NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI
(APPELLATE JURISDICTION)
Company Appeal (AT) (CH) No. 17 of 2021
(Under Section 421 of the Companies Act, 2013)
(Arising out of the Order dated 25.05.2021 in C.P. No.06/BB/2021
Filed under Section 271 and 272 of the Companies Act, 2013 passed by the Hon'ble National Company Law Tribunal, Bengaluru Bench)

In the matter of:

Devas Multimedia Private Limited
(Through Ex-Director)
A Company within the meaning of Companies Act, 2013
Having its office at
No. 29/1, Kaveriappa Layout,
Opposite Jain Hospital,
Vasanth Nagar,
Bangalore- 560 052.
Represented by its Ex-Director,
Dr. MG Chandrasekhar **...Appellant**

V

1.Antrix Corporation Limited
A Government company within the meaning
of the Companies Act, 2013
Having its registered office at:
Antariksh Bhavan Campus,
Near New BEL Road,
Bengaluru 560 094,
Karnataka.
Represented by its Chairman and Managing Director. **...Respondent No.1**

2.Ministry of Corporate Affairs
5th Floor, 'A' Wing,
Shastri Bhavan,
New Delhi – 110 001.
Represented by its Secretary **...Respondent No.2**

And

Company Appeal (AT) (CH) No. 24 of 2021
(Under Section 421 of the Companies Act, 2013)
(Arising out of the Order dated 25.05.2021 in C.P. No.06/BB/2021 Filed under Section 271 and 272 of the Companies Act, 2013 passed by the Hon'ble National Company Law Tribunal, Bengaluru Bench)

In the matter of:

Devas Employees Mauritius Private Limited
(As a shareholder of Devas Multimedia Private Limited)
A company incorporated under the laws of the
Republic of Mauritius, bearing Company No. C087664,
Having its registered office at:
C/o International Proximity
5th Floor Ebene Esplanade
24 Cybercity
Ebene 72201
Republic of Mauritius
Represented by its Director,
Mr. Babbio JR Lawrence Thomas **...Appellant**

V

1.Antrix Corporation Limited
A Government company within the meaning
of the Companies Act, 2013
Having its registered office at:
Antariksh Bhavan Campus,
Near New BEL Road,
Bengaluru 560 094,
Karnataka.
Represented by its Chairman and Managing Director. **...Respondent No.1**

2.Ministry of Corporate Affairs
5th Floor, 'A' Wing,
Shastri Bhawan,

New Delhi – 110 001.
Represented by its Secretary **...Respondent No.2**

3.Devas Multimedia Private Limited (in liquidation)
A company within the meaning of
the Companies Act, 2013
Having its registered office at:
First Floor, 29/1,
Millers Tank Bunk Road,
Bengaluru -560 052
Represented by the Official
Liquidator, Office of Official Liquidator,
Attached to High Court of Karnataka,
No. 26-27, 12th Floor, Raheja Towers,
West Wing,
MG Road, Bengaluru – 560 001. **…Respondent No.3**

Present: (In Both the Appeals)

For Appellant : M/s. Anuradha Dutt, Advocate

For Respondent No. 1 : Mr. N. Venkataraman, Addl. Solicitor General and Mr. Arjun Krishnan, Advocate

For Respondent No. 2 : Mr. Sanjay Shorey, Director of Legal and Prosecution, MCA

Coram: Mr. Justice M. Venugopal Member (J)
Mr. V. P. Singh Member (T)

JUDGMENT (08-09-2021)
(VIRTUAL MODE)

M. Venugopal (J)

Preface:

1. The Appellants have filed the 'instant Company Appeals' (AT) (CH) No.17 of 2021 and (AT) (CH) No.24 of 2021 as 'aggrieved persons' being dissatisfied with the order Dated 25.05.2021 in C.P.No.06/BB/2021 (filed by the

1st Respondent/Petitioner) passed by the 'National Company Law Tribunal, Bengaluru Bench'.

2. Earlier, the National company Law Tribunal, Bengaluru Bench while passing the 'impugned Order' dated 25.052021 in CP.No.06/BB/2021 (filed by the 1st Respondent/Petitioner) had among other things at paragraphs 32 to 35 had observed the following:

> 32. "The incorporation of Devas itself was with fraudulent motive and unlawful object to collude and connive with then officials of Antrix and to misuse/abuse process of law, to bring money into India and to divert it under dubious methods to foreign countries. The Agreement in question was not executed in pursuance to any public notification. DEVAS by declaring itself that it was developing a platform capable of delivering multimedia and information services via satellite and terrestrial systems to mobile receivers tailored to the needs of various market segments, has requested Antrix for space segment capacity for the purpose of offering S-DMB Service, new digital multimedia and information service including but not limited to audio and video contents etc. By agreeing to the request of Devas, Antrix has decided to make available to Devas, on lease basis a part of space segment capacity on Primary Satellite 1(PS1) and option to gain additional capacity on primary Satellite 2(PS2) to be manufactured for services etc.
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> 33.Devas, while accepting the termination of Agreement in question before ICC Court, later changed its version and claimed huge damages. Though the Tribunal finds that Government of India has sovereign power to frame and change its policies, which includes termination of Agreement in question, it has continued to misuse process of law to its advantage. It has successfully taken Arbitration out of Country contrary to terms of

Agreement. And even without permitting Antrix/Government to take appropriate course of action on the Award, it has precipitated the issue by initiating various proceedings before Indian and Foreign Courts for enforcement of the Award in question, when the validity of Award is under challenge before competent Court. When Devas continues to misuse legal status obtained by virtue of its incorporation as a Company. Antrix, after obtaining due sanction from the Government of India, has filed the instant Petition seeking to Wind up the Company. Even after filing of the instant Petition, instead of proving to the satisfaction of Tribunal that it is not liable to be wound up, as sought for by the Petitioner, Devas has started proxy war by approaching the Hon'ble NCLAT and Hon'ble High Court of Karnataka, through Devas Employees Mauritius Pvt. Ltd., by raising untenable grounds one after the other. Even after failing in its effort to stall the proceedings of this Tribunal, so many untenable contentions are raised on behalf of DEVAS, viz., there is no urgency in the matter, evidence has to be adduced, this Tribunal has no jurisdiction to decide the case unless all criminal cases pending are decided, filing several frivolous Interim Applications at every stage, threatening the Bench to exit from hearing of the case, making allegations that Bench has predetermined the issue etc.

34. It is not in dispute that Devas is not carrying out any business operations, after termination of Agreement in question. Admittedly, Devas hardly has any other business except to grab PS1 and PS2 from Antrix in terms of Agreement and to carry out its illegal object to divert money. Devas failed to show any cogent reasons as to why it should not be wound up and to keep its name on the Register of Registrar of Companies, Karnataka. The only reason apparent on record by perusal of

various pleadings raised in the instant Petition is that it wants to prosecute enforcement of Award in question, in the name of Company, in the Courts in India and abroad, by abusing process of law. Therefore, the intention of Devas in opposing the instant Petition by raising untenable and baseless grounds is to abuse the rights conferred by virtue of law, on the Company and to abuse process of law.

35. Since fraudulent activities are attributed to Devas and its officers from the date of its incorporation, as detailed supra, its shareholders have no role in the instant proceedings at the present stage, as their liability is limited to their share-holding. Moreover, it is not the case of minority shareholders (Devas Employees Mauritius Pvt. Ltd., impleading Applicant) in C.A.No.11 of 2021, that it has filed any Petition or Application alleging any acts of oppression and mismanagement on the part of management of DEVAS. As per law, once winding up order is passed by Tribunal/Court, it is binding on all concerned including shareholders/stakeholders and shareholders of Devas will be given opportunity by Liquidator appointed in the case of redress their grievances. It is not the case of Impleading Applicant that management of Devas has committed acts of oppression and mismanagement so as to deprive their legal rights. Not a single allegation is made by impleading Applicant against the management of Devas. Therefore, the impleading Application is not at all maintainable and it is liable to be dismissed as it is devoid of merits and it is misconceived."

and ultimately came to the conclusion that the 1st Respondent/Petitioner had established its case beyond doubt that the incorporation of the 'Appellant'/'1st Respondent Company' was made in a fraudulent manner and for unlawful purposes and further that its management is continuing to resort to fraudulent

activities, etc. and passed an order to wind up the Appellant/1st Respondent Company by exercising the powers conferred as per Section 273 of the Companies Act, 2013 and allowed the Company Petition No.06/BB/2021 by ordering the winding up of the 'Appellant'/1st Respondent Company by issuing a consequential direction in appointing the 'Provisional Liquidator' ('Official Liquidator' Bengaluru attached to Hon'ble High Court of Karnataka who was appointed as 'Provision203al Liquidator' as per order dated 19.01.2021) as 'Liquidator' to take steps to liquidate the 'Appellant'/1st Respondent Company in accordance with law, etc.

THE APPELLANT'S SUMMATION OF FACTS:

3. It is the stand of the 'Appellant', that the International Telecommunication Union (ITU) during the year 1970 granted a portion of 'S-band frequencies' to the Government of India, and in turn, the Government of India delegated the right to use that Spectrum to the Department of Space (DOS). Since the 'Department of Space' had failed to efficiently allocate the Spectrum, Government of India by 2003 was at the risk of losing its right to the assigned Spectrum Space, which led the Government of India in relocating 40 MHZ of S-band Spectrum to the Department of Telecommunications for terrestrial use.

4. SATCOM Policy of India, specifically called up on DOS Indian Space Research Organization (ISRO) to build and lease satellite capacity for public and private use. Indeed, the then SATCOM Policy Paragraph 2.62 had stated that the 'Department of Space' was authorised to provide this capacity to non-governmental uses and the same may be in the form of even good faith negotiations and 'first come first serve' basis. The SATCOM Policy advocated large scale private investment in the building and operating of Indian designed and Launch Satellites and specifically provided for a role for Foreign Direct

Investments in India's Satellite Programme and as required advocated for the leasing of Bandwidth on Indian Satellites by third party investors.

5. In the year 2002, Mr. Vishwanathan (an ex-Mckinsey Employee, who later joined World Space, Inc., a pioneer in the Provision of Satellite Digital audio radio services (SDARS) in various parts of the World) worked on a Joint Venture with American Mobile Satellite Corporation during its time at World Space. This venture led to the launch of XM Satellite Radio in the United States, which was one of the first satellite radio operators in the world using terrestrial repeaters) along with other leading consultants formed Forge Advisors, LLC ("Forge LLC") as a consultancy firm. They were joined by many industry and subject matter experts.

6. After the formation of 'Forge Advisors', Mr. Ram Vishwanathan informed that Department of Space/ISRO was seeking new ways to commercialize its resources and it was thought that 'Forge Advisors' might be able to assist DOS/ISRO by providing Consulting and Advisory Services. In fact, Mr. Venugopal and Dr. Chandrasekar Former Directors of DEVAS had extensive experience with the Indian Satellite Market and Space Programme and had extensive knowledge in regard to a) the Commercial Satellite Industry in India b) Indian Space Programme and its physical and technological limitations c) that technology beyond building and communication satellites.

7. In early 2003, Dr. Chandrasekar had introduced Mr. Ram Vishwanathan to Dr. Kasturi Rangan who was occupying the four most senior positions in India's Space Hierarchy (i)Chairman of the Space Commission, (ii)Secretary the Department of Space, (iii) Chairman of ISRO and(iv) Chairman of Antrix Corporation Ltd. ("Antrix"). Dr. Kasturi Rangan, the Secretary of Department of Space and Chairman of ISRO commenced discussions with Forge LLC, on how to use its remaining Satellite S-band Spectrum or face the possibility that

the 'Government of India' would reallocate it. Following lengthy discussions with various DOS/ISRO/Antrix Officials for nearly two years (including Dr.Madhavan Nair) a non-binding MOU was entered into between Forge LLC and Antrix.

8. Dr. Kasturi Rangan is not charged with any criminal offence either under Central Bureau of Investigation, the Prevention of Money Laundering Act or Enforcement Proceeding and/or in the Arbitration Proceedings, presently pending before the Hon'ble Delhi High Court. As such, it cannot be said that negotiations between ISRO, Antrix and Forge LLC were part of any conspiracy and/or a fraud.

9. Mr. D. Venugopal became an 'Advisor' to Forge LLC between 2004 till the signing of 'Devas Agreement'. Forge LLC spent significant time exploring possible strategic options for ISRO/Antrix, including review of the technical and financial requirements of a system for use of S-band spectrum, along with identifying the best possible commercial applications, partners and relationships for DOS/ISRO to use the S-band spectrum.

10. A 54-slide presentation was delivered by Mr. Vishwanathan in March 2004, to 'ISRO' and Antrix proposing a joint venture (JV with Forge LLC) which envisioned ISRO building and launching a state-of-the-art communications satellite capable of delivering those services. In fact, Forge LLC took the responsibility for the construction and operation of the DEVAS system at the terrestrial level, including all aspects of commercialisation of the services to the consumers in India and development of requisite technologies.

11. The 'Forge Advisors' with representatives of 'Antrix' and the Government of India attendance, took part in various meetings (including the meetings dated 06.05.2004, 21.05.2004 and 24.05.2004) and in this meetings Dr. G. Madhavan Nair (who replaced Dr. Kasturi Rangan, Chairman of Space

Commission, Secretary of Department of Space and Chairman of ISRO and Antrix) and others took part in these meetings Mr. Vishwanathan presented proposals to ISRO and Antrix, the parties discussed the project's viability and attractiveness, and the parties identified areas of agreement and planned future action.

12. 'Forge LLC' in these meetings, proposed a joint venture between ISRO and Antrix, on the one hand and Forge LLC, on the other. The participants in the meetings understood that the 'system architecture' would include 'space segment, ground segment and receiver segment' i.e. would be a hybrid satellite terrestrial system. Because of the fact that Antrix had not wanted a joint venture either with a foreign company or an Indian company, it was therefore, decided to incorporate an Indian company. As a matter of fact, the technocrats and consultants of Forge LLC entered into negotiations and discussions with DoS, ISRO and Antrix, regarding use of satellite to provide Satellite Digital, Multimedia Broadcasting Service (SDMB) to cities and villages in India.

13. On 11.06.2004, a meeting of Antrix was held in which Dr. Madhavan Nair (Chairman) and other officers of the Government were present and Mr.S.K. Das, IAS and Member (Finance) of the Space Commission Mr.Sridhara Murthi, Executive Director of Antrix and other directors and the Company Secretary had attended the said meeting. In respect of Agenda-9, in the Board Meeting on 11.06.2004, after detailed discussions on the Joint Venture Proposal between Forge LLC for a Satellite-based system for delivering video, multimedia and information services via high power satellite to mobile receivers in vehicles and mobile phones, were held. Also. the discussion in respect of 'Memorandum of Understanding' signed in July 2003, took place.

14. The Board had decided to have a committee headed by Dr. K.N. Shankara, Director Space Application Center, to evaluate the merits of Devas proposal

from Antrix / ISRO point of view, to evaluate market potential foreseen by joint venture, to assess the risk and identify issues relevant for establishing the joint venture and technical aspects. Also, it was discussed that a committee was already formed headed by Dr. Shankara, Director Space and Others and it was recorded that the committee had met even the representative of Forge LLC and after discussions the Board of Directors gave an 'in principal approval' for taking further steps.

15. The Shankara Committee recommended that the 'Joint Venture Proposal' be converted into a 'Lease Agreement', thus, ensuring that the ownership of the Satellite and Arbitral Slot and Frequencies would always be with ISRO and the commercial execution of business on ground and associated risks are entirely taken by Devas. Finally, the committee in its 'Report' had recommended that Antrix can enter into a definite agreement with Devas. However, Dr. K.M. Shankara, Mr.V.R. Katti and Mr.M.Y.S. Prasad (who recommended the execution of Devas Agreement) are not accused of any wrong doing.

16. In the 57th Meeting of the Board of Directors of the Antrix that took place on 24.12.2004, a note was circulated and 'Devas Project' was discussed and the Executive Director of Antrix was authorised to take further steps and signed requisite documents. During June 2009 through September 2009 Devas in conjunction with ISRO and DOS' conducted and successfully completed the field trial and demonstrations in Bangalore of the Hybrid Satellite and Terrestrial Capabilities of the Devas system including mobile multimedia, interactive services, and emerging broadband wave forms.

17. Mr. Venugopal in August 2008 submitted an application for licence on behalf of Devas to the WPC, enclosing a copy of the letter of Dr. S.V. Kibe, (Programme Director in ISRO) in April 2008, in support of the same and that an 'experimental licence' was granted on 07.05.2009. He and the Representative of

Devas, attended the technical advisory group committee meeting on 27.12.2008 along with Dr. Chandrasekar and another officer, where a detailed presentation was made on the 'Devas System'.

18. As regards the technological aspect of 'Satellite Services', the 'TAG' is the 'Advisory Group' and in the meeting, represented by several ministries no one raised any concern about deploying hybrid satellite terrestrial system in S-brand. In this meeting, it was suggested that the technical characteristic of the experimental plan by Devas be discussed by a sub-committee of 'TAG'. In the meeting that took place on 06.01.2009, Dr. Chandrasekar along with Mr. Venugopal and Mr. Gokil presented the experimental plan of Devas and demonstrated there would not be any interference to the ongoing services on INSAT 3C.

19. According to the Appellant the ICC had authorised DOS to build capacities to meet the requirements of Government Departments/Private Parties and evolve its own procedures. In fact, the Department of Space officials were involved in the negotiations and finalization of the Devas Agreement. Antrix is the Marketing arm of the 'Department of Space'. Antrix cannot take any decision which does not have approval of the Department of Space and Ministry of Finance. In the report dated 06.03.2011, the committee constituted by the Department of Space had mentioned that Antrix is an integral part of the Department of Space/ISRO. Antrix provides transponder lease services; launch services, machine support services, etc. to third parties.

20. Devas, in connection with its business activities (delivering broadband wireless access and audio visual services through an integrated hybrid satellite and terrestrial communication system) had entered into an agreement dated 28.01.2005 with Antrix/Marketing Arm of the Government of India's ISRO setup under the Department of Space. For 5 years thereafter, both Antrix and

Devas worked together to develop a first of its kind 'integrated satellite system in India'. A new company (like a special purpose vehicle) was incorporated to enable the Company to be bound by Indian Law and Regulations. Following a consultative process, 'TRAI' issued recommendations, including recommendations that specifically contemplated the provisions of Satellite Digital Multimedia Broadcast (SDMP) services in the S-band and as part of the recommendations, the 'TRAI' had stated in its report dated 27.06.2005 that for the S-band frequencies a "single Licence may be issued to provide satellite radio service and complementary terrestrial service to the potential service providers to efficiently plan the network in a seamless fashion to deliver quality of service to customers."

21. The Union Cabinet gave its approval to undertake design, develop and launch GSAT-6/INSAT/4E on 01.12.2005 and the Government of India's press Information Bureau released a statement on behalf of the Union Cabinet which summarize the key specifications of GST-6/INSAT/4E as well as the benefits of the implementation of this Satellite System would provide India (including providing coverage to the whole country).

22. Devas has the ownership and right to use the 'intellectual property right' involved in designing the technology required for lending devas services. Devas had the ability to design both 'DMRs' and 'CIDs'. Devas owned and had the right to use the 'discoveries and ideas' …. know-how, concepts, creations, improvements upon, additions or any research effort relating to any of the foregoing' associated with the functional designs that it had developed and had discussed with ISRO/Antrix.

23. XM Radio and Sirius Satellite Radio used technology other than the DVB-SH Standard and were very successful in United States of America. Further, these hybrid services were also been rendered in Japan and Korea and Devas

officials studied MBSAT system pertaining to the Hybrid Technology. As a matter of fact, 'Devas System' was designed to be better and optimized for India.

