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**17th NUJS-HSF
Corporate Law Moot Court Competition
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IN THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

Civil Appeal No. 767 of 2024

Arnav Barman

Isha Barman

Foodbay India Pvt Ltd

...Appellants

versus

Seed Surge Ltd

...Respondent

1. According to a McKinsey study published in 2017, '*how the world eats is changing dramatically*'. Arnav Barman and Isha Barman (née Naidu) became millionaires because they realised this long before many others did. As is so often the case, the penny dropped because of a personal experience: in their case, their inability while studying at the Indian Institute of Management, Ahmedabad, to find the food they had been accustomed to eating in their childhood.
2. Accordingly, in 2010, shortly after they graduated (and married), Mr and Mrs Barman decided to start a new business which they named – perhaps less imaginatively than one might expect – as Foodbay. The idea – novel at the time but commonplace now – was that anyone who wanted to order a meal from their preferred restaurant could do so by using an online app which would connect them to the restaurant and a network of riders who would deliver the food.
3. In early 2011, Mr and Mrs Barman incorporated Foodbay India Pvt Ltd, referred to in this document as Foodbay. The memorandum of association contained an objects clause drafted in wide terms and the company adopted the standard form of articles of association that existed at the time.
4. In its early days, Foodbay was a novelty in India. But it experienced difficulties precisely for that reason; and also because the food delivery business is not a viable proposition without sufficient capital to carry on the business on a large scale and in multiple

locations. Although Mr and Mrs Barman had always firmly been of the view that they should not give up or even dilute their control of the company, this somewhat idealistic view did not survive contact with reality. By the autumn of 2012, they had reconciled to the fact that it would not be possible for Foodbay to thrive or even survive without a substantial injection of capital.

5. Having taken professional advice, it became apparent to them that they could seek to raise capital either by listing Foodbay or by allowing a venture capital firm to invest in it. They did not find either of these courses appealing because of their concerns about the loss of control but decided on balance that the latter was the less unattractive course, not least because it would eliminate the risk of an unsuccessful listing which could have been fatal to a company in its early stages, as Foodbay then was.
6. Raising venture capital is not easy but Foodbay had received favourable press attention since its launch and there was an intuitive appeal about the business model that the founders were able readily to convey to potential investors. After discussions with a number of leading VC firms, the Barmans finally decided that they would work with Seed Surge Ltd.
7. Seed Surge was at the time a relatively new VC fund that specialised in funding start-ups in emerging markets. It had been incorporated in London in 2009 by Helen Dunn and had achieved some notable successes since then. The Barmans met Ms Dunn for lunch at the Dorchester Hotel in London in December 2012 and felt that they could work with her. After extensive discussion, Seed Surge agreed to make a substantial investment in return for a majority shareholding in Foodbay, but on the basis that the Barmans would nonetheless continue to run the company, which was non-negotiable for the Barmans.
8. Accordingly, on 19 December 2012, Foodbay, Seed Surge and the Barmans entered into a Shareholders Agreement. This provided that:
 - (1) Seed Surge would invest £175 million in Foodbay.
 - (2) Foodbay would issue new shares to Seed Surge such that Seed Surge would hold 51% of Foodbay's issued share capital.

- (3) Seed Surge would have the right to appoint three out of the seven directors constituting Foodbay's board of directors.
 - (4) The Barmans (referred to in the SHA as 'the Promoters') would be entitled to appoint the remaining four directors, so long as they remained the only shareholders in Foodbay other than Seed Surge.
 - (5) The Promoters were obliged to give sufficient notice to Seed Surge of all board and board committee meetings and provide Seed Surge at its request with access to all financial or other information available to Foodbay.
- 9. The SHA also contained provisions designed to prohibit Foodbay from soliciting investment from anyone else or from listing its shares without the consent of both Seed Surge and the Promoters. Similarly, it also contained confidentiality and other provisions prohibiting Seed Surge from providing any information about Foodbay to third parties, especially competitors. The SHA also restrained the parties from selling their shares in Foodbay without the prior consent of all other parties.
 - 10. Other relevant provisions of the SHA are set out in **Annex 1**.
 - 11. None of the provisions of the SHA was incorporated into the articles of association of Foodbay.
 - 12. Seed Surge's investment in Foodbay received wide acclaim. It was seen, particularly by the Indian media, as a vote of confidence by a leading VC firm in Foodbay's business model and it added to the sense that the Barmans were young entrepreneurs who were going to transform Foodbay into India's own Deliveroo or Uber.
 - 13. Initially, Seed Surge and the Barmans worked together constructively; and the substantial capital provided by Seed Surge was put to good use, with Foodbay expanding rapidly in Delhi, Mumbai, Chennai, Bangalore and Kolkata, in addition to developing advanced plans to begin operations in other cities. By late 2016, Foodbay was worth Rs 7500 crores.
 - 14. But friction started to emerge. This had its origins in the desire of the Barmans from their IIM days to have complete control over a company which they perhaps understandably regarded as 'theirs' even though they held only 49% of the shares. Initially, when the

