

Mr. Ethan SteIn and anr. Vs. Mr. Balkrishna V. Doshi and anr.

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Court : Delhi

Decided On : Feb-02-2009

Reported in : 157(2009)DLT180

Judge : Reva Khetrapal, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11, 11(6), 14, 14(1), 14(2), 15, 15(1), 15(2) and 16

Appeal No. : OMP 115/2008 and AA 376/2008

Appellant : Mr. Ethan SteIn and anr.

Respondent : Mr. Balkrishna V. Doshi and anr.

Advocate for Def. : Rakesh Tiku and ; Aditya Bhardwaj, Advs. for R-1 and 2

Advocate for Pet/Ap. : Ramji Srinivasan, Sr. Adv. and; Arjun Garg and; Nitin Thukr

Disposition : Reported

Judgement :

Reva Khetrapal, J.

1. By this common judgment, I propose to dispose of OMP 115/2008 which is a petition under Section 14(2) read with Section 14(1)(a) and 14(1)(b) and Section

15(2) read with Section 15(1)(a) of the [Arbitration and Conciliation Act, 1996](#) (hereinafter referred to as 'the Act') and Arbitration Petition No. 376/2008 under Sections 11(6), 15(1)(a) and 15(2) of the said Act. While OMP No. 115/2008 was filed in February, 2008 for substitution of Mr. Vijay S.T. Shankardass, an Arbitrator (also a Barrister, practicing mostly in London and occasionally visiting India), since he had withdrawn from the proceedings, the Arbitration Petition No. 376/2008 was filed on 23.09.2008 for substitution of Mr. Prag P. Tripathi as an Arbitrator from the Tribunal of three Arbitrators on account of the fact that vide his letter dated 28.08.2008, Mr. Prag P. Tripathi resigned from the arbitral tribunal in view of a long time having elapsed without any proceedings and also in view of his present commitments.

2. The facts relevant for the disposal of the present petitions are within a narrow compass. On 10th March, 2000, an Arbitration Agreement was entered into between late Mr. Joseph Allen Stein (the father of the present petitioners) and the respondents Mr. Balkrishna V. Doshi (the respondent No. 1) and Mr. Jai Rattan Bhalla (the respondent No. 2) whereby the parties, all of whom were architects by profession, in order to resolve the disputes and differences which had arisen relating to their three partnership concerns, viz. Stein Doshi & Bhalla, Stein Doshi & Bhalla (New Delhi) and Stein Doshi & Bhalla (Ahmedabad) constituted an arbitral tribunal comprising of three arbitrators, namely, (i) Mr. Vijay Shankardass, resident of 7, Sector 14, Gurgaon, (ii) Mr. Mahendra Raj, resident of 20-B, Prithvi Raj Road, New Delhi and (iii) Mr. Achyut Kanvinde, resident of B-10 Maharani Bagh, New Delhi. During the pendency of the arbitration proceedings before the aforesaid three arbitrators, Mr. Joseph Allen Stein expired on 06.10.2001. The petitioners, who are the sons and legal representatives of late Mr. Joseph Allen Stein, by communication dated 2nd January, 2002 informed the arbitrators about the demise and also that they were the legal representatives entitled to continue the proceedings and represent the estate of the deceased. During the pendency of the proceedings, however, Shri A.P. Kanvinde, one of the arbitrators also expired on December 28, 2002.

3. It bears mentioning at this juncture that from March 10, 2000 (the date of the Arbitration Agreement and the constitution of the arbitral tribunal) till December 28,

2002 (the date of the demise of Shri A.P. Kanvinde), the said panel of arbitrators never held any formal meeting nor gave any directions regarding the filing of the claims, etc.

4. Subsequent to the demise of Shri A.P. Kanvinde, the petitioners vide letter dated 07.01.2003 requested the respondents to name another person as arbitrator in place of Shri A.P. Kanvinde, so that the agreed arbitrator could complete the arbitral panel and the arbitration could be proceeded with. However, the respondents failed to suggest the name of any arbitrator in substitution of Shri A.P. Kanvinde.

