Bombay High Court
Hindustan Petroleum Corporation ... vs M3Nergy Sdn. Bhd on 16 October, 2019

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

COM. APPEAL NO. 317 OF 2019
IN
COM. ARBITRATION PETITION NO. 76 OF 2018
WITH
NOTICE OF MOTION NO. 550 OF 2019
IN
COM. APPEAL NO. 317 OF 2019
IN
COM. ARBITRATION PETITION NO. 76 OF 2018

WITH
APPEAL NO. 333 OF 2019
IN
ARBITRATION PETITION NO. 548 OF 2014
WITH
NOTICE OF MOTION NO. 580 OF 2019
IN
APPEAL NO. 333 OF 2019

WITH
COM. APPEAL NO. 348 OF 2019
IN
COM. ARB. PETITION NO. 1101 OF 2018

1. Hindustan Petroleum Corporation Ltd.,
an Indian Company incorporated under the
provisions of the Companies Act, 1956 having
its registered office at Petroleum House,
17, Jamshedji Tata Road, Churchgate,
Mumbai - 400 020.

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2. Prize Petroleum Company Ltd.,
A Company under the provisions of the
Companies Act, 1956 having its registered
office at UCO Bank Building, Sansad Marg,
New Delhi - 110001. .. Appellants

Vs.

M3nergy Sdn. Bhd. (Formerly known as
M3nergy Berhad) a Malaysian Company
incorporated under the laws of Malaysia,
having its registered office at 25th Floor,
Wisma UOA II, 21, Jalan Pinang, 50450,
Kuala Lumpur, Malaysia. .. Respondent

....

Mr. Aspi Chinoy, Senior Advocate a/w Mr. Hiroo Advani, Mr. Rishabh Shah, Mr. Sheikh Yusuf Ali & Mr. Chirag Bhatia i/b Advani & Co. for the Appellants.

Mr. Soli Cooper, Senior Advocate a/w Mr. Rishabh Jogani & Ms. Shruti Shah i/b Shardul Amarchand Mangaldas & Co. for the Respondent

....

CORAM : PRADEEP NANDRAJOG, C.J. &
SMT. BHARATI DANGRE, J.

RESERVED ON : OCTOBER 14, 2019
PRONOUNCED
ON: : OCTOBER 16, 2019

JUDGMENT [PER PRADEEP NANDRAJOG, C.J.]:

1. By a common partial Award dated 9 th January 2014 the learned Arbitral Tribunal decided two issues. The first was to the jurisdiction of the Arbitral Tribunal. The second was whether the respondent was in breach of Article 22.5 of the JEA and therefore liable for damages to the appellants. The Award holds that it had jurisdiction to decide the dispute between the parties and that the respondent was in breach and hence liable to pay damages. The said Award was challenged before the learned Single Judge vide Arbitration Petition No. 548/2014. The Arbitral Tribunal proceeded with the merits of the claim laid by the appellants and by a majority Award dated 27th September 2017 awarded the amounts referred to in the majority Award in favour of the appellants. The same was challenged under Commercial Arbitration Petition No. 76/2018.

2. The two Arbitration Petitions have been disposed of by a common judgment dated 10th January 2019. Allowing Arbitration Petition No. 548/2014 and holding that there was no concluded contract between the parties the Award dated 9 th January 2014 under which the Arbitrators held that the jdk 4 os.comap.317_333_348.19.jt.doc Tribunal had jurisdiction has been set aside and needless to state the consequence thereof is setting aside of the majority Award by allowing Commercial Arbitration Petition No. 76/2018.

3. After the majority and the minority Awards were published on 27th September 2017, the Arbitral Tribunal passed an Award relating to costs which is dated 15 th June 2018. This award was challenged vide Commercial Arbitration Petition No. 1101/2018. In view of the judgment and order dated 10th January 2019 allowing Arbitration Petition No. 548/2014 and Commercial Arbitration Petition No. 76/2018 vide decision dated 11th March 2019 Commercial Arbitration Petition No. 1101/2018 has been allowed.

4. Challenge in Appeal No. 333/2019 is to the decision dated 10th January 2019 allowing Arbitration Petition No. 548/2014. Challenge in Commercial Appeal No. 317/2019 is to the same decision dated 10th January 2019 in so far as it has allowed Commercial Arbitration Petition No. 76/2018. Challenge in Commercial Appeal No. 348/2019 is to the order dated 11th March 2019 allowing Commercial Arbitration Petition No. 1101/2018.

