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

COM. ARBITRATION PETITION (L) NO. 1444 OF 2019

Naresh Kanayalal Rajwani & Ors. ... Petitioners
Vs
M/s Kotak Mahindra Bank Ltd. & Anr. ... Respondents

Dr. Abhinav Chandrachud a/w Laxminarayan Shukla, Unnati Ghia, Mehul Rathod i/b M/s Legal Vision for the Petitioners.

Mr. Vishal Kanade a/w Chinmayee Ghag and Nishant Rana i/b Zastriya Attorneys and Legal Consultants for Respondent No.1.

CORAM : B. P. COLABAWALLA, J.
DATE : 9th MARCH, 2021

P.C. :

1. The present Arbitration Petition is filed by the petitioners under Section 34 of the Arbitration and Conciliation Act, 1996 (for short the **"Arbitration Act"**) challenging the Award dated 4th

August, 2019 passed by the Sole Arbitrator.

2. At the very outset, respondent No.1 has taken a preliminary objection that this Court does not have jurisdiction to entertain the present petition filed under Section 34 of the Arbitration Act. Respondent No.1 has urged that before the petition be entertained on merits, the issue of jurisdiction of this Court be decided first.

3. In order to decide the preliminary issue of jurisdiction, it would be necessary to set out some brief facts. The arbitration clause in the loan agreement executed between the parties reads as under:-

> "*In the event of any dispute or differences arising under this Agreement including any dispute as to any amount outgoing, the real meaning or purport thereof ("Dispute"), such Dispute shall be finally resolved by arbitration. Such arbitration shall be conducted in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 or any amendment or re-enactment thereof* ***by a single arbitrator to be appointed by the Lender. The venue of arbitration shall be at New Delhi*** *and the arbitration shall be conducted in English language".*
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> *(*Emphasis Supplied.)

4. Since disputes arose between the parties, arbitral proceedings were instituted at New Delhi and which culminated into an Arbitral Award dated 30th January, 2013 (for short the **"First Arbitral Award"**) in favour of respondent No.1. This First Arbitral Award was passed at New Delhi.

5. This First Arbitral Award was challenged by the petitioners herein before this Court by filing Arbitration Petition No. 427 of 2013 [the earlier Section 34 petition] under Section 34 of the Arbitration Act. In the said petition, respondent No.1 appeared on six occasions before this Court [as recorded in paragraph 3 of the judgment of this Court dated 17th August, 2015]. Despite respondent No.1 appearing on several occasions, it did not object to the territorial jurisdiction of this Court to decide the said petition. Finally, the First Arbitral Award was set aside by a learned Single Judge of this Court on 17th August, 2015.

6. Respondent No.1 accepted this order and did not challenge the same or file any application for review or modification thereof. It, in fact, acted in furtherance thereto and initiated fresh

arbitration proceedings by nominating respondent No.2 as the Sole Arbitrator on 9th February, 2018. On 9th March, 2019 the Sole Arbitrator issued a disclosure statement under the Arbitration Act. It is the case of the petitioners that though the Sole Arbitrator disclosed that he had been an Arbitrator in 500 arbitrations for various Financial Institutions, he did not disclose whether he had served as an Arbitrator in any matter concerning the 1st respondent – bank. It is also the case of the petitioners that they applied to the Sole Arbitrator on several occasions for receiving copies of the papers and proceedings in the arbitration, but without any success. Apart from the Statement of Claim, nothing was served on the petitioner. This, of course, is not germane for me to decide the preliminary issue of jurisdiction raised by respondent No.1. Be that as it may, the Arbitral Tribunal thereafter passed a fresh Award on 3rd August, 2019 (for short the **"Second Arbitral Award"**). This arbitration also took place at New Delhi and the Second Arbitral Award was also passed at New Delhi. It is the Second Arbitral Award that is challenged in the present petition.

7. In this factual backdrop, Mr. Kanade, the learned counsel appearing on behalf of respondent No.1, submitted that the "seat" of

arbitration, as designated by the parties, is admittedly New Delhi and the petitioners do not even dispute that the "seat" of the Arbitral Tribunal is at New Delhi. He submitted that now it is well settled that once a "seat" is designated by the parties, then only the Courts where the "seat" is situate would have jurisdiction to entertain all applications/petitions arising out of the arbitral proceedings. Mr. Kanade submitted that the moment the "seat" is designated by the parties, it is akin to an exclusive jurisdiction clause. Once the arbitral "seat" is determined, the "seat" of arbitration alone determines the jurisdiction of the Courts over the arbitration. In this regard, Mr. Kanade relied upon a decision of the Supreme Court in the case of ***BGS SGS Soma JV versus NHPC Ltd.*** **[(2020) 4 SCC 234]** and more particularly paragraphs 49 to 59 thereof. He submitted that the Supreme Court in the aforesaid case clearly stipulates that the Courts having jurisdiction over the "arbitral seat" would have exclusive jurisdiction due to which any proceedings filed in any other Court, would have to be held as proceedings filed in a Court without jurisdiction. Relying upon the aforesaid decision, Mr. Kanade submitted that in the present case, since the parties to the arbitration agreement had chosen New Delhi as the "arbitral seat"/ "juridical seat", the present petition could have been filed only in the Courts at

New Delhi, and no other. He therefore submitted that any petition filed to challenge the Second Arbitral Award can only be at the Courts at New Delhi.