5. Subsequent to the demise of Shri A.P. Kanvinde also, the remaining two arbitrators, namely, Mr. Vijay Shankardass and Mr. Mahendra Raj conveyed their disinclination to continue any further as arbitrators and withdrew from the arbitration - Shri Vijay S.T. Shankardass vide a letter dated March 12, 2003 and Shri Mahendra Raj vide a letter dated April 16, 2003. Resultantly, the petitioners approached the respondents to name other persons as arbitrators in place of Shri Vijay S.T. Shankardass and Shri Mahendra Raj, but failed to evoke any response.

6. On August 1, 2003, compelled by the dormant attitude of the respondents towards the appointment of the arbitrators and with a view to ensure the commencement of the arbitration proceedings, the petitioners filed a petition under Section 11(6) read with Section 15(2) of the Act, being AA No. 174/2003 for the appointment of arbitrators in place of the deceased arbitrator Shri A.P. Kanvinde and the two arbitrators Shri Vijay S.T. Shankardass and Shri Mahendra Raj, who had withdrawn.

7. In the aforesaid proceedings, this Court vide its order of December 14, 2004, held as under:

'Instead of making interpretation of the letters written by the Arbitrators and then coming to the conclusion if the Arbitrators had resigned or withdrawn or they wanted to continue with the proceedings, it is considered expedient and proper that willingness of the Arbitrators to act as Arbitrators be again sought so as to find out if the remaining two Arbitrators are willing to act as Arbitrators. Though this

Court could render its decision after reading the correspondences exchanged with the Arbitrators but to my mind that would be of no avail as Arbitrators must conduct arbitral proceedings of their own volition. If this Court holds that they never withdrew and asks them to conduct the arbitral proceedings and if the Arbitrators are not willing to act as Arbitrators as is indicated in their letters, it shall be a futile exercise to have the proceedings conducted from the Arbitrators. Therefore, this Court felt that instead of interpreting the letters written by the Arbitrators to the parties, it shall be fair and just to have their willingness once again and then deal with the matter further for the appointment of third Arbitrator. This Court will appreciate if the Arbitrators and the parties once again they undertake the task of appointing a panel of Arbitrators with their conscious mind. I am not disposing of this petition at this stage but keeping it alive for the purpose of ascertaining if the two Arbitrators are willing to accept this task as Arbitrators or not. The two Arbitrators be apprised of this order.'

8. Pursuant to the aforesaid order, Shri Mahendra Raj conveyed his consent to act as an arbitrator vide letter dated January 13, 2005. On February 17, 2005, Shri Vijay S.T. Shankardass too gave his consent to act as an arbitrator.

9. Consequently, vide order dated November 9, 2006, the following order was passed recording the consent of Shri Mahendra Raj and Shri Vijay S.T. Shankardass to act as arbitrators and appointing Shri Parag P. Tripathi, Sr. Advocate as the third arbitrator so as to make the quorum complete in view of the death of Shri A.P. Kanvinde:

Vide order dated 14th December, 2004, this Court gave an option to the learned Arbitrators to exercise their option if they wanted to continue as Arbitrators. Sh. Mohinder Raj [sic Mahendra Raj], Arbitrator, as is seen had expressed his willingness to act as an Arbitrator provided all the parties to the petition wanted him to act as such. As regards another learned Arbitrator, Sh. Vijay Shankar [sic Mr. Vijay S.T. Shankardass], he was to send his communication to the parties which he seems to have given consent by writing a letter to the respondents.

Earlier panel of three Arbitrators was constituted by the parties themselves including the two referred to above. However, unfortunately one of the Arbitrators

passed away and, therefore, it has become essential to appoint third Arbitrator, so as to make the quorum complete. Accordingly, Mr. Prag P. Tripathi [sic Parag P. Tripathi], Sr. Adv. of this Court is hereby appointed as third Arbitrator....

10. The aforesaid order of this Court was communicated to all the three arbitrators on December 20, 2006. And on 3rd March, 2007, a letter was sent from the petitioners' side to the panel of arbitrators that the first date for the arbitration proceedings be fixed.