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5. The factual backdrop leading to the dispute between the parties requires the journey to be tracked from 27 th December 2004 when Oil and Natural Gas Corporation ("ONGC") invited tenders for development of 'Offshore Marginal Field Cluster-7' ("OMFC-7"). Hindustan Petroleum Corporation Ltd. ("HPCL") a company incorporated under the Companies Act, 1956 and Prize Petroleum Company Ltd. ("PPCL") also a Company incorporated under the Companies Act, 1956 of whose 50% shares are held by HPCL as also M3nergy which is a Company incorporated under the Laws of Malaysia executed a Memorandum of Understanding on 29 th June 2005 with the object of forming a bidder group for OMFC-7. PPCL submitted a bid on behalf of the Consortium on 29th June 2005. Bid was accepted. ONGC awarded the contract to the Consortium on 31st March 2006. Required by the tender documents, a Service Contract for development of OMFC-7 was executed by PPCL on behalf of the Consortium with ONGC on 27th September 2006. Article 7.4 of the said Service Agreement required the consortium Companies to execute Joint Executing Agreement ("JEA") with ONGC within 15 days of the effective date. Article 7.4.1 required to Executing Contractor/Consortium to provide ONGC with a copy of a duly executed JEA within 30 days of the effective jdk 6 os.comap.317_333_348.19.jt.doc date. This JEA had to be executed by the three Consortium partners.

6. Required to be finalized and thereafter the JEA to be executed, three Consortium partners commenced discussions by having before them a written Memorial of the JEA. The representatives of the parties drew up the Minutes of the meeting held from 16th April 2007 till 18th April 2007 and in paragraph 4 of the Minutes recorded as under:-

> "4. The Joint Executing Agreement (JEA) was discussed among the members. The final draft as agreed to among the members was initialed and 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 and 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 with their organization so as to formally execute the JEA ASAP upon decision of the Management Committee on Article 7.3"

7. This was mirrored in the written Memorial of the JEA by inserting a sheet in the Memorial containing a note recording as under:-

jdk 7 os.comap.317_333_348.19.jt.doc "Clause 7.3. has two variants, Needs to be deliberated and one variant has to be approved by the MC."

Relevant would it be to highlight that the acronym MC means the Managing Committee of the members of Consortium.

8. A reservation was also expressed regarding accounting procedure in the Minutes drawn up. On 23 rd April 2007 the Managing Committee of the Consortium Members met. The Agreement arrived at by the Managing Committee was minuted on 23rd April 2007 itself and the Minutes drawn up read as under:-

> "Minutes of the Management Committee Meeting held during 23 April 2007 at Prize Petroleum Company Ltd., Tower B (504-505), Millennium Plaza, Sector 27, Gurgaon-122 002
>
> ---
>
> PRESENT:
>
> 1. Dr. M N Prasad Prize Petroleum Company Ltd.
>
> (PPCL)
>
> 2. Mr. S V Sahni Hindustan Petroleum Corporation Ltd.

(HPCL)

3. Mr. Nazir Kassim M3nergy BERHAD. (M3NERGY) jdk 8 os.comap.317_333_348.19.jt.doc

4. Datuk Shahrazi bin Sha'ari M3nergy BERHAD. (M3NERGY) IN ATTENDENCE:

1. Mr. Rajan Kapoor Hindustan Petroleum Corporation Ltd.

	(HPCL)
2. Mr. V P Sharma	Hindustan Petroleum Corporation Ltd.(HPCL)

3. Dr. Prabhakar Thakur Hindustan Petroleum Corporation Ltd.

	(HPCL)
4. Mr. Jakob Sedic	M3nergy BERHAD. (M3NERGY)
5. Mr. G R Saini	Prize Petroleum Company Ltd. (PPCL)
6. Mr. A. N. Singh	Prize Petroleum Company Ltd. (PPCL)

Agenda items for Management Committee Meeting - Cluster 7 project During the meeting, following matters were proposed to be discussed and approved:

a) Nomination of the Chairman of MC for first year.

b) Appraise Management Committee on the development on Reservoir Modeling front.

c) Formally take on record the nomination of Executing committee & Management Committee members by the JV partners.

d) Formally take on record decision of Executing jdk 9 os.comap.317_333_348.19.jt.doc Committee for implementing the project on EPIC basis.

