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

**ARB No.5 of 2017 (O&M)
Date of Decision: 17.11.2022**

ASHOK KUMAR BALYAN

.....Petitioner

Vs

AMBUJ AGGARWAL & ORS

.....Respondents

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

Present: Mr. Amit Jaiswal, Advocate
for the petitioner.

Mr. Vishal Sodhi, Advocate
for respondents No.1 and 2.

Mr. Sunil K. Rana, Advocate
for respondent No.3.

RAJ MOHAN SINGH, J.(Oral)

[1]. The Petitioner has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred as 'the Act') for appointment of an independent Arbitrator for adjudicating the dispute between the parties arising out of Memorandum of Understanding (for short 'the MOU') dated 28.02.2012.

[2]. The petitioner has pleaded that a partnership under the name and style of M/s Prakriti Clonal Agro Tech was formed

vide partnership deed dated 17.10.2009 between the respondents. The petitioner was inducted as 4th partner to the extent of 10% share in profits and losses of the firm vide MOU dated 28.02.2012. The MOU was signed by all the partners. As per clause 10 of the MOU in case of any difference of opinion, controversy or dispute between the partners with this MOU or with regard to performance of obligation hereunder, the matter shall be referred for adjudication to the Arbitrator appointed with the mutual consent of the partners under Arbitration and Conciliation Act, 1996 or any statutory modifications or re-enactment thereof for the time being in force and the decision of the Arbitrator shall be final and binding on all the partners. The aforesaid MOU dated 28.02.2012 is the bone of contention between the parties. The respondent No.2 denied the execution of the said MOU whereas the respondent No.1 has admitted the existence of the MOU.

[3]. According to the petitioner, the original of the MOU was with the respondent No.2 and he has withheld the same despite repeated asking. Vide letter dated 11.08.2017, Mr. Gagandeep Singh Sirphikhi, Advocate was appointed as a Commissioner for recording evidence in view of denial made by the respondent No.2 in respect of genuineness of the MOU. The Court Commissioner has already recorded the evidence of the parties.

Statement of the petitioner has been recorded as PW-1. Statement of Aseem Kumar Singla has been recorded as PW-2 and statement of Jaswinder Singh Dhaliwal/respondent No.2 has been recorded as RW-1. In the cross-examination of RW-1 i.e. present respondent No.2, it has been admitted by him that no criminal complaint has been filed against the petitioner in respect of forged MOU dated 28.02.2012 either by respondent No.3 or by respondent No.1. The respondent No.2/RW-1 does not know whether they have given complaint to the Police or not. Respondent No.3 has not given or handed over all the documents to the remaining partners at the time of his retirement. It is correct that one acknowledgement was given by respondent No.2 and respondent No.1 regarding the documents which were received from respondent No.3 at the time of his retirement. The acknowledgement dated 22.11.2014 has been seen by respondent No.2 and he has also identified his signature on the same as Ex.PA. He has also admitted to be correct that there is a reference of MOU dated 28.02.2012 in the said acknowledgement.

[4]. Copy of acknowledgement dated 22.11.2014 would show that MOU dated 28.02.2012 finds mentioned at Sr.No.(b) of the inventory of documents. The details of which have been given in the said acknowledgement.

[5]. Learned counsel for the respondents disputes the claim of the petitioner as regards his status to be that of 4th partner in the firm on the ground that deed of retirement of respondent No.3 dated 24.12.2014 does not find his signature. Even the alleged MOU dated 28.02.2012 is signed by the parties at the last page without signing other pages of MOU. Learned counsel refers to the clause 8 of the retirement deed dated 24.12.2014 to contend that the petitioner had only advanced unsecured loan to the firm and his status has not been shown to be that of partner.

[6]. However, learned counsel for the petitioner refutes the aforesaid assertion on the ground that even in the notice for resignation/dissolution of partnership w.e.f. 21.11.2014 issued by the respondent No.3, the same was issued to the petitioner as well other partners namely Mr. Ambuj Aggarwal respondent No.1 and Mr. Jaswinder Singh Dhaliwal respondent No.2. In terms of Section 7(4)(b) of the Arbitration and Conciliation Act, 1996, an agreement can be culled out from an exchange of letters, telex, telegrams or other means of communication which provide a record of agreement. Learned counsel by relying upon **Govind Rubber Limited vs. Louids Dreyfus Commodities Asia Private Limited, (2015) 13 SCC 477** further submits that the agreement even if not signed by the parties can be culled

out from the correspondence between the parties. The Court has to adopt a pragmatic approach particularly in the light of signing of last page of the MOU by the parties. The communication between the parties has to be appreciated in the light of signing of last page of the MOU as well.

[7]. Perusal of the arbitration clause itself is suggestive of the fact that all subsequent amendments/statutory modifications or re-enactment shall be taken into consideration while referring the *lis* between the parties. The recital of applicability of subsequent statutory amendments would satisfy the requirement of Section 16(1)(a) of the Act and in such eventuality the arbitration clause would itself to be treated as independent agreement between the parties and the same would survive for the purpose of answering the present dispute. Learned counsel refers to **Bharat Broadband Network Limited vs. United Telecoms Limited, (2019) 5 SCC 755** to contend that in view of statutory amendment in the year 2015, recital thereof duly finds mentioned in the arbitration clause. Section 12(5) of the Act would be applicable. The said provision would indicate that the official Arbitrator would become ineligible to act as an Arbitrator. After the aforesaid amendment in the provision, any prior agreement to the contrary was wiped out by non-obstante clause in Section 12(5) of the Act which declares the

official Arbitrator ineligible to be appointed as Arbitrator and only way in which this ineligibility can be removed is either the parties may after the disputes have arisen between them waive the applicability by an express agreement in writing in continuation of earlier Arbitration. No such position exists in the present case, rather the subsequent modification, amendments, re-enactment would squarely apply to the facts of the case and the ratio of **Bharat Broadband Network Limited's** case (supra) is fully applicable in this context.

[8]. In view of **Bharat Sanchar Nigam Ltd. and another vs. M/s Nortel Networks India Private Limited, 2021(2) RCR (Civil) 337** the matter has to be referred to Arbitrator in case of slightest doubt in respect of accrual of cause of action. It is only in case of dead wood, the reference can be declined.

[9]. In view of pleadings and material on record, I find that the issue is arbitrable in nature and the same can only be adjudicated by the Arbitrator with reference to the material to be led by the parties before him. The petitioner has tentatively valued its claim to the tune of Rs.23,82,410/- towards three components i.e. Rs.12,91,000/- qua total amount of contributions towards the capital of the firm, Rs.5,20,719 towards profits for the years 2011-12, 2012-13, 2013-14 and Rs.5,70,691/- towards interest @ 18% w.e.f. 16.04.2015 (date

of notice of dissolution) till 15.01.2017 on above amounts i.e. 12,91,000/- + 5,20,719/-).

[10]. At this stage, without forming any opinion on the merits of the case, I hereby appoint **Mr. N.S. Brar, former PCS R/o # 110, IAS/PCS Society, New Chandigarh, Sector 1, Mullanpur, Mobile No.9815388534** 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.

[11]. 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.

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

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

Mr. N.S. Brar, former PCS
R/o # 110, IAS/PCS Society,
New Chandigarh, Sector 1,

Mullanpur, Mobile No.9815388534

[14]. Petition stands disposed of accordingly.

November 17, 2022

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Whether speaking/reasoned

Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes/No

Yes/No