

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

+ **O.M.P. 527/2009 & I.A. No.11711/2009**

Date of Decision: 29th July, 2010

RAJ KUMAR DUA & ANOTHER Petitioners
Through: Mr. S.S. Tomar, Advocates

versus

NARESH ADHLAKHA & OTHERS Respondents
Through: Mr. Vikas Mahajan, Advocate for
respondent No.2
Mr. Ashok Dua, respondent No.3 in
person

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI**

1. Whether the Reporters of local papers may : No
be allowed to see the judgment?
2. To be referred to Reporter or not? : Yes
3. Whether the judgment should be reported : Yes
in the Digest?

% **JUDGMENT (Oral)**

VIPIN SANGHI, J

1. This petition has been preferred by the two petitioners, who are brothers, under Sections 14 & 15 of the Arbitration and Conciliation Act, 1996 (the Act) for termination of mandate of respondent No.1, arbitrator. The respondent No.2 is the sister of the two petitioners and the wife of respondent no.1, the arbitrator. Respondent No.3 is also a brother of the petitioners and brother-in-law of respondent No.1.

2. A deed of family settlement was arrived at on 15.03.2005 between the two petitioners, respondent No.3 and respondent No.2. By this deed of settlement the parties, namely, the three brothers and the sister decided upon the manner of distribution of the properties left by their parents. The said deed, which is a registered instrument, inter alia, provided that *"In the event of any dispute between them the same shall be in discretion power of the Sole Arbitrator Shri Naresh Adlakha S/o Shri R.S. Adlakha R/o H-I-133, Lajpat Nagar-I, New Delhi-110024 appointed by the all the legal heirs of the deceased (late Smt. Sudesh Dua) Shri Ashok Dua, Shri Raj Kumar, Shri Anil Dua and Smt. Sividha Adlakh by virtue of undertaking, General Power of Attorney and Special Power of Attorney. Whose decision shall be final and binding upon all the legal heirs of the deceased (Late Smt. Sudesh Dua) Shri Ashok Dua, Shri Raj Kumar Dua, Shri Anil Dua and Smt. Suvidha Adlakha and their legal heirs and none of them would be competent/entitled to change/alter/challenge if anywhere what so ever."*

3. With regard to the implementation of the settlement as contained in the said deed, disputes arose between the parties. The petitioner no.1 herein preferred a civil suit bearing No.1071/2006 before the Court of Senior Civil Judge, Delhi for declaration and injunction against his other two brothers and sister. An application under Section 8 of the Act read with Order 7 Rule 11 CPC was preferred by Smt. Suvidha Adlakha, respondent No.2 and Sh. Ashok Dua,

respondent no.3 herein, invoking the aforesaid arbitration agreement. Consequently, that application was allowed vide order dated 18.12.2008 and the disputes were referred to the arbitration of respondent No.1 herein. The Court left the question of impartiality or bias to be decided by the arbitrator himself. Therefore court did not interfere at that stage to decide about such impartiality/bias of the arbitrator. The court also declined to appoint a new arbitrator in place of respondent no.1.

4. The petitioners preferred OMP No.70/2009, inter alia, under Sections 14 & 15 of the Act. The petitioners sought the removal of respondent No.1 herein from the position of arbitrator and also sought appointment of a new arbitrator by this Court. That petition was disposed of on 26.05.2009. In view of the provisions of Section 12 of the Act the Court permitted the petitioners to move an application before the arbitrator requiring him to disclose his interest in the subject matter to the parties and to recuse himself. The arbitrator was also directed to disclose his interest vis-à-vis the parties and pass a speaking order on the application made by the petitioners.

5. The petitioners moved the application as aforesaid. The arbitrator by his order dated 19.08.2009 disposed of the said application and decided to continue with the arbitration proceedings. He rejected the apprehensions expressed by the petitioners with regard to his independence and impartiality by holding that they were

misplaced.

6. Consequently, the petitioners have preferred the present petition also under Sections 14 & 15 of the Act to seek the termination of the mandate of respondent No.1 and for appointment of an independent arbitrator.