24. In World Administrative Radio Conference 1992 (WARC-1992) India had obtained a Satellite Sound Broadcasting service along with complementary round component in the 1.4 GHz, 2.3 GHz and 2.5 GHz bands. The 'letters rogatory confirm that European Telecommunications Standards Institute (ETSI) owned the right to a certain technology developed years after Devas and Antrix entered into Devas Agreement. The 'Letters Rogatory' do not purport that European Telecommunications Standard Institute (ETSI) was the exclusive holder of any intellectual property rights that would have been required for Devas to have the 'ability to design' DMRs or CIDs. ETSI is a 'repository of technology' developed in 2008 that Devas would have been easily able to Licence.

25. Before signing the 'Devas Agreement' and later, many officers were involved in the meetings that took place on 06.05.2004, 21.05.2004 and 24.05.2004. Further, the 122nd 'TAG' Meeting was held on 30.11.2004. In the said meeting, many officials took part and before Devas services were even commenced the top officials of Space Commission, ISRO, ICC, Tag, WPC, DoT, Ministry of Finance and other officers were aware of 'Devas Agreement' and/or the leasing of space and providing Hybrid Technology by Devas. As such, there is no question of concealment.

26. The Licence was issued to Devas by the DoT on 02.05.2008 in 'Category A' ISB Licence at a Pan India Level. A perusal of ISP Licence of Devas makes it clear that 'SDMB Multimedia Services' can be provided under the 'ISP Licence'. Devas had applied for the IPTV Licence on 30.12.2008 which was granted to it on 31.03.2009.

27. Devas, at the time of entering into 'Devas Agreement' had not violated any provision of 'SATCOM Policy' and Article 3 of 'SATCOM Policy' is inapplicable to 'Devas Agreement', as Devas was not building a satellite. The 'Devas Agreement' is subject to all permissions being granted by the 'Statutory Authorities'. Besides this, Article 2.5.2 of the SATCOM Policy has no application at the stage of signing of 'Devas Agreement' and it would come into operation, once the transponder capacity was made available by a successful of launch of satellite in the orbit. Hence, Article 2.5.6. of SATCOM Policy is not breached, because of the fact that 'Devas Agreement' is subject to all permissions being granted by the Statutory Authorities.

28. 'Devas' secured the investors through lawful means (after signing the 'Devas Agreement') and obtained Government Licences, etc. The Foreign Investors in 'Devas' after meeting the Government Officials and after satisfying themselves about the 'Devas Agreement' and the seriousness of the Government to undertake its obligations under the 'Devas Agreement' had invested the money and the Foreign Investment came in after 'FIPB approval'.

29. One of the investors of 'Devas' is Deutsche Telekom Asia Pte. Ltd., a wholly owned subsidiary of Deutsche Telekom AG. The investment by Deutsche Telekom in Devas was made pursuant to the approval granted by Foreign Investment Promotion Board on 18.05.2006. Another Investor is Columbia Capital LLC, being a venture capital firm, focusing on investments in wireless, broadband, new media etc. Another investor Telecom Ventures LLC is a Principal Investment Firm based in the United States of America specialising in Venture Capital and Private Equity Investments.

30. Dr. Radhakrishnan, when he became the Chairman of ISRO appointed one Dr. B.N. Suresh to examine the 'Devas Agreement', to review the same and the said report did not find any fault with the 'Devas Agreement'. On 16.06.2020,

Dr. Radhakrishnan wrote to DoT and the Ministry of Law and Justice seeking their opinions whether 'Antrix Devas Agreement' need be annulled invoking any of the provisions of the Contract to preserve the precious S band spectrum for the strategic requirements of the nation, etc. He also sought the advice of then Additional Solicitor General for his advice as to how the Agreement could be annulled and the Additional Solicitor General had explained precisely why the Indian Government wanted to terminate the Agreement and further that the Government was advised to solely rely on the force majeure class for terminating the 'Devas Agreement'.

31. On 17.02.2011, the union Cabinet Committee on Security (CCS) Officially determined to terminate 'Antrix Agreement'. On 25.02.2011, Antrix purported to terminate the 'Devas Agreement' Article 7(c) and Article 11(c) of the 'Devas Agreement' and to thereby caused irreparable loss to Devas, which lead Devas to invoke Pre Arbitration Steps and then Arbitration in accordance with the Arbitration Agreement contained in the 'Devas Agreement'. The money received by Antrix from 'Devas' towards 'Upfront Capacity Reservation Fees' was returned by 'Devas' without encashment.

32. When the endeavours of pre arbitration negotiations failed, 'Devas' invoked Arbitration by filing a requisite for Arbitration (RFA) before the International Court of Arbitration of the International Chamber of Commerce ('ICC') assailing the 'Termination of Devas Agreement' by 'Antrix'. The ICC 'Arbitral Tribunal' on 14.09.2015 published an Unanimous 'Arbitration Award', in favour of 'Devas' for damages amounting to USD 562.50 Millions + Pre Award simple interest at 3 – months USD LIBOR + 4% from February 2011 to September 2015.

33. As on September 2015, Antrix is liable to pay USD 672.79 Millions approximately to 'Devas' and that a simple interest at 18% per annum was also

granted post award till Antrix pays the ICC Award in full. A sum of USD 1.2 Billion approximately is the current outstanding amount.

34. Because of the filing of Winding up Petition and a 'Provisional Liquidator' being appointed, he had suspended the 'Powers of Devas Lawyers' to represent Devas in various proceedings including the proceedings relating to the ICC Arbitration Proceedings in Delhi High Court [in OMP (Comp) No.11 of 2021]. The 'Provisional Liquidator' who has been acting against 'Devas Interest' was confirmed as the 'Official Liquidator'.

35. The Mauritian shareholders of Devas, viz (CC Devas, Telcom Devas, Devas Employees Mauritius Private Limited) invoked Arbitration against the Republic of India under the India-Mauritius Bilateral Investment Protection Agreement on or about 03.07.2012 (the 'Mauritius BIT Arbitration') and further that Deutche Telecom AG also invoked arbitration against the Republic of India under the India-Germany Bilateral Investment protection Arbitration on or about 02.09.2013 (the German BIT Arbitration).

36. The 'Arbitral Tribunal' issued the partial final award on jurisdiction and liability in 'Mauritius BIT Arbitration', in favour of the 'Devas Mauritius Shareholders' on 27.05.2016. On 13.10.2020, the quantum award was passed to and in favour of the 'Shareholders'. Further, in the 'German BIT Arbitration Tribunal', in the year 2017 an 'Award' was passed on Jurisdiction and liability in favour of the 'Devas Shareholders'.

37. The Swiss Federal Court on 11.12.2018 had rejected the Republic of India's challenge to the German BIT Tribunal Award in favour of the 'Devas Shareholders'. The Government of India after the ICC and Mauritius BIT Awards had stepped up its actions against 'Devas' its shareholders and other Directors to further mala fide objective without any legal or factual basis and the purported 'FEMA and PMLA proceedings' were instances, in this regard.

38. The entire exercise of numerous Departments of Government of India is without jurisdiction and a flagrant abuse of state's machinery of the Government of India. As per Section 235 of the Companies Act, 2013, an investigation against 'Devas' was initiated by the 'Registrar of Companies' because of the fact that 'Arbitration was invoked' and in fact, WP(C) No.8554 of 2011 was filed by 'Devas' before the Hon'ble High Court of Delhi and Interim protection order was granted in favour of 'Devas'. During the pendency of the said Writ Petition, the 'Registrar of Companies' on 07.05.2012 issued a 'show cause notice' as to why the Company Certificate of Incorporation should not be cancelled and 'Devas' filed an application in the pending Writ Petition and that the Hon'ble High Court of Delhi had restrained the Registrar of Companies from proceeding with the show cause notice.

39. A Preliminary enquiry was registered by the Central Bureau of Investigation on 01.05.2014 alleging that certain Government Officials from Antrix had cheated the Government by abusing their financial position to cause favour to 'Devas' and that on the basis of the preliminary enquiry FIR No.RC217 2015 A 002 dated 16.03.2015 was registered in respect of the offences under Section 120B r/w 420 of Indian Penal Code together with Sections 13(2) r/w 13(1)(d) of the Prevention of Corruption Act, 1988. After that, based on the First Information Report ECIR No.12/BGZO/2015 was registered at Bangalore, on 31.07.2015 by the Enforcement Directorate, Bangalore Zonal Office against 'Devas' and others and that a charge sheet was filed by the CBI AC II New Delhi on 11.08.2016 and further on 08.01.2019 a 'Supplementary Charge Sheet' was filed.

40. Any of the averments made in the two charge sheets as mentioned aforesaid, can be relied upon as proof in respect of 'Fraud' and 'Cheating' especially, when no finding was given by the 'court of law' one way or other,

after examining the evidence of Central Bureau of Investigation. Also, Antrix never raised any allegation of fraud in the 'termination letter' dated 25.02.2011 or in its statement of defence dated 15.11.2013 filed before the 'ICC Arbitral Tribunal'.

41. The instant winding up proceedings appear to be an endeavour to prevent 'Devas' from pursuing its remedies in India or outside India (including Washington) where enforcement proceedings are pending on behalf of 'Devas'.

42. Antrix, on 10.11.2016, filed an application before the Hon'ble Civil Court, Bengaluru to amend the Section 34 Petition to allege among other things that the ICC award was based on an illegal investment which could not have been considered by the ICC Tribunal and also, on 30.11.2016, an application under Section 9 was filed (AA 483 of 2011) relying on the purported FEMA Proceedings that were under challenge before the Hon'ble Karnataka High Court in W.P. No.35168 of 2016 seeking to restrain 'Devas' from acting upon the ICC Award.

43. By placing reliance upon the aforesaid actions initiated by the Enforcement Directorate and the CBI, Antrix filed an application in terms of Section 36(2) of the Arbitration Act, praying to stay the ICC Award. Antrix filed CP No.06/BB/2021 before the National Company Law Tribunal, Bengaluru on 18.01.2021 without waiting for the decision in respect of the Section 36(2) Application filed by it.

44. The allegations made in the winding up petition (including Para 13) of the winding up Petition and Annexure P6 to the NCLT Petition are identical to the allegations raised by 'Antrix' before the Hon'ble High Court of Delhi in the Arbitration Proceedings. The allegations are subjudice before the Hon'ble Delhi High Court, which were filed earlier in point of time before the filing of the winding up petition. Therefore, these allegations cannot form the basis of

tribunal's opinion as required under Section 271(c) of the Company Act. Even for vacating an 'award' on the basis of fraud, the procedure is to challenge the same either in enforcement proceedings or in any other Competent Civil Court and not by winding up the Company holding the award and that too without providing an opportunity to properly defend itself.

45. 'Antrix' cannot identify specifically, a single fraudulent or illegal act that 'Devas' has committed. Fraud ought to have been raised at the stage of termination of 'Devas Agreement' and cannot be raised at a belated stage, after the 'ICC Award'. The Hon'ble Supreme Court in the decision Devas Multimedia Pvt. Ltd. v. Antrix Corporation Ltd. (vide Special Leave Petition No.28434 of 2018 dated 04.11.2020) had permitted 'Devas' to seek deposit of the sum awarded from the Hon'ble Delhi High Court in proceedings related to ICC Award currently pending 'Adjudicating'.

46. The Chief Commissioner of Income Tax had addressed a letter dated 04.11.2020 to the Vice President of the Income Tax Appellate Tribunal (produced before the National Company Law Tribunal) which refers to the BIT Arbitrations launched by Foreign Investors of Devas, which directs the Proceedings against the Devas be conducted on war footing.

APPELLANT'S CONTENTIONS: (In Company Appeal (AT)(CH) No.17 of 2021)

47. The Learned Counsel for the 'Appellant' submits that the 'Impugned Order' of the 'Tribunal' dated 25.05.2021 in Company Petition No.06/BB/2021 to the effect that 'Antrix' had satisfied the requisite conditions as per Section 271(c) of the Companies Act, 2013 is an illegal and incorrect one.

48. The Learned Counsel for the 'Appellant' contends that the 'Tribunal' had considered the execution of 'Devas Agreement', its classes, the interpretation of numerous classes, the 'Arbitration Proceedings', the 'ICC Award' and the

'Enforcement Proceedings' which are private disputes between the two parties and also sub judice before the relevant judicial and or Quasi Judicial Forums.

49. The Learned Counsel for the 'Appellant' takes a stand that the 'Appellant' that the 'adjudication' on 'Devas Agreement' 'ICC Award' 'Enforcement' was prima-facie outside the ambit of the 'Tribunal'. Also that, in a private dispute between the two parties, even if one of the party is owned and controlled by the Government, the same cannot be a subject matter of proceedings under Section 271(c) of the Companies Act.

50. The Learned Counsel for the 'Appellant' projects an 'argument' that for considering the 'allegations of fraud' in the present proceeding, the test is to consider whether the Company ought to be wound up and, in this regard, whether 'Devas' can exhibit a prima-facie defence or a plausible defence and its defence is not moonshine.

51. The Learned Counsel for the 'Appellant' submits that the 'National Company Law Tribunal, Bengaluru Bench' while passing the 'Impugned Order' in CP/06/BB/2021 on 25.05.2021 had not followed the mandatory provision of Advertisement of Hearing/petition before passing the final winding up order, and at least, two weeks' time was required for the 'Advertisement'. As such, the 'Appellant' was not provided with an opportunity of hearing.

52. The Learned Counsel for the 'Appellant' takes a stand that the 'sanction order' dated 18.01.2021 accorded by the Central Government is not a bona fide and valid one because of the fact that 'Antrix' (wholly owned company of the Government of India) is another arm of the Central Government. Also that the 'Provisional Liquidator' is also a Central Government Employee as per Section 359 of the Companies Act, 2013 and that the Central Government cannot be a 'judge' in its own cause.

53. The Learned Counsel for the 'Appellant' projects an 'argument' that 'Antrix' had failed to plead 'fraud' in the 'ICC Arbitration Proceedings' and hence it is estopped from pleading 'fraud' in the proceedings before the 'Tribunal'. Further, the Auditor's Reports appended to the financial statements of 'Antrix' had a categorical statement that 'Antrix' had not reported any 'fraud' on it, even after alleged discovery of 'fraud' in 2016.

54. The Learned Counsel for the 'Appellant' proceeds to point out that the 'Tribunal's 'arbitrary' finding in the impugned order that there was direct collusion and connivance with the officials of 1st Respondent/'Antrix' is an incorrect one because of the fact that Special CBI Court, PMLA Court and the Hon'ble Delhi High Court had not rendered any such finding. Also that, without an 'appreciation of evidence' and trial, the said finding of the 'Tribunal' cannot be sustained in the eye of Law.

55. It is represented on behalf of the 'Appellant' that even if a contract is procured by 'fraud' it is not 'void abinitio' and is only 'voidable' as per Section 19 of the Indian Contract Act, 1872.

56. The Learned Counsel for the 'Appellant' contends that the 'Tribunal' at paragraph 16 in the 'Impugned Order' had rendered a finding touching upon the merits of the 'Award' despite being aware that the 'Award' is under 'challenge' and in short, the said finding is beyond the jurisdiction of the 'Tribunal'.

57. The Learned Counsel for the 'Appellant' submits that the 1st Respondent/'Antrix Corporation Ltd.' had failed to disclose that the limitation to file a winding up petition is three years from when the 'right to apply accrues' as per Article 137 of the Limitation Act, 1963. Moreover, the 1st Respondent/'Antrix' had admitted that 'fraud' was discovered in the year 2016 and as per Section 17 of the Limitation Act, 1963, when there is a 'fraud', the 'cause of action' shall begin to run from the date of the 'fraud' is discovered.

58. Continuing further, the Learned Counsel for the 'Appellant' brings to the notice of this 'Tribunal' that the 1st Respondent/'Antrix Corporation Ltd.' in the Hon'ble High Court of Delhi in OMP (Comn) 11/2021 i.e. Proceedings for setting aside the 'ICC Award', had filed an 'amendment application' dated 10.11.2016 stating that they had discovered 'fraud' in the year 2016.

59. The Learned Counsel for the 'Appellant' contends that the 'Tribunal's observation that the 'cause of action' for winding up was a 'continuous cause of action' is an erroneous one. Apart from that, the finding of the 'Tribunal' that there is no need to publish the 'Advertisement' of the 'winding up petition' is contrary to law.

60. The Learned Counsel for the 'Appellant' forcefully submits that before passing of a 'final winding up order' and after 'Admission of the Petition', the 'Tribunal' is mandatorily required to invite objections through publication of 'Advertisement of Petition' by giving not less than 14 days' notice before the Hearing. All the objections filed/received in pursuance of the said 'Advertisement' before passing 'final winding up order' were to be heard by the 'Tribunal'.

61. According to the Learned Counsel for the 'Appellant', the 'Tribunal' had failed to appreciate that the termination of 'Devas Agreement' was an account of 'force majeure' and not on 'fraud'. Besides this, it is projected on the side of the 'Appellant' that even if it is held that the 'Tribunal' jurisdiction is not a summary one, then also without 'trial' a 'finding of fraud', 'collusion' or 'conspiracy' cannot be rendered.

62. The Learned Counsel for the 'Appellant' comes out with a plea that the 'Tribunal' at the time of passing of the 'Order' had failed to appreciate that the 'litigation' is pending qua the enforcement of ICC 'Award', which is sufficient in itself to refuse the 'winding up' because of the fact that if a 'litigation' by a

company is pending its substratum is not lost and that the company ought not to be warmed up.

63. The Learned Counsel for the 'Appellant' submits that the 'Tribunal' had ignored the amounts receivable by 'Devas' under the ICC 'Award', while considering the assets of 'Devas'. Also that, 'Devas' could not have been wound up in view of the fact that, it was incurring legal expenses to enforce the 'Award'.

64. The Learned Counsel for the 'Appellant' contends that the 'Tribunal' had not disposed of the 'Applications' filed by 'Devas' for conducting cross-examination and application for further 'Hearing' necessitated by the 1st Respondent/'Antrix' raised new 'arguments' in its written submissions, which were not raised in its 'pleadings' or in 'oral arguments'.

65. The Learned Counsel for the Appellant submits that the Companies (Auditors Report) order 2003, Companies (Auditors Report) order 2015 and Companies (Auditors Report) Order 2016 require all 'Auditors' to include in the Auditor's Report of each 'Financial Year' a statement to that effect that there has been no 'fraud' perpetuated by or on the Company. In this connection on behalf of the Appellant it is contended that an 'Auditor' finalises a Balance Sheet from the information furnished by the management of the Company and Company itself. As a matter of fact, 'Antrix' had never challenged the statements made in the Auditor's Report.

APPELANT'S CITATIONS:

1. The Learned Counsel for the 'Appellant' refers to the decision of the Hon'ble Supreme Court in Asset Reconstruction Company (India) Ltd. v Bishal Jaiswal & Ors. reported in Manu/SC/0279/2021 wherein it is held that:

> "Entry made in the Books of Accounts, including the Balance Sheet amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act, 1963."

2. The Learned Counsel for the 'Appellant' cites the decision of Hon'ble Supreme Court in Jignesh Shah & Anr. v Union of India & Anr. reported in (2019) 10 SCC 750 Online SC wherein at Page 750 at special pages 772 to 777 in paragraphs 28 to 34 and 38 it is observed as under:

> 28 "A reading of the aforesaid provisions would show that the starting point of the period of limitation is when the company is unable to pay its debts, and that Section 434 is a deeming provision which refers to three situations in which a company shall be deemed to be "unable to pay its debts" under Section 433(e). In the first situation, if a demand is made by the creditor to whom the company is indebted in a sum exceeding one lakh then due, requiring the company to pay the sum so due, and the company has for three weeks thereafter "neglected to pay the sum", or to secure or compound for it to the reasonable satisfaction of the creditor. "Neglected to pay" would arise only on default to pay the sum due, which would clearly be a fixed date depending on the facts of each case. Equally in the second situation, if execution or other process is issued on a decree or order of any court or tribunal in favour of a creditor of the company, and is returned unsatisfied in whole or in part, default on the part of the debtor company occurs. This again is clearly a fixed date depending on the facts of each case. And in the third situation, it is necessary to prove to the "satisfaction of the Tribunal" that the company is unable to pay its debts. Here again, the trigger points is the date on which default is committed, on account of which the company is unable to pay its debts. This again is a fixed date that can be proved on the facts of each case. Thus, Section 433(e) read with Section 434 of the Companies Act, 1956 would show that the trigger point for the purpose of limitation for filing of a winding-up petition under Section 433(e) would be the date of default in payment of the debt in any of the three situations mentioned in Section 434.
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> 29. Shri Kaul relide upon several well-known judgments, which lay down the law under Sections 433 and 434 of the Companies Act, 1956. He relied upon Madhusudan Gordhandas & Co. v. Madhu Woollen Industries (P) Ltd. (1971) 3 SCC 632 wherein in a case of a winding-up petition filed under Section 433(e), the High Court had rejected the claim of the appellant to wind up the Company as creditors of the Company. Unlike

the present case, the appellant therein gave no statutory notice to raise any presumptions of inability to pay debts. In this context, this Court held: (SCC p. 638, paras 20 and 21).

