

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 137 of 2002

Reserved on: July 11, 2012

Decision on: July 23, 2012

DR. HEMANT KUMAR ROHATGI & ANR. Petitioners
Through Mr. Kailash Vasdev, Senior Advocate
with Mr. S.K. Dhingra with Mr. Dhruv Rohatgi
and Ms. Shefali Mitra, Advocates.

versus

SOUTH DELHI MATERNITY & NURSING HOME
PRIVATE LTD. & ORS. Respondents
Through Mr. T.K. Ganju, Senior Advocate with
Mr. R.K. Mishra, Mr. Aquib Ali, Mr. Aditya
Ganju, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
23.07.2012

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 8th December 2001 of the learned sole Arbitrator adjudicating the disputes between the two Petitioners Dr. Hemant Kumar Rohatgi (Petitioner No.1) and Mrs. Swati Rohatgi (Petitioner No.2) on the one hand and Dr. Brij Mohan Rohatgi, Mrs. Urvashi Rohatgi, Dr. Jaideep Rohatgi and Mrs. Sulab Rohatgi (Respondent Nos. 2, 3, 4 and 5 respectively) on the other hand. By the impugned Award the learned Arbitrator determined that Respondents 2 to 5 should pay the Petitioners a total sum of Rs.32,31,600 together with interest @ 12% p.a. from the date of the Award till the date of payment and upon receipt of such amount the Petitioners were directed to surrender their 6830 + 350 shares in the Respondent No.1 company, deposit the original share scripts with the Registrar of this Court and execute transfer

deeds in favour of the Respondents 2 to 5 and their nominees.

2. The background to the above Award was that the Petitioners and Respondent Nos.2 to 5 are closely related. On 27th February 1976 a partnership firm consisting of Dr. Sharad Rohatgi, Dr. Ramesh Rohatgi, Dr. Hemant Kumar Rohatgi and Dr. Jaideep Rohatgi was formed. The object of the partnership was to acquire land for the construction of a nursing home. The capital of the partnership firm was contributed by the four partners. It was stipulated in the partnership deed that the firm could be converted into a private limited company under the name and style of 'Doctors Cooperative Private Limited'.

3. On 2nd March 1976 a Commercial Plot No.14 in the Commercial Centre, Kailash Colony Extension, New Delhi of land ad-measuring 218.5 sq. mtr. was sold by the Delhi Development Authority ('DDA') to the aforementioned partnership firm for a total consideration of Rs.1,85,000. For the purchase of the aforementioned plot while Dr. Sharad Rohatgi and Dr. Ramesh Rohatgi contributed Rs.50,000 each, Dr. Hemant Kumar Rohatgi contributed Rs.45,000 and Dr. Jaideep Rohatgi contributed Rs.40,000. On 2nd January 1981 a private limited company, South Delhi Maternity & Nursing Home Private Limited (Respondent No.1) was formed with the object of running a maternity clinic. On 26th April 1983 DDA transferred the lease hold rights in the aforementioned plot in favour of Respondent No.1. On 8th November 1983 the shareholding pattern of Respondent No.1 in its paid up share capital was as under:

1. Dr. Sharad Rohatgi	-	500 shares of Rs.100 each
2. Dr. Ramesh Rohatgi	-	500 shares of Rs.100 each
3. Dr. Hemant Kumar Rohatgi	-	450 shares of Rs.100 each
4. Dr. Jaideep Rohatgi	-	400 shares of Rs.100 each

4. The partnership capital of Rs.1,85,000 was converted into the share capital of the company in the same ratio and proportion.

5. On 3rd February 1984 a lease deed in respect of the plot was executed by the President of India in favour of Respondent No.1 in terms of which Respondent No.1 was to construct a building on the said plot. On account of the failure of the Respondent No.1 to do so, notices were issued to it during 1983 to 1989 by the DDA threatening to re-enter the premises. It is stated that Respondent No.1 paid compounding charges from time to time and that extension of time was granted by the lessor i.e. the President of India, to build on the leased land.

6. In November 1983 Dr. Sharad Rohatgi and Dr. Ramesh Rohatgi resigned as directors and their resignation was accepted on 29th November 1983, on which date Dr. Hemant Kumar Rohatgi was appointed as Managing Director. It is stated that the remaining directors decided to raise funds by issuing additional shares in Respondent No.1 company. Dr. Hemant Kumar Rohatgi held 6830 shares and his wife Swati Rohatgi held 350 shares. Between them they held 7180 shares of Respondent No.1 company constituting 33.59% shares. Respondent Nos. 2 to 5 collectively held 66.41% of the total equity shares of Respondent No.1.