8. Mr. Kanade then argued that though the petitioners do not dispute that the "seat" of the Arbitral Tribunal is at New Delhi, they assert that this Court would have jurisdiction by virtue of Section 42 of the Arbitration Act. Mr. Kanade submitted that in the facts of the present case, Section 42 of the Arbitration Act would have no application at all. It was his submission that Section 42 would come into play only in two categories, namely, (i) where the "seat" has been identified by parties in the contract; or (ii) where the "seat" is not specified. Mr. Kanade submitted that the present case admittedly falls in the first category i.e. where the arbitral "seat" has been identified by the parties. In cases falling under the second category, namely, where no seat is designated, the application of Section 42 would depend on where part of the cause of action has arisen in the territorial jurisdiction of different Courts. This situation has been succinctly elucidated in paragraph 59 of the aforesaid Supreme Court judgment in the case of **Soma JV (supra)**. However, this Court is not called upon to examine the application of Section 42

in such cases. The present case squarely falls within the first category, namely, where the arbitral "seat" has been designated by the parties. Mr. Kanade submitted that where the arbitral "seat" is designed by the parties, Section 42 of the Arbitration Act would be applicable only if an application inter alia under Section 9 or under Section 34 is made in a Court having jurisdiction over the arbitral "seat" as determined by the parties. He submitted that this is the position in law as enunciated in paragraph 59 of the Judgment of the Supreme Court in **Soma JV (supra)**.

9. Mr. Kanade then relied upon another decision of the Supreme Court in the case of **State of West Bengal & Ors.** Vs **Associated Contractors [(2015) 1 SCC 32]** to contend that any application preferred to a Court other than the one that is conferred with exclusive jurisdiction by virtue of the "seat" being agreed to between the parties, would also be without jurisdiction. In the present case, once the parties have designated New Delhi as the arbitral "seat", the Courts at New Delhi alone have exclusive jurisdiction. In such a scenario, filing of the earlier Section 34 petition [Arbitration Petition No.427 of 2013] challenging the First

Arbitral Award in this Court would not denude or affect the exclusive jurisdiction of the Courts at New Delhi. He submitted that in fact this Court did not have territorial jurisdiction to entertain the earlier Section 34 petition (challenging the First Arbitral Award) since exclusive jurisdiction was vested by the parties in the Courts at New Delhi. Mr. Kanade submitted that if this be the case then the reliance placed by the petitioners on Section 42 to confer jurisdiction on this Court is wholly misplaced. This is for the simple reason that for Section 42 to apply, the first application had to be made to a Court that had jurisdiction to entertain it and not otherwise.

10. Mr. Kanade then submitted that it is a settled position in law that the parties cannot arrogate jurisdiction to a Court which does not have inherent jurisdiction to adjudicate upon the dispute. This being the case, the contentions raised by the petitioners about respondent No.1 having waived its objection to the territorial jurisdiction of this Court does not hold any merit. He submitted that once the Courts in New Delhi were conferred exclusive jurisdiction by virtue of the fact that the "seat" of arbitration was in New Delhi, the same would mean that no other Court [save and except the ones at New Delhi] would have jurisdiction, whether territorial or subject-

matter, to entertain the present petition. He, therefore, submitted that it cannot be contended that this Court had territorial jurisdiction to decide the earlier Section 34 Petition. If this be the case, then the reliance placed on Section 42 of the Arbitration Act is wholly misconceived and it be, therefore, held that the present petition is liable to be rejected on the ground of lack of jurisdiction.

11. On the other hand, Dr. Chandrachud, the learned counsel appearing on behalf of the petitioners, submitted that since disputes arose between the parties, respondent No.1 invoked arbitration which culminated in the First Arbitral Award. The First Arbitral Award was then challenged before this Court by filing Arbitration Petition No.427 of 2013 [the earlier Section 34 petition]. In the said petition, respondent No.1 appeared on six occasions before this Court, after which this Court set aside the First Arbitral Award vide its order dated 17th August, 2015. At no point of time, did respondent No.1 ever raise any objection to the territorial jurisdiction of this Court to entertain the earlier Section 34 petition [i.e. Arbitration Petition No.427 of 2013]. Dr. Chandrachud submitted that this does not stop here. Respondent No.1 thereafter accepted the order dated 17th August 2015 passed by this Court setting aside the First Arbitral

Award and thereafter initiated fresh arbitration proceedings. On 9th February, 2018, respondent No.1 nominated respondent No.2 as an Arbitrator who ultimately passed the Second Arbitral Award and which is impugned in the present petition. Dr. Chandrachud submitted that respondent No.1, having participated in the arbitration proceedings before this Court in the first round and not having raised any objection to this Court's territorial jurisdiction, as well as acting in furtherance of the order passed by this Court on 17th August, 2015 by invoking a fresh arbitration, is now precluded from contending that this Court did not have jurisdiction to entertain the earlier Section 34 petition [i.e. Arbitration Petition No.427 of 2013]. If this be the case, then Section 42 of the Arbitration Act is clearly applicable, and therefore, all subsequent proceedings arising out of and with respect to the arbitration agreement between the parties, would have to be filed only in this Court.

12. To substantiate his argument, Dr. Chandrachud took me through the provisions of Section 42 of the Arbitration Act and contended that where with respect to an arbitration agreement any application under Part I of Arbitration Act has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings

and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court. In the instant case, admittedly the present Arbitration Petition filed under Section 34 of the Arbitration Act arises out of the same arbitration agreement between the parties as was the previous Arbitration Petition filed under Section 34 of the Act [i.e. Arbitration Petition No.427 of 2013] and entertained by this Court. Therefore, under Section 42 of the Arbitration Act, this Court alone has the jurisdiction to hear and decide the present petition, was the submission.