> "20. Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See London and Paris Banking Corpn., in re (1874) LR 19 Eq.444) Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See Brighton Club and Norfolk Hotel CO. Ltd., in re (1865)35 Beav 204 : 55 ER 873.)
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> 21. Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt. See A Company, In (1950) 94 SJ369. Where however there is no doubt that the company owes the creditor a debt entitling him to a winding-up order but the exact amount of the debt is disputed the court will make a winding-up order without requiring the creditor to quantify the debt precisely See Tweeds Garages Ltd., In 1962 Ch 406 : (1962) 2 WLR 38 The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends."

30. The Court then stated that as the making of a winding-up order is discretionary, the Court will ordinarily consider the wishes of all the creditors, and if they are opposed to winding up the company, the Court may, in its discretion, refuse such order. What was relied upon strongly by Shri Kaul was Para 29, in which the Court held: (Madhusudan Case Madhusudan Gordhandas & Co. v. Madhu Woollen Industries (P) Ltd., (1971) 3 SCC 632, SCC p. 641)

> "29…. In determining whether or no the substratum of the company has gone, the objects of the company and the case of the company on that question will have to be looked into. In the present case the company alleged that with the proceeds of sale the

company intended to enter into some other profitable business. The mere fact that the company has suffered trading losses will not destroy its substratum unless there is no reasonable prospect of it ever making a profit in the future, and the Court is reluctant to hold that it has no such prospect. [See Suburban Hotel Co., In (1867) LR 2 Ch App 737 (CA) and Davis and Co. Ltd. v. Brunswick (Australia) Ltd. (1936) I AII ER 299 (PC)]. The Company has not abandoned objects of business. There is no such allegation or proof. It cannot in the facts and circumstances of the present case be held that the substratum of the company is gone. Nor can it be held in the facts and circumstances of the present case that the company is unable to meet the outstandings of any of its admitted creditors. The company has deposited in court the disputed claims of the appellants. The company has not ceased carrying on its business. Therefore, the company will meet the dues as and when they fall due. The company has reasonable prospect of business and resources."

31. According to Shri Kaul, it was not possible for his client to approach the High Court with a winding-up petition as on the date on which he filed the suit for specific performance, because La-Fin (i.e. the Company sought to be wound up), could not be said to have lost its substratum as on such date. It was for this reason he approached the winding up Court in 2016, when the assets of La-Fin, which, as of 2013 were worth over INR 1000 crores, had in 2016 become only worth INR 200 crores.

32. This judgment Madhusudan Gordhandas & Co. v. Madhu Woollen Industries (P) Ltd., (1971) 3 SCC 632 does not take Shri Kaul's argument any further. Nowhere in the winding-up petition is it alleged that the company sought to be wound up has lost its substratum, in the sense that there is no reasonable prospect of it ever making a profit in the future, nor can it be said that the company had abandoned its business and is, therefore, unable to meet the outstanding owed by it. On the other hand, what emerges from this judgment Madhusudan Gordhandas & Co. v. Madhu Woollen Industries (P) Ltd., (1971) 3 SCC 632 (and para 21 therein in particular), is that it is not open for a company to say that a debt is undisputed, that it has ability to pay the debt, but will not pay the debt.

Equally, where a debt is clearly owed, but the exact amount of debt is disputed, the company will be held to be unable to pay its debts. What has to be seen in each case is whether the debt is bona fide disputed. If so, without more, a winding-up petitions would then be dismissed. One other thing must be noticed at this stage. The trigger for limitation is the inability of a company to pay its debts. Undoubtedly, this trigger occurs when a default takes place, after which the debt remains outstanding and is not paid. It is this date alone that is relevant for the purpose of triggering limitation for the filing of a winding-up petition. Though it is clear that a winding-up proceeding is a proceeding "in rem" and not a recovery proceeding, the trigger of limitation, so far as the winding-up petition is concerned, would be the date of default. Questions as to commercial solvency arise in cases covered by Section 434(1)(c) of the Companies Act, 1956, where the debt has first to be proved, after which the Court will then look to the wishes of the other creditors and commercial solvency of the company as a whole. The stage at which the Court, therefore, examines whether the company is commercially insolvent is once it begins to hear the winding-up petition for admission on merits. Limitation attaches insofar as petitions filed under Section 433(e) are concerned at the stage that default occurs for, it is at this stage that the debt becomes payable. For this reason, it is difficult to accept Shri Kaul's submission that the cause of action for the purposes of limitation would include the commercial insolvency or the loss of substratum of the company."

33. The next judgment referred to and relied upon by *Pradeshiya Industrial & Investment Corpn. Of U.P. v. North India Petrochemicals Ltd. (1994) 3 SCC 348.* In this case, it was found that Dalmia Industries had resorted to arbitration proceedings, in which there was a substantial dispute raised on the amount claimed. The passage strongly relied upon by Shri Kaul is set out hereinbelow: (SCC p.354, para 27)

"27. What then is inability when the section says "unable to pay its dues"? That should be taken in the commercial sense. In that, it is unable to meet current demands. As stated by Williams James, V.C. it is "plainly and commercially insolvent- that is to say, that its assets are such, and its existing liabilities are such, as to make it reasonably certain- as to make the Court feel satisfied – that the existing and probable assets would

be insufficient to meet the existing liabilities". (In *European Life Assurance Society, In re (1869) LR 9 Eq 122; V.V. Krishna Iyer Sons v. New Era Mfg. Co. Ltd. 1964 SCC OnLine Ker 206: (1965) 35 Comp Cas 410: (1965) 1 Comp LJ 179)"*

This passage is in the context of an order under Section 433(*e*) of the Companies Act, 1956 being discretionary, which is referred to in the preceding para 25. As stated hereinabove, the facts as to commercial insolvency are to be pleaded and proved at the admission stage of the winding-up petition; the trigger for the winding-up proceeding for limitation purposes, as has been stated hereinabove, being the date of default.

34. Shri Kaul then relied upon *Mediquip Systems (P) Ltd. v. Proxima Medical System Gmb H (2005) 7 SCC 42* and in particular, paras 18 and 23 thereof, which state as follows: (SCC pp. 49-50)

*"*18. This Court in a catena of decisions has held that an order under Section 433(*e*) of the Companies Act is discretionary. There must be a debt due and the company must be unable to pay the same. A debt under this section must be a determined or a definite sum of money payable immediately or at a future date and that the inability referred to in the expression "unable to pay its debts" in Section 433(*e*) of the Companies Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to be utilized merely as a means for realizing debts due from a company.

23. The Bombay High Court has laid down the following principles in *Softsule* (P) Ltd., In re 1976 SCC OnLine Bom 76: (1977) 47 Comp Cas 438 (Comp Cas pp. 443-44)

Firstly, it is well settled that a winding-up petition is not legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. If the debt is not disputed on some substantial ground, the court/tribunal may decide it on the petition and make the order.

Secondly, if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433 (1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play

and the winding up on the ground that the company is unable to pay its debts is not substantiated.

Thirdly, a debt about the liability to pay which at the time of the service of the insolvency notice, there is a bona fide dispute, is not "due" within the meaning of Section 434 (1)(a) and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" the same so as to incur the liability under Section 433(*e*) read with Section 434 (1)(a) of the Companies Act, 1956.

Fourthly, one of the considerations in order to determine whether the company is able to pay its debts or not is whether the company is able to meet its liabilities as and when they accrue due. Whether it is commercially solvent means that the company should be in a position to meet its liabilities as and when they arise."

38. We therefore allow Civil Appeal (Diary No.16521 of 2019) and dispose of Writ Petition (Civil) No. 455 of 2019 by holding that the winding-up petition filed on 21-10-2016 being beyond the period of three years mentioned in Article 137 of the Limitation Act is time-barred, and cannot therefore be proceeded with any further. Accordingly, the impugned judgment of the NCLAT Pushpa Shah v. IL&FS Financial Services Ltd., 2019 SCC Online NCLAT 572 and the judgment of the NCLT IL&FS Financial Services Ltd. v. La-Fin Financial Services (P) Ltd., 2018 SCC Online NCLT 11437 are set side.)

SLP (C) (Diary No.13468 of 2019 Arising from Judgment and Order in Pushpa Shah v. Union of India, 2019 SCC Online Bom 2385 [Bombay High Court, WP (Lodg.) No.352 of 2019, dt. 4-3-2019] & TP (C) No.817 of 2019.

39. In view of the aforesaid, nothing survives in so far as Special Leave Petition (Diary No. 13468 of 2019) and Transfer Petition (Civil) No.817 of 2019 are concerned, and they are accordingly disposed of as having become infructuous."

3. The Learned Counsel for the 'Appellant' adverts to the decision of the Hon'ble Supreme Court in Mediquip System (P) Ltd. v Proxima Medical System

GMBH reported in 2005(7) Supreme Court Cases wherein at Page 42 at Special Page 49 to 51 wherein at paragraphs 20, 24 and 25 it is observed as under:

20. "Section 433 of the Companies Act says:

"433 A Company may be wound up by the court,-

(a) – (d) * * *

(e) if the company is unable to pay its debts:

(f) * * *"

From the above it follows:

(1) there must be a debt; and

(2) the company must be unable to pay the same.

An order under clause (e) is discretionary.

24. The Madras High Court in Tube Investments of India Ltd. v. Rim and Accessories (P) Ltd. (1990) 3 Comp LJ 322, Comp LJ at p. 326 has evolved the following principles relating to bona fide disputes.

(i) if there is a dispute as regards the payment of the sum towards the principal, however small that sum may be, a petition for winding up is not maintainable and the necessary forum for determination of such a dispute existing between parties is a civil court;

(ii) the existence of a dispute with regard to payment of interest cannot at all be construed as existence of a bona fide dispute relegating the parties to a civil court and in such an eventuality, the Company Court itself is competent to decide such a dispute in the winding-up proceedings; and

(iii) if there is no bona fide dispute with regard to the sum payable towards the principal, it is open to the creditor to resort to both the remedies of filing a civil suit as well as filing a petition for winding up of the company.

25. The rules as regards the disposal of winding-up petition based on disputed claims are thus stated by this Court in Madhusudan Gordhandas & Co. v. Madhu Woollen Industries (P) Ltd. (1971) 3 SCC 632 : (1972) 42 Comp Cas 125 : AIR 1971 SC 2600. This Court has held that if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The principles on which the court acts are:

(i) that the defence of the company is in good faith and one of substance;

(ii) the defence is likely to succeed in point of law; and

(iii) the company adduces prima facie proof of the facts on which the defence depends."

4. The Learned Counsel for the 'Appellant' seeks in aid of the decision of the Hon'ble Supreme Court in Pradheshiya Industrial and Investment Corporation UP v North India Petro Chemicals Ltd. and Anr. reported in 1994 (3) SCC at Page 348 at Special Page 354 and 359 wherein at paragraph 27 and 29 it is observed as under:

> 27 "What then is inability when the section says "unable to pay its dues"? That should be taken in the commercial sense. In that, it is unable to meet current demands. As stated by William James, V.C. it is "plainly and commercially insolvent – that is to say, that its assets are such, and its existing liabilities are such, as to make it reasonably certain – as to make the Court feel satisfied – that the existing and probable assets would be insufficient to meet the existing liabilities". (In European Life Assurance Society, LR (1869) 9 Eq. 122; V.V. KrishnaIyer & Sons v. New Era Mfg. Co. Ltd. (1965) 35 Comp Cas 410: (1965) 1 Comp LJ 179 (Ker)
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> 29. It is beyond dispute that the machinery for winding-up will not be allowed to be utilized merely as a means for realising its debts due from a company. In Amalgamated Commercial Traders (P) Ltd. v. A.C.K. Krishnaswami (1965) 35 Comp Cas 456 (SC) this Court quoted with approval the following passage from Buckley on the Companies Acts. (13th Edn., p. 451):
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> > "It is well-settled that a winding-up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the court."

5. The Learned Counsel for the 'Appellant' by referring to Section 3 of the Limitation Act, 1963 under the Head 'Bar of Limitation' points out that 'it is the duty of the Court/Tribunal to go into the route of the matter independently, if

suit, appeal or application is beyond limitation or not, although the plea of limitation is not projected as a defence'.

6. The Learned Counsel for the 'Appellant' places relies on the decision of the Hon'ble High Court of Karanataka in Srinivasa (T) v Flemming India reported in Manu/KA/0089/1990 wherein at paragraph 7 and 8 it is observed as under:

> 7 "That the rent was for furniture which landlord was to supply has been pleaded and spoken to by the managing director-respondent. It his evidence, he has supported his pleading as to the circumstances under which exhibit P-1 the bailment agreement came into being. It may be so or may not be so. But it is not for this court to assess that evidence and refuse a decree or draw up a decree in favour of the petitioner and then proceed to wind up the company. In summary procedure which this court, as a company court must follow, these things cannot be investigated in depth. The court is satisfied that the defence raised in the circumstances of case in bona fide and likely to succeed in a civil court. If that prima facie case is found, that would constitute sufficient reason for this court to reject the petition relegating the parties to the civil court. In this connection, it is useful to extract a passage from the decision of the Supreme Court in Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd. [1972] 42 Comp Cas 125. The Supreme Court has observed that (at page 131):
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> > "Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt. Where, however, there is no doubt that the company owe the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed, the court will make a winding up order without requiring the creditor to quantify the debt precisely. The principle on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, and, thirdly, the company adduces prima facie proof of the facts on which the defence depends." (underlining Here printed in italics. Is mine)

8. The ruling of the Supreme Court squarely applies to the defence pleaded by the respondent-company here."

7. The Learned Counsel for the 'Appellant' points out the decision of the Hon'ble Supreme Court in Nehru Place Hotels Ltd. v Bushan Ltd. reported in Manu/DE/2988/2011 wherein at paragraph 22 and 24 among other things it is observed as under:

"22. In a recent decision of the Supreme Court in the case of IBA Health (I), Pvt. Ltd. Info-Drive Systems Sdn., Bhd: MANU/SC/0772/2010 : 2010 (10) SCC 553, it was observed that it is the duty of the company court to examine whether the company, whose winding up has been sought, has a genuine dispute to a claimed debt. The Supreme Court observed that a dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The company court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial and the grounds of dispute, on the part of the company, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. The Supreme Court observed that:

> It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the Court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a bona fide disputed debt."

24 .The question whether the Respondents are right in contending that in view of the provisions of the Delhi Apartment Ownership Act, 1986, they are not liable to pay the amount agreed upon by them and recorded in the compromise decree, cannot be decisively gone into by a company court in ascertaining as to whether the Respondents were unable to pay their debts. All that the company court is required to do, as observed by the supreme Court in IBA Health (supra), is that whether the dispute raised by the Respondents was substantial and genuine or in other words, whether it was bona fide and not spurious, speculative, illusory or misconceived. We note that the learned company Judge has examined the provisions of the

Delhi Apartment Ownership Act, 1986 in great detail and has then come to the conclusions, which according to him also, are only tentative. All that the company court is required to do is to examine as to whether there is a bona fide dispute with regard to the debt, which is sought to be enforced. Once the company court comes to the conclusion that the dispute is substantial and genuine, meaning thereby that it is bona fide and not illusory or misconceived, then the only course open to the company court, is that it should dismiss the petition for winding up and leave the creditor to his civil remedies. The Supreme Court has cautioned that winding up proceedings should not become a substitute for recovery proceedings."

8. The Learned Counsel for the 'Appellant' refers to the decision of the Hon'ble Supreme Court in MVI. Ahmadhur v Registrar of Companies, reported in 1972 SCC Online Gavati at Page 77 wherein at paragraph 6 to 13 it is observed as under:

6. "In the instant case no advertisement as required by rule 96 was either published or was directed to be published.

7. Rule 99 reads as follows:

"99. Advertisement of Petition. – subject to any directions of Court, the petition shall be advertised within the time and in the manner provided by rule 24 of these Rules. The advertisement shall be in Form No.48."

8. Rule 24 reads as follows:

"24. Advertisement of petition. – (1) Where any petition is required to be advertised, it shall unless the Judge otherwise orders, or these Rules otherwise provide, be advertised not less than fourteen days before the date fixed for hearing, in one issue of the Official Gazette of the State or the Union Territory concerned, and in one issue each of a daily newspaper in the English language and a daily newspaper in the regional language circulating in the State or the Union Territory concerned, as may be fixed by the Judge.

(2) Except in the case of a petition to wind up a company the judge may, if he thinks fit, dispense with any advertisement required by these rules."

9. Under Form No.48 Notice has to be given of the petition for winding up a company by the High Court to any creditor, contributory or other person desirous of supporting or opposing the making of an order on the said petition.

10. On consideration of the provisions of rules 99 and 24 and Form No.48 it is clear that when a petition for winding up a company is filed in court, it shall give directions as to advertisement to be published in accordance with the relevant rules. In view of sub-rule (2) of rule 24, the publication of the advertisement of a petition to wind up a company cannot be dispensed with.

11. In the instant case no advertisement as required by rule 96 read with rules 99 and 24 and Form No.48 was published. That being the position, the impugned order of winding up of the company is not legally sustainable.

12. This view is supported by the decision in National Conduits (P.) Ltd. v. S.S. Arora (A.I.R. 1968 S.C. 279), wherein the Supreme Court has observed (at page 281) as follows:

> "When a petition is filed before the High Court for winding up of a company under the order of the court, the High Court: (i) may issue notice to the company to show cause why the petition should not be admitted(ii) may admit the petition and fix a date for hearing and issue a notice to the company before giving directions about advertisement of the petition; or (iii) may admit the petition, fix the date of hearing the petition, and order that the petition be advertised and direct that the petition be served upon the persons specified in the order. A petition for winding up cannot be placed for hearing before the court, unless the petition is advertised; that is clear from the terms of rule 24(2)."

13. The law is well-settled that a petition for winding up of a company cannot be placed for hearing before the court unless the petition has seen advertised as required under the rules."

9. The Learned Counsel for the 'Appellant' cites the decision of the Hon'ble Supreme Court in Falcon Gulf v Industrial Designs Bureau reported in 1993 SCC Online Rajasthan wherein at Page 193 at paragraph 7 to 11, 17 and 18 it is observed as under:

7. “The learned counsel for the appellant urged that as the compliance of Rule 96 of the Companies (Court) Rules, 1959 (hereinafter to be referred to as ‘the Rules’) had not been made, the petition was liable to be rejected. The learned counsel urged that the learned Company Judge did not consider as to whether the petition was liable to be admitted and for advertisement to be published, the mandatory provision has not been complied with and the consequence of the same was that the order winding up was illegal. The learned counsel for the appellant also referred to Rule 99 of the Rules and submitted that the advertisement had not since been made, the learned Company Judge had no jurisdiction to go into the merits of the winding up petition and direct for winding up.

8. Rules 96 and 99 of the Companies (Court) Rules, 1959 are reproduced below:-

“96. Admission of petition and directions as to advertisement:- Upon the filing of the petition, it shall be posted before the Judge in Chambers for admission of the petition and fixing a date for the hearing thereof and for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served. The Judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition.

