

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**ARBITRATION PETITION NO. 548 OF 2014
WITH
COMMERCIAL ARBITRATION PETITION NO. 76 OF 2018
WITH
CONTEMPT PETITION NO. 174 OF 2018
IN
NOTICE OF MOTION NO. 2503 OF 2018
IN
COMMERCIAL ARBITRATION PETITION NO. 76 OF 2018
WITH
NOTICE OF MOTION NO. 2503 OF 2018
IN
COMMERCIAL ARBITRATION PETITION NO. 76 OF 2018**

M3ENERGY Sdn.Bhd.

...Petitioner

vs

Hindustan Petroleum Corporation Ltd. & Anr.

...Respondents

Mr.Soli Cooper, Senior Advocate with Rishab Gupta and Rishab Jogani I/b. Shardul Amarchand Mangaldas & Co. for Petitioner.

Mr.Hiroo Advani with Sheikh Yusuf Ali, Asif Lampwala, Chirag Sancheti, Chirag Bhatia, Chaiti Desai and Mahi Mehta I/b. Advani & Co. for Respondent.

CORAM : S.C.GUPTE, J.

DATE : 10 JANUARY 2019

ORAL JUDGMENT :

This arbitration petition, Arbitration Petition No.548 of 2014, challenges an award passed by an arbitral tribunal of three arbitrators termed as a “partial award”. The partial award *inter alia* considers the question of jurisdiction of the arbitral tribunal to adjudicate upon disputes and differences between the parties. The objection to the arbitrators'

jurisdiction was taken by the Petitioner by filing an application under Section 16 of the Arbitration and Conciliation Act, 1996 ('Act'). The objection was on the ground that the draft Joint Executing Agreement ('JEA'), which contained the arbitration agreement, was neither executed nor even concluded and therefore, there was no valid and subsisting arbitration agreement between the parties. The arbitral tribunal held the JEA to be a concluded contract, and the arbitration agreement contained in it as valid, subsisting and binding. This aspect of the award has *inter alia* been challenged in the present arbitration petition.

2 A few salient facts of the case for the purposes of assessing the merits of the jurisdiction issue may be noted as follows :

2.1. The Petitioner, M3ENERGY SDN.BHD., is a company incorporated under the laws of Malaysia, having technical expertise in management of offshore exploration and production of oil & gas ('M3ENERGY'). Respondent No.1, Hindustan Petroleum Corporation Ltd., is an Indian company incorporated under the provisions of the Companies Act, 1956 engaged in the business of oil refining and marketing ('HPCL'). Respondent No.2, Prize Petroleum Company Ltd., is a joint venture in which HPCL has 50% stake, incorporated under the Companies Act, 1956 ('Prize').

2.2 On 27 December 2004, Oil and Natural Gas Commission ('ONGC') invited tenders for development of offshore marginal field cluster-7 known as "OMFC-7" ('Project').

2.3 M3ENERGY, along with HPCL and Prize, entered into a Memorandum

of Understanding on 29 June 2005 ('MOU') for submitting a bid for the project as a consortium. The MOU defined respective roles and responsibilities of the parties in case the project were to be awarded to the consortium. The MOU stipulated initial participating interest of Prize, HPCL and M3ENERGY in the proportion of 10:60:30 and execution of contract jointly by Prize and M3ENERGY. The MOU envisaged management of the contract through Integrated Project Management Team ('IPMT'), and defined the respective roles of the parties in IPMT.

2.4 In accordance with the terms of the MOU, on or about 29 June 2005, Prize submitted a bid on behalf of the consortium. The MOU formed an integral part of the bid documents.

2.5 By a letter of award dated 26 March 2006, ONGC awarded the contract for the project to the consortium. The letter of award *inter alia* required the consortium to submit the initial development plan ("IDP") within a stipulated period.