7. With the money from loans, which were later on converted into shares, the construction of the building on the plot in question was completed sometime in 1988-1989. While the building was nearing completion a Suit No. 2765 of 1988 was filed by Dr. Sharad Rohatgi and Dr. Ramesh Rohatgi seeking a declaration and permanent injunction. The dispute forming the subject matter of the said suit was referred to the sole arbitration of Justice Avadh Behari Rohatgi by an order dated 5th June 1991. Justice Rohatgi passed an Award on 6th May 1992. He decided that

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since Dr. Sharad Rohatgi and Dr. Ramesh Rohatgi contributed Rs.50,000 each as their share capital they should be paid Rs.5 lakhs each by Dr. Hemant Kumar Rohatgi Group and Dr. Jaideep Rohatgi Group. The said Award was accepted by the parties and a sum of Rs.10 lakhs was paid to Dr. Sharad Rohatgi and Dr. Ramesh Rohatgi. Of these Rs.10 lakhs Rs.6,66,000 was contributed by the Dr. Jaideep Rohatgi Group and Rs.3,33,000 was contributed by the Dr. Hemant Kumar Rohatgi Group. With the payment of the aforementioned sum of Rs.10 lakhs both Dr. Sharad Rohatgi and Dr. Ramesh Rohatgi ceased to be the shareholders of the company. Thereafter, only two main groups of shareholders i.e. the Dr. Hemant Kumar Rohatgi Group (Petitioners) and the Dr. Jaideep Rohatgi Group (Respondent Nos. 2 to 5) remained. While the former got 7180 shares the latter got 14,200 shares in the Respondent No.1 company.

8. The Petitioners filed C.P. No. 197 of 1996 under Section 433 of the Companies Act, 1956 in this Court seeking the winding up of the Respondent No.1 company. Originally in the company petition, Petitioner No.2 Mrs. Swati Rohatgi was not a party. She filed an arbitration agreement with an application dated 3rd September 2001 seeking to be made a party to the arbitration proceedings. The said application was allowed. The two Petitioners, the Respondent Nos. 2 to 5 as well as Respondent No.1 were party to the arbitration proceedings.

9. In the said proceedings an order was passed by the Court on 8th August 1999 referring the disputes to Justice Avadh Behari Rohatgi (Retd.) as sole Arbitrator in terms of the Arbitration Agreement dated 31st July 1999 entered into between the parties. The operative portion of the said order directed as follows:

“All the disputes between the parties regarding the share holding of the said company (namely

South Delhi Maternity & Nursing Home Private Limited) shall be referred to the sole arbitration of Justice Avadh Behari Rohatgi. The parties of the first part have agreed to surrender and/or transfer their shares in the name of the said company to the parties of the second part and/or their nominees for a consideration which will be decided by the learned arbitrator. The mode and methods of payment of the said consideration will also be decided by the sole arbitrator.”

10. The learned Arbitrator in para 25 of the impugned Award dated 8th December 2001 noted:

“The only question that arises for my decision in this case is: What is the consideration which Dr. Jaideep group will pay to Dr. Hemant Rohatgi group for surrendering their share holding in favour of Dr. Jaideep group? I have also to indicate the mode and method of the payment of the said consideration.”

11. The learned Arbitrator proceeded to consider the claim of the Petitioners that they should be paid Rs.1,000 per share, as was done in 1992, when Dr. Sharad Rohatgi and Dr. Ramesh Rohatgi were paid Rs.5 lakhs each. The learned Arbitrator noted that although in 1992 both Dr. Sharad Rohatgi and Dr. Ramesh Rohatgi were paid Rs.5 lakhs each, the Petitioners could not be paid the same price since there was a recession in the market and properties were not fetching the prices prevalent in 1992. Further, there were loans and liabilities of Respondent No.1 company. Then there was the house tax liability in respect of the property which was the only asset of Respondent No.1 company. Respondent No. 1 being a private company, its shares were not listed in the stock exchange. Therefore, there were no buyers for its shares. On the above basis the learned Arbitrator proceeded to determine the reasonable value that could be placed on the shares of Respondent No.1. In the process he referred to

the treatise 'Lindley on Partnership'. Reference was made to the decision of this Court in ***Kidarsons Industries Pvt. Ltd. v. Hansa Industries Pvt. Ltd. 1993 (26) DRJ 43*** which was upheld by the Division Bench in ***Hansa Industries Pvt. Ltd. v. Kidarsons Industries Pvt. Ltd. 1998 (3) AD (Delhi) 27***. Thus, a fair market value had to be determined.