“Advertisement of petition:- Subject to any directions of the Court, the petition shall be advertised within the time and in the manner provided by rule 24 of these rules. The advertisement shall be in Form No.48.”

9. The learned counsel for the respondent urged that this objection ought to have been raised before the learned Company Judge and as it had not been done, the appellant was estopped from raising it in the appeal. In the alternative, counsel contended that since the power of a court of appeal is the same as that of the first court, the appellate court can direct for the advertisement in accordance with Rule 96 of the Rules and could not be pleased in that event to set aside the order of the learned Company Judge and send the case back for trial to him, in as much as, to do so would be inequitable and unjust. The learned counsel urged that once a petition for compulsorily winding up of a company was admitted, the Court was not bound forthwith to advertise the petition. That being so, the Rule 96 was not mandatory and had to be held as directory.

10. “We have heard learned counsel for the parties and are of the opinion that since the compliance of Rule 96 of the Rules was a must before any order of compulsorily winding up made, the order of the learned Company Judge has to be set-aside. It may be true that the Court of appeal has the same powers as the first court. We would have certainly acted on that principle had the defect been of technical nature and would have not affected the merits. The steps required by Rule 96 are of vital nature and compliance of the same appears to be mandatory. The purpose of advertisement contemplated by Rule 96 is very wholesome and is mean for the benefit of all the creditors and shareholders.

11. Winding up of liquidation is the process by which the management of a company’s affairs is taken out of its directors’ hands and its assets are realised by a liquidator. A company may be wound up under the Companies Act by the Court on the grounds laid down in Section 433. Before the winding up proceedings are taken by the creditors, not only a petition must be served upon the company, but also it must be advertised in the manner prescribed in Rule 24 of the Rules.

17. In the beginning, we have noted the order of the then learned Company Judge, who being of the opinion that as the company petition filed in the connected case No. 11/1991 had been advertised, it was not necessary to advertise the present petition. Two matters were different. Advertisement of one petition No. 11/1991 was for the purposes of that alone. The requirement of law needed advertisement of other as well. As this had not been done, the order of the learned Company Judge is liable to be set-aside.

18 For what we have said above, the only course left is to set aside the order of the learned Company Judge and send the case back to him for decision after getting the winding up petition advertised in accordance with the Companies (Court) Rules, 1959.”

10. The Learned Counsel for the ‘Appellant’ adverts to the decision of the Hon’ble High Court of Delhi in CO APP 5/2004 dated 21.09.2004 between Jagatjit Industries Ltd. v Jagatjit Brown Foreman India Ltd. reported in 2021 SCC Online SC 321 wherein at paragraph 8, 10, 11 to 14 it is observed as under:

8“In support of the aforesaid contention that the impugned judgment and order was passed in violation of the mandatory provision of Rule 96 read

with Rule 24 of the Rules, reliance has been placed upon the Division Bench decision of this Court in Lt. Col R.K. Saxena v. Imperial Forestry Corporation Ltd. Reported in 2001 VI AD (Delhi) 823; judgment of the Gauhati High Court in MVI. Ahmadur Rahman and others v. Registrar of Companies reported in Vol. 43 (1973) Company Cases 522; on the Supreme Court decision in The National Conduits (P) Ltd. V. S.S. Arora reported in AIAR 1968 SC 279 and also the Division Bench decision of the Rajasthan High Court in Falcon Gulf Ceramics v. Industrial Designs Bureau reported in AIR 1994 Rajasthan 120. The learned counsel or the appellant has also drawn our attention to the provisions of Rules 24, 96, 99 and Form No. 48 of the Company (Court) Rules. Relying on the said provisions, the counsel submitted that a company petition for winding up of a company cannot be placed or hearing before the court unless the petition has been advertised as required under the Rules. We have also heard the counsel for the respondent on the aforesaid preliminary issue. In order to appreciate the contention, we may appropriately extract the relevant provisions, namely, Rules 96, 99 and 24 of the said Rules and Form No. 48.

> "96 Admissions of petition and directions as to advertisement. Upon the filing of the petition, it shall be posted before the Judge in Chambers for admission of the petition and fixing a date for the hearing thereof and for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served. The Judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition."
>
> "99 Advertisement of petition.- Subject to any directions of the Court, the petition shall be advertised within the time and in the manner provided by rule 24 of these rules. The advertisement shall be in Form No. 48."
>
> "24 Advertisement of petition.- (1) Where any petition is required to be advertised, it shall, unless the Judge otherwise orders, or these rules otherwise provide, be advertised not less than fourteen days before the date fixed for hearing, in one issue of the Official Gazette of the State or the Union Territory concerned, and in one issue each of a daily newspaper in the English language and a daily newspaper in the regional language circulated in the State or the Union Territory concerned, as may be filed by the Judge.

(2) Except in the case of a petition to wind-up a company, the Judge if he thinks fit, dispense with any advertisement required by these Rules."

"FORM No.48

(See rule 99)

[Heading as in Form No.1]

Company Petition No……of 19…

……..Petitioner

Advertisement of Petition

Notice is hereby given that a petition for the winding-up of the above-named company by the High Court at……..(or the district Court of …….) was on the ……..day of ……19…… presented to the said Court by the said company [or, where the petition was not presented by the company, state the name and address of the petitioner and the capacity in which presents the petition e.g., creditor, contributory, etc.] and the said petition is directed to be heard before the court of the ……day of 19……. Any creditor, contributory or other person desirous of supporting or opposing the making of an order on the said petition should send to the petitioner or his advocate notice of his intention signed by him or his advocate with his name and address, so as to reach the petitioner or his advocate not later than 5 days before the date fixed for the hearing of the petition, and appear at the hearing for the purpose in person or by his advocate. A copy of the petition will be furnished by the undersigned to any creditor or contributory on payment of the prescribed charges for the same.

Any affidavit intended to be used in opposition to the petition should be filed in court, and a copy served on the petitioner or his advocate, not less than 5 days before the date fixed for hearing.

Advocate for the petitioner……"

10. The question, therefore, that arises for consideration is as to whether or not such citation is required to be published before ordering for winding up of a company under the provisions of Section 433 of the Companies Act. The relevant provisions have already been extracted.

Rule 96 provides that the company petition would be posted before a Judge in Chambers for admission of the petition and for fixing a date for the hearing thereof and for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served. It is also provided that the Judge may, if he thinks fit, direct advertisement of the petition. It is thus clear that the company petition on being filed is to be posted before the Company Judge for admission when the Company Judge may (a) issue notice to the company to show cause why the petition should not be admitted (b) admit the petition and fix a date for hearing, and issue a notice to the company before giving directions about advertisement of the petition, or (c) admit the petition, fix the date of hearing of the petition, and order that the petition be advertised and direct that the petition be served upon persons specified in the order.

11. Rule 24 of the rules, which is extracted herein above, also provides the mode and manner of advertising a petition, which is required to be advertised in the manner provided therein. We may also refer to sub-rule (2) of Rule 24, which provides that there is no discretion vested on the Company Judge as a petition for winding up cannot be placed for hearing before the Court unless the petition is advertised. This position is clear on a bare perusal of the aforesaid sub-rule 2 of Rule 24/

12. In this connection, we may also refer to the contents of Form 48, which provides that any creditor, contributory or other person desirous of supporting or opposing the making of an order on the said petition should send to the petitioner or his advocate notice of his intention signed by him or his advocate with his name and address. The contents of From No.48 clearly prove and establish that the aforesaid advertisement is to be carried out before a company petition is set down for hearing.

13. The aforesaid provisions also came up for consideration before the Supreme Court in the National Conduits (P) Ltd. (supra) wherein the Supreme Court has held that a petition for winding up cannot be placed for hearing before the Court, unless the petition is advertised which is clear from the terms of Rule 24(2) of the Rules. Following the aforesaid decision of the Supreme Court, the Division Bench of this Court in Lt. Col. R.K. Saxena (supra) and Division Bench of Gauhati High Court in MVI. Ahmadur Rahman and others (supra) have held that the petition for winding up cannot be placed for hearing before the Court, unless the

petition is advertised, which is clear from the terms of Rule 24(2) of the Rules.

14. In our considered opinion, the requirement of advertising as provided for under the provisions of Rules. 96, 99 and 24 is mandatory and there could be no deviation from the aforesaid procedure, which has to be followed before an order for winding up of a company is passed. Since in the present case, no citation was brought out before as required under the aforesaid provisions of the rules before ordering for winding up of the respondent company (appellant herein), we are satisfied that the impugned order is required to be set aside for non-compliance of the aforesaid mode and manner of publication before placing the petition for hearing and ordering for winding up of the company."

11. The Learned Counsel for the 'Appellant' points out the decision in P. Vijay Krishna Prasad, Proprietor, M/s.Vijay Transport Services, Chennai-28, Tamil Nadu, India v Howra Biopower India Ltd., AURO MIRA HOUSE New No.29, OldNO.11, Shafee Mohammed Road, Thousand Lights, Chennai 6, Tamil Nadu reported in 2014 SCC Online Madras 880 wherein at paragraph 4, it is observed as under:

4."An argument may be advanced that the Court is not justified in dismissing the company petition without issuing notice to the respondent. I am unable to accept the plea that in all cases notice should be sent to the respondent, when the petitioner has not made out a prima facie case for issuing notice. It is to be borne in mind that the winding up petition is like a death warrant to accompany. A notice in a winding up petition is initiation of winding up proceedings. The respondent company will have to incur the cost of litigation, besides being engaged in prolonged litigation to defend its case. A petition under Section 433 of the Companies Act can at the best be considered as a resort to wind up accompany which apparently appears to be company which is a chronic defaulter and situation warrants the winding up of the company. The Courts have been consistently taking the view that while bona fide litigations should be encouraged, misconceived and superfluous litigating procedures should be curbed. A petition for winding up of a company

should not be entertained as a matter of course. Only in circumstances which clearly establish that the company is suffering from a situation which attracts the provisions of Section 433 of the Companies Act, the question of admitting the case and issuing notice will arise. If a notice of the Court in a case of winding up catches the wind, it will reach the body of other creditors and will immediately trigger the panic button and the same would lead to disastrous consequences to all concerned. Several stake holders will be affected. Therefore, the Court should be cautious while issuing a notice in the petition filed for winding up. One of the tests that have been laid down in various decisions of the Court in a petition filed under Section 433 of the Companies Act is complete disclosure in the petition, the details that are relevant for the Court to consider issuing a notice. The Court will have to consider all such particulars before exercising its discretion to issue notice. If the petition does not prima facie establish a case under Section 433 of the Companies Act, the court is justified in dismissing the petition at the threshold. It is not a matter of right for the creditor to lay a petition for winding up on a mere debt. Something more is required."

12. The Learned Counsel for the 'Appellant' refers to the decision in Rohit Manjrekar M.S. Earth Events (India) Private Limited v Registrar of Companies, Karnataka, 2018 SCC Online NCLT 31749 wherein at paragraph 5 it is observed as under:

> 5"As per Section 252 of the Companies Act 2013, a person/Company/any member or creditor, or workmen thereof can approach the Tribunal by way of appeal if striking off the company is contrary to law, within a period of 3 years/20 years as case may be. And the object of the provision is to give chance to the aggrieved parties of striking off subject to satisfying the Tribunal that the impugned action is contrary to law. AS stated by the ROC, it is true that this Tribunal is only empowered to order restoration of the Company, which is struck off, subject to justification furnished by the party. We are convinced that the Company is active in its business since its inception, and it also used to comply with all statutory requirements as per law except the defaults which leads to striking off the

Company by the ROC. As per law, a Company cannot be struck when such Company is involved in litigation. As per documents filed along with petition, the Company is also involved in a litigation by instituting a Trade Mark case before City Civil Court and Sessions Judge, Bangalore at the relevant point of time. Therefore, is just and proper to order restoration of the name of Company as prayed for."

13. The Learned Counsel for the 'Appellant' cites the decision of the Hon'ble Calcutta High Court in Bukhtiarpur Bihar Light Railway Co. Ltd. v Union of India and Anr. reported in AIR 1954 Cal 499 wherein at paragraph 32 (Hon'ble Chief Justice Mr. Chakkaravarthi) and 38(Hon'ble Justice S.R. Gupta) it is observed as under:

> 32 "A winding-up order may be a form of equitable execution, but there is no equity in making such an order when the debt of the creditor is not in peril, although the substratum of the company may be gone, and when matters remain outstanding which can be best attended to in the interest of the share-holders by the company functioning as a company through its directors. A winding-up order is not a normal alternative in the case of a company to the ordinary procedure for the realisation of debts due from it.
>
> 38. Thus, it appears to me that the facts on which it is urged by Mr.Kar that the substratum of the company is gone are very much in dispute between the parties. It is impossible to come to a definite finding one way or the other on the materials before us. It is not possible to come to a definite conclusion that the railway was taken over from the company by the District Board of Patna and unless we can do that, the question that the substratum of the company is gone cannot be entertained as the basis for making an order for winding up."

14. Apart from the above decisions, the Learned Counsel for the 'Appellant' points out the decision of the Hon'ble High Court of Delhi in ZTE Corporation v. Garg and Ors. reported in Manu/DE/0691/2013 wherein at paragraph 10 and 11 it is observed as under:

10 “Merely because a financial loss would be suffered by the appellant qua the arbitration Awards which had been passed against him would not entitle him to come under the exception seeking a refusal of the restoration of the company. The position of the company vis-à-vis this stand is that a healthy company who was admittedly operational at the time when its name was struck off would be deprived of its right to function as a going concern and in the bargain would not be permitted to recover its dues which amounts have accrued to it under the Awards of the Arbitral Tribunal.

11. In this factual scenario, in no manner can it be said that it would not be “just” to restore the name of the company. The concept of “just” being to enable a person to get his due; based in turn on the concept of fairness.”

15. The Learned Counsel for the ‘Appellant’ falls back upon the decision of the Hon’ble Supreme Court in Svenska HandelsBanken v M/s Indian Charge Chrome and others reported in 1994 (1) SCC at Page 502 wherein at special page 517 at paragraphs 40 to 42 and at special page 530 at paragraph 86 and 87 it is observed as under:

40. “With all due respect to the learned Judge, we fail to understand this reasoning. Section 92 of the Evidence Act debars the court from looking into oral evidence once the contract is executed in writing except as provided for in six provisos thereof.

41. Again it appears that the High Court found a strong prima facie case against defendant 4 merely on reading the plaint. Pleadings make only allegations or averments of facts. Mere pleadings do not make a strong case of prima facie fraud; The material and evidence has to show it. No material whatsoever is referred to by the High Court.

42. In A.L.N. Narayanan Chettyar v Official Assignee, High Court Rangoon (AIR 1941 PC 93) the Privy Council held that:

“Fraud like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion and conjecture.

86. We have already held that the Contracts between the lenders and the borrower are not vitiated by any fraud much less established fraud and

there is no question of irretrievable injury. Therefore, there was no reason for the High Court to set aside the order of the trial court. Again there is no case of any irretrievable injury either of the type as held in the case of itek Corpn. (566 Fed Supp 1210, 1217) As there is no difficulty in the judgment of this country being executable in the courts in Sweden.

87. The High Court was not right in working on mere suspicion of fraud or merely going by the allegations in the paint without prima facie case of fraud being spelt out from the material on record."

16. The Learned Counsel for the 'Appellant' refers to the decision of the Hon'ble Supreme Court in V.Ravikumar v State rep. by Inspector of Police, District Crime Branch, Salem, Tamil Nadu and Ors. reported in 2019 (14) SCC at Page 568 wherein at special page 569 it is observed and held as under:

"A mere breach of contract is not in itself a criminal offence, and gives rise to the civil liability of damages. However, the distinction between mere breach of contract and cheating, which is a criminal offence, is a fine one. While breach of contract cannot give rise to criminal prosecution for cheating, fraudulent or dishonest intention is the basis of the offence of cheating. This has to be determined in the facts and circumstances of each case. The language and tenor of *Vesa Holdings*, (2015) 8 SCC 293 particularly the observation that breach of contract would give rise to an offence of cheating only in those cases where there was any deception played at the very inception, is to be understood in the context of the facts of that case and accordingly construed. The phrase "in those cases where there was any deception played at the very inception" cannot be read out of context. It is well settled that a judgment is a precedent for the issue of law which is raised and decided. Phrases and sentences in a judgment are to be understood in the context of the facts and circumstances of the case and the same cannot be read in isolation. [Paras 23 to 30]

Hridaya Ranjan Prasad Verma v. State of Bihar. (2000) 4 SCC 168 : 2000 SCC (Cri) 786, relied on

Vesa Holdings (P) Ltd. V. State of Kerala, (2015) 8 SCC 293 : (2015) 3 SCC (Cri) 498, *clarified*

In this case, in the FIR, there were allegations of fraudulent and dishonest intention including allegations of fabrication of documents. Thus it cannot be said that there were no allegations which prima facie constitute ingredients of offences under Sections 420, 409 and 34 of the Penal Code in complaint. The allegations of fraud and cheating prima facie constitute offences under Section 420 of the Penal Code. The correctness of the allegations can be adjudged only at the trial when evidence is adduced." [Paras 23 and 31].

17. The Learned Counsel for the 'Appellant' cites the Judgment of this Tribunal in Company Appeal (AT) (INS) No.667 of 2020 dated 01.02.2021 between M+R Logistics (India) Pvt. Ltd. v. AGA Publications Ltd. wherein at paragraph 20 and 21 it is observed as under:

20. "Section 9 of IBC deals with the Application for initiation of Corporate Insolvency Resolution Process (in short CIRP) by Operational Creditor, Sub-section 3(d) read as under:

…

"(3)(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and"

…

As per the decision of the Hon'ble Apex Court, the Corporate Debtor (Respondent in this case) must bring to the notice of Operational Creditor, the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute. In the present case, the Respondent very well brought to the notice of the Appellant with regard to the existence of dispute much prior to filing Section 9 Application. Therefore, the Judgment of Hon'ble Apex Court squarely applicable to the facts of present case.

21. From the facts and records it is emphatically clear that there exists a dispute between the parties which are prior to issuance of Demand Notice. Neither the Adjudicating Authority nor this Appellate Tribunal, in summary jurisdiction, can go into those issues which otherwise require a regular trial."

18. According to the Learned Counsel for the 'Appellant' in the decision of the Hon'ble Supreme Court in Manoj Narula v Union of India reported in (2014) 9 SCC wherein at Page 1 at special page 64 wherein at paragraph 122 it is observed as under:

> 122. "The law does not hold a person guilty or deem or brand a person as criminal only because an allegation is made against that person of having committed a criminal offence – be it in the form of an off-the cuff allegation or an allegation in the form of a first information report or a complaint or an accusation in a final report under Section 173 of the Criminal Procedure Code or even on charges being framed by a competent court. The reason for this is fundamental to criminal jurisprudence, the rule of law and is quite simple, although it is often forgotten or overlooked – a person is innocent until proven guilty. This would apply to a person accused of one or multiple offences. At law, he or she is not a criminal – that person may stand "condemned" in the public eye, but even that does not entitle anyone to brand him or her a criminal. Consequently, merely because a first information report is lodged against a person or a criminal complaint is filed against him or her or even if charges are framed against that person, there is no bar to that person being elected as a Member of Parliament or being appointed as a Minister in the Central Government."

19. The Learned Counsel for the 'Appellant' cites the decision of the Hon'ble Supreme Court in New Horizons Limited v Union of India reported in 1995(1) SCC at Page 478 at Special Page 479 wherein at paragraph 17 it is observed as under:

> "In the matter of entering into a contract, the State does not stand on the same footing as a private person who is free to enter into a contract with any person he likes. The State, in exercise of its various functions is governed by the mandate of likes. The State, in exercise of its various functions, is governed by the mandate of Article 14 of the Constitution which excludes arbitrariness in State action and requires the State to act fairly and reasonably. The action of the State in the matter of award of a contract has to satisfy this criterion. Moreover a contract would either

involve expenditure from the State exchequer or augmentation of public revenue and consequently the discretion in the matter of selection of the person for award of the contract has to be exercised keeping in view the public interest involved in such selection. Therefore, while dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or Licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant. It is however, recognised that certain measure of "free play in the joints" is necessary for an administrative body functioning in an administrative sphere."