2.6 On or about 27 September 2006, in pursuance of the letter of award, ONGC entered into a service contract with the consortium represented by Prize for the purpose of defining the relationship between the parties on the one hand and ONGC on the other for execution of the project. The consortium partners were collectively referred to as "contractor" in it. The service contract *inter alia* required the contractor, i.e. consortium members, to execute and submit a duly signed/executed JEA within 15 days of execution of the service contract. It is the Petitioner's case that due to insistence of HPCL and Prize on revisiting the roles and responsibilities of

the parties in the project (which were already defined in the MOU), no agreement on the JEA could be reached within the specified time or extended period allowed by ONGC.

2.7 In the premises, on or about 4 September 2008, ONGC terminated the service contract as against all consortium members. None of the parties has challenged the termination.

2.8 On 15 May 2009, HPCL and Prize issued a notice of arbitration alleging *inter alia* that the draft JEA initialled by the parties on 18 April 2007 constituted a concluded contract containing *inter alia* an arbitration agreement and raising claims against M3ENERGY *inter alia* on the ground that it was responsible for termination of the service contract by ONGC. The arbitral tribunal was constituted in pursuance of this notice of invocation.

2.9 As noted above, jurisdiction of the arbitrators to adjudicate upon the disputes and differences between the parties was contested by M3ENERGY by filing an application under Section 16 of the Act. It was the case of M3ENERGY that the JEA initialled by the parties was only a draft; it was to be finalized and approved by their respective managements and thereafter executed by the parties; and only thereafter could there be a concluded contract and which alone would have bound the parties.

2.10 The arbitral tribunal considered rival submissions of the parties on its jurisdiction as part of its partial award, which *inter alia* dealt with issues of jurisdiction and primary liability of M3ENERGY for termination of the

service contract. The tribunal held against M3ENERGY on both issues, reserving determination of quantum of damages payable by it for a future date.

3 The partial award is challenged on various grounds. Principally, what is urged before this court by Mr.Cooper, learned Senior Counsel appearing for the Petitioner, is that the tribunal clearly erred in holding the initialled draft JEA to be a concluded contract and accordingly, the arbitration clause contained in it as a valid and subsisting arbitration agreement, thereby erroneously assuming jurisdiction to adjudicate upon the disputes and differences between the parties. Learned Counsel submits that not only were essential terms of JEA yet to be negotiated between the parties as of the date of the termination of the service contract by ONGC, but that the parties intended to be bound by the JEA only when such JEA was formally executed by the parties after approval by their respective managements; neither party intended to bind itself to the other or others on the so called agreed terms of the initialled JEA without such approval and execution.

4 At the outset, it must be made clear that whatever may be the position with respect to other findings of fact or law arrived at by the arbitral tribunal on merits of the dispute, insofar as the objection to the tribunal's jurisdiction is concerned, it is essentially for the court to assess its merits on the basis of jurisdictional facts pleaded by the parties. The principle of party autonomy contained in the twin doctrines of independent existence of an arbitration agreement (i.e. independent from the underlying contract) and *kompetenz-kompetenz* merely implies that the

arbitral tribunal has to rule on its jurisdiction in the first instance. The arbitration agreement being an independent and stand-alone contract between the parties, the tribunal always has the initial jurisdiction and authority to rule on its own jurisdiction. That is the purport of Section 16 of the Act. If the arbitral tribunal holds itself to be possessing jurisdiction to adjudicate upon their disputes and differences, the parties have to undergo the entire arbitration reference and only thereafter raise the issue in a challenge under Section 34 to the final arbitration award rendered in such reference. In such challenge, it is for the court to scrutinize the objections to the arbitral tribunal's jurisdiction. In that scrutiny, the jurisdictional facts, on the basis of which the tribunal claims to act, are examined by the court for their existence. The yardstick applied by the challenge court to other assessments of the arbitral tribunal, namely, on matters of merit, whether on questions of fact or of law, is not apposite for considering this jurisdictional challenge. It is not that the court merely considers whether or not a finding arrived at by the arbitrator on a jurisdictional fact is contrary to public policy of India under Clause b(ii) of Sub-section (2) of Section 34 or on the ground of patent illegality appearing on the face of the award within the meaning of Sub-section (2-A) of Section 34. The arbitral forum either possesses jurisdiction in the matter or it does not. By coming to an erroneous finding on jurisdictional facts, whether or not its view on such matters be a possible view, it cannot confer upon itself the jurisdiction which it did not possess. In other words, the question of jurisdiction, in the ultimate analysis, is only for the court to decide, though, as part of the principle of party autonomy, the question is, and ought to be, decided in the first instance always by the arbitral forum.