7. Upon issuance of notice to the respondents, a joint reply was filed by respondent Nos.2 & 3 opposing the petition. However, today respondent No.3 has appeared in person. He has disengaged his counsel Mr. Vikas Mahajan and withdrawn the power of attorney given to him. He further states that he also withdraws his reply and instead he supports the petitioners in their prayer for termination of mandate of respondent No.1 arbitrator. Consequently, it is only respondent No.2, the wife of respondent No.1, who is opposing this application.

8. The submission of learned counsel for the petitioners is that the reason given by the learned arbitrator for rejecting the challenge to his mandate as an arbitrator on the ground of bias is that the parties were aware of the relationship between them and the arbitrator. Consequently, they could not have raised the said ground to allege bias against him. So far so good.

9. However, he further submits that the arbitrator, in the order passed by him, has also admitted that he has instituted a civil suit for recovery against Sh. Anil Dua, petitioner No.2 herein for monies

allegedly advanced by him prior to his appointment as an arbitrator, and that he has also lodged FIR No.588/2008 at police station Sarojini Nagar against, inter alia, Sh. Anil Dua for his alleged forcible entry into flat No.102, Sarojini Nagar, New Delhi. The petitioners submit that these developments had taken place after the appointment of respondent No.1 as an arbitrator and since he has acted against the interest of petitioner No.2 by initiating litigation and lodging a first information report, it cannot be said that the arbitrator would act without any bias at least against one of the parties to the arbitration.

10. This petition is opposed by respondent No.2. Learned counsel for the respondent No.2 submits that the challenge to the appointment and continuation of an arbitrator on the ground of bias can be raised under Section 12 by adopting the procedure under Section 13. Under Section 12(3) an arbitrator may be challenged if – *(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality.* Under Section 12(4) *a party may challenge an arbitrator's appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.* Section 13 provides that a party who challenges the authority of the arbitrator on the ground contained in Section 12 unsuccessfully, can raise a grievance while preferring objections to the arbitral award, that may be rendered, under Section 34. It is, therefore, argued that a ground of bias cannot be raised under Section 14 and the same would not be covered by the

expressions “de jure” or “de facto” inability to perform his functions by the arbitrator.

11. Mr. Mahajan, learned counsel for respondent no.2 has relied upon the decision of a Division Bench of this Court in ***Bharat Heavy Electricals Ltd. v. C.N. Garg & Ors.*** 88 (2000) DLT 242 (DB) to submit that once the challenge to the authority of the arbitrator under Section 12 by resort to Section 13 fails, the party has no other alternative remedy, but to proceed with the arbitration and the challenge can be re-agitated, if necessary, at the stage of Section 34 proceedings. He also relies on another decision reported as ***Neeru Walia v. Inderbir Singh Uppal & Anr.*** 160 (2009) DLT 55 (decided on 29.05.2009). In this decision, it was held by the learned Judge (S.N. Dhingra, J) that the provisions of Sections 14 & 15 of the Act cannot be invoked for termination of the mandate of an arbitrator on the ground that he was acting with a bias. While rendering this decision, the learned Single Judge had relied on an earlier decision of his in ***Delhi State Industrial & Infrastructure Development Cop. Ltd. v. Integrated Techno System Pvt. Ltd. & Anr.*** 2009 (111) DRJ 468 (decided on 25.05.2009).

12. Having heard learned counsels for the petitioners and respondent No.2, I am of the view that this is a fit case for termination of the mandate of the respondent No.1 arbitrator.

13. With due respect, I do not agree with the view taken by the

learned Single Judge in **Neeru Walia** (supra) and in **Delhi State Industrial & Infrastructure Development Cop. Ltd.** (supra), and do not consider myself to be bound by them, as they have been rendered without taking into account the earlier decision of this Court in **Alcove Industries Ltd. v. Oriental Structural Engineers Ltd. & Anr.** 2008 (1) Arb. L.R. 393 (Delhi) decided on 28.12.2007 by me and the decision of another learned Single Judge of this Court (Rajeev Sahai Endlaw, J) in **National Highways Authority of India v. K.K. Sarin & Ors.** 159 (2009) DLT 314 (decided on 09.04.2009).