12. Before the learned Arbitrator the Dr. Hemant Kumar Rohatgi Group submitted that in their estimation the cost of land was Rs.1,22,36,000 (Rs.56,000 x 218.5 sq.m) and the cost of construction was Rs.30,86,845. On the other hand, the Dr. Jaideep Rohatgi Group estimated the cost of land as Rs.92,86,250 (Rs.42,500 x 218.5 sq.m.) and the cost of construction as Rs.32,40,435. The learned Arbitrator took the average of both values and determined the cost of land as Rs.1,07,61,125 and the cost of construction as Rs.31,63,640, thus totalling to Rs.1,39,24,765. After subtracting the current liability, un-secured loans and house tax liability, the net value was determined as Rs.1,10,95,824. The report of the chartered accountants fixed the value per equity share at Rs.135 which had to be further reduced by 20% since it was a private company. Thus, the value per share was determined as Rs.108.

13. The learned Arbitrator went on the basis that there was depreciation in the land prices after 1992. The prices in the past therefore afforded no guidance. The valuation suggested by the Respondent Nos. 2 to 5 was ridiculously low and the Petitioners had "pitched their claim very high". Accordingly, the learned Arbitrator decided to "take a middle path and a balanced view". The learned Arbitrator gave the following reasons for determining the value per share to be Rs.450:-

"What is significant in this case is that there is no vast difference in the value of the land and the cost of construction as estimated by the valuers of both sides. Of course, the claimants

have valued the land a little on the higher side, in my opinion. The total value of the land and the cost of constructions of the claimant is Rs.1.52 crores. The estimate given by the respondents of land and construction comes to Rs.1.25 crores. In addition to this I have taken into account the current liabilities, the loans taken by the company and the house tax liability. There is no question of capital gains in this case. Because it is a transfer of shares by the minority to the majority. The question of unearned increase similarly does not arise because the land in question is owned by the company. In the Perpetual Lease Deed dated 3rd February, 1984 the lessee is M/s. South Delhi Maternity and Nursing Home Pvt. Ltd. On sale of the property the shares of the company can be transferred in the name of the purchaser. It will thus mean that there will be a change of hands in the company. In the case of a domestic company such as the present one other factors enumerated by the counsel for the respondents such as brokerage do not carry much weight. The value of the share estimated by the respondents at Rs.108/- per share is wholly unrealistic ridiculously low, as I have said. I have valued the share at Rs.450/- per share having regard to the facts and circumstances of this case.”

14. Thereafter, the learned Arbitrator issued certain consequential directions.

15. Mr. Kailash Vasdev, learned Senior Counsel appearing for the Petitioners, first submitted that this Court had referred to the learned Arbitrator “all the disputes between the parties regarding the shareholding of the company”. This pertained to the changed shareholding pattern of Respondent No.1 company whereby as against the intended 50% shareholding of each group, the Dr. Jaideep Rohatgi Group ended up

holding 66.41% shares whereas the Dr. Hemant Rohatgi Group held only 33.59%. However, the learned Arbitrator failed to decide this dispute. The learned Arbitrator, according to Mr. Vasdev, confined the Award only to the second aspect i.e. the consideration for which the Petitioners were required to transfer their shares to the Dr. Jaideep Rohatgi Group.

16. Secondly it was submitted by Mr. Vasdev that in the reply filed to the present petition the Respondents had stated that they had no intention of ousting the Petitioners and that the Petitioners were welcome to continue in the company as shareholders. He therefore submitted that the Petitioners were willing to continue in the company and there was no need to adjudicate any dispute whatsoever. Thirdly, he submitted that the finding of the learned Arbitrator that the value per share was Rs.450 was not based on any evidence and was perverse. He submitted that when Dr. Sharad Rohatgi and Dr. Ramesh Rohatgi had been paid Rs.5 lakh each way back in 1992, on the basis of a share value of Rs.1,000 per share, there was no question of the share value coming down to Rs.450 in 2001.

17. Mr. Vasdev challenged the premise of the learned Arbitrator that the land prices in 2001 had fallen. He contested the report of M/s. G.C. Mallick & Associates, Chartered Accountants. Instead he relied on the report of M/s. Kumar Narang & Co., Chartered Accountants who determined the share value at Rs.920 per share. He submitted that there was no basis for rejection of the latter report. Referring to the judgment of the Supreme Court in **ONGC Limited v. Garware Shipping Corporation Limited (2007) 13 SCC 434** he submitted that since the impugned Award would shock the judicial conscience it should be set aside. Reference was also made to the decision in **Som Dut Builders Limited v. State of Kerala (2009) 10 SCC 259**.

18. Replying to the above submissions Mr. T.K. Ganju, learned Senior Counsel for the Respondents, pointed out that the learned Arbitrator had adopted the right approach in taking the average value of the land and construction as proposed by the Petitioners and the Respondents respectively. There was in fact, no substantial difference between the two values. Ultimately, the learned Arbitrator did not even go by those values for determining the value per share. Since the statutory liabilities of the company had increased it was unrealistic for the Petitioners to expect to be paid Rs.1,000 or Rs.920 per share. He submitted that the payment of Rs.5 lakhs each to Dr. Sharad Rohatgi and Dr. Ramesh Rohatgi was by way of lumpsum amounts and not on the basis of the value of their shares. Therefore, that could not be a reliable yardstick for determining the value of shares.