5 In the light of the foregoing discussion, let us now examine if jurisdictional facts pleaded by HPCL and Prize in the present matter are established. As we have noted above, the relationship between the parties originated in the MOU of 29 June 2005. The MOU provided for a framework for a prospective joint execution of the project by the consortium members. The MOU does not have any arbitration clause. The MOU was followed by a letter of award dated 31 March 2006 issued by ONGC in favour of the consortium members. Thereafter, on 27 September 2006, the parties entered into a service contract with ONGC. This contract defines the relationship between the consortium parties on the one hand and ONGC on the other, for execution of the project. This service contract has an arbitration agreement. It is, however, nobody's case that the present arbitration reference was under this arbitration clause. In any event, for adjudication of *inter se* disputes between the consortium members, the arbitration clause contained in the service contract is clearly inapposite. The service contract *inter alia* required the consortium members to enter into a JEA. The negotiations for drawing up this JEA began around the time of the kick-off meeting of the consortium members with ONGC on 17 October 2006. The first important proper meeting between the consortium members for working on the proposed JEA appears to have been sometime in November 2006. M3ENERGY had proposed in this meeting that the JEA should be on the lines of the MOU which had *inter alia* defined the roles and responsibilities of consortium members. The parties could not hammer out any agreed draft of JEA or IDP within the stipulated period. In their meeting of 7 March 2007, the consortium members agreed to seek extension of time from ONGC upto 12 March 2007. On 28 March 2007, Prize wrote a letter to M3ENERGY insisting that Prize be the sole executing

contractor. M3ENERGY, for their part, wrote that though the MOU had provided for joint executorship of Prize and M3ENERGY for the service contract, M3ENERGY could accept Prize to be nominated as the sole executing contractor provided the project was jointly executed through IPMT formed by the members of consortium partners and managed according to the approved schedule, budget and decision making process. Such decision making in IMPT was expressed to be by an affirmative vote of two or more parties holding in aggregate participating interest of at least 71%. M3ENERGY also offered their other comments on the drafts of JEA then being debated between the parties including the updated draft of 12 February 2007 on which no comments were received at least till one day prior to 28 March 2007 from Prize. M3ENERGY offered to give top priority to assist in finalisation of the JEA but qualified their offer by submitting that they could not accept quality overrun by urgency created by lack of planning. In the backdrop of these facts, the executive committee consisting of two members each from individual consortium partners met during 16-18 April 2007. The agenda items of this meeting included "JEA Initialing" and "Delegation of authority charts for the EC/MC members". The minutes of the meeting held on these dates *inter alia* record the following :

"The Joint Executing Agreement (JEA) was discussed among the members. The first draft as agreed to among the members was initialed & taken on record. As regards Article 7.3 of the JEA concerning the charging of costs of EC meetings to the JV account, the matter could not be concluded and the members decided & agreed to refer the matter to the Management Committee for a decision. Executing Contractor advised that in the meantime, members may have the initialed document approved at the appropriate level within their organization so

as to formally execute the JEA ASAP upon decision of the Management Committee on Article 7.3.”

Two other aspects, namely, 'review & approval matrix' and 'level of authorization' were adopted after discussions and made integral part of the JEA. Various other aspects of joint execution of the project were discussed and debated. The draft JEA *inter alia* contained a note on Clause 7.3 to the following effect : “Clause 7.3 has two variants, Needs to be deliberated and one variant has to be approved by the MC”. This meeting was followed by a managing committee ('MC') meeting of 23 April 2007 where the parties gave their in-principle approval to the issues of review & approval matrix and level of authorization. But these were said to be treated as approved only upon signing of the JEA. The minutes of meeting record as follows:

“That since these documents are integral part of the JEA, the MC members agreed that these documents will automatically get adopted upon signing of the JEA by the MC members.”