14. It was held in **Alcove Industries Ltd.** (supra) that there is no inconsistency between the remedies available to a party under Sections 12 and 13 on the one hand and Section 14 on the other and the invocation of one remedy by a party does not restrict that party from invoking the other remedy as well. It was held that these remedies constitute a single scheme, wherein the aggrieved party would first be expected to challenge the arbitrator under Sections 12 and 13, and if that fails, and; the party is still aggrieved, and; can make out a case of *de jure* or *de facto* inability of the Arbitrator to act, to move the Court under Section 14. It was held that the power of Court under Section 14 to decide the controversy as to whether or not the mandate of the arbitrator stands terminated cannot be taken away by a decision of the arbitrator under Section 13(2) of the Act, which in no way, is binding on the Court. Pertinently, in **Neeru Walia** (supra) the Court also placed reliance in **Newton Engineering and**

Chemicals Ltd. v. Indian Oil Corporation Ltd. & Ors. 136 (2007)

DLT 73, which was elaborately discussed in **Alcove Industries Ltd.** (supra) and it was held that the said decision did not lead to an inference that in appropriate cases the remedy under Section 14 of the Act cannot be invoked by an aggrieved party, merely because it is open to him to raise the challenge before the arbitrator under Section 13 read with Section 12, which he may or may not invoke. The decision in **Delhi State Industrial & Infrastructure Development Cop. Ltd.** (supra) rendered by the same learned Judge also does not take into account the earlier decision in **Alcove Industries Ltd.** (supra).

15. In **National Highways Authority of India** (supra) the same view has been taken as that in **Alcove Industries Ltd.** (supra). Paragraphs 28, 34 & 35 of this decision are relevant and are reproduced hereinbelow:

"28. I have already in Sharma Enterprises v. National Building Constructions Corporation Ltd. MANU/DE/1238/2008 held that Section 5 of the 1940 Act as interpreted in Panchu Gopal Bose (supra) finds place in the form of Section 14 of the 1996 Act. There can be no other interpretation of the power given to the court to terminate the mandate of the arbitrator when the arbitrator de jure is unable to perform this function. The de jure impossibility can be nothing but impossibility in law. Bias vitiates the entire judicial/arbitration process and renders the entire proceedings nugatory. Reference in this regard may also be made to State of West Bengal v. Shivananda Pathak MANU/SC/0342/1998 : [1998]1SCR811 cited by the ASG, though in a different context, holding that all judicial functionaries have necessarily to decide a case with an unbiased mind; an essential requirement of a judicial adjudication is that judge is impartial and neutral and in a position to apply his mind objectively - if he is predisposed

or suffers from prejudices or has a biased mind he disqualifies himself from acting as a judge. This equally applies to arbitrators, as statutorily provided in Sections 12 and 13. In my opinion, if the arbitrator is biased, he is de jure unable to perform his functions within the meaning of Section 14. Thus if the court without any detailed enquiry is able to reach a conclusion of arbitrator for the reason of bias is unable to perform his functions, the court is empowered to, without requiring the parties to inspite of so finding go through lengthy costly arbitration, hold that the mandate of arbitrator stands terminated. However, the said power under Section 14 has to be exercised sparingly with great caution and on the same parameters as laid down by Apex Court in *SBP & Company v. Patel Engineering Limited* 2005 8 SCC 618 in relation to Section 11(6). Only when from the facts there is no doubt that a clear case of bias is made out, would the court be entitled to interfere. Else it would be best to leave it to be adjudicated at the stage of Section 34.

