

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

+ **F.A.O. NO.270 OF 2009 & C.M. NOS.9144 OF**  
**2009 & 9145 OF 2009**

% Reserved on : 17<sup>th</sup> July, 2009  
Pronounced on : 20<sup>th</sup> July, 2009

RAJIB SAHA & ANR. .... Appellants  
Through: Mr. Vijay Nair & Mr. Rajat  
Joneja, Advocates.

versus

PAUL BERKOWITZ .... Respondent  
Through: Mr. Sachin Dutta, Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE MUKUL MUDGAL**

**HON'BLE MR. JUSTICE NEERAJ KISHAN KAUL**

1. Whether Reporters of the local newspapers may be allowed to see the judgment? [NO]
2. Whether to be referred to the Reporter or not? [NO]
3. Whether the judgment should be reported in the Digest? [NO]

## **J U D G M E N T**

**NEERAJ KISHAN KAUL, J.**

1. The present appeal has been filed against the order of learned Single Judge dated 29.4.2009.

2. Briefly, the facts of the case are that the respondent was working as a salaried Director with appellant No.2. The appellant No.1 was one of the shareholders of appellant No.2 Company. The appellant No.1 entered into a share-purchase agreement with the respondent on 8.8.2006 and the appellant No.2 was a party to the said agreement. In terms of the share-purchase agreement, the appellant No.1 had agreed for sale of his 16,27,043 shares of the appellant No.2 Company at a rate of Rs.2.90 per share. It is not disputed that appellant No.1 received the amount as stated in the

agreement through foreign remittance from the respondent on 10.4.2007 and the parties executed necessary documents as contemplated by the share-transfer agreement. Necessary permissions were applied for by appellant No.1 and were obtained by 15.9.2007. It was the case of the respondent before the learned Arbitral Tribunal that despite getting requisite permissions for transfer of shares to a foreign national (the respondent) and despite receiving the consideration, the appellant No.1, who was to present to the appellant No.2 the necessary share transfer forms duly filled 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 the appellant No.2 Company. The appellant No.2 Company, therefore, did not recognize the transfer and did not correct the register of shareholders as the appellant No.1 did not do the necessary last act of submitting share-transfer forms with the appellant No.2. On finding that the appellants were not fulfilling their part of the obligations under the agreement, the respondent invoked the arbitration clause and the impugned award was passed by the learned Arbitral Tribunal.

**3.** The defence taken by the appellants before the learned Arbitral Tribunal was that there was delay on the part of the respondent in remitting the sale consideration. It was also stated on behalf of the appellants that the respondents had left the appellant No.2 Company and was working with its business rival and under the circumstances, it was justified in not transferring the shares to the

respondent. It was also contended that the respondent had not issued 'Conditions Satisfaction Notice' as contemplated under the agreement on the closing date.

**4.** After considering the entire agreement and contentions of both the parties, the learned Arbitral Tribunal came to the 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 eight months of entering into the agreement, but the purchase price was accepted by appellant No.1, the seller, and appellant 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, appellant No.1 refused to actually get the shares transferred in the name of the respondent by deliberately not applying to the company or enabling the respondent to apply to the company by not making the necessary papers available to him.

**5.** The learned Arbitral Tribunal found no force in the plea of the appellant that the respondent had joined the rival business company, namely, AMSOFT and came to the conclusion that there was no material placed before the Tribunal showing that AMSOFT was a business rival of appellant No.2 Company. The Tribunal also found that no occasion arose for the respondent of sending the 'Conditions Satisfaction Notice' since all the conditions had been satisfied to the knowledge of the appellant No.1 and after satisfaction of these conditions, necessary transfer form had also been executed by the parties. When the question of relief arose, the Tribunal

considered the arguments of the appellants that it was not just and equitable to grant decree of specific performance and agreed to this for the reasons that the appellant No.2 was a closely held company and in view of souring of relations between the appellant No.1 and the respondent, the actual transfer of shares to the respondent would only result in further disputes between the parties and possibly result into further litigation leading to impediment in proper working of the company. The Tribunal considered it a fit case for awarding damages/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 appellant No.1 during cross-examination that the shares of appellant No.2 had been offered to others on enhanced rates and on 5.9.2007, 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 of Rs.13 per share in lieu of the shares and the appellant No.1 to retain the shares agreed to be sold. Calculating at this rate, the Tribunal awarded a sum of Rs.2,11,52,000/- to the respondent. Costs were also awarded to the respondent. No interest was awarded, however, the Tribunal observed that in case the amount was not paid within three months, the respondent would be entitled to interest @ 18 per cent per annum on the amount awarded, till realization.