On 16 August 2007, Prize addressed an email to MC members with a request to change 71% vote at MC level which was part of the initialled JEA. By their reply dated 17 August 2007, M3ENERGY objected to this change reiterating the underlying reason for adopting 71% vote at MC level and asserting that there was a strong basis for adopting this voting principle. By their letter dated 12 December 2007, M3ENERGY wrote to ONGC about the deliberations in MC meeting, indicating that JEA to be finalised would reflect the roles of consortium partners in the project on the lines of the MOU. On 17 January 2008, M3ENERGY addressed a letter to HPCL that the agreement laid out in the MOU between the consortium members was paramount and fundamental to finalisation and acceptance

of the JEA; the terms of MOU could alone form the foundation of the partnership and the basis for M3ENERGY's participation in the service contract. M3ENERGY, in the premises, requested HPCL to respect the agreed terms of the MOU and explicitly restate the same in the JEA. M3ENERGY signed-off by stating that after receipt of confirmation of partners' agreement on the position expressed by it, it would initial and sign a copy of the finalised JEA. By their letter dated 4 February 2008, M3ENERGY reiterated its commitment to development of Cluster-7 and sent to HPCL four originals of JEA initialled and signed by it for the latter's approval and submission to ONGC. Apropos of this letter of 4 February 2008, HPCL by its letter dated 3 April 2008, wrote to M3ENERGY as follows:

“The draft JEA was agreed and initialled by the three partners as far back as 18 April 2007. This agreement was endorsed in a Management Committee meeting on 23 April 2007 and was to be signed on satisfactory completion of some formalities by your company and that vide a letter dated 4 February 2008 M3ENERGY (formerly Trenergy) circulated a revised draft JEA that substantially changes the roles and responsibilities of partners, leaving very little role for either Prize or Hindustan Petroleum - who between them hold 70% interest in the project. This needs to be reviewed and resolved so that the project is completed expeditiously.”

Once again, the parties met on 18 April 2008. This was an MC meeting. Item 4 of the agenda deals with “signing of JEA”. Apropos of this item, the minutes of meeting record that the members, after discussions, had unanimously agreed that the chairmanship of the Management committee would remain permanently with HPCL, instead of on rotational basis between partners and that accordingly, it was decided that the draft JEA

would be modified to reflect this change in Articles 6.3 and 6.8. The minutes further record that Article 6.5, was sought to be modified by HPCL to reduce the vote percentage for any MC decision from the presently envisaged 71% to 60% and that this modification was consented to by Prize but M3ENERGY in consultation with their Board/CEO would revert by 23 April 2008. After considering the modification/deletion of various other articles, in particular reference to Article 20.2 of the JEA, which contained the arbitration agreement to be entered into between the parties, the minutes record as follows:

“This article was sought to be modified by HPCL to bring it in line with the provisions of the Indian Arbitration & Conciliation Act, 1996 and after deliberation, this was accepted by the partners”.

As regards finalization of roles & responsibility matrix, the minutes record a consensus that Prize and HPCL would propose a revised matrix with justification for the proposed changes and the members agreed to take this up on priority. The discussion on this item ends with a request on the part of the Chairman to M3ENERGY to send their response by April 23, 2008 so that after initialing it, a complete JEA could be submitted to ONGC by April 30, 2008. The minutes, on this item, end by recording that “M3ENERGY agreed to do so”. The correspondence between the parties ends with the letters exchanged between the parties in the last week of May 2008 where HPCL proposed to M3ENERGY that either the JEA initialled at the meetings between 16 and 18 April 2007, or an amended draft of the February 2008 JEA incorporating the Petitioner as a joint executing contractor but reducing the voting percentage at the managing committee's meeting to