e) Executing Committee proposes that the matter of "charging of costs related to attending the Executing Committee meetings to the Joint Account" under the JEA be discussed and resolved at MC level.

f) Adoption of Level of Authorization (AOL) as approved & adopted by the Executing Committee.

g) Adoption of "Procurement & Contracting requirement - Policy & Administration" document as approved & adopted by the Executing Committee.

h) Adoption of work program & budget for FY 2007- 08 as approved by the Executing Committee Discussions/Resolutions/Adoption by the Executing Committee

1) By unanimity, members agreed that with effect from today HPCL's representative would be the Chairman of the Management Committee for a period of one year upto & including 22 April 2008. In terms of rotation sequence, it would be followed by M3nergy & PPCL respectively for one year each.

2) The Executing Contractor on behalf of the Executing Committee informed the members about the development on Reservoir modeling being currently taken up by CMG. Members were informed that upon receipt of report by CMG, same would be circulated to the JV partners for information. Members agreed that the representative from CMG be present & make presentation to IRS / ONGC. It was agreed that tentatively, the presentation be scheduled in 1 st week of May '07 depending on the receipt of the report and confirmation of dates by ONGC. Members would be jdk 10 os.comap.317_333_348.19.jt.doc informed about the fixed dates for the IRS/ONGC meeting as well as the MMC meeting with ONGC. Members noted the same.

The Petral model used earlier by SLB, had created block boundary around the physical boundary of the block thereby restricting the reservoir extent.

3) MC discussed the need and approach to select a reputed consultant to complete required works to certify reserves of Cluster 7 fields. In regard to this, the following has been agreed by the members:

a. Executing Contractor to prepare detailed scope of work with listed inputs & deliverables b. Based on the agreed scope of services, obtain bids for the certification from the following consultants i. Gaffney, Cline & Associates ii. Rider Scott iii. DeGolyer and MacNaughton

4) The members took on record the nomination of Executing & Management Committee members as following. Members were informed that same has been recorded & adopted by the Executing Committee.

	EC Members		MC Members	
	Member	Alt. Member	Member	Alt. Member
HPCL	Mr. Rajan Kapoor	Dr. P Thakur	Mr. M. A. Tankiwala	Mr. S V Sahni
M3NERGY	Mr. Jakob Sedic	Mr. Mohd Hanif	Mr. Nazir Kassim	Datuk Shahrazi bin Sha'ari
PPCL	Mr. G R Saini	Mr. A N Singh	Dr. M N Prasad	TBA

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TBA - To be advised

5) The members took note of the decision of the Executing Committee to implement the cluster 7 project on EPIC basis and resolved to agree to approve the decision of the Executing Committee.

6) The matter of "charging of costs related to attending the Executing Committee meetings to the Joint Account" under the JEA was discussed among the members. Upon discussion, it was decided

& agreed by members that such costs not be charged to the Joint account.

7) The members took on record the adoption of "Review & Approval Matrix" & "Level of Authorization" (AOL) by the Executing Committee & gave their in-principal approval for the same. 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.

8) Members took on record the adoption of "Procurement & Contracting requirement - Policy & Administration" by the Executing Committee members and approved & adopted the same. Copy of same is attached.

9) The proposed work program & budget for FY 2007-08 as adopted by Executing Committee was presented to members. The members approved the said work program & budget and adopted the same. The work program & budget as approved is attached.

10) The proposal to issue the Expression of Interest (EOI) for FEED was also discussed by the jdk 12 os.comap.317_333_348.19.jt.doc members. In conclusion, the members advised the Executing Contractor to have an EOI for both FEED as well as EPIC. Executing Contractor noted the same & confirmed that the EOI shall be accordingly modified before being put to press.

The Chairman thanked the members for their active & positive participation. The meeting ended with vote of thanks by the Chairman.

Adoption of the minutes & signature of the Members;

Members/Alt. Member HPCL Sd/-

Member/Alt. Member M3NERGY Sd/-

Member/Alt. Member PPCL"

9. Relevant would it be to highlight that vide paragraph 6 of the Minutes, the decision concerning charging of costs was finalized by recording that such costs need not be charged to the joint Account.