13. Dr. Chandrachud also relied upon the decision of the Supreme Court in the case of **State of West Bengal & Ors Vs. Associated Contractors (supra)** to contend that the words used in Section 42 of the Arbitration Act are "with respect to an arbitration agreement" which are words of wide import and would take within its sweep all applications made before, during or even after the arbitral proceedings are over. He therefore submitted that in the instant case it is this Court alone which would now have jurisdiction to entertain all applications with respect to the "arbitration agreement" entered

into between the petitioners and respondent No.1.

14. Dr. Chandrachud submitted that respondent No.1, by not raising the issue of territorial jurisdiction of this Court when it entertained the earlier Section 34 petition. [i.e. Arbitration Petition No.427 of 2013] and further, accepting the judgment/order passed therein on 17th August, 2015, not only waived their objection to territorial jurisdiction but in fact accepted the jurisdiction of this Court. It is, therefore, now too late in the day for respondent No.1 to contend that this Court did not have territorial jurisdiction to entertain the earlier Section 34 petition [i.e. Arbitration Petition No.427 of 2013]. Dr. Chandrachud, submitted that in the case of **Snehalata Goel** Vs **Pushpalata [(2019) 3 SCC 594]** the Supreme Court has clearly held that territorial jurisdiction of the Court does not go to the root of the matter unlike subject matter jurisdiction. He, therefore, submitted that the party who fails to object to the territorial jurisdiction of the Court, cannot subsequently dispute its territorial jurisdiction in another proceeding. Dr. Chandrachud submitted that applying the aforesaid principle, respondent No.1, by failing to object to the territorial jurisdiction of this Court to entertain the earlier Section 34 petition [i.e. Arbitration Petition No.427 of

2013], it had waived its right to now object to the territorial jurisdiction of this Court.

15. Dr. Chandrachud lastly submitted that the reliance placed by respondent No.1 on the judgment of the Supreme Court in the case of **Soma JV (supra)** is wholly misconceived. The Supreme Court in that case had not dealt with a case like the present one in which the party contesting the jurisdiction of the Court in the subsequent application had failed to object to the territorial jurisdiction of the Court in the previous application. He submitted that if one looks at the facts of the case in **Soma JV (supra)**, it is clear that the same is completely distinguishable on facts and has no application to the present matter. Dr. Chandrachud submitted that the ratio of any decision must be understood in the background of the facts of that case. He submitted that the case is only an authority for what it actually decides and not what logically follows from it. In this regard Dr. Chandrachud relied upon a decision of the Supreme Court in the case of **Sarva Shramik Sanghatana (KV)** Vs **State of Maharashtra [(2008) 1 SCC 494].** Relying upon this decision, Dr. Chandrachud submitted that a little difference in the facts or additional facts may

make a lot of difference in the precedential value of a decision. Dr. Chandrachud submitted that in the case of **Soma JV (supra)** the facts revealed that the issue of jurisdiction was raised at the very first instance and not a situation like the present one where the party had waived its right to raise the issue of territorial jurisdiction. He, therefore, submitted that there was no merit in the preliminary issue of jurisdiction raised by respondent No.1 and hence the same ought to be rejected.

16. I have heard the learned counsel for parties at great length and have perused the papers and proceedings in the above matter. To understand this controversy, it would be appropriate to once again set out the admitted facts. Admittedly, respondent No.1 initiated arbitral proceedings which culminated into the First Arbitral Award [Arbitral Award dated 30th January, 2013]. The First Arbitral Award was challenged in this Court by filing Arbitration Petition No.427 of 2013 under Section 34 of the Arbitration Act [the earlier Section 34 petition]. Respondent No.1, who appeared on six occasions before this Court in Arbitration Petition No.427 of 2013, never contended or even raised the issue that this Court did not have territorial jurisdiction to entertain Arbitration Petition No.427 of

2013 [the earlier Section 34 petition]. Ultimately, the First Arbitral Award was set aside by this Court vide its order dated 17th August, 2015. After the order was passed by this Court on 17th August, 2015, fresh arbitration proceedings were initiated by respondent No.1. These fresh arbitration proceedings culminated into a fresh Arbitral Award dated 4th August, 2019 [the Second Arbitral Award], and which is impugned in the present petition. In this background, I have to examine whether Section 42 of the Arbitration Act would be applicable to the facts and circumstances of the present case. If it is not, then this Court would have no jurisdiction to entertain the above petition considering that the "seat" of arbitration is at New Delhi.

17. Section 42 of the Arbitration Act reads as under:-

> "*42.* ***Jurisdiction. -*** *Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."*
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> (emphasis supplied)

18. Section 42 stipulates that notwithstanding anything

contained elsewhere in Part I of the Arbitration Act or in any other law for the time being in force, where with respect to an arbitration agreement, any application under Part I has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court. For Section 42 to apply, with respect to an arbitration agreement, an application under Part I has to be made to a "Court". Only then all subsequent applications arising out of the same arbitration agreement have to be filed only that "Court". The word "Court" is defined in Section 2(1)(e) of the Arbitration Act and reads thus:-

> "*(e) "Court" means:-*
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> *(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;*
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> *(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases,*

> *a High Court having jurisdiction to hear appeals from decrees of Courts subordinate to that High Court."*

19. The definition of the word "Court" stipulates that a Court means, in a case of an arbitration other than an international commercial arbitration, the Principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such Principal Civil Court, or any Court of Small Causes. In other words, on reading Section 2(l)(e)(i) [and which is applicable in the present case], it is clear that any Civil Court of a grade inferior to the Principal Civil Court or any Court of Small Causes inherently lacks jurisdiction to entertain any application under the Arbitration Act. This is for the simple reason that it is only the Principal Civil Court of original jurisdiction in a district and which includes the High Court exercising its ordinary original civil jurisdiction that would have jurisdiction to entertain any application under the Arbitration Act.