34. I have also wondered as to whether Section 13(5) leads to an inference that upon the challenge to the arbitrator under Section 13(1) being unsuccessful, the only remedy is under Section 34 of the Act inasmuch as Section 13(5) does not make any reference to Section 14. However, if we are to hold so then we would be rendering the de jure inability of the arbitrator to perform his functions otiose. To me, the scheme of the Act appears to be that the challenge has to be first made before the arbitrator in accordance with the Section 13 of the Act and upon such challenge being unsuccessful the challenging party has a remedy of either waiting for the award and if against him to apply under Section 34 of the Act or to immediately after the challenge being unsuccessful approach the court under Section 14 of the Act. The court when so approached under Section 14 of the Act will have to decide whether the case can be decided in a summary fashion. If so, and if the court finds that the case of de jure inability owing to bias is established, the court will terminate the mandate. On the contrary, if the court finds the challenge to be frivolous and vexatious, the petition will be dismissed. But in cases where the court is unable to decide the question summarily, the court would still dismiss the petition reserving the right of the petitioner to take the requisite plea under Section 34 of the Act. This is for the reason of the difference in language in Section 14 and in Section 34

*of the Act. While Section 14 provides only for the court deciding on the termination of the mandate of the arbitrator, Section 34 permits the party alleging bias to furnish proof in support thereof to the court. Section 34(2)(a) is identically worded as Section 48. The Apex Court in relation to Section 48 has in *Shin-Etsu Chemicals Co. Ltd. v. Aksh Optifibre Ltd.* MANU/SC/0488/2005 : AIR2005SC3766 held that leading of evidence is permissible. Per contra, Section 14 does not permit any opportunity to the petitioner to furnish proof. Thus all complicated questions requiring may be trial or appreciation of evidence in support of a plea of bias are to be left open to decision under Section 34 of the Act.*

35. I therefore conclude that a party alleging bias is required to first follow the procedure in Sections 12 and 13 and if unsuccessful has choice of either waiting till the stage of Section 34 or if he feels that bias can be summarily established or shown to the court, approach the court immediately under Section 14, after the challenge being unsuccessful, for the court to render a decision."

16. The decision of the Division Bench in ***Bharat Heavy Electricals Ltd.*** (supra) relied upon by learned counsel for respondent No.2, in my view, does not advance the submission made by him. A perusal of the said judgment shows that it was rendered in writ proceedings wherein the vires of Section 13(3) & (4) of the Act had been challenged. The challenge was raised on the ground that there was no provision in the Act for removal of the arbitrator by the Court though such a provision was contained in Section 11 of the Act of 1940. It was also contended that no remedy was available to the aggrieved party under the Act for challenging the award on the ground of bias and prejudice on the part of the arbitrator. While dealing with the first of the aforesaid two submissions the Division Bench in

paragraphs 8, 13, 14 & 15 held as follows:

“8. The legislature was more than cautious while providing in explicit term that no judicial Authority shall intervene except where so provided (Section 5). Thus clear mandate is to bar judicial interference except in the manner provided in the Act. Conversely if there is no provision to deal with a particular situation, Courts cannot assume jurisdiction and interfere. Comparing this legislation with the earlier legislation on the subject-namely the Arbitration Act, 1940, the message is loud and clear. The legislature found mischief in various provisions contained in the Arbitration Act, 1940 which would enable a party to approach the Court time and again during the pendency of arbitration proceedings resulting into delays in the proceedings. Law makers wanted to do away with such provisions. So that arbitration proceedings are not unduly hampered. The very purpose of arbitration, which is an alternate Dispute Redressal Forum, is defeated once the Courts interfere with these proceedings. The experience in the working of the old Arbitration Act showed that it was resulting in more delays than in civil suits. Therefore, not only such provisions were omitted in the new Act, provision in the form of Section 5 was inserted to convey the message. The scheme of the new Act is clear enough, i.e. during the arbitration proceedings Court’s interference is done way with. The new Act deals with the situation even when there is challenge to the constitution of the Arbitral Tribunal. It is left to the Arbitrator to decide the same in the first instance. If a challenge before the Arbitrator is not successful, the Arbitral Tribunal is permitted to continue the Arbitral proceedings and make an Arbitral award. Such a challenge to the constitution of the Arbitral Tribunal before the Court is then deferred and

