costs.

April 29, 2009
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SHIV NARAYAN DHINGRA J.