19. Mr. Ganju submitted that determination of the dispute concerning the percentage of shareholding was irrelevant since in any event the Petitioners had agreed before the Company Court that they were prepared to transfer their shareholding to the Respondents 2-5 for a consideration. He disputed the interpretation placed by Mr. Vasdev on a statement made by the Respondents in their reply to the effect that the Petitioners could continue in the company. He pointed out that the Petitioners were never willing to invest any further sums to convert the building into a nursing home whereas, it was the Respondents who were interested in doing so and were in fact looking after the upkeep and maintenance of the building even now.

20. Mr. Ganju pointed out that the report of M/s. Kumar Narang & Co., Chartered Accountants was unreliable and in fact unrealistic. Referring to the decision of ***Kidarsons Industries*** (*supra*), Mr. Ganju pointed out that the method adopted by the learned Arbitrator did not call for interference.

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Lastly, relying on the decision in *Mallikarjun v. Gulbarga University (2004) 1 SCC 372*, *Narayan Prasad Lohia v. Nikunj Kumar Lohia 2002 (3) SCC 572* and *Lucky Home Co-operative Group Housing Society Ltd. v. M/s. Shanti Developers and Promoters AIR 1996 Delhi 148* Mr. Ganju submitted that the scope of interference by this Court with the Award of the learned Arbitrator was limited. The impugned Award did not suffer from any apparent error or any patent illegality to warrant interference.

21. The first issue to be considered is that whether the learned Arbitrator erred in not dealing with the issue of the shareholding pattern of the Respondent No.1 company. The order referring the disputes between the parties to arbitration no doubt begins by stating that “all the disputes between the parties regarding the share holding of the said company” are being referred. However, it also notes that the Petitioners’ Group had agreed to surrender and transfer their shares in the Respondent No.1 company to Respondent Nos. 2 to 5 or their nominees “for a consideration which will be decided by the learned Arbitrator”. The learned Arbitrator was also to decide “the mode and method of payment of the said consideration”. Consequently, it was unnecessary for the learned Arbitrator to decide about the shareholding pattern since in any event the Petitioners agreed to transfer all their shares to Respondent Nos. 2 to 5 for a consideration. This Court is, therefore, unable to find any error having been committed by the learned Arbitrator in this regard.

22. The central issue before the learned Arbitrator concerned the valuation of the Petitioners’ shares. In the impugned Award the learned Arbitrator has discussed in detail the method adopted by him. He not only considered the value of the assets of the Respondent No.1 company i.e. the plot of land and the value of the construction thereon, but also the

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outstanding liabilities of the Respondent No.1 company. This, in fact, was the correct approach. A perusal of the report of M/s. G.C. Mallick & Associates, Chartered Accountants also reflects this approach. The said report determines the value per share as Rs.146. For higher values of the assets the said report determines the value per share to be Rs.217. The learned Arbitrator has in fact not gone by these values and has determined the value per share at twice more the maximum value suggested by M/s. G.C. Mallick & Associates. The learned Arbitrator has given cogent reasons for doing so.

23. The report of M/s. Kumar Narang & Co., Chartered Accountants in the first place was not as elaborate as the report of M/s. G.C. Mallick & Associates. While it accounts for the current liabilities and unsecured loans, it fails to provide for the contingent property tax liability. The land and building value according to the said report is no doubt higher than that suggested by M/s. G.C. Mallick & Associates. However the report fails to explain the basis for such higher value. In any event it was for the learned Arbitrator to take a decision as to which of the two reports was more reliable. It cannot be said that the learned Arbitrator erred in not going by the report of M/s. Kumar Narang & Co. It is not possible to agree with the submission of the Petitioners that by fixing the value per share of the Respondent No.1 company at Rs.450, the learned Arbitrator committed a patent illegality. The view of the learned Arbitrator, in the circumstances was a plausible one.

24. While referring the disputes to arbitration, this Court had recorded the agreement between the parties that they would accept the Award of the learned Arbitrator as final and binding. The Petitioners have nevertheless challenged the Award. This Court has, notwithstanding the above agreement, considered the said challenge on merits. The Court finds no

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ground having made out for interference with the impugned Award under Section 34 of the Act.

25. Consequently, the petition is dismissed with costs of Rs.5,000 to be paid by the Petitioners to the Respondents through counsel within four weeks.

JULY 23, 2012

S.MURALIDHAR, J

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