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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**ARB No.187 of 2018 (O&M)
Date of Decision: 28.10.2022**

VISHNU OVERSEAS PVT LTD

.....Petitioner

Vs

STATE OF HARYANA AND ORS

.....Respondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present: Mr. Vivek Goyal, Advocate
for the petitioner.

Mr. Amit Aggarwal, D.A.G., Haryana.

Mr. Vishal Garg, Advocate
for respondents No.2 and 3.

RAJ MOHAN SINGH, J.(Oral)

[1]. Petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred as 'the Act') for appointment of an independent Arbitrator to adjudicate the dispute between the parties arising out of agreement dated 27.09.2016.

[2]. The aforesaid agreement was entered into between the parties in respect of paddy being milled into rice as per Clause 10 of the Haryana Rice Procurement (Levy) Order, 1985. The

disputed quantity of paddy is 2481.232 MT which according to the petitioner is tentatively valued more than Rs.1 crore. Admittedly the agreement in question has an arbitration clause which has also been invoked by the petitioner.

[3]. Contesting respondents No.2 and 3 have objected to the prayer for appointment of Arbitrator on two counts. Firstly, for the loss caused to the respondents No.2 and 3, they have already filed a suit for recovery against the petitioner in which petitioner has been served and has also filed written statement. Petitioner has not filed any application under Section 8 of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrator by the civil Court. Secondly, respondents No.2 and 3 have already launched criminal prosecution for the misappropriation of paddy done by the petitioner. FIR No.540 dated 06.12.2017 under Sections 406, 420 and 120-B IPC has been lodged against the petitioner at Police Station Kaithal City, District Kaithal.

[4]. I have considered the aforesaid objections raised by learned counsel for respondents No.2 and 3. In **Vijay Kumar Sharma @ Manju vs. Raghunandan Sharma @ Baburam & Ors., 2010(2) SCC 486**, the Hon'ble Apex Court in para 9 has held that even pendency of an application under Section 8 before any Court will not come in the way of an arbitration being

commenced or continued and an arbitral award being made.

Para 9 of the aforesaid judgment reads as under:-

“9. It is evident from sub-section (3) of section 8 that the pendency of an application under section 8 before any court will not come in the way of an arbitration being commenced or continued and an arbitral award being made. The obvious intention of this provision is that neither the filing of any suit by any party to the arbitration agreement nor any application being made by the other party under section 8 to the court, should obstruct or preclude a party from initiating any proceedings for appointment of an arbitrator or proceeding with the arbitration before the Arbitral Tribunal. Having regard to the specific provision in section 8(3) providing that the pendency of an application under section 8(1) will not come in the way of an arbitration being commenced or continued, we are of the view that an application under section 11 or section 15(2) of the Act, for appointment of an arbitrator, will not be barred by pendency of an application under Section 8 of the Act in any suit, nor will the Designate of the Chief Justice be precluded from considering and disposing of an application under Section 11 or 15(2) of the Act. It follows that if an arbitrator is appointed by the Designate of the Chief Justice under section 11 of the Act, nothing prevents the arbitrator from proceeding with the arbitration. It also therefore follows that the mere fact that an appeal from an order dismissing the suit under Order 7 Rule 11 Civil Procedure Code (on the ground that the disputes require to be settled by Arbitration) is pending before the High Court, will not come in the way of the appointment of an arbitrator under section 11 read with section 15(2) of the Act, if the Authority under

section 11 finds it necessary to appoint an Arbitrator. Therefore the first contention of the appellant is liable to be rejected.”

[5]. In view of ratio of aforesaid case, the first objection raised by learned counsel for respondents No.2 and 3 pales into insignificance. As regards the second objection, lodging of criminal case also is of no consequence as the criminality as raked up by the respondents shall be dealt with by the proper Court in accordance with law. The legislative intent of the Act is party autonomy and minimal judicial intervention in arbitral process. All issues and objections are to be decided by the arbitral Tribunal in accordance with law. Same set of facts may lead to civil and criminal proceedings. If it is clear that civil dispute involves question of fraud etc. then mere fact that prosecution of criminal case would not lead to conclusion that dispute is otherwise arbitrable, ceases to be so. Reference can be made to para nos.14 and 16 of **Avitel Post Studioz Limited & Ors. vs. HSBC PI Holdings (Mauritius) Limited, 2021(4) SCC 713** which are reproduced hereasunder:-

“14. In a recent judgment reported as Rashid Raza (supra), this Court referred to Sikri, J.’s judgment in Ayyasamy (supra) and then held:

“4. The principles of law laid down in this appeal make a distinction between serious allegations of forgery/fabrication in support of the plea of fraud

as opposed to “simple allegations”. Two working tests laid down in para 25 are: (1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or (2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain.”

After these judgments, it is clear that “serious allegations of fraud” arise only if either of the two tests laid down are satisfied, and not otherwise. The first test is satisfied only when it can be said that the arbitration clause or agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. The second test can be said to have been met in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or malafide conduct, thus necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain.”

16. *In the light of the aforesaid judgments, paragraph 27(vi) of Afcons (supra) and paragraph 36(i) of Booz Allen (supra), must now be read subject to the rider that the same set of facts may lead to civil and criminal proceedings and if it is clear that a civil dispute involves questions of fraud, misrepresentation, etc. which can be the subject matter of such proceeding under section 17 of the Contract Act, and/or the tort of deceit, the mere fact that criminal proceedings can or have been instituted in respect of the*

same subject matter would not lead to the conclusion that a dispute which is otherwise arbitrable, ceases to be so.”

[6]. In view the aforesaid factual position of the case, I hereby appoint HMJ R.C. Gupta (Retd.) R/o # 215CP, Sector 4, M.D.C. Panchkula, Mobile No.9780008147 as the sole Arbitrator, to resolve the dispute/difference between the parties. The appointment of the Arbitrator shall be subject to the declaration to be made by him as required under Section 12 of Arbitration and Conciliation Act, 1996 in respect of his independence and impartiality to settle the dispute between the parties.

[7]. The Arbitrator would complete the proceedings within the specified time in terms of Section 29-A of the said Act. The Arbitrator shall be paid fee in accordance with the IVth Schedule of the Act as amended from time to time. The fee shall be borne by both the parties equally.

[8]. Venue of the Arbitration shall be the place to be disclosed by the Arbitrator according to his convenience.

[9]. A copy of this order be dispatched to the Arbitrator at the following address:-

HMJ R.C. Gupta (Retd.)
R/o # 215CP, Sector 4, M.D.C. Panchkula,
Mobile No.9780008147

[10]. Petition stands disposed of accordingly.

October 28, 2022	(RAJ MOHAN SINGH)
<i>Atik</i>	JUDGE
Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No