it could be only after the arbitral award is made that the party challenging the Arbitrator may make an application for setting aside an arbitral award and it can take the ground regarding the constitution of Arbitral Tribunal while challenging such an award. Thus course of action to be chartered in such contingency is spelt out in the Act itself. Court interference on basis of petitions challenging Arbitral Tribunal during the pendency of the arbitration proceedings would be clearly against the very spirit with which the Arbitration and Conciliation Act, 1996 has been enacted. The mischief which existed in the earlier enactment and is sought to be removed by the present enactment cannot be allowed to be introduced by entertaining writ petitions in the absence of any provision in the new Act in this respect. A statute is an edict of the legislature and the conventional way of interpreting or construing a statute is to seek the 'intention' of its maker. A statute is to be construed according "to the intent of them that make it" and "the duty of judicature is to act upon the true intention of the legislature—the mens or sententia legis".

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13. The challenge to the constitutional validity of the statutory provisions was levelled mainly on the grounds that the Act does not contain any remedy for a party who makes allegations of bias and prejudice against an Arbitrator and an arbitral award passed by such an Arbitrator cannot be challenged. In other words, according to him, there is no remedy to an aggrieved party in such a situation. His argument was that although Sub-section (5) of Section 13 prescribed that party challenging the Arbitration may make an application for setting aside an arbitral award in accordance with

Section 34, reading of Section 34 would show that no provision is made to challenge the arbitral award on the ground of bias or partiality of the Arbitral Tribunal. He further submitted that arbitral award can be set aside only on the grounds mentioned in Section 34 and in the absence of a provision enabling the party to challenge arbitral award on the ground of bias of an arbitral proceeding, such a ground would not be entertained within the parameters of Section 34 and, therefore, the aggrieved party is in fact rendered without remedy and this makes Sections 13(3) and 13(4) as unconstitutional. We are unable to agree with this contention of the Counsel for the petitioner. This way say so on two grounds: First, Sub-section (5) of Section 13 provides that an aggrieved party can challenge the Arbitrator and seek the relief of setting aside of such an arbitral award in accordance with Section 34 of the Act. Clause (b) of Sub-section (2) of Section 34 empowers the Court to set aside an award where the Court finds that the award is in conflict with the public policy of India. The Explanation to the clause shows that this clause has to be liberally interpreted. Public policy will include an award being challenged on account of fraud or corruption. In the present case the petitioner has tried to level allegations of bias and prejudice against the Arbitrator. Bias and prejudice are matters which are contrary to public policy and verge on corruption. Though the term 'public policy' is incapable of precise definition, it connotes some matter which concerns public good and public interest. The principles governing public policy are capable of expansion or modification. The Supreme Court observed in **Central Indian Water Transport Co. Ltd. and Anr. v. Brojo Nath Ganguly**, reported as AIR 1986 SC1571, that if there is no head of public policy which covers a case, then the

Court must in consonance with public conscience and in keeping with public good and public interest declare practices which were considered normal at one time but have become obnoxious and oppressive to public conscience, to be opposed to public policy. It observed: "Above all, in deciding any case it may not be covered by authority our Courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the Court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution". The principle of public policy is this: 'ex dolo malo non oritur actio'. Lord Brougham defines public policy as the principle which declares that no man can lawfully do that which has a tendency to be injurious to the public welfare. Public policy comprehends only protection and promotion of public welfare. Principles of natural justice that is, 'jus naturale' are founded on public policy. They are the very foundation of any administrative system. From time immemorial, the decisions of judicial or quasi-judicial bodies including Administrative Tribunals are tested on these principles. This initial application of the doctrine of natural justice to Courts and quasi-judicial bodies has been extended even to Administrative Authorities who have the function of determining civil rights and obligation. Those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting their case. The decision must be in consonance with this spirit and the Tribunal should act with a sense of responsibility. It cannot be imagined that legislature intended not to make bias as one of the grounds of challenge to the arbitral award. We are,