60% of the participating interest, should be executed, whilst M3ENERGY stuck to its stand that the JEA would have to adhere to the framework of the MOU. That was the position when ONGC addressed its notice of default to the consortium members stating *inter alia* that they had failed to submit signed JEA by 31 May 2008 as agreed during the meeting of 21 May 2008. This was followed by a second notice of default issued by ONGC on 11 June 2006. After some correspondence between the parties and ONGC *inter alia* concerning of extension of the time-line and the managing committee meeting held on 1 August 2008, the representative of M3ENERGY agreed that M3ENERGY would sign the initialled JEA subject to discussions with its management. On 13 August 2008, M3ENERGY notified the other consortium members that in the light of insistence of HPCL on Prize being the sole executing contractor, and the decisions of MC having to be made by 60% of participating interest, linking of the issue of voting percentage to that of joint executing contractor and uncertainties in oil and gas exploration, M3ENERGY would submit the JEA to its board of directors for approval in the meeting to be convened in the following week. A further meeting was held between the parties on 26 August 2008 but final JEA to be executed between them could not be agreed upon. It was in the backdrop of these events that ONGC issued its termination notice of 4 September 2008, terminating the service contract with the consortium members. Such is the picture emerging from the documentary evidence concerning the jurisdictional facts placed before the arbitral tribunal.

6 When we come to the oral evidence of the parties, there are important admissions of the Respondents' witness (Abhay Narayan Singh) to be noticed on the subject as to whether JEA initialed by the parties on

16/18 April 2007 was a concluded contract. The following portions of his cross examination are a case in point :-

“45. Q. In the JEA that was initialed on the 16/18th April 2007, wasn't it also agreed that it would have to be approved by their respective organization subsequent to the initiating ?

Ans. : The executing contractor had advised the parties to have the document approved at the appropriate level within the organization. This was with a view to manage respective companies internal processes since a Management Committee (M.C.) as per the JEA was the supreme body. Before signature by MC all the partners were requested to get through their internal processes. That was the whole intent.

46. Q. I put it to you that the document though initialed on the 16/18th April 2007 was subject to approval by their relevant boards for it to become effective ?

Ans. : As answered in my previous Ans. to Q.45 that initialed JEA was to be taken up by the partners through their internal management process before being signed off by the MC Members.”

7 So also, some of the admissions of another witness of the Respondents (Rajan Kapoor) may be noted in this behalf. These are quoted below :

“37. Q. Are you aware that there was Ex. 'E' to be attached to the proposed JEA which have been Partners roles and responsibilities

matrix set up for the consortium ?

Ans. : Yes. At the time the JEA was initialed in April 2007, there was no Ex E. This exhibit was introduced by the Respondent when they retracted from their decision to accept Claimant No.2 as executing contractor.

39. Q. Would you agree that Ex. E when it was introduced was agreed between the Consortium partners ?

Ans. : No.

40. Q. I put it to you that the contents of Exh. E found at Vol.XI, pg.1849 was agreed to be part of the JEA ?

Ans. : No. Although the contents of Ex. E were discussed extensively no final agreement was reached.

41. Q. The contents of Ex. E was agreed to by the parties and agreed in the form and manner as it is set out at page 1849 of Vol. XI. Is that correct ?

Ans. : No. That is not correct.

42. Q. The actual position is that, what was being requested by the Respondent was that the contents as set out in Ex. E were to be carried out by the parties as described ?

Ans. : Yes. Please refer to my Ans. to Q.40. Although the

contents were discussed they were not agreed between the parties.”

8 These admissions suggest that the initialed JEA was a draft prepared by two negotiating teams, namely, the respective representatives of the Petitioner and the Respondents. This draft, initialed by members of the teams on 16/18 April 2007, was to be approved at the appropriate level within their respective organizations; such approval formed an important part of the internal processes of the respective companies; before signatures by Managing Committee, which as per JEA was the supreme body, all partners were requested to get through their internal processes; and that was the intent of the parties when JEA was initialed on 16/18 April 2007. The admissions further suggest that important elements of JEA, such as the partners' respective roles and responsibilities matrix for the consortium, were not agreed between the parties when JEA was initialed on 16/18 April 2007, and though, according to the Respondents, in the end these matters were discussed between the parties, there was no agreement reached.