20. The Learned Counsel for the 'Appellant' refers to the decision of the Hon'ble High Court of Kerala in Bernad Thattil v Ramachandra Pillai reported in 1987 CriLJ 739 wherein at paragraph 4 it is observed as under:

4. "It is contended by the learned Counsel for the Petitioner that the reply notice sent by the petitioner's lawyer cannot be proved to have been sent under Instructions from the accused on account of the embargo contained in Section 126 of the Evidence Act prohibits disclosure of any communication made by a client to his lawyer. The said provision says that:

no barrister, attorney, pleader or vakil, shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client.

The interdict embodied in Section 126 of the Evidence Act is against disclosure of the communication made to a lawyer in the course of his employment as such. If the communication has already been disclosed, then the inhibition Under Section 126 loses its effectiveness. To disclose means to make known or to reveal. That communication which has already been made known to others, or already been revealed to another, does not have the lid of confidentiality over it. In such circumstances, no

question of disclosure arises since the communication has already been made known to others. In this case, what is stated in the reply notice by the petitioner's lawyer is evidently what he has disclosed to others, and more particularly, to the respondent's lawyer. Therefore, the said communication cannot continue to have the protection afforded by Section 126 of the Evidence Act."

APPELANT'S SUBMISSIONS (In Company Appeal (AT)(CH) No.24 of 2021)

21. According to the Learned Counsel for the 'Appellant'/'DEMPL' the 'Appellant'/'DEMPL' is a shareholder of 'Devas Multimedia Pvt. Ltd. (Appellant in Comp.App.(AT) (CH) No.17 of 2021) holding 3.48% of the equity share capital of 'Devas' and that the 'Appellant' had subscribed to the equity shares of 'Devas Multimedia Pvt. Ltd.' (Devas) between the year 2009 and 2010 after securing the requisite statutory approvals from the 'Foreign Investment Promotion Board'.

22. It is the submission of Learned Counsel for the 'Appellant' that the 'Appellant'/'DEMPL' projected CA No.11 of 2021 in CP No.06/BB/2021 before the 'Tribunal' seeking to implead itself in the winding up proceedings and the said application came to be dismissed on 25.02.2021. Being aggrieved against the dismissal order of the CA No.11 of 2021 dated 25.05.2021 the 'Appellant' has preferred the instant Company Appeal (AT) (CH) 24 of 2021 and also the 'Appellant', assailed the final order of the 'Tribunal' dated 25.05.2021 Impugned Order passed in CP No.06/BB/2021 ordering the winding up of 'Devas'.

23. The Learned Counsel for the 'Appellant' comes out with a plea that the 'Appellant' is directly and vitally affected by the 'Impugned Order' passed by the 'Tribunal', because of the fact that as shareholders like the 'Appellant' have as a consequence of the 'Impugned Order', among other things lost their right to

participate in the affairs and the management of 'Devas'. In this regard, the Learned Counsel for the 'Appellant' refers to the Hon'ble Supreme Court decision in SP Gupta v President of India 1981 Supp (1) SCC 87 wherein at paragraph 16 it is held that where the company is unable to represent and protect its interest, the shareholder has a right to initiate proceedings to protect the interest of the Company and its Shareholders and/or Creditors.

24. The Learned Counsel for the 'Appellant points out that 'any person aggrieved can file an 'Appeal' as seen from the language of Section 421 of the Companies Act, 2013 and further that the 'Liquidator' is not acting in the interest of 'Devas' and therefore in order ot protect the interest of 'Devas' the 'Appellant' has preferred the present 'Appeal'. Moreover, the 'Appellant' has 'Locus standi' to oppose the present 'winding up proceedings' and in fact, the 'Tribunal' had committed an error in ignoring that an 'Appellant' even though a 'minority shareholder' has the 'locus' to oppose the winding up in view of the exceptions laid down in the decision Foss v Harbottle, (1843) 2 Hare 461. Apart from that, the Hon'ble Supreme Court in the decision in S.P. Gupta v President of India 1981 Supp (1) SCC at page 87 had held that 'any shareholder' can maintain an action for the benefit of the company of which it is a shareholder.

25. The Learned Counsel for the 'Appellant' adverts to the decision of the Hon'ble Supreme Court in National Textiles Union & ors. v. P R Ramakrishnan & Ors. reported in 1983 (1) SCC at page 228 wherein at paragraph 9 and 11 it is observed that while considering the winding up petition, interest of shareholders, creditors, workmen are to be taken into consideration and that a shareholder may appear to oppose the winding up petition. The Appellant had relied on paragraph 9 of the said judgment which quotes the authority Palmer Company Precedents. 17th Edn .vol. 2 at page 77 "… where it is stated that any creditor or shareholder

may appear to support or oppose the petition but no one else can do so even if he has an indirect interest in the continued existence of the company…"

I. 1ST RESPONDENT'S SUBMISSIONS: (In Both Appeals)

26. According to the Learned Counsel for the 1st Respondent/Antrix Corporation Ltd, the Agreement dated 28.01.2005 entered into between the then Officials of Antrix and Devas contained a definition for 'Devas Services' and when read with the recitals in the said agreement, it envisages three indispensable conditions for the delivery of Devas services viz. Devas Technology, Devas Services and delivery of Devas Services which can be received in a single user device/medium.

27. It is represented on behalf of the 1st Respondent that none of the three pre-requisites were in existence either in 2005 or till the time of terminating the agreement in 2011, a fact Devas did not deny at any point of time during the proceedings before the 'Tribunal'. The 'Devas' neither had the 'Devas Technology' nor built one and there were no policies in India that permitted a service similar to Devas Services to be rendered. In short, without these two pre-conditions, other pre-condition of 'Devas Services' cannot exist and could not have been delivered by 'Devas'.

28. The Learned Counsel for the 1st Respondent points out that the creation of Devas is for a fraudulent purpose as it had chosen to enter into an agreement referring to a particular technology and a particular type of service which were not inexistence at all and especially, when Devas in capable of rendering 'Devas Services'. Furthermore, 'Devas' till date had failed to produce a single document that would prove that 'Devas' owned Devas Technology capable of rendering Devas Services to a single user device/medium either at the time of entering into the agreement dated 28.01.2005 or during the operation of the Agreement until 2011.

29. The Learned Counsel for the 1st Respondent brings it to the notice of this 'Tribunal' that the 'SATCOM Policy, 2000' had not contemplated the delivery of a service similar to 'Devas Services' using 'Devas Technology', which is a hybrid service comprising of broadcasting, telecommunication, internet and various other services capable of being delivered as one bouquet using both the 'satellite' and 'terrestrial routes'.

30. Indeed, the prevalent policy had only envisaged essentially broadcasting and 'telecommunication services' as 'independent services' and hybrid services' were not visualised. In as much as there was no policy in place, a corresponding licensing, regime, protocols, Authorization, approvals of sanction were also not available. As such, it is the contention of Learned Counsel for the 1s Respondent that in the absence of prevailing policy and licencing regimes, 'Devas' could not have entered into an agreement agreeing to deliver 'Devas Services' using 'Devas Technology'. In reality, 'Devas' did not go through the necessary steps specified for a private user to obtain satellite capacity for commercial services. The SATCOM Policy' envisages a single window clearance' by a 'Committee of Secretaries' from seven different Ministries of the Government of India among other technical committee members from the respective departments and Devas failed to pass this muster.

31. On behalf of the 1st Respondent, it is brought to the notice of this 'Tribunal' that prior to the entering into of an Agreement with the then officials of 'Antrix' on 28.01.2005, there was exchange between the then Officials of Antrix' and Forge LLC', USA, in terms of MOU, Joint Venture and Preparation of Agenda followed by Minutes, etc. which point out that what was conceived to be delivered was a unique service called 'Devas Services' as service which Devas' could not have delivered in India because of the lack of policy, licensing regimes and no technology being available with Devas' or with the world to

render the same. Added further, 'Devas' was incorporated on 17.12.2004 and an Agreement was entered into on 28.01.2005 with the then Officials of Antrix to deliver 'Devas Services'.

32. The prime submission of the Learned Counsel for the 1st Respondent is that post the Agreement, the Space Commission, ISRO and Department of Space had prepared Minutes including 'Cabinet Notes' wherein there was no reference either to 'Devas', 'Devas Technology' or 'Devas Services' and the approval by the Cabinet was on 01.12.2005, being 'generic' allowing the 'Department of Space' to build special satellites using S-Band frequency and the same can also be used for non-governmental purposes since several firm expressions of interest were shown. The ground reality of the existence of 'Devas' and the Agreement dated 28.01.2005 were clearly suppressed and general approvals for satellite use for non-government purposes were obtained.

33. The Learned Counsel for the 1st Respondent contends that since the Cabinet Approval is generic 'Devas' cannot make any claim over the two satellites fraudulently leased to them, by the then Officials of Antrix, which was a result of systematic violation of established procedures under the 'SATCOM Policy' and other 'Regulatory Laws of India'.

34. The Learned Counsel for the 1st Respondent submits that when 'DEVAS' presented its case on 26.12.2008 before the Technical advisory Group (TAG) (3 years after the Agreement dated 28.01.2005, which was signed by the then Officials of 'Antrix'). And that 'TAG' raised lot of concerns and wanted 'Devas' to come back with a complete experimental plan which would be placed before a review committee comprising of numerous Departments and Ministries after which the request for an experimental licence would be decided. However, 'Devas' neither approached the 'TAG' nor submitted details before the 'Review

Committee', but secured an experimental licence from 'Department of Telecommunication' during May 2009.

35. The Learned Counsel for the 1st Respondent proceeds to add that an endeavour was made to manipulate the Minutes of the Meeting of 'TAG' that took place on 26.12.2008, wherein the concerns and objections raised by 'TAG' stood deleted. In fact, the Members of the 'TAG' raised objections and demanded the original facts to be restored as 'Minutes' and the same was done by the end of 2009. Apart from that 'Devas' secured an experimental licence fraudulently and that the mandatory approval of MI&B was also not secured.

36. The Learned Counsel for the 1st Respondent submits that in the absence of 'SATCOM policy' or 'Licencing Procedures' and when 'Devas Services and Devas Technology' was not in existence, 'Devas' approached the 'DoT' and secured initially an 'ISP Licence' on 02.05.2008, which was amended to include IPTV services on 31.03.2009. This was the only Licence obtained by Devas in India. This Licence was issued for 15 years and was valid upto 2023 which would also be extended thereafter, if found eligible. Further, the Government of India, has not prevented or restricted Devas from rendering 'ISP/IPTV' services. However, 'Devas' did not render the same but for less than two months for 25-30 people in Jayanagar area in Bangalore, earning a paltry income of INR 80,000, which was not denied by 'Devas' before the 'Tribunal'.

37. The Learned Counsel for the 1st Respondent contends that the Licence for ISP/IPTV has no connection with the Agreement dated 28.01.2005 which was for delivery of 'Devas Services' through 'Devas Technology' and in fact, the experimental Licence was secured only on 07.05.2009, a year after the 'ISP Licence' was obtained by 'Devas'. At this juncture, it is the submission of Learned Counsel for the 1st Respondent that the 'Devas' approached 'FIB' for approval of '100% Foreign Direct Investment (FDI)' for ISP services (without

providing Gateways) and the same was approved. Indeed, 'FIB' also approved the Foreign Collaboration Agreement with the various investor who later became shareholders, permitting investments into India for the purpose of ISP/IPTV Services and DoT had already issued the necessary Licences for ISP/IPTV Services on 02.05.2008. 'Devas' had brought in Rs.589 Crores as 100% FDI' which was only for ISP/IPTV Services and diverted more than 95% of the investments illegally for ISP purposes not only in India but also outside the Country.

38. The Learned Counsel for the 1st Respondent contends that the 'Devas' made a 'Upfront Capacity Fee' to 'Antrix' to the tune of Rs.58 Crores (from and out of the investment) thereby making the entire payment illegal, since payments for leasing, transponders are governed by separate 'FIB Approval' which 'Devas' had not secured, resulting in huge financial frauds. Besides these, 'Devas' had diverted INR 255 Crores in respect of the creation of 'Devas' Multimedia America Incorporated (hereinafter referred to as DMAI) and payments for business support services received from DMAI, when Devas' could not show a single proof to establish what support services were received from DMAI. That apart, Devas' had diverted INR 233 Crores towards legal expenses abroad to defend the 'ICC Arbitration'. Further, the 'ICC Arbitration' was not regarding any ISP Services' for which the INR 589 Crores brought in by 'Devas' were approved and the subsequent Licences were granted. Out of INR 589 Crores, more than INR 550 Crores were diverted to non-ISP Purposes within and outside India and therefore becomes illegal payments in law, which was admitted by 'Devas' before the 'Tribunal'.

39. The Learned Counsel for the 1st Respondent submits that the SATCOM Policy included only Satellite based Communication Services which is not 'Devas Services' as such, when the 'SATCOM Policy' had not contemplated a

service in the nature of 'Devas Services', Devas entering into an Agreement dated 28.01.2005 with the then Officials of 'Antrix' render the same is an illegal and fraudulent one.

40. The Learned Counsel for the 1st Respondent points out that the spectrum available with DoT is for terrestrial use, entering into an Agreement dated 28.01.2005 with the then Officials of 'Antrix' to render 'Devas Services' through Satellite and Terrestrial Modes of transmission is a fraudulent and illegal one. In fact, Government Body authorised to allocate space segment is DoS/ISRO and this very admission by 'Devas' should be a ground for winding up the Company, as the Agreement dated 28.01.2005 that allocated S-Brand Spectrum exclusively to Devas, was signed the then officials of 'Antrix' and DoS/ISRO did not authorise 'Devas' any space Agreement.

41. The Learned Counsel for the 1st Respondent submits that the 'Devas' had stated that negotiations with the then Officials of ISRO/DoS resulted in a Memorandum of Understanding, however, 'Devas' had admitted before the 'Tribunal' that the said 'Memorandum of Understanding' is a non-binding one. Also that the Memorandum of Understanding signed between 'Devas' and the 'then Officials of Antrix' was to deliver 'Devas Services', a service which could not have been rendered in India due to the non-availability of policy and licensing regimes governing a service in the nature of 'Devas Services'.

42. The Learned Counsel for the 1st Respondent comes out with a plea that the 'Joint Venture Agreement' dated 15.04.2004 entered into with the then Officials of 'Antrix' is an illegal one and in this Agreement, the participants from DoS/ISRO/Antrix/Space Commission were included and at the time of signing the 'Joint Venture Agreement', all the four meetings were headed by Mr.G. Madhavan Nair who is the prime accused in the criminal proceedings initiated

by the Central Bureau of Investigation and the Enforcement Directorate for indulging in an illegal and fraudulent activities.

43. The Learned Counsel for the 1st Respondent contends that the Article 2.4.1 of the SATCOM Policy classified the user sectors as telecommunications, broadcasting, education, developmental communications and security communications for Defence Ministry and Services and that there is no reference to the multimedia Hybrid services called 'Devas Services' in the 'SATCOM Policy'. In fact, Article 2.5.6 of the 'SATCOM Policy' fastens the responsibility to obtain the necessary Licences to offer a service in a particular territory in India or in other countries on the party as taken the capacity on Lease. As such, onus is on 'Devas' to show that 'SATCOM Policy' conceives 'Devas Services' and to further show that as a person entitled to take the capacity on lease Devas can proceed to take the licences. In short, 'Devas' possessed no operating licences to deliver 'Devas Services'.

44. The Learned Counsel for the 1st Respondent by referring to the Article 2.5.7 of the SATCOM Policy projects a plea that the burden rests on the person to secure the requisite operating frequency and necessary licences attached to it from the concerned authorities. Really speaking, no frequency allocation was made in the National Frequency Allocation Plan for the Devas Services nor there existed any licence for the service in the nature of 'Devas Services'.

45. The Learned Counsel for the 1st Respondent contends that Article 2.6.2 of the 'SATCOM Policy' sub clauses (b) (c) and (d) permit DoS/INSAT to evolve suitable transparent procedures for allotting capacity other than telecommunication and such procedures should be in the form of 'auction', good faith, negotiations, first come first serve or any other equitable method. In this connection, the Learned Counsel for the 1st Respondent points out that since there was no provision for the Hybrid Services involving terrestrial and Satellite

components in the extent 'SATCOM Policy', DoS/Instant had not evolved any such transparent procedures for allotment of capacity for rendering 'Devas Services'.

46. The Learned Counsel for the 1st Respondent drew the attention of this 'Tribunal' to Article 2.7 (a) of 'SATCOM Policy' which permits DoS/INSAT to build capacity for non-governmental parties based on commercial consideration, technical feasibility and without adversely affecting the capacity for already projected and accepted Government funded needs. Furthermore, it is the stand of the 1st Respondent that 'Devas' never approached this Agencies for availing such provision in the 'SATCOM Policy' but opted to seek the upfront allocation of the capacity on Government approved Satellite under 'INSAT' through a fraudulent Agreement dated 28.01.2005.

47. The Learned Counsel for the 1st Respondent brings it the notice of the Tribunal that the Articles 3.4 of the 'SATCOM Policy' describes three distinct licences that are required in establishing and 'Indian Satellite System'. Indeed, authorisation by DOS to own and operate 'Indian Satellite System' was later amended to include the Leasing Transactions and that the neither 'DOS' nor 'CAIS' has issued any authorization to 'Devas' to operate a dedicated Indian Satellite System under this Clause in India.

48. The Learned Counsel for the 1st Respondent points out that WPC of the Ministry of Communication had not issued any such authorization to Devas to operate a space station in accordance with the ITU Radio Regulation. Added further, at no stage had obtained any commercial licence as much as Devas services were not part of the 'SATCOM Policy'. Besides this, the Devas had not obtained any operating licences for the Devas Services, as none existed at that point of time.

49. The Learned Counsel for the 1st Respondent contends that as per Article 3.5 of the 'SATCOM Policy' the authority for issuing operating licences in Article 3.4 has to be a Committee of Secretaries comprising Dos, DoT, M7 IB, MoH, MoD and MoI with Wireless Advisor to the Government of India as a permanent invitee. (A single window clearance) and further that Devas no point of time had approached the 'Committee of Secretaries' to obtain the required licences and the Devas Services were neither conceived in the 'SATCOM Policy' nor the attendant licences were enumerated in the Policy.

50. The Learned Counsel for the 1st Respondent submits that after violating all the steps prescribed, in connivance with 'DEVAS' then officials of 'Antrix' in collusion with Devas had constituted a K.N. Shankara Committee to validate the fraudulent Agreement dated 28.01.2005 and this committee was appointed by the then Chairman, who occupied the office of Chairman/Secretary of DoS/ISRO/Antrix/Space Commission, comprising of Members working under the then Chairman and under his control and this report has no sanction either in law or on SATCOM Policy and as such, it is the stand of the 1st Respondent that the Agreement dated 28.01.2005 is an illegal and fraudulent one.

51. The Learned Counsel for the 1st Respondent contends that the 'Devas' had secured one operating Licence during its existence in India (Category A ISP Internet Service Provider Licence) which was granted by DoT on 02.05.2008 and later, the Licence was amended on 31.03.2009 to include 'IPTV Services'. Hence, as on 31.03.2009, 'Devas' was permitted by the 'DoT' to render ISP Services including 'IPTV Services'. An experimental Licence was obtained by 'Devas' on 07.05.2009, year after the ISP/IPTV Licence which was granted to the 'Devas' by DoT. Therefore, it is the prime contention of the 1st Respondent that 'Devas' cannot contend it could have delivered 'Devas Services' under the

ISP/IPTV Licence Dated 02.05.2008 and on the other hand, contend that it had secured a successful experimental Licence from WPC on 07.05.2009.