10. During the year 2007-2008 the Consortium Members discussed whether M3nergy could be appointed as the Joint Executing Contractor and if not what should be the voting share of M3nergy. At a meeting held between 4 th to 6th jdk 13 os.comap.317_333_348.19.jt.doc December 2007 it was recorded that all pending issues need to be resolved so that the JEA could be executed and handed over to ONGC. In this meeting the accounting procedure to be followed was finalized. On 1st August 2008 the Members of the Managing Committee of the three Companies met and pertaining to Item No.1 of the Agenda concerning the JEA to be executed and submitted to ONGC, recorded an agreement as under:-

> "After deliberations, it was agreed that the JEA initialed in April 2007 will be the final document to be executed and submitted to ONGC.
>
> M3Energy has agreed to sign the document on 5.08.2008 after discussions with their Management. The original was handed over to M3Energy for signature from their end."

11. The JEA could not be executed because M3nergy refused to do so. On 4th September 2008, exercising power under Article 31.3.(i) of the Service Contract, ONGC gave notice period of 90 days calling upon the Consortium Members to execute and submit it to the JEA. None being submitted, ONGC terminated the contract. Neither party challenged termination.

12. HPCL and PPCL gave notice invoking the jdk 14 os.comap.317_333_348.19.jt.doc arbitration clause contained in the written Memorial of the JEA initialed by the parties when they met from 16 th to 18th April 2007. Arbitral Tribunal was constituted. The Statement of Claim was filed by HPCL and PPCL against M3nergy. A jurisdictional challenge was laid by M3nergy before the Arbitral Tribunal on the plea that the initialed JEA was not the final Agreement between the parties. Vide first partial Award dated 9th January 2014 the learned Arbitrators held that there was a concluded Agreement between the parties which contained an arbitration clause and thus the Tribunal had jurisdiction to entertain the claim. The learned Arbitrators also held M3nergy responsible for the breach and declared so.

13. On the issue of jurisdiction, suffice it to highlight, case of the claimants was that the written Memorial of the JEA which set the discussions at the meetings held from 16 th April 2007 till 18th April 2007 became the final document to be executed evidenced from the Minutes of the meeting of the Members of the Managing Committee of the three companies held on 1st August 2008. The contra case pleaded by the Respondent was that unless the formal JEA was drawn up, the written Memorial could not be treated as the written Agreement and therefore the arbitration clause contained jdk 15 os.comap.317_333_348.19.jt.doc therein would not bind the parties. The discussion in the award dated 9th January 2014 is in paragraphs 21 to 49 of the award. The learned Arbitrators have noted the initialed JEA written Memorial which was discussed by the Consortium partners in the meeting held from 16 th April 2007 till 18th April 2007. The Arbitral Tribunal has thereafter noted the minutes drawn up in the Managing Committee meeting of the Consortium members which was held on 23rd April 2007. The Arbitral Tribunal has noted that vide para 6 of the minutes drawn up the issue concerning charging of costs was finalized by recording that such costs need not be charged to the Joint Account. The learned Arbitral Tribunal has thereafter noted the minutes of the meeting held between 4 th to 6th December 2007 in which the accounting procedure was finalized and initialed by the parties. The Arbitral Tribunal has also noted the minutes of the meeting held on 1st August 2008.

14. The impugned judgment dated 10th January 2019 sets the signature tune to discuss the evidence by setting forth the legal principle to be followed by a Court seized of an objection to an award pertaining to the jurisdiction of the Arbitral Tribunal by recording in paragraph 4 as under:-

"4. At the outset, it must be made clear that whatever may be the position with respect to other jdk 16 os.comap.317_333_348.19.jt.doc 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 of 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 jdk 17 os.comap.317_333_348.19.jt.doc 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."

15. Thereafter the learned Single Judge has proceeded to reappraise the evidence and the conclusion reached is that the JEA remained only at the stage of negotiations and did not fructify in to an agreement and because the arbitration clause was part of the JEA it could not form a stand-alone contract. The learned Single Judge has not dealt with the reasoning of the arbitral tribunal on account of the view taken by the learned Single Judge that law enjoined upon him to independently appraise the evidence and not deal with the manner in which the arbitral tribunal has dealt with the evidence.

16. Thus, in the three appeals arguments were restricted only to the legal issue : Whether a dispute embracing the jurisdiction of the arbitral tribunal requires the Court seized of a jdk 18 os.comap.317_333_348.19.jt.doc challenge to an award to ignore the reasons given by the arbitral tribunal on appraisal of the evidence before the tribunal and independently appraise the evidence.