**6.** It is specifically noted by the learned Single Judge in the impugned judgment that in the objections, the appellants have mainly assailed the award on the basis of facts.

**7.** During the arguments before the learned Single Judge the counsel for the objectors/appellants offered that the appellants were agreeable to specific performance of the agreement, i.e., they were now prepared to transfer the shares in the name of the respondent, to which the respondent did not agree and pleaded that from the time of the dispute till date, the appellants have deliberately eroded the value of the company and the value of the share has thereby reduced and the appellants deliberately made the company a defunct company in order to take this plea.

**8.** The learned Single Judge took note of the fact that it was admitted by the appellants' witness that the value of the shares of the appellant 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 Rs.15. The present value of the share, according to the respondent, was almost at par with the face value and that was the reason that the appellants were now agreeable for specific performance. The learned Single Judge, thus, rightly held that the appellants could not now compel the respondent to agree to specific performance of the agreement instead of the awarded amount.

**9.** It was also submitted before the learned Single Judge by the counsel for the appellants that the value of the shares could only be ascertained on the basis of Valuation Certificate and the learned

Arbitral Tribunal had wrongly assessed the value of shares at Rs.13 per share. Learned Single Judge rightly noted that it was not the case of the appellants that the appellants produced before the learned Arbitral Tribunal the Valuation Certificate from a Chartered Accountant showing the value of the shares of the appellant No.2 Company during the period September, 2007 when the appellant No.1 failed to fulfill its obligation of transferring shares in the name of the respondent.

**10.** The learned Single Judge correctly came to the conclusion that the Tribunal could have decided the value of the shares only on the basis of the evidence produced before it and the Tribunal had taken into account the entire evidence produced before it. Further we are in agreement with the finding of the learned Single Judge that the RBI's guidelines have been made to ensure that the shares of an 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 shares for the price more than the one given in the Valuation Certificate by a Chartered Accountant. The learned Single Judge correctly held that the RBI guidelines are there to secure the financial interest of the country and not to secure the financial interest of one individual company. The guidelines do not bind an Arbitral Tribunal in determining compensation in lieu of shares and the Tribunal was free to determine the value of shares on the basis of the evidence adduced. The learned Single Judge correctly affirmed the finding of

the learned Arbitral Tribunal that just compensation had to be given to the respondent.

**11.** The counsel for the respondent also brought to our notice Clause 2.2 (i) of the share-purchase agreement (page 117) which is reproduced herein below :-

“2.2 (i) In consideration of the purchase of the Sale Shares, the Purchaser shall pay, a sum of Rs.2.90/- (Rupees two and ninety paise only) for each share comprising the Sale Shares (“Sale Consideration”) amounting to a total of Rs.47,18,424.70/- (Rupees forty-seven lakh eighteen thousand four hundred and twenty four only) to the Seller, as per the Valuation Certificate provided by a Chartered Accountant.”

**12.** As per the counsel for the respondent the Valuation Certificate provided by a Chartered Accountant was attached to the share-purchase agreement. As per the learned counsel for the respondent, the appellants in their statement of defence before the learned Arbitrator had categorically stated that immediately on receipt of sale consideration they had approached the authorized dealer for issuance of Foreign Inward Remittance Certificate (FIRC) on 23.4.2007 and finally, the approval from the authorized dealer for the transfer of sale shares was received by the appellant No.2 Company on 15.9.2007. Thus, as per the counsel for the respondent all formalities had been completed and yet the appellants had refused to transfer the shares in favour of the respondent. He further submitted that there was no violation of RBI guidelines and that the Tribunal was free to determine value of shares on the basis of evidence adduced.

**13.** We are in complete agreement with the findings of the learned Single Judge and the same warrant no interference. Further it is settled law that when the arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract, there is no scope for the court to reappraise the matter as if this was an appeal and even if two views are possible, the view taken by the Arbitrator would prevail. So long as the award made by the Arbitrator can be said to be one by a reasonable person, no interference is called for. Moreover in the present case, the findings of the Arbitrator have been affirmed by the learned Single Judge as well. In the objections, the appellants have mainly assailed the award on the basis of the facts. Issues relating to default, quantum of damages and the respondent allegedly working for a rival are all issues of fact and the Arbitrators are within their jurisdiction to decide the issue as they deem it fit after considering all relevant facts, pleadings, evidence and terms of the contract.

**14.** The appeal is accordingly dismissed. All pending applications stand dismissed as well.

**NEERAJ KISHAN KAUL  
[JUDGE]**

**MUKUL MUDGAL  
[JUDGE]**

**JULY 20, 2009  
'AA'**