

(2006) 03 DEL CK 0243

Delhi High Court

Case No: CS (OS) No. 430 of 2002

Penta Software (P) Ltd.

APPELLANT

Vs

Shri Aseem Khera and Others

RESPONDENT

Date of Decision: March 21, 2006

Hon'ble Judges: Anil Kumar, J

Bench: Single Bench

Advocate: P.K. Aggarwal, for the Appellant; Nemo, for the Respondent

Judgement

Anil Kumar, J.

This judgment shall dispose of plaintiff's suit for recovery of Rs.42.72 lakh along with pendente lite and future interest and a decree of specific performance in respect of 49,990 equity shares of M/s. Path Finder Info Services Pvt. Ltd. in favor of plaintiff No.1 and to deliver the original shares to the plaintiffs. ?

2. The brief facts to comprehend the disputes are that the plaintiff no.2 and the defendant no.1 conceived a project of an international call centre at Gurgaon, Haryana. The total cost of the project was Rs.35.00 cores/US\$ 7 million. The defendant no.1 is a non-resident Indian settled in USA and the terms which were agreed between the parties were that plaintiff and defendant were to invest one million US dollars each in the project and 5 million US dollars were to be invested by the US Venture Capital fund to be arranged by the defendants. A company was to be incorporated in India and another company was to be incorporated in the United States. Indian company was to be wholly owned company of the US Company and the plaintiff and the defendants were to be equal partners in the US company.

3. The plaintiff contended that consequently M/s.Path Finder Info Services Pvt. Ltd was incorporated in Delhi and M/s.Path Finder Solution Incorporation was incorporated in the United States.

4. The plaintiff no.1 averred that it transmitted an amount of US\$ 100,000 to the defendants after taking permission from the Reserve Bank of India. The plaintiffs

also invested an amount of Rs.3.7 crores in Indian company, M/s. Path Finder Info Services Pvt. Ltd., and also got installed various equipments, such as, air-conditioning plant and 24-hours power back-up at 240.243, Udyog Vihar, Phase IV, Gurgaon.

5. Defendant no.1 remitted US\$11000 for acquiring equity of the Indian company i.e., M/s.Path Finder Info Services Pvt. Ltd. Against the said amount of US\$ 11000, 49980 shares of M/s.Path Finder Info Services Pvt. Ltd. were transferred in favor of defendant No.1. Ten equity shares were held by Shri Ramesh Shah. He transferred 10 equity shares held by him in favor of defendant no.1 as part of the original scheme where defendant no.1 was to be 100% subsidiary company of the U.S.Company. plaintiff no.2 continued to hold balance 10 shares in his name on behalf of defendant no.1.

6. Subsequently, the defendants expressed their inability to arrange and remit necessary fund of US\$ 1 million contrary to the agreement under which they had to arrange and remit the funds till 20th March, 2001 and on failure to remit the necessary funds, the defendants were liable to refund US\$ 89000 to the plaintiff and they were also to return 49990 shares of M/s. Path Finder Info Services Pvt. Ltd. for being allotted/transferred to plaintiff No.1.

7. On failure of the defendants to refund US\$ 89000 equivalent to Rs.42.72 lakh and return of 49990 shares, the plaintiff has filed the present suit for recovery of Rs.42.72 lakh and a decree for specific performance in respect of 49990 equity shares in favor of plaintiff No.1 and delivery of the original shares to the plaintiff No.1 and in the alternative the plaintiff has prayed for a decree for recovery of money in the sum of Rs.5.28 lakh with pendente lite interest and future interest at 12% per annum.

7. The summons of the suit were served on the defendants by publication in the newspaper "The Statesman" (overseas edition) dated 19th July, 2003. The defendants despite service remained absent and no one appeared on their behalf and, Therefore, they were proceeded ex parte by order dated 23rd March, 2004

8. The plaintiff has filed evidence on affidavit. An affidavit of Shri N.K. Khanna (Naresh Kumar Khanna), plaintiff No.2, who deposed about the resolution dated 11th February, 2002 authorizing him to sign and verify the pleadings and institute the suit. The copy of the resolution dated 11th February, 2002 was proved and exhibited as Ex.PW1/2. The copy of memorandum of understanding between the plaintiff and the defendants was deposed about. It was contended that the original memorandum of understanding is in power and possession of defendants and a copy of said document was sent to the plaintiff by fax. The copy of memorandum of understanding between the plaintiff and the defendants was proved and exhibited as Ex.PW1/3. The deponent proved the certificate of incorporation dated 10th August, 1999 as Ex.PW1/1 and the another certificate of incorporation dated 24th

May, 2000 as Ex.PW1/4. The Memorandum of Article of Association of M/s. Path Finder Info Services Pvt. Ltd. were proved and exhibited as PW1/5 and a photocopy of letter dated 22nd August, 2002, to the Chief General Manager, Reserve Bank of India was proved and exhibited as PW1/6. A copy of the letter received from the Reserve Bank of India dated 9th November, 2000 communicating the terms and conditions granting approval for proposal for setting up of a foreign concern in the United States of America in the field of setting up of a world-class centre for providing customer-related services was proved and exhibited as Ex.PW1/7.