17. Shri. Aspi Chinoy, learned Senior Counsel for the appellants relied upon a decision of a Division Bench of this Court reported as 2005(2) Mah. L.J. 386 VFC Securities Pvt. Ltd. Vs. Rashesh N Shah Shares & Brokers Pvt.Ltd. and a decision of the Supreme Court reported as 2012 (5) SCC 214 Kvaerner Cementation India Ltd. Vs. Bajranglal Agarwal & Anr. to urge that even on the issue of

jurisdiction of the arbitral tribunal the same principles of law as had been laid down concerning arbitral awards on merits apply and need to be followed. Meaning thereby, wrong decisions of the arbitral tribunal on issue of jurisdiction, unless shown to be perverse cannot be corrected and that if an issue of fact arose for consideration, the arbitral tribunal would be the final judge to determine the said fact after appraising the evidence and unless it could be shown that vital evidence was ignored or irrelevant evidence was considered while reaching the conclusion, decision by the arbitral tribunal on a question of fact was final.

18. Shri. Soli Cooper, learned Senior Counsel for the respondent relied upon a decision of the Supreme Court of jdk 19 os.comap.317_333_348.19.jt.doc United Kingdom reported as 2010 UKSC 46 Dallah Real Estate and Tourism Holding Company (Appellant) V. The Ministry of Religious Affairs, Government of Pakistan (Respondent) to urge that on issues of jurisdiction of an arbitral tribunal the correct approach is for the Court to appraise the evidence again akin to the manner in which an appellate court does. Learned Senior Counsel urged that as per Section 7 of the Arbitration and Conciliation Act, 1996 an arbitration agreement had to be in writing, and if in a document, had to be signed by the parties. As per the learned Senior Counsel in the instant case, the appellants had relied upon the arbitration clause in the JEA which was initialed and formed the basis of discussion held from 16th April 2007 to 18th April 2007 and the fact of the matter was that no document was admittedly signed by the parties which contained an arbitration clause.

19. Since learned Counsel for the parties had addressed arguments restricted to the legal issue: Whether the view taken by the learned Single Judge was premised on a correct reading of the law, we refrain from expressing any opinion on the conclusions to be arrived at from the evidence on record and deal only with the legal issue which was debated at the hearing held on 14th October 2019.

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20. The decision of the Division Bench of this Court in VFC Securities Case (supra) deals with the issue of the learned Arbitrator deciding on his own jurisdiction concerning the arbitration clause in the Rules of the National Stock Exchange. Thus, the law laid down therein that if an arbitration clause in a Rule binding the parties falls for interpretation, unless there was an error of construction of a kind which would make it perverse would not be interfered with by a Court is not attracted to the facts of the present case. The decision of the Supreme Court in Kvaerner case (Supra) also does not deal with a similar case at hand.

21. As per Section 16 of the Arbitration and Conciliation Act, 1996 the arbitral tribunal has to rule on its own jurisdiction and if the decision is that it had the jurisdiction, the same has to be challenged in accordance with Section 34 after the arbitral tribunal makes an arbitral award. Sub-Section (2) of Section 34 of the said Act empowers a Court to set aside an award if the arbitration agreement was not valid under the law to which the parties had subjected themselves to. Thus, it is apparent that the principles of law laid down in the judicial decisions limiting the power of the Court to interfere with arbitral awards rendered on merits would apply with equal jdk 21 os.comap.317_333_348.19.jt.doc force to a challenge to a decision under Section 16 of the

Arbitration and Conciliation Act 1996.

22. Concerning decision of the Supreme Court of the United Kingdom cited by learned Senior Counsel for the Respondent, suffice it to note that dealing with an international award pertaining to a contract governed by the French laws the Court noted the argument concerning review of the decision of an arbitral tribunal on a dispute to its jurisdiction, the contention noted was that the Tribunal had power to consider and rule on its own jurisdiction (kompetenz-kompetenze) or (competence-competence), and that in the case before it the Tribunal did so after full and close examination, and that its first partial award on jurisdiction should be given strong evidential effect. In these circumstances, the argument was, a court should refuse to become further involved, at least when the tribunal's conclusions could be regarded on their face as plausible or reasonably supportable. The Bench noted the treatise authored by Fouchard, Gaillard, Goldman's International Commercial Arbitration wherein para 659 it was pertinently opined:-

"Even today, the competence-competence principle is all too often interpreted as empowering the jdk 22 os.comap.317_333_348.19.jt.doc arbitrators to be the sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, the real purpose of the rule is in no way to leave the question of the arbitrators' jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award".