11. In response to the letter dated 20th December, 2006, on 13.03.2007, the petitioners received a letter dated 23.02.2007 from Shri Vijay S.T. Shankardass referred to as a 'report' wherein he claimed to have resolved all the differences between the parties after listing the efforts made by him during a span of sixteen years beginning from the year 1991, Shri Vijay S.T. Shankardass recused himself from the arbitral proceedings in the following terms:

To my mind apart from an enquiry and scrutiny of accounts of SDB(A) which to the best of my knowledge Mr. Doshi has offered and has been awaiting for a long time now, nothing remains for my consideration or resolution of the various differences or disputes amongst the erstwhile partners as envisaged in the aforesaid memorandum of understanding and minutes or as may have been subsequently raised by the various partners.

Consequently, I shall regard my task of mediation and resolution of various differences and disputes between the three erstwhile partners of the three entities, SDB, SDB(ND) and SDB(A) as envisaged under the aforesaid memorandum of understanding and the numerous communications of the partners with me from time to time over the years as now being concluded, with matters resolved as best as they could under the circumstances be. I would therefore, consider myself discharged from my responsibilities of assisting, mediating and carrying out conciliation in relation thereto to the extent that I had undertaken them. However, if I can be of any further assistance to any of you individually or collectively please do not hesitate to let me know.

12. Subsequently, the petitioners' Advocate, in response to his letter dated 3rd March, 2007, received a letter from Shri Vijay S.T. Shankardass dated 9th March, 2007, the contents whereof are as under: Having already concluded the proceedings concerning the three partnerships, Stein, Doshi & Bhalla, Stein, Doshi & Bhalla (New Delhi) and Stein, Doshi & Bhalla (Ahmedabad) that I have been conducting and involved in since 1991, of which I have sent a report each to J.R. Bhalla, Shri B.V. Doshi and Shri Ethan Stein, I do not see the relevance of or need for my involvement or inclusion in any other proceedings relating to or amongst these parties.

13. Soon thereafter, on 16th March, 2007, Shri Parag P. Tripathi, Sr. Advocate sent a letter of the same date to Shri Vijay S.T. Shankardass and Shri Mahendra Raj to fix a date for the arbitration. No response was received by Shri Parag P. Tripathi to the aforesaid letter from Shri Vijay S.T. Shankardass. Since the arbitration proceedings were not taking off, the petitioners filed IA No. 4362/2007 and AA No. 174/2003 praying for the substitution of Shri Vijay S.T. Shankardass for another arbitrator, which however, was dismissed as withdrawn with liberty 'to file a proper independent petition after completing necessary formalities in accordance with law' vide order dated 20th April, 2007. On the same day, that is, on 20th April, 2007, the respondent No. 1 wrote to the panel of arbitrators and to the parties wherein the respondent No. 1 concurred with the alleged 'conclusions' of Shri Vijay S.T. Shankardass and stated that he did not see any useful purpose in pursuing the matter.

14. On 9th June, 2007, the petitioners sent a notice by speed post acknowledgment due to the respondents calling upon the respondents to agree to the appointment of the third arbitrator in place of Shri Vijay S.T. Shankardass. A reply to the said notice was sent by the respondents through their Advocate, which was dated 6th July, 2007, wherein they admitted the Arbitration Agreement, but refused to name an arbitrator to take the place of Shri Vijay S.T. Shankardass on the ground that Shri Vijay S.T. Shankardass had not withdrawn from the arbitration.

15. The petitioner No. 1, in order to take the matters beyond the pale of controversy, thereafter wrote to Shri Vijay S.T. Shankardass vide letter dated August 17, 2007. The relevant extracts of the said letter being pertinent to the issue are reproduced hereunder:

While the issues relating to the document referred in your letter dated 9.3.2007 as a 'report' may be taken up before the arbitral panel (unless of course you decide to recall the same), circumstances are such that the matter of your willingness in serving on the arbitral panel as per the judgment dated 9.11.2006 of the Hon'ble High Court of Delhi in A.A.174/2003 requires clarification. Your letters (of 23.2.2007 and 9.3.2007) indicate that you are either disengaged or disengaging from this arbitration or in any event are disinclined to participate....Consequently there is an urgent need to know whether or not it is convenient for you to serve on the arbitral panel? Answer to this will be greatly appreciated.