9 The oral and documentary evidence referred to above, thus, clearly indicate that the draft JEA initialed on 16/18 April 2007 was not a concluded agreement between the parties. Some of the essential terms of the JEA were yet to be negotiated between the parties. The discussion in that behalf remained inconclusive right till the date of termination of the service contract by ONGC. The parties intended that their respective managements would first approve the terms and thereafter JEA would finally be executed by the parties. The parties agreed to be bound by JEA

only when the terms thereof were approved by their respective managements and final JEA was executed between the authorized signatories of the parties. That evidently was not done till the termination of the service contract by ONGC.

10 This directly leads to a conclusion that there was no conclusive contract between the parties so far as JEA was concerned. The arbitration agreement, being a part thereof, could not, thus, be said to have been entered into between the parties at any time. Learned Counsel for the Respondents submits that the arbitration agreement is an independent contract; it is to be considered as a stand alone agreement; whether or not the underlying contract stands concluded as between the parties, the arbitration agreement could always be considered as having come about independently. Learned Counsel in this behalf relies on judgments in the cases of **Shakti Bhog Foods Limited Vs. Kola Shipping Limited**¹, **Smita Conductors Ltd Vs. Euro Alloys Ltd**², **Great Offshore Limited Vs. Iranian Offshore Engineering And Construction Company**³, **Trimex International FZE Limited, Dubai Vs. Vedanta Aluminium Limited, India**⁴ and **Caravel Shipping Services Pvt. Ltd. Vs. Premier Sea Foods Exim Pvt. Ltd.**⁵ Relying on these judgments, it is submitted that there is no need for an arbitration agreement to be signed by the parties. Leaned Counsel submits that the only pre-requisite of a valid arbitration agreement is that it must be in writing.

11 **In Shakti Bhog Foods Ltd.** (supra), the appellant before the

1 (2009) 2 Supreme Court Cases 134

2 (2001) 7 Supreme Court Cases 728

3 (2008)14 Supreme Court Cases 240

4 (2010) 3 Supreme Court Cases 1

5 2018 SC OnLine SC 2417

court, who was an exporter of food products, was to export sorghum to the State of Niger. There was correspondence between the parties for loading of cargo at Kakinada port for transportation to Cotonou. The respondent issued a bill of lading. The vessel arrived at Kakinada port. The proposal of export, however, did not finally fructify; no export order could be procured from the State of Niger. As per the charter party agreement, the existence of which was alleged by the respondent and denied by the appellant, the appellant had to load maize to Colombo from Kakinada port in case of failure to get an export order from Niger. The respondent alleged breach of this contract by the appellant. The disputes between the parties arose as a result and were, on an application moved under Section 45 of the Act, referred to arbitration in London. It was argued before the Supreme Court by the appellant that there was no concluded arbitration agreement between the parties. The court held that under Section 7 of the Act, the arbitration agreement might be in the form of an arbitration clause in a contract or in the form of a separate agreement; such arbitration could be considered in writing if it was contained in a document signed by the parties or in exchange of letters, telex, telegrams or other means of communication which provided a record of the agreement or an exchange of statement of claim and defence in which the existence of an agreement was alleged by one party and not denied by the other. The court held that the charter party agreement containing an arbitration clause could well be made out from the acts of the parties by way of exchange of letters, etc. The court, thus, in effect, found such agreement providing for arbitration in London based on the correspondence between the parties as also fixture note and bill of lading signed by the parties. To the same effect are the observations of the Supreme Court in **Great Offshore Ltd.** (supra).