23. Noting that same was the position of law in France, in paragraphs 26 & 30 of the opinion the Court held as under:-

> "26. An arbitral tribunal's decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the tribunal. This leaves for consideration the nature of the exercise which a court should undertake where there has been no such submission and the court is asked to enforce an award. Domestically, there is no doubt that, whether or not a party's challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court, on an application made in time for that purpose under S.67 of the Arbitration Act 1996, just as he would be entitled under S.72 if he had taken no part before the arbitrator: see e.g. Azov Shipping Co. v Baltic Shipping Co. [1999] 1 Lloyd's Rep 68. The English and Fresh legal positions thus coincide: see the Pyramids case (para 20 above).

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30. The nature of the present exercise is, in my opinion, also unaffected where an arbitral tribunal has either assumed or, after full deliberation, concluded that it had jurisdiction. There is in law no distinction between these situations. The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion. It is also so whatever the composition of the tribunal

- a comment made in view of Dallah's repeated (but no more attractive for that) submission that weight should be given to the tribunal's "eminence", "high standing and great experience". The scheme of the New York Convention, reflected in ss. 101-103 of the 1996 Act may give limited prima facie credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in Article V(1) and S.103. But that is as far as it goes in law. Dallah starts with advantage of service, it does not also start fifteen or thirty love up."

24. But immediately thereafter in paragraph 31 the Court held as under:-

> "31. This is not to say that a court seised of an issue under Article V(1)(a) and S. 103(2)(b) will not examine, both carefully and with interest, the reasoning and conclusion of an arbitral tribunal jdk 24 os.comap.317_333_348.19.jt.doc which has undertaken a similar examination. Courts welcome useful assistance. The correct position is well-summarised by the following paragraph which I quote from the Government's written case:
>
> "233. Under S. 103(2)(b) of the 1996 Act / Art V. 1(a) NYC, when the issue is initial consent to arbitration, the Court must determine for itself whether or not the objecting party actually consented. The objecting party has the burden of proof, which it may seek to discharge as it sees fit. In making its determination, the Court may have regard to the reasoning and findings of the alleged arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them."
>
> 25. Thus, the legal position is that on an issue concerning the partial arbitral award relating to the jurisdiction of the arbitral tribunal, while reviewing the decision of the arbitral tribunal, the Court is bound to examine, both carefully and with interest, the reasoning and conclusion of an arbitral tribunal. Indeed, in the said decision, in paragraphs 33 to 39, the Supreme Court of United Kingdom set out the approach of the tribunal to the issue of jurisdiction and thereafter analysed the history of the dispute. The Court found that the arbitral tribunal had not applied the French Law to be adopted while directing its mind to the common intention of the parties and jdk 25 os.comap.317_333_348.19.jt.doc had drawn wrong conclusions from the facts. In view thereof, the Court held that the ruling by the arbitral tribunal on its jurisdiction was correctly set aside by the Court of first jurisdiction.

26. Far from supporting the view canvassed by learned Senior Counsel for the respondent, the decision militates against the view propounded and the only deviation we note relating to the settled principles of law in India is in the use and choice of words and expressions used. At base, the Supreme Court of United Kingdom found a misdirected approach by the arbitral tribunal in the law to be applied on the issue of determining the common intention of the parties and found wrong conclusions drawn from the evidence i.e. a non-judicious approach justifying the setting aside the award. Same is the position of law in India. A wrong application of a principle of law (as against an erroneous interpretation of law) is held as a ground to hold that the award is vitiated and drawing

wrong conclusions from the evidence is a case of non-judicious approach as per the law in India.

27. The principle of law stated by the learned Single Judge to guide his decision in paragraph 4 of the impugned decision being contrary to the settled principles of law, we set jdk 26 os.comap.317_333_348.19.jt.doc aside the impugned judgment dated 10th January 2019 and allow Appeal No. 333/2019 and Commercial Appeal No. 317/2019. We restore Arbitration Petition No. 548/2014 and Commercial Arbitration Petition No. 76/2018 for adjudication afresh. We allow Commercial Appeal No. 348/2019 and set aside the order dated 11th March 2019 and restore Commercial Arbitration Petition No.1101/2018 for adjudication afresh.

28. Parties shall bear their own costs in appeals.

29. Pending Notices of Motion are disposed of.

SMT. BHARATI DANGRE, J. CHIEF JUSTICE