therefore, of the view that it will be difficult to exclude a challenge on account of bias and prejudice on the part of the Arbitrator from the purview of Sub-clause (ii) of Clause (b) of Sub-section (2) of Section 34 of the Act. If the allegations of bias and prejudice are established, no Court will countenance such allegations. If a Court is satisfied that there is merit in such allegations, the award will have to be set aside. In our view, the relevant provisions of the Act, referred to above, are sufficient to enable an aggrieved party to challenge an arbitral award on the basis of allegations of bias and prejudice on the part of an Arbitrator and it cannot be said that such a party is without any remedy under the Act. Thus we find no merit in the contention that Section 13(3) and (4) are ultra vires the Constitution of India on account of there being no provision in the Act to challenge an award on the ground of bias and prejudice on the part of Arbitrator.

14. Sub-section (5) of Section 13 has to be read along with Section 34 of the Act for this purpose. Sub-section (5) of Section 13 specifically provides that party challenging the Arbitrator may make an application for setting aside "such" an arbitral award in accordance with Section 34 of the Act. It clearly implies that challenge is permitted even on the grounds taken by the aggrieved party on which the challenge to the Arbitral Tribunal was made as, in the instant case, on the ground of bias and partiality of the Arbitral Tribunal. Thus even on principle of 'Doctrine of Incorporation' this ground has to be read in Section 34. Section 34 cannot be read in the manner suggested by the petitioner inasmuch as then it would amount to taking away the right of the aggrieved party which has been conferred upon him under Section 13(5) of the Act. Provisions of Section 13(5) and Section 34 are

to be read harmoniously. A right conferred upon an aggrieved party under Section 13(5) of the Act cannot be taken away by a narrow and pedantic interpretation of Section 34 of the Act.

15. A possible question in this connection may arise about there being no provision for removal of an Arbitrator during the arbitration proceedings by the Court. Admittedly the Act does not contain any provision where the Court can remove an Arbitrator during the pendency of arbitration proceedings. In this connection we have to remind ourselves of the intention behind the legislation, i.e. the Arbitration and Conciliation Act, 1996. As already observed, the Act is modelled after the UNCITRAL Model Law. This Model Law has been adopted by various countries. The need for such a Model Law arose because of increased international commercial activity. Such activity in modern times is at Government or Semi-Government level. In such circumstances it was only fair and proper that all the participating countries should have similar legal provisions when it came to Arbitration. In fact Arbitration is envisaged as a method for speedy alternate redressal of disputes between the parties to commercial transactions. If Court interference was permitted during arbitration proceedings, the very object of speedy redressal of disputes would have been frustrated. That is why keeping the peculiar conditions in India, coupled with the need for speedy resolution of disputes, the provision of Court interference was avoided. Rather Section 5 was inserted which provides that there will be no judicial intervention. We have already noted that a party having grievances against an Arbitrator on account of bias and prejudice is not without remedy. It has only to wait till the arbitral award comes and it can challenge the award on various grounds including bias and

prejudice on the part of the Arbitrator. Before the stage of challenge of award under Section 34 comes, Sub-sections (1), (2) and (3) of Section 13 envisage a situation where the Arbitrator may on his own reclude himself on objection being taken qua his functioning as an Arbitrator or where both the parties agree to his removal as per procedure accepted by them. If both fail, the Arbitrator is required to decide on the challenge to his functioning as an Arbitrator levelled by a party. The Arbitrator is expected to be a fair person and if he finds that there is substance in the allegations, an Arbitrator is expected to dispassionately rule on such an objection. Failing all this the last resort for an aggrieved party is the challenge under Section 13(5) read with Section 34. Thus going on with the ethos of the new Act of speedy progress of arbitration proceedings without judicial interference coupled with the fact that an aggrieved party is not without remedy, it cannot be said that the absence of a provision regarding removal of an Arbitrator renders the relevant provisions of the statute ultra vires the Constitution. We are of the considered view that absence of a provision of removal of an Arbitrator does not render the relevant statutory provisions invalid or ultra vires the Constitution of India.”