20. Having seen the relevant provisions, I shall now examine as to how they apply to the facts of the present case. Earlier, the First Arbitral Award [Arbitral Award dated 30th January, 2013] was challenged before this Court by filing Arbitration Petition No. 427 of 2013 [the earlier Section 34 petition]. When that petition was entertained and heard by this Court and although respondent No.1 appeared in the said matter on six occasions, no objection to the territorial jurisdiction of this Court was taken by it. Thereafter, the First Arbitral Award was set aside by this Court vide its order dated 17th August, 2015. After this order was passed, respondent No.1 accepted the said order and initiated fresh arbitration proceedings which ultimately culminated in the Second Arbitral Award [the impugned Award]. This being the factual position, it is quite clear that respondent No.1, by its conduct, had submitted to the territorial jurisdiction of this Court and waived its right to object to the same when it entertained Arbitration Petition No.427 of 2013 [the earlier Section 34 petition] and passed its order dated 17th August, 2015. It is not as if this Court, when it entertained Arbitration Petition No. 427 of 2013 [the earlier Section 34 petition], lacked inherent jurisdiction to entertain the said petition. If at all, it did not have territorial jurisdiction to entertain Arbitration Petition No. 427 of 2013 [the

earlier Section 34 petition]. However, as mentioned earlier, respondent No.1 never raised any issue regarding the territorial jurisdiction of this Court when it entertained and heard Arbitration Petition No. 427 of 2013 [the earlier Section 34 petition] and hence waived the same. The reason I say this is because it is now well settled that when an objection to the territorial jurisdiction of a Court is not taken by a party, he is deemed to have waived it and cannot raise that issue/objection in subsequent proceedings. In this regard, the reliance placed by Dr. Chandrachud on the Judgment of the Supreme Court in the case of **Sneh Lata Goel Vs. Pushplata and ors [(2019) 3 SCC 594]** is well founded. In the facts of that case, an objection was raised in execution regarding the territorial jurisdiction of the Court that passed the decree. It did not relate to subject-matter jurisdiction. The Supreme Court inter alia held that an objection to territorial jurisdiction does not travel to the root of or to the inherent lack of jurisdiction of a civil court to entertain the suit and hence can be waived. The relevant portion of this decision reads thus:-

> **"18.** The Court in *Kiran Singh case* [*Kiran Singh* v. *Chaman Paswan,* AIR 1954 SC 340] disallowed the objection to jurisdiction on the ground that no objection was raised at the first instance and that the party filing the suit was precluded from raising an objection to jurisdiction

of that court at the appellate stage. This Court concluded thus: (AIR p. 345, para 16)

> "*16*. … If the law were that the decree of a court which would have had no jurisdiction over the suit or appeal but for the overvaluation or undervaluation should be treated as a nullity, then of course, they would not be estopped from setting up want of jurisdiction in the court by the fact of their having themselves invoked it. That, however, is not the position under Section 11 of the Suits Valuation Act."

Thus, where the defect in jurisdiction is of kind which falls within Section 21 CPC or Section 11 of the Suits Valuation Act, 1887, an objection to jurisdiction cannot be raised except in the manner and subject to the conditions mentioned thereunder. Far from helping the case of the respondent, the judgment in *Kiran Singh* [*Kiran Singh* v. *Chaman Paswan*, AIR 1954 SC 340] holds that an objection to territorial jurisdiction and pecuniary jurisdiction is different from an objection to jurisdiction over the subject-matter. An objection to the want of territorial jurisdiction does not travel to the root of or to the inherent lack of jurisdiction of a civil court to entertain the suit.

19. In *Hira Lal Patni* v. *Kali Nath* [*Hira Lal Patni* v. *Kali Nath*, AIR 1962 SC 199] , a person filed a suit on the original side of the High Court of Judicature at Bombay for recovering commission due to him. The matter was referred to arbitration and it resulted in an award in favour of the plaintiff. A decree was passed in terms of the award and was eventually incorporated in a decree of the High Court. In execution proceedings, the judgment-debtor resisted it on the ground that no part of the cause of action had arisen in Bombay, and therefore, the High Court had no jurisdiction to try the cause and that all proceedings following thereon where wholly without jurisdiction and thus a nullity. Rejecting this contention, a four-Judge Bench of this Court held thus: (AIR p. 201, para 4)

> "*4*. The objection to its [Bombay High Court] territorial *jurisdiction is one which does not go to the competence of the* court and can, therefore, be waived. In the instant case, when the plaintiff obtained the leave of the Bombay High Court on the original side, under Clause 12 of the Letters Patent, the correctness of the procedure or of the order granting the leave could be questioned by the defendant or the objection could be waived by him. When he agreed to refer the matter to arbitration through court, he would be deemed to have waived his objection to the territorial jurisdiction of the court, raised by him in his written statement. *It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the Code of Civil Procedure*."
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> (emphasis supplied)

20. In *Harshad Chiman Lal Modi* v. *DLF Universal Ltd.* [*Harshad Chiman Lal Modi* v. *DLF Universal Ltd.*, (2005) 7 SCC 791] , this Court held that an objection to territorial and pecuniary jurisdiction has to be taken at the earliest possible opportunity. If it is not raised at the earliest, it cannot be allowed to be taken at a subsequent stage. This Court held thus: (SCC pp. 803-04, para 30)

> "*30*. … The jurisdiction of a court may be classified into several categories. The important categories are (*i*) territorial or local jurisdiction; (*ii*) pecuniary jurisdiction; and (*iii*) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to

> subject-matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity."

