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

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\+ **ARB.A. 2/2015**

KUMAR APURVA ..... Appellant

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Gaurav Gaur and Mr. Adesh Kumar Sharma, Advocates.

versus

VALUEFIRST DIGITAL MEDIA PVT. LTD. ..... Respondent

Through: Mr. Rajiv Kumar Virmani, Senior Advocate with Mr. Khalid Arshad, Mr. Mohit Chadha, Mr. Abhishek Bansal, Mr. Ishwar Upneja and Mr. Sunny Bajaj, Advocates.

CORAM: JUSTICE S. MURALIDHAR

O R D E R

% **23.03.2015**

1. This appeal is directed against an order dated 22nd November 2014 passed by the sole Arbitrator in an application filed by the Respondent under Section 17 of the Arbitration and Conciliation Act, 1996 ('Act').

2. The backgrounds facts are that the Appellant was employed with the Respondent, a leading digital media company offeringcommunication, social interaction and content to its clients. It is stated that the Respondent provides a platform to enable its clients to interact on SMS, voice, GPRS/3G email etc. An agreement titled 'Employee Intellectual Property Protection Agreement' was entered into between the Petitioner and the Respondent on 15th October 2008. Clause 13 of the said agreement dealt with 'non-competition' and Clause 14 with 'non-solicitation'. Under Clause 13.1, during the term of the Appellant's employment with the Respondent and for a period of two years thereafter, the Appellant was directly or indirectly not to engage in, as an employee, associate, consultant, proprietor, partner, director, or otherwise, or have any ownership interest in or participate in any business where such work involved the development or use of similar or identical intellectual property or know-how/trade secrets as that of the company. Under Clause 14 during the term of employment and for a period of two years thereafter, the Appellant was not to directly or indirectly, without prior written

consent of the Respondent, solicit, recruit, hire, encourage or induce any employee, director, solicitor etc. to leave the employment of the Respondent or negatively alter their relationship with the Respondent.

3. The Appellant was appointed as an Additional Director of the Respondent with effect from 25th May 2010 and subsequently, as Chief Executive Officer ('CEO') of the Respondent on 25th August 2011. On 25th January 2011, a Shareholders Agreement ('SHA') was executed between the Respondent (described as the Company);it defined 'Promoters' as a collective term which described three parties i.e. (i) Mr. Gagan Chadha, (ii) the Appellant and (iii) Mr. Vishwadeep Bajaj; and the 'Investors' NEA FVCI Ltd. ('NEA Ltd.) and HAV3 Holdings (Mauritius) Ltd. ('HAV3'). Both NEA Ltd. and HAV3 are companies incorporated in Mauritius. It is not in dispute that in terms of the said SHA, the Appellant subscribed to 2.6% of the equity shareholding of the company. It is stated that as of today his share holding has increased to 4.07%.

4. Under Clause 6.6 of the SHA, except as 'permitted' under Clause 6.3 (dealing with 'permitted transfers') the Promoters were not to transfer or pledge any equity securities until the earlier of the QIP and the other liquidity event, without the prior written consent of the investors. Clause 7 of the SHA dealt with the 'Investor right of first offer.' Clause 7.1 stated that subject to Clause 6.6, if the Promoters and/or their affiliates proposed to transfer any equity securities, then the Investors, which included NEA, HAV3 and another Investor company Emergic Venture Capital Private Ltd., would have a right of first offer (but no obligation) with respect to such shares (called the Right Of First Offer securities or ROFO securities). Clause 7.2 laid out the detailed procedure for implementation of the ROFO. *Inter alia*, it envisaged the Promoters sending a notice to the ROFO transferees informing them of the number of shares(ROFO securities) they wished to sell. Within 30 business days from the date of receipt of the notice, the ROFO transferees had to inform

such Promoter of the price and the number of securities they were willing to pay.

5. The SHA also contained a non-compete and non-solicit clause. Clause 14.1 stated that for a period beginning from the date of the SHA and ending two years after,(a) the Promoters and/or their affiliates ceasing to hold any equity securities or (b) the Promoters ceasing to be employed by the company, whichever is later, the Promoters and their affiliates would not engage in, invest, advise or participate in any business similar to or competing with the business of the Company or any of its subsidiaries. Clause 23 was the arbitration clause. Under Clause 21.1 of the SHA, the SHA would continue until the earlier of:

> (a) termination of the Agreement by the consent of each of the Investors, the Company and the Promoters in writing;
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> (b) all of the Investors and their affiliates ceasing to hold any equity securities; or
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> (c) QIPO taking place.