52. The Learned Counsel for the 1st Respondent submits that based on the TRAI recommendations dated 23.01.2008 and follow up view of M & IB to allow trails of different technologies a notice dated 04.12.2008 was circulated by the Associate Director of INSAT for conducting 129th Meeting of TAG and Agenda item no 7 which was with reference to the Devas Multimedia Satellite Technical Characteristics and Experiments to be carried out between January and March 2009. In fact, during the meeting on 26.12.2008, the DDG(TEC) and DDG (DS) DOT enquired under which licence would the set services be provided, since the licence would be required for an experimental plan and that the Devas replied that they have an ISP category 'A' licence.

53. The Learned Counsel for the 1st Respondent adverts to the fact that the 'TAG Members' felt the same requires examination and sought 'Devas' to provide Technical Characteristics User Terminals and gap filler transmitter besides detailed Technical Characteristics of the experimental plan. Moreover, a decision was taken that once the Technical Details are submitted by Devas a review committee consisting of Joint Wireless Adviser (WPC), Chief Engineer (AIR), DD (DS), DDG(TECV), DDG (NOCC)/BSNL and TAG Secretariat would examine the Experimental Plan. Also that, on 06.01.2009 that the clearance for the experiments plan is given to a 'Government Agency' and the experimental plan ISRO/DOS on behalf of the Devas if and when granted.

54. The Learned Counsel for the 1st Respondent proceeds to point out that the draft minutes of the meeting that took place on 06.01.2009 were placed in the file, and were lying even as late 26.10.2009. In fact, when a request to peruse the minutes was made by the Attendees of the meeting, portion of the internal discussion of the review team from the draft minutes were deleted and were

replaced with the wordings, 'After detailed deliberations, on various aspects of the proposed experimental plan, the review team recommended that the experiment can be concluded under ISRO guidance,' and this was circulated on 21.10.2009.

55. The Learned Counsel of the 1st Respondent submits that the aforesaid manipulated minutes were protested by then Associate Professor INSAT by letter dated 04.11.2009, then the DDG (DS) through letter dated 06.11.2009, the then DDG (NOCC) through letter dated 12.11.2009, the then DDG(I) and by the Dy, Wireless Advisor, DOT, profiting that the minutes of the TAG Sub-Committee did not reflect the actual discussion held in the TAF Sub-Committee on 06.01.2009. Furthermore, the original minutes were restored on 19.11.2009 and the same was circulated as per notice dated 20.11.2009. But in the meanwhile, an experimental licence was issued by WPC wing in favour of Devas. Based on the manipulated minutes of the TAG Committee meeting 06.01.2009 and experimental licence was issued to Devas and as such, an experimental licence issued to and in favour of 'Devas' in an invalid one as it flows from a fraudulent and illegal activity.

56. The Learned Counsel for the 1st Respondent contends that one of the requirements for an approval by the M & IB for conducting experimental trials was not obtained by Devas and a mere experiment of a new technology not backed with any policy or licencing regime to either demanded or attribute failure on the part of the Government in not granting it. Also that, when the case of Devas for experimental licence was presented to TAG on 26.11.2008, Members found that the Devas had only a category of A ISP licence, a fact again not denied by Devas. Hence the TAG Members sought an examination and wanted Devas to provide various technical characteristics and parameters of its experimental plan.

57. The Learned Counsel for the 1st Respondent submits that Devas had not produced any such date to TAG a fact again not denied by Devas and the TAG had also viewed that once Devas had presented the required technical details, a review committee consisting of Joint Wireless Advisor (WPC), Chief Engineer (AIR), DD(DS), DDG(NOCC), DDG(TEC) and TAG Secretariat would examine the experimental plan. Devas did not produce these details nor did review committee examine the experimental plan before issuing any experimental licence to Devas. As such, the whole act of securing an experimental licence is not only an illegal act but also a fraudulent one.

58. The Learned Counsel for the 1st Respondent projects a legal plea when an experimental licence is secured by an act of fraud any subsequent application by Devas for allocation of frequency or seeking non-existing operating licences are indeed, further acts of fraud committed by 'Devas'.

II. 1ST RESPONDENT'S CONTENTIONS:

59. The Learned Counsel of the 1st Respondent contends that the note the Space Commission and subsequent cabinet note for the approval of the building two satellites allegedly promised to Devas were prepared by ISRO/DoS respectively in the capacity of the Government Department under the Government of India. As matter of fact, it is brought to the notice of this 'Tribunal' by the Learned Counsel for the 1st Respondent ISRO/DoS neither authorized Antrix to act on their behalf nor they can do that as the responsibility of the Government department under the Government of India had authorised is not be transferred to a state-owned private company. Apart from that ISRO/DoS was neither consulted nor asked to review the agreement dated 28.01.2005, thereby breaching several conditions of the 'SATCOM policy' and such violations makes the agreement dated 28.01.2005 is an illegal and fraudulent one.

60. The Learned Counsel for the 1st Respondent contends that one Mr. Gururaj who signed the agreement on behalf of Devas, neither an employee of Devas nor had the expertise in satellite services not former employee of ISO/DoS/Antrix. In reality, he was a clerk in the office of the Chartered Accountant Mr. Umesh who was the accountant of the Devas at the time of Agreement and in Central Bureau of Investigation(s) Mr. Gururaj had admitted that for signing of an agreement that he had received a token amount.

61. The Learned Counsel for the 1st Respondent, points out that TRAI report dated 27.06.2005, as relied upon Devas does not discuss a service in the nature of Devas Services and therefore, on the date of entering in to an agreement dated 28.01.2005, there was no corresponding licencing regime to permit the rendering the Devas services and Devas being formed to render the same is an illegal and fraudulent one and deserves to be wound up.

62. The Learned Counsel for the 1st Respondent submits that the Agreement dated 28.01.2005 was suppressed before the 104th meeting of Space Commission; note prepared by ISRO; cabinet note prepared by DOS and cabinet approval was obtained by suppression of the Agreement dated 28.10.2005. A combined reading of outcome of 104 space committee meeting, the follow up note by ISRO and the Cabinet report prepared by DOS would shockingly reveal post the agreement dated 28.01.2005 meeting took place, notes were prepared up to cabinet and later approvals were obtained. But none of these documents refers to Devas and the Agreement dated 28.01.2005.

63. The Learned Counsel for the 1st Respondent forcefully points out that any discussion, minutes or approvals (including the cabinet approval) was generic and contains no reference wither in respect of Devas or the Agreement dated 28.01.2005 and the approvals can only relate and apply for such service which are in existence and included in the policy document of Government of India.

64. The Learned Counsel for the 1st Respondent contends that 'Devas' never warranted that it had technological rights to deploy its proposed plan. Also, that it is the stand of the 1st Respondent that 'Devas' neither owner nor did they possess any IP or rights both of which could have been assigned by virtue of Article 12(b) (iv), (vi) and Article 17 of the Agreement dated 28.01.2005.

65. The Learned Counsel for the 1st Respondent submits that the 'Devas' had failed to show that they developed a 'Devas Technology', which is capable of delivering 'Devas Services' both via Satellite and terrestrial modes of transmission capable of being received in a single user device.

66. The Learned Counsel for the 1st Respondent contends that none of the transmission systems viz. i) ITU-DS & ITU-DH used by World Space in 1998, (ii) ITU-E later used by MB-SAT for providing similar services as World Space. (iii) TDM-QPSK & TDM-COFMD used by XM Radio and Sirius Radio in 1998 were capable of delivering 'Devas Services'. Also, that not all media services are 'Devas Services'. Moreover, none of the services rendered through the transmissions system mentioned by 'Devas' had the three indispensable prerequisites that 'Devas Services' warranted.

67. The Learned Counsel for the 1st Respondent submits that even as late as 2007, when DVB-SH was developed, there existed no equivalent transmission to deliver 'Devas Services' and further that DVB-SH Transmission Services was developed only in the year 2007 and it was later upgraded during the year 2008 and 2009 and this fact came to light through the 'French Letter of Rogatory' received by the Government of India, upon a request being placed in this regard.

68. The Learned Counsel for the 1st Respondent contends that in regard to the meetings dated 06.05.2004, 21.05.2004 and 24.05.2004, they pertain to the discussions forge had with the then officials of 'Antrix' and the discussions in these meetings was in relation to the deliverance of 'Devas Services' in India.

69. The Learned Counsel for the 1st Respondent draws the attention of this 'Tribunal' to the admission of 'Devas' that it treated the signing of the Agreement dated 28.01.2005 as a ministerial act. In short, the 'Shankara Committee' was a fraudulent design to achieve this end of making the Agreement dated 28.01.2005 a ministerial act.

70. Continuing further the Learned Counsel for the 1st Respondent points out that the 122nd Meeting of 'TAG' held on 30.11.2004 took place when 'Devas' was not even incorporated and 'Devas' came into existence only on 17.12.2004. As a matter of fact, Agenda 11 for this meeting refers to the Spectrum required for 'Devas Project' and that the programme Director had informed 'TAG' that 'one Devas USA based entity is expressing inclination to provide multimedia broad casting services that assured that 'TAG' will inform further developments and the reference made was about 'Devas' a USA based company and not the 'Devas' which was wound up by the 'Tribunal', since it was not incorporated as on 30.11.2004. To put it precisely, no approvals of sanctions were granted in the meeting and there was merely an information or expression of willingness and nothing beyond that.

71. The Learned Counsel for the 1st Respondent contends that in the 124th 'TAG' meeting not a single word about 'Devas' or the Agreement dated 28.01.2005 was discussed in this meeting especially when the meeting was conducted after the Agreement dated 28.01.2005 was signed.

72. The Learned Counsel for the 1st Respondent projects an argument that the Minutes of 124th 'TAG' meeting states that 'GSAT-6' Satellites are being made for a specific customer, and it is this GSAT-6 Satellite which the Cabinet approved relying on the 'Cabinet Note' prepared by the 'Department of Space' which mentioned there are several firm expressions of interests. In fact, the very Minutes of 124th 'TAG' meeting is evident that the 'Cabinet Approval' was

obtained fraudulently and as a result of suppression. Apart from that, the 'Cabinet Approval' does not make any reference to 'Devas' and the Agreement dated 28.01.2005.

73. The Learned Counsel for the 1st Respondent submits that the 'experimental Licence' granted to 'Devas' on 07.05.2009 was a Licence to establish maintain, work and experimental wireless telegraph stationary in India under the Indian Telegraph Act, 1885. As such, there is not even a remote connection to the 'experimental Licence' and 'Devas Services' as contemplated under the Agreement dated 28.01.2005. Besides this, as on 20.07.2010, 'Devas' did not even possessed the requisite operating Licence as it had applied for the same only on that day and therefore, entering into an Agreement dated 28.01.2005, without even possessing the requisite operating Licence makes the Agreement obtained 'out of fraud'.

74. The Learned Counsel for the 1st Respondent contends that the term 'IPTV' means Television Services provided through Internet Protocol (IP) and can be accessed by a user with internet and that 'Devas Services' is a combination of broadcasting and telecommunication services among others offered as one bouquet of services. As such, it is impossible to deliver 'Devas Services' using merely Internet and further that a user receiving 'Devas Services' ought to be in possession of a single device capable of receiving Transmission from both Satellite and Terrestrial Segments, which is not Internet.

75. The Learned Counsel for the 1st Respondent refers to Clause 7.1 of the ISP/IPTV Licence which enjoins as under:

> "The LICENCEE shall be responsible for, and is authorised to own, install, test and commission all the Applicable system for providing the internet Services under this Licence Agreement. DTH Service Providers shall be permitted to provide Receive Only Internet Service after obtaining

ISP licence from Department of Telecommunications. Further, ISP Licences shall be permitted to allow customers for downloading data through DTH after obtaining necessary permission from the Competent Authority. DTH Service Providers will also be permitted to provide bidirectional Internet Services after obtaining VSAT and ISP Licence from DoT."

76. The Learned Counsel for the 1st Respondent contends that in the teeth of Clause 7.1 of the ISP/IPTC Licence when 'Devas Services', includes broadcasting Service as part of bouquet, then 'Devas' had not placed a single document to exhibit that it had secured any other operating Licence apart from ISP/IPTC Licence issued by the 'DoT' on 02.05.2008/31.03.2009. Even the very ISP/IPTV Licence prescribes that 'Devas' is to respect and go through the 'SATCOM Policy' if it wishes to render services through 'Satellite Media'. Furthermore, 'Devas' has not provided any material on record to show that it had secured 'NOCC' and 'SACFA' clearances for utilising 'Space Segment' as required.

77. The Learned Counsel for the 1st Respondent submits that Clause 36.7 of the ISP/IPTV Licence permits use of Space Segment for internet services and not 'Devas Services'.

78. The Learned Counsel for the 1st Respondent refers to 'Article 3.1: of the Satellite Communications Policy Framework for India as approved by the Government of India, which provides "Authorise Indian Administration in consultation with Department of Space and other concerned Regulatory Authorities to inform, notify, coordinate and register Satellite Systems and Networks by and for Indian Private Parties following certain well defined and transparent norms. The Satellite Systems of all Government Agencies to be established by Department of Space".

79. The Learned Counsel for the 1st Respondent by adverting to the aforesaid Article 3.1 points out that when a Satellite System is registered for 'Devas', the participation of 'Devas' and its corresponding obligations in the 'Registration' by following well defined and 'transparent norms' cannot be neglected.

80. The Learned Counsel for the 1st Respondent submits that an amount of INR 579 Crores was invested in 'Devas' DT Germany through DT Asia invested INR 430 Crores and few individuals and few Mauritius based entities including Devas Employees Mauritius Private Limited is fighting the proxy for 'Devas' in numerous forums, invested INR 130 Crores. After investing INR 430 Crores approximately, DT Germany through DT Asia procures only 19% of the shares and after investing a significantly lesser portion of INR 130 Crores approximately, the four Mauritius entities secured 37% of the shares.

81. The Learned Counsel for the 1st Respondent contends that when 'Devas' has not done any business in India, it has not placed on record any explanation as to why such a business was valued at such an exponential rate. Also that 'Devas' brought in INR 579 Crores after FIB approvals quoting it would be rendering internet 'ISP Services' in India and that 'Devas Services' is a combination of broadcasting and telecommunication services among others and certainly and definitely not an internet (ISP) services. As such, it is the vital contention of the 1st Respondent side that the investments brought in for 'ISP services' cannot be utilised under the fraudulent Agreement dated 28.01.2005 as 'Devas Services' and 'ISP Services' are not one and the same.

82. The Learned Counsel for the 1st Respondent submits that 'Devas' diverted INR 550 Crores outside India in 4 tranches and the first tranche being INR 75 Crores purported to be utilised for share subscription of 'Devas Multimedia American Incorporation' and this American Subsidiary was established, allegedly to render business support services to 'Devas'. By way of second

tranche INR 180 Crores was diverted to 'DMAI' under the guise of business support services received from 'Devas' from 'DMAI' and 'Devas' had not placed any document or business proof to show that it had indeed received services from 'DMAI' and those services were put to use in India for the growth of 'Devas'. In this connection, the Learned Counsel for the 1st Respondent makes a pertinent mention that 'Devas' had in fact "written off" these payments as 'Losses' in their Books.

83. The Learned Counsel for the 1st Respondent points out that the only business 'Devas' did in India was for a few months of ISP Business for about 25/30 people in Bangalore which fetch a poultry sum of INR 80,000. That apart, DMAI had not rendered any support service to 'Devas', leave alone ISP Services, to render any other Service. Also that, the Learned Counsel for the 1st Respondent submits that it is not correct for 'Devas' to state that monies were diverted in the year 2011 after the Agreement dated 28.01.2005 was terminated and in fact, the monies were sent out of India from the year 2008 onwards, while the Agreement dated 28.01.2005 was terminated only during 2011. In fact, the DoT had not terminated the 'Licence' dated 02.05.2008 and 31.03.2009 for ISP/IP TV Services and this Licence was and is valid till 2023. The incorporation of DMAI was earlier to the 'Termination of Agreement' dated 28.01.2005 which was only in 2011.

84. The Learned Counsel for the 1st Respondent points out that 'Devas' made large payments to the extent of INR 233 Crores outside India to various 'Law Firms' and these were diverted out of India, to defend the ICC Arbitration Case initiated by Devas against 'Antrix Post' the 'Termination of Agreement' dated 28.01.2005 in 2011.

85. It is the version of the Learned Counsel for the 1st Respondent that the 'Termination of Agreement' dated 28.01.2005 in February 2011 has no

relevance or consequence to the 100% FDI brought into India by 'Devas' for ISP Services. In fact, there is no 'Arbitration' or 'Litigation' pending regarding the ISP/IP TV Services. In short, it is the plea of the 1st Respondent that the diversion of 233 Crores from and out of investments approved for ISP Services to defend ICC Arbitral Proceedings is an unlawful and fraudulent diversion of Funds.

86. The Learned Counsel for the 1st Respondent submits that the payment of INR 58 Crores to 'Antrix' (Fourth Tranche) out of INR 579 Crores brought into India was for making upfront capacity fee payments to 'Antrix' for the S-band transponders under the Agreement dated 28.01.2005, a fraudulent one. Also, that the 'Devas' had not produced any proof to show that the payment of INR 58 Crores was as per clauses 36.6 and 36.7 of the Licences dated 02.05.2008. Indeed, clauses 36.6 and 36.7 of the ISP Licence dated 02.05.2008 issued by DoT to 'Devas' provide a procedure, in case 'Devas' chose to utilise Satellite Medium for providing the ISP Services.

87. The Learned Counsel for the 1st Respondent brings it to the notice of this 'Tribunal' that the Enforcement Directorate had seized INR 21 Crores which was lying in Fixed Deposits and in fact, INR 58 Crores was paid to 'Antrix' for upfront capacity and which was returned by 'Antrix' to 'Devas' was also seized by the 'Enforcement Directorate'. Moreover, an amount of INR 12 Crores approximately was used to pay salaries of the Directors of 'Devas'.

88. The Learned Counsel for the 1st Respondent contends that if 'Devas' intention was to render the non-existent 'Devas Services' which involved transmission through satellites, then 'Devas' ought to have applied under Clause 27 of Press Note-4 (2006 Series). However, under the Press Note-4 (2006 Series) issued by the Ministry of Commerce and Industries through the Department of Industrial Policy and Promotions, ISP Services were listed under Clause 25 and

further that Clause 27 specifically categorizes Satellites establishment and operation.

89. The Learned Counsel for the 1st Respondent submits that when 'Devas' had neither applied nor obtained FIB Approval for leasing Satellite Transponder facilities and when FDI Investments are not meant for the same and cannot be diverted for any other purposes other than ISP services, 'Devas' cannot divert INR 58 Crores out of 100% FDI meant for ISP upfront capacity payments towards leasing the S-band Frequencies in GSAT-6/INSAT-4E Satellite. Further, it is projected on the side of the 1st Respondent that if 'Devas' applied under Clause 27 of Press Note-4 (2006 Series), FIB would have been mandated as per law to check if the applications satisfies the guidelines of DoS/ISRO. As a matter of fact, only to avoid rejection, 'Devas' had applied under 'ISP Services' which does not involve DoS or ISRO. Therefore, it is contended on behalf of the 1st Respondent that it was a well planed intentional fraud committed by 'Devas' and further that the illegal diversion and siphoning of funds to an extent of INR 4989 Crores out of India, the 58 Crores upfront capacity payment is an unauthorised and illegal one.