In your letter of 23.2.2007 you have stated that you have discharged your responsibilities. Therefore, I must point out that no dispute has yet been examined let alone resolved. My claims noted in A.A.174/2003 are yet to be adjudicated....I need to point out that your letter of 23.2.2007 contains factual inaccuracies and furthermore indicates a conflict with the arbitration agreement and the parties expectation of an Arbitration that the arbitrators will conduct in accordance with Law.

16. On 25th September, 2007, Shri Vijay S.T. Shankardass wrote back to the petitioners, stating that he had made himself sufficiently clear in that he had discharged the responsibilities undertaken by him when he agreed to mediate in the matter and further stating:..So Ethan, really, there is not much that I can help with anymore now, as in my respectful view matters more or less stand concluded either in fact or merely by lapse of time. However, if you still feel I could ever be of assistance, I shall be willing to come forward, more out of respect for Mr. Stein than anything else.

17. The aforesaid led to the filing of OMP 115/2008 in this Court for appointment of a substitute arbitrator in place of Shri Vijay S.T. Shankardass. Notice of the petition was issued to the respondents, who filed a reply opposing the prayer for

the substitution of Shri Vijay S.T. Shankardass on the ground that he had never resigned from the arbitration nor the reply dated 25th September, 2007 could be construed as an automatic termination of his mandate as he had expressed willingness to come forward in case the petitioners needed his assistance. It was stated by the respondents that Shri Vijay S.T. Shankardass continued to be one of the arbitrators since his appointment was made by the mutual consent of all the parties. It was also submitted that prior to the constitution of the fresh panel of arbitrators, Shri Vijay S.T. Shankardass had already resolved many contentious issues between the partners as well as their progeny. It was alleged that the petitioners were trying to 'play with the arbitration proceedings and the award of the agreed arbitrator' and could not be permitted to reject any arbitrator at their own whims and fancies.

18. On 28th August, 2008, Mr. Parag P. Tripathi, Sr. Advocate wrote a letter to the petitioners stating:

5. In view of the long time which has elapsed without any proceedings and my present commitments, I regret to say that it would not be possible for me to continue as an arbitrator.

6. I, therefore, request you to kindly communicate this to the Hon'ble Court so that another arbitrator may be appointed in my place.

19. The aforesaid led to the filing of ARB.P. 376/2008 in this Court for appointment of a substitute arbitrator in place of Shri Parag P. Tripathi, Sr. Advocate.

20. Notice of the petition was issued to the respondents and the respondents have filed their reply, raising more or less identical issues which have been raised by them in the previous proceedings, that is, OMP No. 115/2008 and Arbitration Petition No. 174/2003 (disposed of by this Court vide order dated 9.11.2006), viz. that there were no disputes for resolution by the arbitrators. The petitioner, on the other hand, submits that this contention not having been entertained by this Court, while passing the order dated 9.11.2006, it is not open for the respondents to go behind the said order once again in these proceedings or attempt a review of the said order in these proceedings.

21. On the completion of the pleadings, the learned senior counsel for the petitioners Mr. Ramji Srinivasan and the learned Counsel for the respondents Mr. Rakesh Tiku were heard at length. Both the counsel painstakingly took me through the pleadings and the entire documentary evidence on record including the inter se correspondence between the parties and the communications addressed to the parties by the arbitrators in response to the communications sent by the parties to the arbitrators.