6. On 23rd September 2012, a letter was written by the Chairman and Managing Director of the Respondent to the Appellant informing him that his employment with the Respondent as CEO was terminated with immediate effect. Within three days thereafter, i.e. on 26thSeptember 2012, the Respondent also had a first information report ('FIR') registered against the Appellant, *inter alia,* under Sections 406/408/420 of the IPC in connection with the sale of shares of Way2Online Interactive India Pvt. Ltd., another internet-based company offering services similar to the Respondent. The allegation by the Respondent was that in 2011, it had proposed to acquire Way2Online for a sum of Rs.40 crores, which was payable to the Promoters of Way2Online and at that stage, the Appellant had persuaded the Respondent not to go ahead with the acquisition. The allegation was that after becoming CEO of the Respondent, the Appellant induced the Respondent to acquire Way2Online for a consideration of Rs.150 crores, and for which, an agreement was entered into on 5th May 2012, with the Respondent paying approximately Rs.21 crores to the Promoters of Way2Online upfront. The Respondent claimed

that out of this initial amount, a sum of Rs.7 crores found its way to the bank account of the Appellant.

7. A counter FIR (FIR 384/12) registered against the Respondent by the promoters of Way2Online on 1st October 2012 and both FIRs have since been quashed by the High Court of Andhra Pradesh on the basis of a settlement reached between the Respondent and the Promoters of Way2Online.

8. It is the further case of the Respondent that immediately after the termination of the Appellant's employment with the Respondent, the Appellant had accepted employment with Way2Online, which was directly in competition with the Respondent. The case of the Respondent was that even while continuing to remain a shareholder of the Respondent (to the extent of 4.07%), the Appellant was involved in a business which was in competition with the Respondent and thus violated the SHA.

9. The Respondent invoked the arbitration clause by issuing notices dated 19th September 2013 and 26th November 2013 to the Appellant. The Respondent also filed OMP No. 386/2014 under Section 9 of the Act as well as Arbitration Petition No. 178/2014. Both petitions were disposed of by the Court on 4th April 2014 appointing the sole Arbitrator and directing that the Respondent's petition under Section 9 of the Act be treated as an application under Section 17 of the Act to be heard and disposed of by the learned Arbitrator.

10. The said application has been since disposed of by the impugned order dated 22nd November 2014 by the sole Arbitrator by issuing the following directions:

> a. The Appellant was restrained directly or indirectly from carrying activities which are competitive to that of the Company and also from soliciting, interfering with, disrupting or attempting to disrupt the relationship between the Company or any Subsidiary and any third party, including without limitation, any customer or supplier of the Company or any Subsidiary, till the pendency of the present proceedings.

b. Further, the Appellant was restrained directly or indirectly to solicit the employment of any officer, director, or employee of the Company or its Subsidiary, or solicit or entice away or attempt to solicit or entice away from the Company and its Subsidiaries, any customer who shall at any time have been a customer, client, agent or correspondent of the Company, during the pendency of the arbitral proceedings.

c. The Appellant was also restrained from transferring, assigning or in any way creating third party interest in shares of the Company held in his name during the pendency of the arbitral proceedings.

11. Before the learned Arbitrator, and before this Court, it was urged that insofar as there was a clause in the employment contract as well as the SHA restraining the Appellant from "exercising a lawful profession, trade or business of any kind" which operated beyond the termination of the contract of employment, such clause would be void in terms of Section 27 of the Contract Act, 1872 and would not be saved by Exception 1. Reliance was placed on a series of decisions including ***Niranjan Shankar Golikari v. The Century Spinning [1967] 2 S.C.R. 378***, ***Superintendence Company of India (P) Ltd. v. Krishan Murgai***

(1981) 2 SCC 246, ***Gujarat Bottling Co. Ltd. v. Coca Cola Company AIR 1995 SC 2372*** and ***Percept D' Mark (India) Pvt. Ltd. v. Zaheer Khan AIR 2006 SC 3426*** to urge that the Respondent could not fall back on Clause 14.1 of the SHA or the corresponding clause of the employment contract to seek to injunct the Appellant from being employed with Way2online. It is not in dispute that the Appellant, after ceasing to be CEO of the Respondent, has been employed as CEO of Way2Online.

12. The Respondent Company, on the other hand, maintained that as long as the SHA was still in operation and the Appellant continued to be a shareholder of the Respondent, the Appellant was bound by Clause 14.1 of the SHA. During the subsistence of the SHA there was no question of the restraint clause being hit by Section 27 of the Contract Act. The Respondent placed reliance on the decision of this Court in ***Wipro Ltd. v. Beckman Coulter International 131 (2006) DLT 681***.

13. The learned Arbitrator has correctly observed in the impugned order that the SHA is not to be construed as a contract between the employer and the employee but a contract between the Respondent its promoters and investors. Nevertheless, as explained by the Supreme Court in the ***Gujarat Bottling Co. Ltd. v. Coca Cola Company*** (supra), the manufacturer was not permitted to deal with products of any other brand during the subsistence of the said agreement. In that case, it was argued on behalf of the Appellant that the observations in the ***Niranjan Shankar Golikari*** case and the ***Superintendence Company of India (P) Ltd. v. Krishan Murgai*** case to the extent that the doctrine of restraint of trade only applies after termination of the contract, should be confined only to contracts of employment. Negativing the said submission, the Supreme Court observed "the underlying principle governing contracts is the same and as a matter of fact the Court takes a more restricted and less favourable view in respect of covenants entered into between an employer and an employee as compared to a covenant between a vendor or purchaser or partnership agreements."