21. In *Hasham Abbas Sayyad* v. *Usman Abbas Sayyad* [*Hasham Abbas Sayyad* v. *Usman Abbas Sayyad*, (2007) 2 SCC 355] , a two-Judge Bench of this Court held thus: (SCC pp. 363-64, para 24)

> "*24*. We may, however, hasten to add that a distinction must be made between a decree passed by a court which has no territorial or pecuniary jurisdiction in the light of Section 21 of the Code of Civil Procedure, and a decree passed by a court having no jurisdiction in regard to the subject-matter of the suit. Whereas in the former case, the appellate court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with."

22. Similarly, in *Mantoo Sarkar* v. *Oriental Insurance Co. Ltd.* [*Mantoo Sarkar* v. *Oriental Insurance Co. Ltd.*, (2009) 2 SCC 244 : (2009) 1 SCC (Civ) 482 : (2009) 1 SCC (Cri) 738] , a two-Judge Bench of this Court held thus: (SCC p. 249, para 20)

> "*20*. A distinction, however, must be made between a jurisdiction with regard to the subject-matter of the suit and that of territorial and pecuniary jurisdiction. Whereas in the case falling within the former category the judgment would be a nullity, in the latter it would not be. It is not a case where the Tribunal had no jurisdiction in relation to the subject-matter of claim … in our opinion, the court should not have, in the absence of any finding of sufferance of any prejudice on the part of the first respondent, entertained the appeal."

23. The objection which was raised in execution in the present case did not relate to the subject-matter of the suit. It was an objection to territorial jurisdiction which does not travel to the root of or to the inherent lack of jurisdiction of a civil court to entertain the suit. An executing court cannot go behind the decree and must execute the decree as it stands. In *Vasudev Dhanjibhai Modi* v. *Rajabhai Abdul Rehman* [*Vasudev Dhanjibhai Modi* v. *Rajabhai Abdul Rehman*, (1970) 1 SCC 670] , the petitioner filed a suit in the Court of Small Causes, Ahmedabad for ejecting the defendant tenant. The suit was eventually decreed in his favour by this Court. During execution proceedings, the defendant tenant raised an objection that the Court of Small Causes had no jurisdiction to entertain the suit and its decree was a nullity. The court executing the decree and the Court of Small Causes rejected the contention. The High Court reversed the order of the Court of Small Causes and dismissed the petition for execution. On appeal to this Court, a three-Judge Bench of this Court, reversed the judgment of the High Court and held thus: (SCC pp. 672-73, paras 6 & 8)

> "*6.* A court executing a decree cannot go behind the decree: between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.
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> ***
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> *8.* … If the decree is on the face of the record without jurisdiction and the question does not relate to the territorial jurisdiction or under Section 11 of the Suits Valuation Act, objection to the jurisdiction of the court to make the decree may be raised; where it is necessary to investigate facts in order to determine whether the court which had passed the decree had no jurisdiction to entertain and try the suit, the objection cannot be raised in the execution proceeding."

> **24.** In this background, we are of the view that the High Court was manifestly in error in coming to the conclusion that it was within the jurisdiction of the executing court to decide whether the decree in the suit for partition was passed in the absence of territorial jurisdiction."
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> (emphasis supplied)

21. From this decision it is clear that when an objection to the territorial jurisdiction of a Court is not taken at the earliest available opportunity it cannot be raised in subsequent proceedings. The policy underlying the same is that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it has resulted in failure of justice. The policy is to treat objections to territorial jurisdiction as technical and not open to consideration by an Appellate Court or in subsequent proceedings, unless there has been a prejudice on the merits. In the facts of the present case, I have no hesitation in holding that respondent No.1, having submitted to the jurisdiction of this Court by appearing in Arbitration Petition No.427 of 2013 and not raising any objection to its territorial jurisdiction, is now precluded from contending that this Court did not have territorial jurisdiction to entertain Arbitration Petition No.427 of 2013 [the earlier Section 34 petition] and which was finally disposed of by this Court vide its

order dated 17th August, 2015.

22. Once having held that respondent No.1 is now precluded from contending that this Court did not have jurisdiction to entertain Arbitration Petition No.427 of 2013 [the earlier Section 34 petition], then clearly, by virtue of the provisions of Section 42, this Court alone would have jurisdiction to entertain the present petition filed under Section 34 of the Arbitration Act to challenge the Second Arbitral Award [the impugned Award]. This is for the simple reason because Section 42 stipulates that notwithstanding anything contained elsewhere in Part I of the Arbitration Act or in any other law for the time being in force, where with respect to an arbitration agreement, any application under Part I has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court. This Court is certainly a Court as defined in section 2(1)(e)(i) in which the earlier Section 34 petition was filed and entertained [Arbitration Petition No.427 of 2013] and the present petition is also with respect to the same arbitration agreement as was in Arbitration

Petition No.427 of 2013 [the earlier section 34 petition]. Hence present petition filed under Section 34 impugning the Second Arbitral Award would have to be filed only in this Court and no other Court.