22. As already stated, the basic thrust of the arguments raised by the respondents it that there are no issues left now to be adjudicated/determined by the Arbitral Tribunal. The respondents in fact suggest this, relying on letters written by Mr. Vijay S.T. Shankardass, wherein he has stated that he considers himself discharged from the responsibilities of assisting, mediating or carrying out conciliation in relation to various differences and disputes between the partners of the partnership firms. He also states that the disputes have been resolved by the lapse of time or otherwise. The learned senior counsel for the petitioners Mr. Ramji Srinivasan, on the other hand, contends that it is not the case of the respondents themselves that the disputes stand resolved nor they have produced any award of the arbitrators to this effect. The parties entered into the Arbitration Agreement dated 10.03.2000 for referring the disputes to a panel of three arbitrators. The said arbitration agreement itself records that:

AND WHEREAS disputes and differences had arisen between the parties hereto relating to the aforesaid partnership.

AND WHEREAS in order to resolve the said disputes and differences, the parties hereto, by Agreement dated 13th December, 1992, referred the said disputes and differences for adjudication to the sole arbitration of Mr. Vijay Shankardass which included the decisions concluded including the one on 18/12/1991.

AND WHEREAS then parties hereto have now mutually agreed and decided to continue the said arbitration proceedings under an Arbitral Panel with the provisions of the [Arbitration and Conciliation Act, 1996](#), before a Panel of three Arbitrators.

23. Mr. Srinivasan submits that admittedly there were disputes between the parties which existed at the time of the arbitration agreement dated 10.03.2000, and it is not clear as to why and how, suddenly, Mr. Shankardass came up with the theory that all disputes between the parties had been set at rest. It is submitted that the disputes still exist and are required to be resolved by way of arbitration and this is clear from the pleadings and documents of the respondents themselves. Paragraph 7 of the reply filed by the respondents to the Arbitration Petition No. 376/2008 clearly contains the issues with regard to which disputes are still pending between the parties. The three issues as have been indicated by the respondents themselves are as under:

- a) Re-organization of three firms, that is, Stein, Doshi & Bhalla, Stein, Doshi & Bhalla (New Delhi) and Stein Doshi & Bhalla (Ahmedabad) (this would also mean issues pertaining to dissolution of the said firms).
- b) Accounts (this would certainly include compliance with the financial agreement between the parties and settlement and adjustment of accounts including payment of royalties and determination of assets, liabilities, etc.)
- c) Completion of the then present assignments of Stein, Doshi and Bhalla. (this could also include the manner in which profits etc., generated from the work carried out for the completion of all the assignments by or under the umbrella of the three firms are to be shared)

24. Mr. Srinivasan also referred to para-7 of the reply of the respondents where it is stated as under:

that subsequently, Mr. Shankardass held number of informal meetings with the partners and in a meeting held on 19.12.1991, Mr. Shankardass formally noted all the issues which the partners had raised and on which, his assistance was required. Against each of the issues raised by the partners, comments by each of the partners were recorded by Mr. Shankardass in writing. The main issues which have come out of the deliberations between the partners and Mr. Shankardass were as follows....

The issues are the three issues set out in Paragraph 23 hereinabove.

25. Mr. Srinivasan urges that it is clear from the above that the issues were not concluded or conclusively decided by the Sole Arbitrator or the Tribunal of three Arbitrators, and there is no award or terms of settlement or conclusive findings recorded even by Mr. Shankardass anywhere.

26. Further, from the communication between the parties also, it is clear that the disputes were existing and live at the time when the arbitration agreement was entered into. The letter dated 12.12.2000 of Mr. Jai Rattan Bhalla contains the clearest admission when it records '...the basic issue as I understand is accounts, and the liabilities of Stein, Doshi and Bhalla.' Further, in their letters dated 23.07.1999 to the Council of Architecture, both Mr. Doshi and Mr. Bhalla have admitted as under:

4. Differences arose between the partners and in December 1991 the matters in dispute were referred to the sole arbitration of Shri Vijay Shankardass, an Advocate.

6. Since the Arbitrator could not finalise his award, the partners have mutually decided to involve Shri A.P. Kanvinde and Shri Mahindra Raj along with Shri Vijay Shankardass in the arbitration proceedings and finalise the dissolution and settlement of accounts...