company was doing well, that fact tended to paper over the cracks that were beginning to emerge in the working relationship. However, by the end of 2017, Foodbay was finding it increasingly difficult to compete with international food delivery companies which had recently established operations in India. The main problem that Foodbay faced was that it did not have anywhere near enough capital, even with the investment that Seed Surge had provided, to match its international competitors in scale. For every new city that Foodbay targeted, its competitors were able to target five; for every new ‘deal’ that Foodbay offered customers to retain their loyalty, its competitors offered a better deal, because of their ability to absorb losses which Foodbay did not have.

15. As a result, Foodbay’s revenue and profitability both began to fall; and, by 2019, it seemed that Foodbay would eventually be forced to merge with one of the big fish. This was anathema to the Barmans but not to Seed Surge. Seed Surge’s principal objective was to secure a profitable exit price for the shares it had purchased and whether that was done through an IPO or a sale made little difference in its eyes. But in the eyes of the Barmans there was a world of difference between those two things. Listing Foodbay would mean that the Barmans remained in control. Selling it to a competitor would not only mean the loss of control but the extinction of Foodbay’s brand and identity. The effect of the veto provisions in the SHA, however, was that neither Foodbay nor Seed Surge could sell their shares or pursue an IPO without the consent of the other. Thus, by the end of 2021, there was an impasse, with neither camp willing to give ground.
16. On 5 February 2022, the Barmans gathered in Ahmedabad for an IIM batch reunion. One of their batchmates, Rajiv Mehta, had risen to a senior position in Tasty Scoot plc, the world’s second largest food delivery business by number of orders and revenue. In the course of a convivial dinner, the Barmans discovered that Mr Mehta knew Seed Surge. They did not regard this as surprising but in the course of conversation Mr Mehta told the Barmans in strict confidence that Seed Surge had in fact recently approached Tasty Scoot with a proposal to buy out its stake in Foodbay. Seed Surge was, of course, not allowed to sell without the consent of the Barmans, which Seed Surge had no doubt would not be forthcoming, especially if the buyer was a competitor like Tasty Scoot. But Seed Surge had concocted a scheme to overcome this, which was that Tasty Scoot would deliberately ramp up its own Indian operations in the markets in which Foodbay was most profitable with a view to driving down prices and forcing Foodbay either to lose

customers (by holding its prices) or lose profits (by reducing them). Seed Surge offered to provide Tasty Scoot with confidential information about Foodbay's business to enable Tasty Scoot to implement this plan. Mr Mehta told the Barmans that he regarded this as wholly unethical (irrespective of the legalities of the matter) and therefore rejected Seed Surge's proposal out of hand.

17. The Barmans, for their part, understandably took rather a dim view of Seed Surge's conduct and were also concerned that it might be hawking this scheme to other competitors, having been rebuffed by Tasty Scoot. They took urgent legal advice as to their rights and obligations under the SHA and were advised that Seed Surge's conduct was a contravention of the confidentiality obligations in the SHA but that it would be difficult to establish that any financial loss was caused by that breach, since Tasty Scoot had in the event rejected the offer.
18. The Barmans nonetheless decided that they could no longer work with Seed Surge, as it was, in their view, seeking actively to harm Foodbay's interests, driven apparently only by its own commercial objective of making a profitable exit.
19. Accordingly, in July 2022, the Barmans commenced a claim in the National Company Law Tribunal seeking relief from oppression and mismanagement. The respondents to the petition were Seed Surge and Foodbay (as a pro forma respondent). The relief sought by the Barmans was an order requiring Seed Surge to sell its shares in Foodbay to them at the price originally paid plus a reasonable rate of interest, alternatively at the current market price (which was significantly lower than the Strike Price specified in clause 18.4 of the SHA). The main ground relied upon in support of the claim was Seed Surge's alleged breach of its confidentiality obligations under the SHA, which was said to demonstrate that it had acted disloyally towards Foodbay.
20. On 24 July 2022, Seed Surge served a Put Option Notice under clause 18.1 of the SHA.
21. On 26 July 2022, solicitors acting for the Barmans wrote to Seed Surge's solicitors stating that the Put Option Notice was invalid because no Event of Default had occurred. They invited Seed Surge instead to enter appearance in the NCLT proceedings so that the dispute between the parties could be resolved in a single forum.