23. It is true that once the "seat" of arbitration is decided by the parties, then it is the Courts where the "seat" is located would have exclusive jurisdiction to decide all applications arising out the arbitration. However, at least as far as domestic arbitrations are concerned, the same is a question of territorial jurisdiction. It is not as if this Court, by entertaining Arbitration Petition No.427 of 2013 [the earlier Section 34 petition], despite the "seat" being located at New Delhi, inherently lacked jurisdiction to entertain it. In fact, respondent No.1, despite appearing in the said petition before this Court, did not object to its territorial jurisdiction and also acted in furtherance of the order passed therein. Not having taken this objection in the earlier Section 34 petition [Arbitration Petition No.427 of 2013] filed in this Court and submitting to its jurisdiction, it is now too late in the day for respondent No.1 to contend that this Court does not have jurisdiction to entertain the present Section 34 petition because this Court lacked jurisdiction to entertain the earlier

Section 34 petition [Arbitration Petition No.427 of 2013].

24. This now only leaves me to deal with the decision of the Supreme Court in the case of **Soma JV (supra)** on which heavy reliance was placed by Mr. Kanade. The facts of that case would show that the arbitration clause contemplated that the arbitration proceedings were to be held in New Delhi / Faridabad, India. On 16.5.2011 a notice of arbitration was issued by the petitioner to the respondent in regard to the payment of compensation for losses suffered due to abnormal delays and additional costs as a result of hindrances caused by the respondent. A three-member Arbitral Tribunal was constituted as per clause 67.3 of the agreement which ultimately culminated into a unanimous Award at New Delhi under which the claims of the petitioner aggregating to INR 424,81,54,096.29 were allowed, together with simple interest at 14% p.a. till the date of actual payment. On 3rd January, 2017, the respondent filed an application under Section 34 of the Arbitration Act, seeking to set aside the Award before the Court of the District and Sessions Judge, Faridabad, Haryana. On 28th April, 2017, the petitioner filed an application under Section 151 read with Order VII Rule 10 of the Code of Civil Procedure, 1908 and Section 2(1)(e)(i) of

the Arbitration Act, seeking a return of the petition for presentation before the appropriate Court at New Delhi and/or the District Judge at Dhemaji, Assam. In November 2017, after the constitution of a Special Commercial Court at Gurugram, the Section 34 petition filed at Faridabad was transferred to the said Gurugram Commercial Court and numbered as Arbitration Case No. 74 (CIS No.ARB/118/2017). On 21st December, 2017, the Special Commercial Court, Gurugram allowed the application of the petitioner and returned the Section 34 petition for presentation to the proper court having jurisdiction at New Delhi. Being aggrieved by that order, the respondent filed an appeal under Section 37 of the Arbitration Act before the High Court of Punjab and Haryana at Chandigarh. The Punjab and Haryana, High Court, *inter alia,* held that Delhi, being a convenient venue where the arbitral proceedings were held and not the "seat" of the arbitration proceedings, Faridabad, would have territorial jurisdiction on the basis of the cause of action having arisen in part in Faridabad and as a result the appeal was allowed and the judgment of the Special Commercial Court, Gurugram was set aside. It was this order of the Punjab and Haryana High Court that was assailed before the Supreme Court. The Supreme Court allowed the appeal and set aside the impugned judgment passed by the Punjab

and Haryana High Court. The argument canvassed before the Supreme Court in support of the Punjab and Haryana High Court decision was that the arbitration clause did not expressly state that either New Delhi or Faridabad was to be the "seat" of the Arbitral Tribunal, and therefore, the arbitration clause only referred to a convenient venue, and the fact that the sittings were held at New Delhi would not, therefore, make New Delhi the "seat" of the arbitration under Section 20(1) of the Arbitration Act. Since the agreements were signed in Faridabad, and since the notices were sent by the petitioners to the respondent's office, part of the cause of action clearly arose in Faridabad as a result of which the Courts in Faridabad would be clothed with jurisdiction to decide the Section 34 application. The alternate argument canvassed was that even assuming that New Delhi was the "seat" of arbitration, both New Delhi and Faridabad would have concurrent jurisdiction, New Delhi being a neutral forum at which no part of the cause of action arose, and Faridabad being a chosen forum where a part of the cause of action had arisen. When read with Section 42 of the Arbitration Act, since the Court at Faridabad was first approached by filing an application under Section 34 of the Arbitration Act, that Court would alone have jurisdiction, was the argument. The facts and the arguments

canvassed in this case would reveal that the issue of jurisdiction was raised at the very first instance and which was upheld by the Special Commercial Court, Gurugram and set aside by the Punjab and Haryana High Court. The argument that was canvassed and rejected by the Supreme Court was that since Faridabad Court was approached first, it would have jurisdiction by virtue of Section 42 of the Arbitration Act. This was negated by the Supreme Court by holding that Faridabad did not have jurisdiction considering that the "seat" of the arbitration was at New Delhi. It is in this light and in this factual scenario that one has to read the findings given by the Supreme Court in paragraph 59. It was not a case where no issue regarding jurisdiction was raised in the first instance and was thereafter raised in a subsequent application, as is the case before me. For ready reference, paragraph 59 is reproduced hereunder:-