Considering the essential requirements of an arbitration agreement under Section 7 of the Act, arbitration clause contained in a fixed charter party agreement signed by both parties was treated as an acceptable arbitration agreement under Section 7. The court repelled the contention that the arbitration agreement had to be an original agreement stamped by both parties and signed on every page. The court held that no such requirement was envisaged by Section 7. These facts are clearly distinguishable. In both cases above, the court essentially found, as a matter of fact, existence of a concluded agreement between the parties of which the arbitration clause formed a part. In the present case, as we have noted above, there is in fact no concluded contract of JEA. There is no warrant in that case for existence of an arbitration agreement which was but to form part of a concluded JEA.

12 Even in **Smita Constructors's** case (supra), the court held on facts that there was agreement in writing as defined under Article II(2) of the Schedule read with Section 2(a) of Foreign Awards (Recognition and Enforcement) Act, 1961. In **Enercon (India) Ltd. vs. Enercon GMBH**⁶, commercial rights of claimants and obligations between the parties were contained in an underlying or main contract, which was followed by a second contract expressing the agreement and intention of the parties to resolve their disputes relating to the underlying contract through arbitration. The arbitration agreement, in the premises, was treated as a stand-alone contract separate from the underlying contract.

13 Learned Counsel for the Respondent placed heavy reliance on

6 (2014) 5 SCC 1

the decision of **Caravel Shipping Services Pvt.Ltd.** (supra). Learned Counsel submits that whilst construing the provisions of Section 7 and in particular, Section 7(4) of the Act, the Supreme Court has held in that case that an arbitration agreement need not always be signed; the only pre-requisite is that it should be in writing as required under Section 7(3). The court held that Section 7(3) merely required the agreement to be in writing and Section 7(4) simply added that an arbitration agreement could be said to be in writing in the circumstances mentioned in its three sub-clauses. One of the circumstances was exchange of letters, telex, telegrams and other means of telecommunication including communication through electronic means which provided a record of the agreement. If the agreement were to be contained in these communications, the requirement of signing would obviously have to be dispensed with.

14 None of these judgments, thus, assists the Respondent. The lack of jurisdiction on the part of the arbitrators herein is not because the arbitration agreement is not signed but because the JEA of which such agreement was to form part was not concluded; the JEA was at the stage of negotiations. If that is so, it is impossible to hold that pending negotiation of JEA, the arbitration agreement forming part of it was brought into effect as a stand-alone contract independent of JEA.

15 In the premises, there is no concluded arbitration agreement between the parties and consequently, the arbitrators lacked jurisdiction to adjudicate upon the disputes and differences between the parties arising under the JEA. The arbitrators' conclusion on this issue is clearly untenable

and contrary to the overwhelming documentary and oral evidence placed before them. In the premises, the impugned award cannot be sustained.

16 The arbitration petition is, accordingly, allowed by setting aside the impugned partial award dated 9 January 2014.

Commercial Arbitration Petition No.76/2018

17 This arbitration petition seeks to challenge the award of the arbitral tribunal which finally determines the quantum of compensation payable by the Petitioner herein to the Respondents. The entire award is premised upon correctness of the arbitrators' partial award *inter alia* dealing with the jurisdiction of the arbitrators to adjudicate upon the disputes and differences between the parties. Since, by my order, quoted above, I have set aside the partial award dated 9 January 2014 holding that there was no concluded arbitration agreement between the parties, this arbitration award, which is premised on the partial award, is liable to be set aside. Accordingly, the arbitration petition is allowed by setting the impugned award dated 27 September 2017.

18 Learned Counsel for the Respondents prays for stay of this order. After the matter is comprehensively heard and the Petitioner's challenge to the impugned award is upheld by the court and the award is set aside, there is no question of passing any order, which will have the effect of subsistence of the impugned award. The application is, accordingly, rejected.

19 Since the award is set aside, the motion is now infructuous and is disposed of as such.

20 Contempt Petition (Lodging) No.174/2018 is stood over to 14 February 2019. Reply, if any, to the contempt petition to be filed within three weeks. Rejoinder, if any, within one week thereafter.

(S.C. GUPTE, J.)