22. On 29 July 2022, Seed Surge served a Dispute Notice under clause 25.1 of the SHA, contending that the Put Option Notice was validly served and that the Barmans' attempt to litigate in the NCLT was a breach of the arbitration agreement in the SHA.
23. The parties then attempted to resolve the dispute amicably but were unable to do so.
24. On 25 September 2022, Seed Surge served a Notice of Arbitration in accordance with the ICC Rules seeking: (i) a declaration that the Put Option Notice had been validly served; and (ii) an order requiring the Barmans to purchase Seed Surge's shares at the Strike Price.
25. Seed Surge also issued an application in the NCLT under section 8 of the Arbitration and Conciliation Act 1996 seeking an order referring the parties to arbitration. In response, the Barmans contended that the dispute was not arbitrable and that the arbitration agreement was in any event not binding on them or Foodbay because it had not been incorporated into the articles of association.
26. The NCLT heard the section 8 application over four days at which each party made detailed submissions. Following that hearing, the NCLT dismissed the section 8 application, holding that:
 - (1) The arbitration agreement in the SHA is governed by Indian law, not English law.
 - (2) Under Indian law, the claim commenced by the Barmans in the NCLT is not arbitrable.
 - (3) In any event, neither the Barmans nor Foodbay is bound by the arbitration agreement because it had not been incorporated into Foodbay's articles of association.
27. Seed Surge appealed to the NCLAT. Following an expedited hearing, the NCLAT allowed the appeal, finding that:
 - (1) The arbitration agreement is governed by English law.
 - (2) Under English law, the claim commenced is arbitrable (and would be arbitrable even if the proper law were Indian law).

- (3) The failure to incorporate the arbitration agreement into the articles of association is irrelevant; even if it were relevant, it would only affect the position of Foodbay, not the Barmans.
28. Accordingly, the NCLAT made an order under section 8 referring the parties to arbitration.
29. The Barmans then appealed to the Supreme Court. At the first hearing of the appeal, which the Court treated as a case management hearing, the Court appointed nodal counsel in the usual way to streamline the process of written submissions and indicated that the following issues should be addressed at the final hearing:
- (1) Which law governs the issue of whether the dispute in this case is arbitrable?
 - (2) What (if relevant) is the governing law of the arbitration agreement in the SHA?
 - (3) Applying the relevant law (or laws), is the claim commenced by the Barmans in the NCLT arbitrable?
 - (4) Is the arbitration agreement binding on the Barmans and Foodbay even though it was not incorporated into Foodbay's articles of association?
30. In view of the important questions of law arising in this appeal, the Chief Justice of India has directed that the appeal will be listed for hearing in February 2025 before a Constitution Bench consisting of five judges.

Annex 1
Relevant provisions of the SHA

18 Put Option

- 18.1 If a Foodbay Event of Default (as defined in clause 11 above) occurs, Seed Surge shall be entitled, but not obliged, to serve a notice on the Promoters and Foodbay under this provision ('Put Option Notice').
- 18.2 Upon the service of a Put Option Notice, the Promoters shall be obliged to purchase Seed Surge's shares in Foodbay at the Strike Price.
- 18.3 The transfer of the shares by Seed Surge and payment by the Promoters shall be made within 30 days of the service of the Put Option Notice.
- 18.4 Upon the transfer and payment referred to above, Foodbay shall remove Seed Surge from its register of members and any directors previously appointed by Seed Surge shall resign.
- 18.4 The Strike Price shall be £26.75 per share.

24 Applicable Law

- 24.1 This Agreement, and any non-contractual or other claims arising out of or in connection with it, shall be governed and construed in all respects by Indian law, without giving effect to the principles of conflict of laws thereof.

25 Dispute resolution

- 25.1 If any dispute, controversy or claim, whether of law or fact, of any nature whatsoever, arises out of, in connection with or in relation to this agreement (a 'Dispute'), any party claiming that a Dispute has arisen shall serve a notice giving details of the Dispute ('Dispute Notice').
- 25.2 The parties shall use all commercially reasonable efforts to resolve the Dispute within 30 days of the service of the Dispute Notice ('the Negotiation Period').
- 25.3 In the event that the parties are unable to resolve the Dispute in or during the Negotiation Period, such Dispute shall be settled exclusively and conclusively by binding arbitration in accordance with the rules of the International Chamber of Commerce then in effect, by three independent and impartial arbitrators, of whom each party shall designate one. The seat of the arbitration shall be London, United Kingdom and the language of the

arbitration shall be English. For the avoidance of doubt, the parties have hereby chosen London as the juridical seat of the arbitration, irrespective of its venue.