> **"59.** Equally incorrect is the finding in *Antrix Corpn. Ltd.* [*Antrix Corpn. Ltd.* v. *Devas Multimedia (P) Ltd.*, 2018 SCC OnLine Del 9338] that Section 42 of the Arbitration Act, 1996 would be rendered ineffective and useless. Section 42 is meant to avoid conflicts in jurisdiction of courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one court exclusively. This is why the section begins with a *non obstante* clause, and then goes on to state "*…where with respect to an arbitration agreement any application under this part has been made in a court…*" It is obvious that the application made under this part to a court must be a court which has jurisdiction to decide such application. The subsequent holdings of this court, that where a seat is designated in an agreement, the

> courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the court where the seat is located, and that court alone then has jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless. Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so-called "seat" is only a convenient "venue", then there may be several courts where a part of the cause of action arises that may have jurisdiction. Again, an application under Section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal under Section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a court in which a part of the cause of action arises would then be the exclusive court under Section 42, which would have control over the arbitral proceedings. For all these reasons, the law stated by the Bombay and Delhi High Courts in this regard is incorrect and is overruled.**"**

25. One must not lose sight of the fact that these observations cannot be viewed divorced from the facts of the case and the arguments canvassed by the parties. The facts of our case are wholly different. As mentioned earlier, the issue of territorial jurisdiction of this Court was never raised by respondent No.1 when the earlier Section 34 petition was filed in this Court. In fact, respondent No.1 accepted the order passed by this Court and proceeded to initiate fresh arbitration proceedings. This being the case, I find that the factual situation before me is totally different from the one in the case

of **Soma JV (supra)**, and therefore, has no application over here.

26. It is now a well settled proposition that the ratio of any decision must be understood in the background of the facts of that case. It has been said a long time ago that a case is only an authority for what it actually decides and not what logically follows from it. The Supreme Court in the case of **Sarva Shramik Sanghatana (KV) (supra)** has succinctly set out this proposition in paragraphs 14 to 18 which read thus:-

> **"14.** On the subject of precedents Lord Halsbury, L.C., said in *Quinn* v. *Leathem* [1901 AC 495 : (1900-1903) All ER Rep 1 (HL)] : (All ER p. 7 G-I)
>
> > "Before discussing *Allen* v. *Flood* [1898 AC 1 : (1895-1899) All ER Rep 52 (HL)] and what was decided therein, there are two observations of a general character which I wish to make; and one is to repeat what I have very often said before—that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, *but are governed and qualified by the particular facts of the case* in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."
>
> (emphasis supplied)
>
> We entirely agree with the above observations.

15. In *Ambica Quarry Works* v. *State of Gujarat* [(1987) 1 SCC 213] (vide SCC p. 221, para 18) this Court observed:

> "*18*. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it."

16. In *Bhavnagar University* v. *Palitana Sugar Mill (P) Ltd.* [(2003) 2 SCC 111] (vide SCC p. 130, para 59) this Court observed:

> "*59*. … It is also well settled that *a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision*."

(emphasis supplied)

17. As held in *Bharat Petroleum Corpn. Ltd.* v. *N.R. Vairamani* [(2004) 8 SCC 579 : AIR 2004 SC 4778] a decision cannot be relied on without disclosing the factual situation. In the same judgment this Court also observed: (SCC pp. 584-85, paras 9-12)

> "*9*. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. *Observations of courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context.* These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd.* v. *Horton* [1951 AC 737 : (1951) 2 All ER 1 (HL)] (AC at p. 761), Lord MacDermott observed: (All ER p. 14 C-D)
>
> > 'The matter cannot, of course, be settled merely by treating the *ipsissima verba* of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great

> weight to be given to the language actually used by that most distinguished Judge, …'

10. In *Home Office* v. *Dorset Yacht Co. Ltd.* [1970 AC 1004 : (1970) 2 WLR 1140 : (1970) 2 All ER 294 (HL)] Lord Reid said,

> 'Lord Atkin's speech … is not to be treated as if it were a statutory definition. It will require qualification in new circumstances.' (All ER p. 297*g*)

Megarry, J. in *Shepherd Homes Ltd.* v. *Sandham (No. 2)* [(1971) 1 WLR 1062 : (1971) 2 All ER 1267] , observed: (All ER p. 1274*d*)

> 'One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament;'

And, in *British Railways Board* v. *Herrington* [1972 AC 877 : (1972) 2 WLR 537 : (1972) 1 All ER 749 (HL)] Lord Morris said: (All ER p. 761*c*)

> 'There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case.'

11. Circumstantial flexibility, *one additional or different fact may make a world of difference between conclusions in two cases.* Disposal of cases by blindly placing reliance on a decision is not proper.

12. The following words of Hidayatullah, J. in the matter of applying precedents have become locus classicus: (*Abdul Kayoom* v. *CIT* [AIR 1962 SC 680] , AIR p. 688, para 19)

> '*19*. … Each case depends on its own facts and a close similarity between one case and another is not enough because *even a single significant detail may alter the entire*

> *aspect*, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.'
>
> ***
>
> '*Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches*. My plea is to keep the path to justice clear of obstructions which could impede it.' "
>
> (emphasis supplied)

> **18.** We have referred to the aforesaid decisions and the principles laid down therein, because often decisions are cited for a proposition without reading the entire decision and the reasoning contained therein. In our opinion, the decision of this Court in *Sarguja Transport case* [(1987) 1 SCC 5 : 1987 SCC (Cri) 19 : AIR 1987 SC 88] cannot be treated as a Euclid's formula.**"**
>
> (emphasis supplied)

27. In these circumstances, I find that the reliance placed by Mr. Kanade on the judgment of the Supreme Court in the case of **Soma JV (supra)** is wholly misplaced and does not carry his case any further.