14. The legal position was summarised by this Court in ***Wipro Ltd.*** (supra) which concerned a Canvassing Agreement between the distributor and a principal which contained a negative covenant concerning non-solicitation of employees. The legal position that was culled out was "negative covenants tied up with positive covenants during the subsistence of a contract be it of employment, partnership, commerce, agency or the like, would not normally be regarded as being in restraint of trade, business of profession unless the same are unconscionable or wholly one-sided." It was further emphasised that as far as the employer and employee contracts are concerned, a negative covenant "restricting an employee's right to seek employment and/or to do business in the same field as the employer would be in restraint of trade and, therefore, a stipulation to this effect in the contract would be void. In other words, no employee can be confronted with the situation where he has to either work for the present employer or be forced to idleness." Further the question of reasonableness of the restraint is not to be considered when an

issue arises as to whether a particular term of a contract is or is not restraint of trade, business or profession.

15. In the impugned order, the learned Arbitrator has, following the decision in ***Wipro Ltd.***, held that non-competing or non-soliciting clauses in the SHA do not amount to restraint of trade, business or profession and would not be hit by Section 27 of the Contract Act. Although it has not been expressly stated in the impugned order it must be held that the above observations have been made in the context of construing whether any relief ought to be granted in the application under Section 17 of the Act. The distinction that the learned Arbitrator sought to draw between the type of agreement between an employer and employee and one like the SHA was valid but it does not follow that the legal principles that would apply in either case would not be the same. In other words, as long as the SHA continues, the restrictive covenants in the SHA would continue to bind the parties.

16. It was argued by Mr. Sandeep Sethi, learned Senior counsel appearing for the Appellant, that to the extent the negative covenant in the SHA was in restraint of the Appellant's right to seek employment elsewhere, it would certainly be hit by Section 27 of the Contract Act notwithstanding that the SHA continued. It was submitted that the Respondent had itself terminated the employment contract of the Appellant and was now using the negative covenant in the SHA to restrain the Appellant from seeking employment.

17. The above submission is, however, not factually borne out from the impugned order. In the first place, it requires to be noticed that the sole Arbitrator has observed that with the Appellant already having joined Way2Online as CEO, no injunction could be granted against the Appellant continuing as such. The learned Arbitrator also held that the question whether the Appellant violated non-compete Clause 14.1 and non-solicit Clauses 14.2 and 14.3 of the SHA, particularly with the Appellant denying that the business of Way2online and the Respondent

were not similar, were disputed questions of fact which required to be determined only after evidence was led.

18. Mr. Rajiv Kumar Virmani, learned Senior counsel appearing for the Respondent, also pointed out that inasmuch as the Respondent has not filed any appeal against the impugned order, the Respondent is at present not seeking to injuct the Appellant from continuing as CEO to Way2Online.

19. Mr. Sandeep Sethi, learned Senior counsel for the Appellant, then submitted that there was an observation in the impugned order which will prejudice the Appellant. This was to the effect that if ultimately the Respondent was able to prove that the Appellant had indulged in competing activities in violation of Clause 14.1 then in that case the Company would be entitled to be compensated by grant of damages "as also injunction restraining the Respondent (the Appellant herein) to continue in employment of Way2online." It is submitted that the above observations of the sole Arbitrator have caused severe prejudice since the present employer of the Appellant has, in view of the impugned order, also expressed its apprehension about the

continuation of the Appellant's employment with Way2online. He further submitted that the impugned order was being circulated widely in the trade and might prejudice the Appellant's future chances of getting further employment.

20. The observations of the sole Arbitrator in the impugned order indicate that no final view has been taken on whether the Appellant had in fact violated Clauses 14.1 or 14.2 or 14.3 of the SHA. What should be the consequential reliefs granted as a result thereof has also been left open for decision. It is not possible to view the impugned order as finally determining the issues one way or the other.

21. Mr. Virmani further points out that if indeed the Appellant wanted to be relieved of the negative covenants in the SHA, then it was open to the Appellant to adopt the procedure under Clause 7 of the SHA and issue a notice offering the Appellant's shares for sale in the first instance to the Investors. He states that till date the Appellant continues to hold 4.07% shares in the Company and has not made any effort to invoke the above procedure.

22. The above submissions point to the fact that the Appellant, if he so chooses, could seek an exit by off-loading his shares in the Respondent. It appears that at one stage the parties did attempt mediation. But on this aspect they were unable to arrive at any amicable settlement. It is, therefore, not as if the Appellant is under compulsion as regards being restrained by the negative covenants in the SHA indefinitely. The apprehensions of the Appellant, not stated on affidavit, do not persuade the Court. In any event, these are not valid grounds for interfering with the impugned order passed by the learned Arbitrator which appears to be one that balances the rights and interests of both the parties.

23. Consequently the Court is not inclined to interfere with the impugned order passed by the learned Arbitrator. The appeal is dismissed but in the circumstances with no order as to costs.

S. MURALIDHAR, J

MARCH 23, 2015

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