In view of the mutual decision of the partners for referring the dispute to the three arbitrators as provided in the partnership deed, no action by the council is called for.

27. My attention, in particular, was invited to the orders of this Court dated December 14, 2004 wherein this Court specifically sought the willingness of Shri Vijay S.T. Shankardass and Shri Mahendra Raj to act as arbitrators culminating in the order dated November 09, 2006 constituting the panel of three arbitrators comprising of Shri Vijay S.T. Shankardass, Shri Mahendra Raj and Shri Parag P. Tripathi, Sr. Advocate of this Court.

28. Relying upon the judgments in the case of Surana Telecom Limited and Bhagyanagar India Limited v. Bharat Sanchar Nigam Limited reported in and Sharma Enterprises v. National Building Construction Corporation and Anr. 2008(9) AD (Delhi) 571, Mr. Tiku initially attempted to urge that the petitioners had failed to specify any dispute in the petition or in any correspondence exchanged with the respondents which could be termed as a dispute or difference inviting adjudication by arbitration.

29. Mr. Ramji Srinivasan, the learned senior counsel for the petitioners, on the other hand, contended that in a case such as the present one where an arbitral tribunal had already been constituted by the parties without having recourse to Section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act. Reliance was placed by him in this regard on 39 of the decision of the Supreme Court in SBP & Co. v. Patel Engineering Ltd. and Ors. (2005) 8 SCC 618 wherein the Supreme Court laid down:

It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act is to decide at that stage....It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the Applicant has satisfied the conditions for appointing an Arbitrator under Section 11(6) of the Act...

Further, it was held that:

47(ix) In a case where a arbitral tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act...

30. It is further submitted that this position has been followed and reiterated by the Hon'ble Supreme Court in the case of Shree Ram Mills Ltd. v. Utility Premises (P) Ltd. reported in (2007) 4 SCC 599.

31. Two things, in my view, are clear from the judgment in SBP & Co. (supra). One, that if an arbitral tribunal was already constituted without having recourse to the provisions of the Act, then the Court will not go into the questions of jurisdiction, objections, existence or validity of the arbitration agreement etc. and the same are to be determined by the Tribunal itself under Section 16. In this case since the Tribunal was constituted on 10.03.2000, the questions as aforesaid including the existence of disputes are to be determined by the arbitral panel itself under Section 16. Second, the judgment holds that once a live claim is made the question of whether the transaction has come to an end is to be decided by the Tribunal itself.

32. In my considered opinion, in the instant case, it is not only clear that there were arbitrable disputes at the time of entering into the arbitration agreement, but it is also clear that the claims still exist between the parties. There is no satisfaction of the parties recorded by Mr. Shankardass or otherwise regarding disputes or the mutual rights and obligations. There is no conclusion of the transaction between the parties. The only thing which Mr. Shankardass alleges to have concluded was some dispute regarding 'Mandi Farms'. All the remaining issues, which are also recorded by the respondents in their pleadings and communications, need to be gone into. The respondents have been pleading clearly contrary to what they have stated in their earlier correspondence. It is evident that such conduct is only with the purpose of avoiding/delaying the arbitral proceedings. It is, therefore, in my view, expedient and necessary in the interest of justice that this Court exercises its powers under the Act regarding appointment/substitution of the Arbitrators.

33. It has been held in the case of Adhunik Steels Limited v. Orissa Manganese and Minerals (P) Ltd. reported in : AIR 2007 SC2563 that:

12. The power and jurisdiction of Courts in Arbitral matters has been the subject of much discussion. The relationship between Courts and Arbitral Tribunals have

been said to swing between forced cohabitation and true partnership. The process of arbitration is dependent on the underlying support of the Courts who alone have the power to rescue the system when one party seeks to sabotage it...