28. Even the decision of the Supreme Court in the case of **State of West Bengal & Ors. Vs Associated Contractors (supra)**

does not support the case of respondent No.1. The facts of this case reveal that in 1995-1996 an item rate tender was duly executed and signed between the respondent – Associated Contractors and the Superintending Engineer concerned for execution of the work of excavation and lining of Teesta-Jaldhaka Main Canal from Chainage 3 k.m. to 3.625 k.m. in Police Station Mal, District Jalpaiguri, West Bengal. Paragraph 25 of the said item rate tender and the contract contained an arbitration clause. The respondent filed an application under Section 9 of the Arbitration Act, seeking interim orders in the High Court of Calcutta. The Calcutta High Court, after granting leave under Clause 12 of the Letters Patent, passed an ad-interim ex-parte injunction order. This order was continued from time to time until it was confirmed by an order dated 10th December, 1998. From the aforesaid order, an appeal was filed and in the appeal the interim order dated 10th December, 1998 was stayed. The Arbitrator was, however, asked to complete the proceedings before him which would go on uninterrupted. In the meanwhile, several orders were passed by the High Court regarding the remuneration of the Arbitrator and payment of the same. Finally, the arbitration proceedings culminated in an Award dated 30th June, 2004. On 21st September, 2004, the State of West Bengal filed an application under Section 34 of the

Arbitration Act to set aside the Arbitral Award before the Principal Civil Court of the learned District Judge at Jalpaiguri, West Bengal. On 10th December, 2004 the respondent filed an application under Article 227 of the Constitution of India challenging the jurisdiction of the District Court at Jalpaiguri. By the impugned judgment dated 11th April, 2005, a Single Judge of the Calcutta High Court allowed the petition under Article 227 of the Constitution of India *inter alia* holding that since the parties had already submitted to the jurisdiction of the Calcutta High Court in its ordinary original civil jurisdiction in connection with which earlier proceedings had arisen out of the said contract, the jurisdiction of the Court of the learned District Judge at Jalpaiguri to entertain the Section 34 application for setting aside the award, was specifically excluded under Section 42 of the Arbitration Act. It was this order that was assailed before the Supreme Court. The argument canvassed before the Supreme Court by the State of West Bengal was that the application made under Section 9 of the Arbitration Act before the Calcutta High Court, was itself without jurisdiction and hence Section 42 of the Arbitration Act would not be attracted. It was argued that the reason for the Division Bench to stay the interim order passed under Section 9 of the Arbitration Act, was because it was convinced *prima facie* that

the High Court had no jurisdiction in the matter. Whilst negating this contention, the Supreme Court in paragraphs 25 & 26 *inter alia* held as under:-

> **"25.** Our conclusions therefore on Section 2(1)(*e*) and Section 42 of the Arbitration Act, 1996 are as follows:
>
> (*a*) Section 2(1)(*e*) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996.
>
> (*b*) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.
>
> (*c*) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.
>
> (*d*) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.
>
> (*e*) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(*e*), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator,

> applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.
>
> (*f*) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.
>
> (*g*) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.
>
> The reference is answered accordingly.
>
> **26.** On the facts of the present case, nothing has been shown as to how the High Court of Calcutta does not possess jurisdiction. It has been mentioned above that leave under Clause 12 has been granted. In the circumstances of the present case, therefore, the judgment dated 11-4-2005 passed by the High Court of Calcutta is correct and does not need any interference. Civil Appeal No. 6691 of 2005 and Civil Appeal No. 4808 of 2013 are hereby dismissed.**"**

29. I fail to see how this decision supports the case of respondent No.1. In fact, this decision categorically holds that the expression "with respect to the Arbitration Agreement" makes it clear that Section 42 of the Arbitration Act will apply to all applications made before or during the arbitral proceedings or after an Award is pronounced under Part I of the Arbitration Act. It further

holds that if the first application is made to a Court which is neither the Principal Civil Court of original jurisdiction in a district, or a High Court exercising original jurisdiction, such an application not being to a Court as defined, would be outside the purview of Section 42. Also an application made to a Court without subject-matter jurisdiction would be outside the purview of Section 42. In the facts of the present case, the first application was made before this Court under Section 34 of the Arbitration Act challenging the First Arbitral Award dated 30th January, 2013. It is not as if this Court whilst entertaining the said petition was not the High Court exercising original jurisdiction or did not have subject-matter jurisdiction to entertain the said petition. If at all, it did not have territorial jurisdiction and which was waived by respondent No.1 as discussed earlier. This being the case, I find that the reliance placed by respondent No.1 on this decision also is wholly misplaced.

30. For all the aforesaid reasons I hold that this Court has jurisdiction to entertain the above Section 34 Petition. It is accordingly listed for admission on 6th April, 2021.

31. This order shall be digitally signed by the Private

Secretory /Personal Assistant of this Court. All concerned shall act on production by fax or e-mail of a digitally signed copy of this order.

(B. P. COLABAWALLA, J.)