90. The Learned Counsel for the 1st Respondent contends that when 'Devas' had not rendered any ISP Service worth its name, the act of securing an ISP Licence, securing an FIB Approval for 100% FDI Investment for ISP Services' and bringing him INR 579 Crores to India for 'ISP Services' and not utilising the same towards that 'object' and diverting 90% of the funds out of the Country and the remaining funds leading to PMLA attachment, all goes to point out that the whole episode centering around the ISP Licence' and FIB Approval' for 'ISP Services' is only to commit a deliberate and well conceived Intentional Financial Frauds and the 'Seeds' were sown in the Indian Soil to plunder and launder monies out of India. In short, the entire investment into India was diverted for

fraudulent and illegal purposes and added further, every fraudulent diversion made by 'Devas' were with the full knowledge and facilitation of the investors/shareholders of 'Devas' and when the investors of 'Devas' permitted 'Devas' to divert it for illegal and fraudulent purposes the same cannot be characterised as a protected investment.

III. 1ST RESPONDENT'S PLEAS:

91. The Learned Counsel for the 1st Respondent submits that the share subscription agreement dated 06.03.2006 between 'Devas' and its investors/ shareholders taken as an illustration to elaborate on this aspect aaa) dealing with definition of 'Antrix' agreement goes to the following effect.

> "Antrix Agreement" means the Agreement for the Lease of Space Segment Capacity on ISRO/Antrix S-Band Spacecraft dated as of January 28, 2005 by and between Antrix Corporation Limited and the Company"

Apart from the above, Section 2.3 of the SS deals with the use of proceeds and Section 3.14 deal with material contracts and obligations, 'Antrix' Agreement, Clause-C reads as under:

> "The execution delivery and performance by the Company of the Antrix Agreement were duly authorized by all necessary corporate and shareholder actions. The Antrix Agreement is valid, in full force and effect and binding against the Company and to the knowledge of the Company, binding against Antrix. To the best of the Company's knowledge, neither the Company nor Antrix is in default of any of its obligations under the Antrix Agreement, nor does any condition exist that with notice or lapse of time or both would constitute a default thereunder. The Company's relationship with Antrix is generally a good commercial working relationship. Antrix has not communicated to the Company any plan or intention, and the Company has not received any written threat from Antrix, to terminate, cancel or materially and adversely modify its relationship with the Company."

92. The Learned Counsel for the 1st Respondent refers to Section 7.1 of the 'SS' which is to the following effect:

> "The investors shall have completed their legal, accounting and business due diligence review of the Company and the results thereof shall have been satisfactory to the investors".

93. The Learned Counsel for the 1st Respondent contends that the share subscription agreement conveys the intention that portion of the investment will go towards payment of upfront fee and that the Application dated 02.02.2006 filed before 'FIPB', the FIPB approval and the ISP Licence issued by DoT dated 02.05.2008 through various clauses referred to in earlier sections make it clear that the licence is only for 'ISP Services' and the List of Shareholders is catalogued in the ISP Licence dated 02.05.2008 and therefore, their 100% FDI ought to be only towards rendition of 'ISP Services'.

94. The Learned Counsel for the 1st Respondent submits that when monies could not have been diverted for any other purpose other than ISP Licence, how did the shareholders allow the monies to be used for payment of upfront capacity fee for space segment in S-Band transponders. Also, it is the stand of the 1st Respondent that all the shareholders are duly represented through Directors on the Board of 'Devas' and INR 489 Crores was diverted out of the India with the complete knowledge of the Board and sent through Banking Channels outside India, 50% of which towards business support services without receiving any such services and the balance 50% towards litigation expenses, when there was no litigation pertaining to ISP Licence issued by DoT on 02.05.2008. Therefore, it is contended on behalf of the 1st Respondent that all the shareholders are parties to the 'fraud of illegal diversion' not only within India but also outside India.

95. The Learned Counsel for the 1st Respondent contends that 'fraud' vitiates everything and includes even the most solemn proceedings and hence, how did 'Agreement' was terminated does not have a bearing on the 'instant case'. Also

that when fraud stands proved and is quite apparent on the face of record in every transaction carried out by 'Devas' in India throughout its existence, why the contract was not terminated on 'fraud' but on force major does not have an impact in the present case.

96. The Learned Counsel for the 1st Respondent points out that the Central Bureau of Investigation filed its charge sheet in the year 2016 and this brought out alarming and shocking aspects of 'fraud' and after further investigation, it filed its second charge sheet in the year 2019, which added new dimensions of 'fraud' in the case. Also that the 'Official Liquidator's Report' before the 'Tribunal' was not relied upon and argued, the said reports brought on record shocking facts about 'Devas' even as late 2021. As such, when 'fraud' was found out in 2016 and again in 2019 and they are continuing to surface in 2021, it vitiates everything and could not have been raised in the year 2011 at the time of 'termination'.

97. The Learned Counsel for the 1st Respondent contends that the 'Tribunal' had not examined any aspect of 'fraud' and further the same is not to be examined by this 'Tribunal'. As a matter of fact, it is the plea of the 1st Respondent that the 'ICC Award' is painted with 'fraud', as it was a 'fraud' on the court played by 'Devas'. Moreover, 'fraud' could not have been pleaded before the 'Arbitral Tribunal' as it was before 2016 and only in 2016 that 'Antrix' had knowledge of the 'Fraud' committed by 'Devas' and later in 2019 and now in 2021.

98. The Learned Counsel for the 1st Respondent points out that the 'ICC Award' obtained by 'Devas' had not attained finality and the Section 34 set aside proceedings are pending before the Hon'ble High Court of Delhi. In this connection, the Learned Counsel for the 1st Respondent brings it to the notice of this 'Tribunal' had that Antrix prefers Section 34 (1) petition in the Bengaluru

City Civil Court and 'Devas' moved the Hon'ble Delhi High Court wherein a was contended that the matter was to be Heard in Delhi and not at Bengaluru. The Hon'ble Delhi High Court passed an order in favour of 'Devas' and in Appeal before the Hon'ble Supreme Court there was a stay on the proceedings, since there was a question of jurisdiction.

99. The Learned Counsel for the 1st Respondent submits that on 04.11.2020, the Hon'ble Supreme Court of India passed an order in transferring the matter from Bengaluru City Civil Court to the Hon'ble Delhi High Court and it further stated that it was 'Devas' who obtained a stay and prevented 'Antrix' from moving forward with the Section-34 proceedings and a circumstance the Hon'ble Supreme Court felt it was iniquitous to permit 'Devas' to enforce such an award while preventing 'Antrix' to fight the award in the set aside proceedings. Hence, the Hon'ble Supreme Court stayed the operations of the ICC Award and kept in abeyance and prevented 'Devas' from enforcing the award under any law or international treaty and the said 'stay' is in operational even as on date.

100. The Learned Counsel for the 1st Respondent contends that the 'Tribunal' had recorded that the cumulative income of 'Devas' for the last three years was less than INR 2 lakhs and when the 'Official Liquidator' takes over the affairs of the company he is supposed to carry out his function as an Officer of the Court. Moreover, BIT Arbitral Tribunal similar to ICC Arbitral Tribunal had not considered the allegations of fraud level against 'Devas' and its shareholders, at this stage, it is represented on behalf of the 1st Respondent that since 'fraud' vitiates everything (including the most solemn proceedings), these awards are also vitiated by 'fraud'.

101. The Learned Counsel for the 1st Respondent points out that 'Antrix' today, is not 'dependent' on the outcome of 'CBI' 'PMLA', 'FEMA' and other

proceedings initiated against 'Devas'. In short, based on the available materials on hand, 'Antrix' can prove a case of 'fraud' against 'Devas'. Also, that the Criminal Proceedings initiated by CBI cannot lead to the winding up of the Company. It is projected on the side of the 1st Respondent that after realising the nature of 'fraud' committed by 'Devas', the enforcement directorate had stepped in to discover further aspects of money laundering against 'Devas'. The 1st Respondent/'Antrix' approached the 'Tribunal' under Section 271(C) of the Companies Act and it is to be remembered that the relief prayed for before the Hon'ble Delhi High Court is to set aside the 'ICC Award' and not to wind up 'Devas'.

102. The Learned Counsel for the 1st Respondent brings it the notice of this 'Appellate Tribunal' that before the 'Tribunal', when the case in CP No.06/BB/2021 came up for 'final hearing' on 23.03.2021, ('a miniscule 3.48% shareholders of 'Devas' viz. 'DEMPL') approached the Hon'ble High Court of Karnataka in WP No.6191/2021 on 23.03.2021 wherein the Constitutional Validity of Section 272(1)(e) r/w Section 272(3) of the Companies Act, was challenged and further a contention was raised that the Sanction order dated 18.02.2021 issued by the Central Government to present the winding petition is a mala fide one. On 28.04.2021 the Hon'ble High Court of Karnataka had dismissed the said Writ Petition and upheld the constitutionality of the assailed provisions. Apart from that, the Hon'ble High Court held that the Sanction Order dated 18.01.2020 was valid in law. In fact, the Hon'ble High Court had awarded cost of INR 5,00,000 on DEMPL for abuse of process of law.

103. Also at paragraph 52 of the order dated 28.04.2021 in W.P.No.6191 of 2021 (filed by the Appellant as Petitioner) the Hon'ble High Court of Karnataka at paragraph 51 and 52 had observed the following:

51. "One of the most profound tenets of constitutionalism is presumption of Constitutionality assigned to each legislation enacted. Indubitably, parliament has competence. The sanction accorded by the Central Government does not meet petitioner with any Civil consequence, Devas has not challenged the sanction order, petitioner has failed to demonstrate Infringement of any rights enshrined in Part-III of Constitution of India.

52. Having held that Registrar and 'a person authorized by the Central Government' fall into different categories. It does not warrant reading down Section 272(3) of the Companies Act."

104. It is to be pointed out that as per Section 272(3) of the Companies Act, 2013, when a 'Registrar' who is entitled to present a petition for winding up under Section 271, except on the grounds specified in Clause(a) (of that Section), he shall obtain the prior sanction of the Central Government to the presentation of the Petition and further that the Central Government shall not accord its sanction unless the Company was given a reasonable opportunity for making representation(s).

105. In the instant case on hand, the Chairman, Managing Director of 1st Respondent/Antrix Corporation Ltd. Mr.Rakesh Sasibhushan, was authorised [by virtue of Section 272(1)(e)] to present a petition before the 'Tribunal' for winding up of the 'Appellant'/Devas Multimedia Pvt. Ltd. Company on the grounds specified under Clause 271(1) (c) of the Companies Act, 2013. Hence, the question of providing an 'opportunity of Hearing' to the 'Appellant' or 'making a representation' by it to the Central Government does not arise on any score.

106. The Learned Counsel for the 1st Respondent contends that the Hon'ble High Court in respect of the allegations of 'fraud' after hearing 'Antrix' was pleased to render a finding that 'DEMPL'/an investor/shareholder of 'Devas'

made no whisper about the allegations of 'fraud' in regard to the money trail during the arguments. In fact, on 27.05.2021 the 'Appellant'(DEMPL) withdrew the 'Writ Appeal', since the 'Tribunal' had already passed the 'Impugned Order'.

107. The Learned Counsel for the 1st Respondent submits that the 'Devas' filed 'Affidavits' before the 'Tribunal' relating to the 'Technology' it promised that it would develop to deliver 'Devas Services' when 'Devas' is unable to establish that it built technology, cross-examination for anything pertaining to such a technology is a futile one.

108. The Learned Counsel for the 1st Respondent comes out with a plea that the 'winding up petition' is not barred by limitation. In this connection, the Learned Counsel for the 1st Respondent points out that it is the plea of 'Devas' that 'Antrix' discovered the 'frauds' in the year 2016 and as such, the limitation would expire in the year 2019. As such, the winding up petition is barred by Limitation.

109. The other alternate stand of the 'Devas' is that 'fraud' was not pleaded during the termination or before the 'ICC Arbitral Tribunal' and since these 'frauds' relate to the Agreement dated 28.01.2005, the limitation period expired in the year 2008 itself. In this regard, the Learned Counsel for the 1st Respondent points out that the present case relates to the series of 'acts of fraud' committed over a period of several years involving plurality and multiplicity violations of various provisions of Law including Indian Penal Code, Prevention of Corruption Act, FMEA, PMLA and Arbitration Act, besides the present proceedings under Section 271(c) of the Companies Act, 2013.

110. The Learned Counsel for the 1st Respondent adverts to the fact that the PMLA authorities had preferred a complaint on 24.12.2018, before the 'Competent Court' bringing out the entire Spectrum of the Money fraud, including share premium and share subscription fraud along with money

laundering aspects. AS a matter of fact, the CBI had issued Letters of Rogatory to various Nations seeking particulars of these transactions including in Singapore and when these documents could have been issued by the appropriate authorities, one of the shareholders took the matter to Court in Singapore, as a result of which exchange of information is getting delayed in connection with the money trails, beneficial owners and the attendant fraudulent activities.

111. The Learned Counsel for the 1st Respondent submits that the 'Tribunal' appointed a 'Provisional Liquidator' on 19.01.2021, who had placed on record the three reports viz. 'OLR 14 of 2021 dated 03.02.2021', 'OLR 23 of 2021 dated 27.02.2021' and 'OLR 31 of 2021 dated 11.03.2021', in which, various information relating to fraud especially the siphoning of funds outside India (though part of the PMLA investigation) has now been nuanced further, showcasing the actual diversion of funds into which entity in the US post the laundering.

112. The Learned Counsel for the 1st Respondent points out that the supplementary charge sheet dated 08.01.2019 is not an independent case and it only supplement the first charge sheet dated 11.08.2016 and if three years is to be counted from the date of supplementary charge sheet dated 08.01.2019, the Company Petition dated 18.01.2021 filed by the 1st Respondent is well within the period of limitation.

113. The Learned Counsel for the 1st Respondent contends that 'Devas' takes a plea that issuance of advertisement is mandatory in terms of Rules 5 and 7 r/w FORM WIN 6 and 11 in the Winding up Rules, 2020 and without giving advertisements, the 'Tribunal' cannot windup 'Devas'.

114. According to the Learned Counsel for the 1st Respondent that 'Devas' is a non-performing company since Day-1 and does not involve any Creditors/Bankers or any other stakeholder and the income of 'Devas',

cumulative for the last four years was less than INR 2,00,000 and one of the shareholders who got impleaded before the 'Tribunal' has filed a separate Appeal against the 'Impugned Order' of the 'Tribunal' before this 'Appellate Tribunal' and other stakeholders are pursuing enforcement actions in various jurisdictions because of the appointment of Provisional/Official Liquidator to take over 'Devas'.

115. The Learned Counsel for the 1st Respondent submits that if by complying with the procedure, nothing is going to be achieved, is non-compliance cannot be considered to be a violation. In this connection, the Learned Counsel for the 1st Respondent points out that a reading of Rule 5, in the Winding up Rules, 2020 would point out that the expression employed in regard to advertisement is 'if any and as such, the 'Appellate Tribunal' has the discretion to dispense with the Advertisement if it deem fits on the facts and circumstances of each case under the 1959 Rules, as per Rule 24(2), the Judge had a discretion to dispense with the requirement of advertisement. And this discretion was permitted only in non-winding up cases. However, in the 2020 Rules, there is no corresponding Provision which mandates advertisement of a Winding up Petition.

116. The Learned Counsel for the 1st Respondent contends that a 'Court of Law' does not act in vain and further that 'Devas' did not carry any business activity and only three are involved viz. the Company, the Shareholders and Directors and all of them are aware of the ongoing Winding up Proceedings. Also that, it is the version of the 1st Respondent that 'technicalities' cannot interfere with the course of justice and that the 'procedures' are handmaids of justice.

117. The Learned Counsel for the 1st Respondent submits that the contention of the 'Devas' that the dispute is between private parties and the 'Tribunal' cannot interpret the Agreement dated 28.01.2005, etc. is untenable because of

the fact that as per Section 271(c) of the Companies Act, any company can be wound up by the 'Tribunal' based on the ground of 'fraud' and that the Winding up petition can be presented by a person authorised by the Central Government. Also that, the 1st Respondent/'Antrix' is authorised by the Central Government by way of the sanction order dated 18.01.2021 authorising it to present Winding up Petition to wind up 'Devas' and the same was upheld by the Hon'ble High Court of Karnataka in the order dated 28.04.2021 in W.P. No.619 of 2021.

118. The Learned Counsel for the 1st Respondent contends that it is the stand of 'Devas' that the Auditor's report attached to the financial statements of 'Antrix' does not allege 'fraud' and therefore 'Antrix' is estopped from pleading 'fraud'. Also that the 'Accountants' and 'Financial Advisors' are in no position to analyse in depth the angles of 'fraud' on the 'Antrix' beyond the statements and documents in front of them.

119. The Learned Counsel for the 1st Respondent submits that even during the last year, 'Antrix' made a considerable amount of profits and had a turnover of INR 1443.50 Crores and that 'Antrix' is still continuing to perform under the respective contracts it has with its clients and it is very much a going concern. Besides this, there exists a new company called 'NSIL' and further that it is inappropriate for 'Devas' to contend all of 'Antrix' business is now allocated to 'NSIL'.

120. The Learned Counsel for the 1st Respondent points out that 'Devas' admits that it sent out the investment outside to pay Lawyers and that the dispute, the Lawyers were handling were not regarding any 'ISP Services' but the investments were approved for 'ISP Services'.

121. The Learned Counsel for the 1st Respondent submits that under the earlier Section 433 (e) of the Companies Act, 1956 the facts involved wherein Winding up Proceedings initiated was on account of 'recovery of debts' and it was held

by the Court that all the 'Creditors' should be made aware of and as such, advertisement is a mandatory requirement as per Section 433(e) of the Act. However, the Learned Counsel for the 1st Respondent brings it to the notice of this 'Tribunal' that the earlier Section 433(e) of the Companies Act, 1956 was not incorporated in the new Companies Act, 2013, as this has been incorporated in the I&B Code and therefore, the decisions relied on the side of the 'Appellant' will have no applicability to the facts of the 'instant case'.

122. The Learned Counsel for the 1st Respondent contends that 'Devas' never did any business in India and as such, there was no third-party interests created by 'Devas' and hence, an 'advertisement' is a 'useless formality'.

123. The Learned Counsel for the 1st Respondent points out that the Hon'ble High Court of Karnataka had observed that in the Winding up of 'Devas' when 'Devas' is fighting its own case its shareholder cannot be permitted to fight a proxy war and that is an abuse of process of law. Also, that it is the fervent plea of the 1st Respondent that the affairs of 'Devas' have been unlawful and fraudulent and in fact, 'Devas' was formed for a fraudulent purpose.

124. The Learned Counsel for the 1st Respondent submits that every evidence and document is staring at 'Devas' face and therefore, in law, this 'Tribunal', has the exclusive jurisdiction to adjudicate matters under Section 271(c) of the Companies Act, 2013.

1ST RESPONDENT'S DECISIONS:

1. The Learned Counsel for 1st Respondent refers to the decisions of Hon'ble Supreme Court in (1) Ramana Dayaram Shetty v. International Airport Authority of India reported in (1979) 3 SCC 489, (2) S.G Jaisinghani v. Union of India reported in (1967) 2 SCR 703, (3) Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir reported in (1990) 4 SCC 1, (4) Common Cause, A registered society v. Union of India reported in (1996) 6 SCC 530, (5) Kumari

Shrilekha Vidyarthy v. State of U.P reported in (1991) 1 SCC 212, (6) LIC v. Consumer Education and Research Centre reported in (1995) 5 SCC 482, (7) New India Public School v. HUDA reported in (1996) 5 SCC 510, (8) Akhil Bharatiya Upbokta Congress v. State of MP reported in (2011) 5 SCC 29 and (9) Sacchidan and Pandey v. State of WB reported in (1987) 2 SCC 295, in respect of plea the agreement dated 28.01.2005 in the instant case is against law relating to "state largesse to private parties especially when it is concerning natural resources such as space segment and spectrum held by the Government of India in public trust of the people.