34. Insofar as the issue regarding pre-SBP stage is concerned, considering the fact that this Court is dealing with the pre-SBP & Co. dispensation, it is neither necessary nor proper for this Court in the present case to go into the question raised by the respondent since the present case is governed by the procedure that was available when the case of Konkan Railway Corporation Ltd. v. Rani Construction (P) Ltd. : [2002]1SCR728 held the field. More so, when the Hon'ble Supreme Court in the case of Maharshi Dayanand University and Anr. v. Anand Coop. L/C Society Ltd. and Anr. : AIR 2007 SC2441 has clarified that the orders already made were not be effected by the ratio of the decision in SBP & Co., as was clear from para 46 of the decision in SBP & Co. wherein prior orders and proceedings had been saved. In paragraph-12 of the said judgment the Supreme Court laid down as follows:

12...We think that in the circumstances, this is a question that must be left to be decided by the Arbitrator, since in terms of Section 16 of the Act the question can be raised before the Arbitrator. Considering that we are dealing with the pre SBP & Co. dispensation, we do not think that it is necessary or proper for us to go into that question and decide the same in these proceedings...We are, therefore, satisfied that it would be appropriate to leave this question, as also the other questions to be decided by the Arbitrator rather than our trying to answer them at this stage in view of the fact that this case is not governed by the principles recognized by SBP & Co.

35. In the instant case, there can be no two views on the fact that the arbitral proceedings were and are sought to be sabotaged, possibly in view of the fact that the respondents are in possession of valuable assets belonging to the three partnership firms, including the land at Mandi. Though Mr. Tiku fairly conceded that a substitute arbitrator may be appointed by this Court in place of Mr. Parag P. Tripathi, Sr. Advocate, he laboriously sought to interpret the communications dated 23.02.2007 and 09.03.2007 to substantiate his contention that Shri Vijay

S.T. Shankardass had not refused to act as an arbitrator and that there was no occasion to appoint a substitute arbitrator in place of Shri Vijay S.T. Shankardass, who had already adjudicated upon the arbitration proceedings. I am constrained to state that the aforesaid contention of Mr. Tiku is wholly untenable in view of the fact that the arbitration proceedings though initiated as far back as on 10th March, 2000 have yet to be launched. How Shri Vijay S.T. Shankardass has fulfilled his obligation as an arbitrator is not understandable in view of the fact that neither any evidence was led by the parties nor possibly claims and counter-claims have been filed as yet. His so-called 'report' on mediation on which reliance is sought to be placed by the respondents by no stretch of imagination can be construed as an award, though, in my view, it is highly doubtful that it can even attain the status of a 'report'. For this Court to delay the appointment of an arbitrator in lieu of Shri Vijay S.T. Shankardass would tantamount to abdicating its functions as mandated by Sections 14 and 15 of the Act, for, it is no longer possible to live under the delusion that Shri Vijay S.T. Shankardass will one day enter into the arbitral proceedings and render an award.

36. To conclude, the petitioners have clearly made out that there are live claims raised by the petitioners which need to be determined by way of arbitration. Although, this Court is not going into the question of existence of disputes in view of para 47 (ix) of the SBP case, the existence of the disputes is clearly reflected from the pleadings and documents of the respondents themselves. The parties have neither recorded their mutual satisfaction regarding the transactions at any point of time, nor was any such satisfaction reached. Therefore, substitute arbitrators need to be appointed so that the arbitral panel can be completed and arbitration can be proceeded with. Accordingly, Shri H.K. Yadav is appointed in substitution of Shri Vijay S.T. Shankardass and Justice A.B. Saharya (Retired Chief Justice of Punjab and Haryana High Court) is appointed in substitution of Shri Parag P. Tripathi, Sr. Advocate. Since both the parties unequivocally consented to the continuation of Shri Mahendra Raj, he will continue to act as an arbitrator in the arbitral tribunal. Thus, the constitution of the Arbitral Tribunal shall be as follows: (i) Mr. Justice Arun B. Saharya (Retired Chief Justice of Punjab and Haryana High Court), (ii) Mr. Mahendra Raj and (iii) Mr. H.K. Yadav.

Both the petitions and IA No. 13317/2008 stand disposed of accordingly, leaving the parties to bear their own costs.

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