

**242 IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH
ARB-608-2021
Date of Decision: 15th February, 2023**

M/s Kaya Blenders and Distillers Ltd.

... Petitioner

Versus

Mana Ram

... Respondent

CORAM : HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present : Mr. Yashjot Singh Dhaliwal, Advocate for the petitioner.
Mr. Viren Sibal, Advocate for the respondent.

AVNEESH JHINGAN , J.(Oral)

1. This petition under Section 11 of the Arbitration and conciliation Act, 1996 (for short 'the Act') is filed for appointment of an Arbitrator.

2. The brief facts are that petitioner and respondent on 14th October, 2019 entered into a partnership agreement-cum-memorandum of understanding (for short 'MoU') for production and sales right of the liquor brands for Jodhpur district. The respondent had to pay advance of Rs. 10,00,000/- which was to be adjusted towards stock in future. The advance paid could not be claimed in case of termination of MoU before its validity. The respondent in case of termination was obliged to lift and sale or pay for stock mentioned in clause 5.

3. Learned counsel for the petitioner places reliance upon Clause 23 of the agreement for appointing arbitrator. The relevant portion is quoted below:-

“ If any dispute or difference arises out of this agreement between the parties, the same shall be resolved by Arbitration and Conciliation Act, having jurisdiction at Patiala Only, having the jurisdiction at Patiala or at

Ludhiana only and the party no. 2 will not have any right to pursue any type of proceedings under the provisions of any Law out of the jurisdiction of District Ludhiana or District Patiala.”

4. Learned counsel for the respondent submits that the FIR No. 29, dated 18th November, 2021, under Sections 420, 406, 467, 468, 471 and 120-B of Indian Penal Code, 1860 and Section 67 of Information Technology (Amendment) Act, 2008 was got lodged by respondent. The contention is that there are allegations of fraud hence, the dispute is not arbitrable. He further submits that respondent was induced by advertisement published in the newspaper for paying the advance money.

5. The scope of jurisdiction at stage of Section 11 of the Act is well settled. The Supreme Court in **Secunderabad Cantonment Board v. B. Ramachandraiah and sons, (2021) 5 SCC 705** relying upon the decision of **Vidya Drolia and others v. Durga Trading Corporation, 2021 (2) SCC 1** held as under:-

“While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the Courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere “only” when it is “manifest” that the claims are ex facie time barred and dead, or there is no subsisting dispute. Paragraph 148 of the Vidya Drolia's case (supra), reads as follows:

“148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes

of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed “no claim certificate” or defence on the plea of novation and “accord and satisfaction”. As observed in Premium Nafta Products Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)] , it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.”

6. The contentions raised by learned counsel for the respondent are being dealt with only for disposal of present petition.

7. There are no allegations in FIR that the MoU is forged or fabricated. From the perusal of the FIR it is evident that the allegations are that the respondent invested the amount on the promise of earning profit of Rs. 2,00,000/- to Rs. 3,00,000/- on an investment of Rs. 25,00,000/-. The

sent by the petitioner company. Respondent came to know that there are some other similarly situated persons. Further that the petitioner company had not applied for licence for the district where the respondent was to operate. An attempt was made by the respondent for refund of the amount but it failed.

8. There is no complexity involved in the allegation of fraud. The contents of the FIR are that *inspite* of depositing amount neither the stock was supplied nor the amount was refunded. These allegations are indicator of the fact that there is dispute between the parties.

9. In **Vidya Drolia and others' case (supra)**, the decision in **N.Radhakrishanan v. Maestro Engineers, (2010) 1 SCC 72** was overruled and it was held that the allegations of fraud relating to civil dispute can be subject matter of arbitration, the exception being of a fraud which invalidates the arbitration clause. The relevant paras are reproduced below:-

“78. In view of the aforesaid discussions, we overrule the ratio in N. Radhakrishanan inter alia observing that the allegations of fraud can (sic cannot) be made a subject matter of arbitration when they relate to a civil dispute. This is subject to the caveat that fraud, which would vitiate and invalidate the arbitration clause, is an aspect relating to non-arbitrability. We have also set aside the Full Bench decision of Delhi High Court in HDFC Bank Ltd. which holds that the disputes which are to be adjudicated by the DRT under the DRT Act are arbitrable. They are non-arbitrable.”

9.2 In **M/s N. N. Global Mercantile Pvt. Ltd. v. M/s Indo Unique Flame Limited and others, (2021) 4 SCC 379**, the Supreme Court held

that the allegations of fraud arising out of dispute inter-se the parties are

arbitrable. Para No. 51 is reproduced below:

“51. In the present case, the allegations of fraud with respect to the invocation of the bank guarantee are arbitrable, since it arises out of disputes between the parties inter se, and is not in the realm of public law.”

10. As per the agreement the arbitration is to take place at Ludhiana or Patiala. Each of the party has to appoint one of the arbitrator, however, this petition is disposed of by appointing Mr. J.S. Klar, District & Sessions Judge (Retd.), # 210, Manjit Nagar, Bhadon Road, Patiala, as a Sole Arbitrator. The Arbitrator is appointed subject to declaration to be made by him under Section 12 of the Act with regard to his independence and impartiality to settle the dispute between the parties.

11. Needless to say that the parties would be at liberty to raise legal issues in arbitration proceedings at the appropriate stage.

12. The Arbitrator shall be paid fee in accordance with the Fourth Schedule of the Act, as amended or as may be mutually settled by the parties and the Arbitrator. Fee of Arbitrator will be equally borne by both the parties. The Arbitrator is requested to complete proceedings as per time limit specified under Section 29-A of the Act.

13. It is clarified that the reference shall be subject to the petitioner's complying with all the requirements of the agreement including the condition of pre-deposit.

14. Copy of the order be sent to the appointed Arbitrator.

(AVNEESH JHINGAN)
JUDGE

15th February, 2023
Parveen Sharma

Whether reasoned/speaking	Yes/No
Whether reportable	Yes/No