17. A perusal of the aforesaid discussion shows that the Court did not consider the interplay of Sections 12 & 13 with Sections 14 & 15 of the Act. The issue as to whether a petition under Section 14 to seek the termination of the mandate of an arbitrator on the ground of the arbitrator becoming *de jure* or *de facto* unable of perform his function is maintainable, was not raised before the Court and was not under consideration of the Division Bench. I, therefore, reject the submission

of the respondent that the present petition is not maintainable at this stage and that the only remedy available to the petitioner is to wait for the arbitral award to be rendered and then, if they are still aggrieved, to prefer objections under Section 34 of the Act by, inter alia, raising a ground of bias against the respondent No.1.

18. In the present case, the challenge to the authority of the arbitrator to proceed with the arbitration, premised on the fact that he is the brother-in-law of petitioner Nos.1 & 2 and respondent No.3 and the husband of respondent No.2, has rightly been rejected by the arbitrator as this was a fact which was well known to all the parties even at the time when respondent No.1 was named as the arbitrator under the agreement. The said challenge was clearly barred under Section 12(4) of the Act.

19. However, the matter does not rest there. The order passed by the arbitrator discloses that he has, after the execution of the settlement deed containing the arbitration agreement, personally initiated civil and criminal proceedings against petitioner No.2. Learned counsel for the petitioners states that, in fact, proceedings had been initiated by the arbitrator against petitioner No.1 as well. In any event, the admitted position is that at least against the petitioner No.2, proceedings had been initiated by the arbitrator in a civil Court as well as by lodging an FIR. This being the position, when the arbitrator himself is embroiled in litigation against one of the parties to

the arbitration agreement, it is not possible to accept that the arbitrator would be able to maintain his impartiality and objectivity while adjudicating upon the rights of the parties. Justice is not only to be done, but it should also be seen to be done. An arbitrator who is himself entangled in litigation with one of the parties to arbitration, cannot possibly be expected to act as a just and unbiased arbitrator. His determination is bound to be clouded by the factum that one of the parties appearing before him in the arbitral proceedings is his adversary.

20. It would be too heavy a burden to put even on the shoulders of a judge, who is sworn to do justice according to law between the parties appearing before him, and whose mind is trained and disciplined to do justice without allowing any other extraneous considerations to cloud his view, in a case like the present, let alone a lay person such as respondent no.1, to do justice between the litigating parties. In my view, to allow the arbitral proceedings to continue before respondent no.1 would be a completely futile and farcical exercise, which would only lead to avoidable harassment and unproductive expenditure of time and money, for all the parties. In my view, therefore, the learned arbitrator has incurred a *de jure* inability to perform his functions, inasmuch, as he cannot be expected to comply with the requirements of Sections 18 of the Act, which provides that the parties shall be treated with equality and that each party shall be given the full opportunity to present his case.

21. For the aforesaid reasons, I allow this petition and terminate the mandate of respondent No.1 as the arbitrator in the proceedings in question.

22. Considering the nature of the dispute, I appoint Mr. Dinesh Dayal, retired Additional District Judge, as the sole arbitrator to adjudicate the disputes between the parties. He may fix his own fees subject to a maximum of Rs.1 Lac to be shared equally between the two petitioners, respondent No.2 and respondent No.3, apart from all other out of pocket expenses. The learned arbitrator shall endeavour to render his award within six months of the first date of hearing before him. The respondent No.1 shall remit the arbitral record and proceedings to the newly appointed arbitrator within a week. The parties shall appear before the newly appointed arbitrator on 06.08.2010 at 04:00 p.m. A copy of this order be also communicated to the learned arbitrator.

23. Petition stands disposed of.

VIPIN SANGHI, J.

JULY 29, 2010
rsk