9. A copy of the letter to the Chief Manager, State Bank of Indore for outward remittance of US\$ 100,000 was proved and exhibited as Ex.PW1/8 and minutes books of the company dated 24th February, 2001 were proved and exhibited as PW1/9 whereas the minutes of the meeting held on 24th February, 2002 at 4.45 pm was proved and exhibited as PW1/10. A copy of the resolution dated 24th February, 2001 was proved and exhibited as Ex.PW1/11 and a certified copy from the Registrar of Companies was proved and exhibited as Ex.PW1/12 and certified copy of "Form 5" was proved and exhibited as Ex.PW1/13. On failure of defendants to refund 89000 US\$ and 49990 equity shares, a notice dated 2nd June, 2001 was sent, a copy of which was proved and exhibited as Ex.PW1/14 and its postal receipt was proved and exhibited as Ex.PW1/15. The deponent deposed categorically that the amount of US\$ 100,000 is lying with the defendants since 28th November, 2000 and the defendants are liable to pay 18% interest per annum since 28th November, 2000 and since the defendants failed to remit one lakh US\$, they have become liable to transfer 49990 shares in favor of plaintiff No.1 against the adjustment of 11000 US\$ out of an amount of US\$ 100,000 sent by plaintiff No.1.

10. The plaintiff has produced the original minutes books of shareholders' meetings of M/s. Path Finder Info Services Pvt. Ltd. which was proved and exhibited as Ex.PW1/10 and the original Director's Minutes Books of M/s. Path Finder Info Services Pvt. Ltd. has been proved and exhibited as Ex.PW1/9.

11. The plea raised by the plaintiffs have remained un-rebutted and are deemed to be admitted. The depositions on behalf of plaintiffs have also not been rebutted. On the basis of the depositions made by the plaintiff, the inevitable inference is that the suit of the plaintiff for recovery of Rs.42.72 lakh and for specific performance in respect of 49990 equity shares of M/s. Path Finder Info Services Pvt. Ltd. or in the alternative for recovery of Rs.5.28 lakh with pendente lite and future interest has been established. The plaintiffs' suit was filed by Shri Naresh Kumar Khanna who has been duly authorized on behalf of plaintiff No.1 company to sign, verify and institute the suit on behalf of plaintiff No.1. The plaintiffs have also been able to establish that there had been a memorandum of understanding between the plaintiffs and the defendants under which defendants had to invest US\$ 1 million each in the project and US\$ 5 million by the US Venture Capital Fund which was to be arranged by the defendants.

12. The plaintiffs have been able to establish that M/s. Path Finder Info Services Pvt. Ltd. was incorporated in Delhi and the plaintiffs remitted an amount of US\$ 1 lakh to the defendants after taking permission from the Reserve Bank of India on the terms and conditions imposed by the Reserve Bank of India. The plaintiffs have also been able to establish that 49990 equity shares of M/s. Path Finder Info Services Pvt. Ltd. were transferred in favor of defendant No.2 on remittance of US\$ 11000 by the defendants. Since the defendants failed to arrange and remit necessary funds of US\$ 1 lakh, the defendants became liable to refund 89000 US\$ equivalent to Rs.42.72 lakh paid by the plaintiffs to the defendants. The defendants have also become liable to refund 49990 equity shares of M/s. Path Finder Info Services Pvt. Ltd. and on failure of the defendants to return 49990 shares, the plaintiffs have become entitled for another sum of Rs.5.28 lakh. The plaintiffs have filed the suit separately for the amount of Rs.42.72 lakh and for the amount of Rs.5.28 lakh which the plaintiffs are claiming in respect of 49990 equity shares.

13. The plaintiffs have proved minutes of extra-ordinary general meeting dated 24th February, 2001 and consequently, the plaintiffs have been able to prove successfully that they are entitle for recovery of US\$ 89000 and for specific performance of 49990 equity shares or a sum of Rs.5.28 lakh in lieu of 49990 equity shares. The plaintiffs have also been able to establish that they are entitled for interest at the rate of 12% per annum which fact has not been countered or disputed by the defendants. The plaintiffs have Therefore, became entitled for interest 12% per annum. Since the plaintiffs themselves claimed an amount of Rs.5.18 in lieu of 49990 equity shares, the plaintiffs have become entitled for said amount in stead of specific performance of 49990 shares.

14. Considering the facts and in totality of circumstances, Therefore, a decree for recovery of a sum of Rs.42.72 lakh in favor of plaintiffs and against the defendants is passed. Another decree for recovery of Rs.5.28 lakh in lieu of 49990 equity shares is also passed in favor of plaintiffs and against the defendants. Therefore, a decree for recovery of total sum of Rs.48 lakhs is passed in favor of plaintiffs and against the defendants. plaintiff shall also be entitled for pendente lite and future interest 9% per annum from the date of the institution of the suit till recovery of the decreetal amount. plaintiff are also awarded costs against the defendants. Decree sheet be drawn accordingly.