2. "The Learned Counsel to 1st Respondent cites the judgement of Hon'ble Supreme Court in Centre for Public Interest Litigation V Unions of India reported in (2012) 3 SCC 1 where in at paragraphs 74-89 and 97 it is observed and held as under:

Para 74. "At the outset, we consider it proper to observe that even though there is no universally accepted definition of natural resources, they are generally understood as elements having intrinsic utility to mankind. They may be renewable or non-renewable. They are thought of as the individual elements of the natural environment that provide economic and social services to human society and are considered valuable in their relatively unmodified, natural form. A natural resource's value rests in the amount of the material available and the demand for it. The latter is determined by its usefulness to production. Natural resources belong to the people but the State legally owns them on behalf of its people and from that point of view natural resources are considered as national assets, more so because the State benefits immensely from their value.

Para 75. The State is empowered to distribute natural resources. However, as they constitute public property/national asset, while distributing natural resources the State is bound to act in consonance with the principles of equality

and public trust and ensure that no action is taken which may be detrimental to public interest. Like any other State action, constitutionalism must be reflected at every stage of the distribution of natural resources. In Article 39(b) of the Constitution it has been provided that the ownership and control of the material resources of the community should be so distributed so as to best subserve the common good, but no comprehensive legislation has been enacted to generally define natural resources and a framework for their protection. Of course, environment laws enacted by Parliament and State Legislatures deal with specific natural resources i.e. forest, air, water, coastal zones, etc.

76. The ownership regime relating to natural resources can also be ascertained from international conventions and customary international law, common law and national constitutions. In international law, it rests upon the concept of sovereignty and seeks to respect the principle of permanent sovereignty (of peoples and nations) Over (their) natural resources as asserted in the 17th Session of the United Nations General Assembly and then affirmed as a customary international norm by the International Court of Justice in the case of Democratic Republic of Congo v. Uganda, Common law recognises States as having the authority to protect natural resources insofar as the resources are within the interests of the general public. The State is deemed to have a proprietary interest in natural resources and must act as guardian and trustee in relation to the same. Constitutions across the world focus on establishing natural resources as owned by, and for the benefit of, the country. In most instances where constitutions specifically address ownership of natural resources, the sovereign State, or, as it is more commonly expressed, "the People", is designated as the owner of the natural resources.

77. Spectrum has been internationally accepted as a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient

utilisation. It has a high economic value in the light of the demand for it on account of the tremendous growth in the telecom sector. Although it does not belong to a particular State, right of use has been granted to the States as per international norms.

78. In India, the courts have given an expansive interpretation to the concept of natural resources and have from time to time issued directions, by relying upon the provisions contained in Articles 38, 39, 48, 48-A and 51-A(g) for protection and proper allocation/distribution of natural resources and have repeatedly insisted on compliance with the constitutional principles in the process of distribution, transfer and alienation to private persons.

79. The doctrine of public trust, which was evolved in Illinois Central Railroad Co. v. People of the State of Illinois (1996) 6 SCC 558, Shivsagar Tiwari v Union of India, has been held by this Court to be a part of the India Jurisprudence in M.C Mehta v. Kamal Nath ((1996) 5 SCC 530, Common Cause v Union of India and has been applied in Jamshed Hormusji Wadia v.Port of Mumbai (WP (c) No. 363 of 2008 Order dated 1-7-2009 (Del),S: Tel Ltd. v Union of India), Intellectuals Forum V. State of A.P ((1996) 5 SCC 510, New India Public School v HUDA and Fomento Resorts and Hotels Ltd. V. Minguel Martins ((1996) 2 SCC 405, Delhi Science Forum v Union of India).

80.***. In Jamshed Hormusji Wadia case ((WP (c) No. 363 of 2008 Order dated 1-7-2009 (Del), S: Tel Ltd. v Union of India), this Court held that the State's actions of its agencies/instrumentalities must be for the public good, achieving the objects for which they exist and should not be arbitrary or capricious. In the field of contracts, the state and its instrumentalities should design their activities in a manner Which would ensure competition and non-discrimination. They can augment their resources but the object should be to serve the public cause and to do public good by resorting to fair and reasonable method.

81. In Fomento Resorts and Hotels Ltd. case ((1996) 2 SCC 405, Delhi Science Forum v Union of India)., the Court referred to the article of prof. Joseph L. Sax and made the following observations: (SCC pp. 614-15, paras 53-55)

"53. The public trust doctrine enjoins upon the Government to protect the resources for the resources for the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. This doctrine puts an implicit embargo on the right of the State to transfer public properties to private party if such transfer affects public interest, mandates affirmative State action for effective management of natural resources and empowers the citizens to question ineffective management thereof.

54. The heart of the public trust doctrine is that it imposes limits and obligations upon government agencies and their administrators on behalf of all the people and especially future generations. For example, renewable and non-renewable resources, associated uses, ecological values or objects in which the public has a special interest (i.e. public lands, waters, etc.) are held subject to the duty of the State not to impair such resources, uses or values, even if private interests are involved. The same obligations apply to managers of forests, monuments, parks, the public domain and other public assets. Professor Joseph L. Sax in his classic article, The Public Intervention' (1970)***, indicates that the public trust doctrine, of all concepts known to law, constitutes the best practical and philosophical premise and legal tool for protecting public rights and for protecting and managing resources, ecological values or objects held In trust.

55. The public trust doctrine is a tool for exerting long-established public rights over short-term public rights and private gain. Today every person exercising his or her right to use the air, water, or land and associated natural ecosystems has the obligation to secure for the rest of us the right to live or otherwise use that same resource or property for the long-term and enjoyment by future generations. To say it another way, a landowner or lessee and a water right holder has an obligation to use such resources In a manner as not to impair or

diminish the people's rights and the people's long-term interest in that property or resource, including down slope lands, waters and resources.

82. In Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal the Court was dealing with the right of organisers of an event, such as a Sport tournament, to its live audio-visual broadcast, universally, through an agency of their choice national or foreign. In para 78, the Court described the airwaves/frequencies as public property, in the following words: (SCC p. 226)

"78. There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licenses to other agencies, including the private agencies,"

83, In Reliance Natural Resources Ltd. v. Reliance Industries Ltd.22, P. sathaslvam, J., with whom Balakrishnan, C.J., agreed, made the following Sathasivam, observations: (SCC p. 64, para 114)

114. It must be noted that the constitutional mandate is that the natural resources belong to the people of this country. The nature of the word 'vest' must be seen in the context of the public trust doctrine (PTD). Even though this doctrine has been applied in cases dealing with environmental jurisprudence, it has its broader application."

84. The learned Judge then referred to the judgments, Special Reference No. 1 of 2001, In re30 M.C. Mehta v. Kamal Nath25 and observed: (Reliance Natural Resources Ltd. case29, SCC p. 65, para 116)

"116. … This doctrine is part of Indian law and finds application in the present case as well. It is thus the duty of the Government to provide complete protection to the natural resources as a trustee of the people at large."

The Court also held that natural resources are vested with the Government as a matter of trust in the name of the People of India; thus it is the solemn duty of the State to protect the national interest and natural resources must always be used in the interests of the country and not private interests.

85. As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the State in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects: first, it regulates the rights and obligations of the State vis-à vis its people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and second, it regulates the rights and obligations of the State vis-à-vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that It does not discriminate between similarly placed private parties.

86. In Akhll Bhartiya Upbhokta Congress v. State of Madhya Pradesh 31, this Court examined the legality of the action taken by the Government of Madhya Pradesh to allot 20 acres of and to an institute established in the name of Kushabhau Thakre on the basis of an application made by the Trust. One of the grounds on which the appellant challenged the allotment of land was that the State Government had not adopted any rational method consistent with the doctrine of equality. The High Court negatived the appellant's challenge, before this Court, the learned Senior Counsel appearing for the State relied upon the judgments in Ugar Sugar Works Ltd. v. Delhi Admn.32, State of U.P. V. Chaudhari Ran Beer Singh, State of Orissa v. Gopinath Dashl4 and Meerut Development Authorly V. Assn. of Management Studies and argued that the Court Cannot exercise the

power of judicial review to nullify the policy framed by the State Government to allot nazul land without advertisement.

87. This Court rejected the argument, referred to the judgments in Ramana Dayaram Shetty v. International Airport Authority of India36, S.G. Jaisinghani v. Union of India, Kasturi Lal Lakshmi Reddy v. State of J&K, Common Cause v. Union of India12, Shrilekha Vidyarthy v. State of U.P.39, LIC v. Consumer Education and Research Centre40 and New India Public School v. HUDA41 and held: (Akhil Bhartiya Upbhokta Congress case31, SCC p. 60, para 65)

"65. What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the state. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State."

88. In Sachidanand Pandey v. State of West Bengal-2, the Court referred to some of the precedents and laid down the following propositions: (SCC p. 330, para 40)

> 40. State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles

have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism."

89. In conclusion, we hold that the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine equality and larger public good.

97***. The exercise undertaken by the officers of DOT between September 2007 and March 2008, under the leadership of the then Minister of Communications and Information Technology was wholly arbitrary, capricious and contrary to public interest apart from being violative of the doctrine of equality. The material produced before the Court shows that the Minister of Communications and Information Technology wanted to favour some companies at the cost of the public exchequer and for this purpose, he took the following steps:

(i) Soon after his appointment as Minister of Communications and Information Technology, he directed that all the applications received for grant of UAS license should be kept pending till the receipt of the TRAI recommendations.

(ii) The recommendations Commission which, made by TRAI on 28-8-2007 were not placed before the full Telecom Commission which, among

others, would have included the Finance Secretary. The notice of the meeting of the Telecom Commission was not given to any of the non-permanent members despite the fact that the recommendations made by TRAI for allocation of spectrum in 2G bands had serious financial implications. This has been established from the pleadings and the records produced before this Court which show that after issuance of licences, 3 applicants transferred their equities for a total sum of Rs. 24,493 crores in favour of foreign companies. Therefore, it was absolutely necessary for Dot to take the opinion of the Finance Ministry as per the requirement of the Government of India (Transaction of Business) Rules, 1961.

(iii) The officers of DoT who attended the meeting of the Telecom Commission held on 10-10-2007 hardly had any choice but to approve the recommendations made by TRAI. If they had not done so, they would have incurred the wrath of the Minister of Communications and Information Technology.

(iv) In view of the approval by the Council of Ministers of the recommendations made by the Group of Minister in 2003, DoT had to discuss the issue of spectrum pricing with the Ministry of Finance. Therefore, DOT was under an obligation to involve the Ministry of Finance before any decision could be taken in the context of Paras 2.78 and 2.79 of the TRAI's recommendations. However, as the Minister of Communications and Information Technology was very much conscious of the fact that the Secretary, Finance, had objected to the allocation of 2G Spectrum at the rates fixed in 2001, he did not consult the Finance Minister or the officers of the Finance Ministry.

(vi) The Minister of Communications and Information Technology introduced the cut-off date as 25-9-2007 for consideration of the

applications received for grant of licence despite the fact that only one day prior to this, a press release was issued by DOT fixing 1-10-2007 as the last date for receipt of the applications. arbitrary action of the Minister of Communications and Information Technology though appears to be Innocuous, actually benefited some of the real estate companies who did not have any experience in dealing with telecom services and had made applications only on 24-9-2007 i.e. one day before the cut-off date fixed by the Minister of Communications and Information Technology on his own.

(vii) The cut-off date i.e. 25-9-2007 decided by the Minister of Communications and Information Technology on 2-11-2007 was not made public till 10-1-2008 and the first-come-first-served policy, which was being followed since changed by him on 7-1-2008 and was incorporated in press release dated 10-1-2008. This enabled some of the applicants, who had access either to the Minister or the officers of DoT to get the demand drafts, bank guarantee, etc. prepared in advance for compliance with conditions of the LoIs, which was the basis for advance determination of seniority for grant of licences and allocation of spectrum.

(viii) The meeting of the full Telecom Commission, which was scheduled to be held on 9-1-2008 to Consider issues relating to grant of licences and pricing of Spectrum was deliberately postponed on 7-1-2008 so that the Secretary, Finance and Secretaries of three other important Departments may not be able to raise objections against the procedure devised by DoT for grant of licence and allocation of spectrum by applying the principle of level playing field.

(ix) The manner in which the exercise for grant of the LoIs to the applicants was conducted on 10-1-2008 leaves no room for doubt that everything was stage-managed to favour those who were able to know in

advance the change in the implementation of the first-come-first-served policy. As a result of this, some of the companies which had submitted applications in 2004 or 2006 were pushed down in the priority and those who had applied between August and September 2007 succeeded in getting higher seniority entitling them to allocation of spectrum on priority basis."

(iii) The Learned Counsel for 1st Respondent for the proposition that the fraud vitiates everything and further that no action flowing from fraudulent activity can be legal and refer the following decision of Hon'ble Supreme Court in Satluj Jal Vidyut Nigam V Raj Kumar Rajinder Singh reported in (2019) 14 SCC 449 wherein at paragraph 68-76 its observed as under:

68. "Fraud vitiates every solemn proceeding and no right can be claimed by a fraudster the ground of technicalities. On behalf of the appellants, reliance has been placed on the definition of "fraud" as defined in Black's Law Dictionary, which is as under:

"Fraud: (1) A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases (esp. when the conduct is willful) it may be a crime. … (2) A misrepresentation made recklessly without belief in its truth to induce another person to act. (3) A tort arising from a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment. (4) dealing; esp., in contract law, the unconscientious use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain."

69. Halsbury's Laws of England has defined "fraud" as follows: Whenever a person makes a false statement which he does not actually and honestly believe to be true, for purpose of civil liability, the statement is as fraudulent as if he had

stated that which he did know to be true, or know or believed be false. Proof of absence of actual and honest belief is all that is necessary to satisfy the requirement of the law, whether the representation has been made recklessly or deliberately, indifference or recklessness on the part of the representor as to the truth or falsity of the representation affords merely an instance of absence of such a belief."

70. In Kerr on the Law of Fraud and Mistake, "fraud" has been defined thus:

"It is not easy to give a definition of what constitutes fraud in the extensive significance in which that term is understood by Civil Courts of Justice. The courts have always avoided hampering themselves by defining or laying down as a general proposition what shall be held to constitute fraud. Fraud is infinite in variety… Courts have always declined to define it, … reserving to themselves the liberty to deal with it under whatever form it may present itself. Fraud ... may be said to include property properly) all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone is considered as fraud. Fraud in all cases implies a wilful act on the part of anyone, whereby another is sought to be deprived, by legal or Inequitable means, of what he is entitled to."

71. In Ram Chandra Singh v. Savitri Devi ((2007) 10 SCC 674 Sunil Pannalal Banthia v City & Industrial Development Corpn. Of Maharashtra Ltd.), it was observed that fraud vitiates every Solemn act. Fraud and justice never dwell together and it cannot be perpetuated or saved by the application of any equitable

doctrine Including res judicata. This Court observed as under: (SCC pp. 327-29, paras 15-18, 23 & 25)

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud, as is well known, vitiates every solemn act. Fraud and justice never dwell together.

16. Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfuly or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

23. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous.

25. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata.

(emphasis supplied)

72. In Madhukar Sadbha Shivarkar v. State of Maharashtra ((2006) 13 SCC 382, Nagar Nigam v Alfaheem Meat Exports (P) Ltd.), this Court observed that fraudhad been played by showing the records and the orders obtained unlawfully

by the declarant, would be a nullity in the eye of the law though such orders have attained finality. Following observations were made: (SCC pp. 569-70, para 27)

27. The said order is passed by the State Government only to enquire into the landholding records with a view to find out as to whether original land revenue records have been destroyed and fabricated to substantiate their unjustifiable claim by playing fraud upon the Tahsildar and appellate authorities to obtain the orders unlawfully in their favour by showing that there is no surplus land with the Company and its shareholders as the valid sub-leases are made and they are accepted by them in the proceedings under Section 21 of the Act, on the basis of the alleged false declarations filed by the shareholders and sub-lessees under Section 6 of the Act. The plea urged on behalf of the State Government and the de facto complainant owners, at whose instance the orders are passed by the State Government on the alleged ground of fraud played by the declarants upon the Tahsildar and appellate authorities to get the illegal orders obtained by them to come out from the clutches of the land ceiling provisions of the Act by creating the revenue records, which Is the fraudulent act on their part which unravels everything and therefore, the question of limitation under the provisions to exercise power by the state Government does not arise at all. For this purpose, the Deputy Commissioner of Pune Division was appointed as the enquiry officer to hold Such an enquiry to enquire into the matter and submit his report for consideration of the Government to take further action in the matter. The legal contentions urged by Mr. Naphade, in justification of the impugned judgment and order prima facie at this stage, we are satisfied that the allegation of fraud in relation to getting the landholdings of the Villages referred to supra by the declarants on the alleged ground of destroying original records and fabricating revenue records to show that there are 384 sub-leases of the land involved in the proceedings to retain the surplus land illegally as alleged, to the extent of more

than 3000 acres of land and the orders are obtained unlawfully by the declarants in the land ceiling limits will be nullity in the eye of the law though such they are tainted with fraud, the same can be interfered with by the State Government and officers to pass appropriate orders. The landowners are also aggrieved parties to agitate their rights to get the orders which are obtained by the declarants as they are vitiated in on account of nullity is the tenable submission and the same is well founded and therefore, we accept the submission to justify the impugned judgment and order *Babu Maruti Dukare* v. State of *Maharashtra ((2006) 3 SCC 549, Intellectuals Forum v State of A. P)* of the Division Bench of the High Court."

(emphasis supplied)

73. In Jai Narain Parasrampuria v. Pushpa Devi Saraf ((2006) 3 SCC 434 Bombay Dyeing & MFG. Co. Ltd., (3) v Bombay Environmental Action Group), this Court observed that fraud Vitiates every solemn act. Any order or decree obtained by practicing fraud is a nullity. his Court held as under:

"55. It is now well settled that fraud vitiates all solemn act. Any order or decree obtained by practising fraud is a nullity. [See (1) Ram Chandra Singh v. Savitri Devi ((2007) 10 SCC 674, Sunil Paannalal Banthia v City & Industrial Development Corpn. Of Maharashtra Ltd.,)followed in (2) Kendriya Vidyalaya Sangathan v. Girdharilal Yadav ((2005) 13 SCC 495: (2006) SCC (L & S) 1225, State of Orissa v Gopinath Dash; (3) State of A.P. v. T. Suryachandra Rao ((2004) 4 SCC 489, Special Response No. 1 of 2001, In Re. (4) Ishwar Dutt v. LAO ((2004) 3 SCC 214, Jamshed Hormusji wadia v Port of Mum bai (5) Lillykutty v. Scrutiny Committee, SC & ST; (6) Maharashtra SEB v. Suresh ((2002) 2 SCC 333, BALCO Employees' Union v Union of India (6) Suresh Raghunath Bhokare ((2001) 3 SCC 635, Ugar Sugar Works Ltd. v Delhi Admn.; (7) Satya v. Teja Singh ((2000) 5 SCC 287, Monarch Infrastructure P. Ltd.,v Ulhasnagar

Municipal Corpn.; (8) Mahboob Sahab v. Syed Ismai ((1997) 1 SCC 388, M. C. Mehta v Kamal Nath ; and (9) Asharfi Lal v. Koili ((1996) 6 SCC 558, Shivsagar Tiwari v Union Of India.]

(emphasis supplied)

74. In State of A.P. v. T. Suryachandra Rao ((2004) 4 SCC 489, Special Reference No. 1 of 2001, In Re, it was observed that where the land which was offered for surrender had already been acquired by the State and the same had vested in it. It was held that merely because an enquiry was made, the Tribunal was not divested of the power to correct the error when the respondent had clearly committed a fraud. Following observations were made: (SCC pp. 152-53 & 155, paras 7-10 & 13-16)

"7. The order of the High Court is clearly erroneous. There is no dispute that the land which was offered for surrender by the respondent had already been acquired by the State and the same had vested in it. This was clearly a case of fraud. Merely because an enquiry was made, the Tribunal was not divested of the power to correct the error when the respondent had clearly committed a fraud.

8. By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from ill-will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the Second condition is satisfied. *[See Vimla* v. *Delhi Admn*. ((1996) 6 SCC 530, Common Cause v Union

of India and Indian Bank v. Satyam Fibres (India) (P) Ltd.((1996) 5 SCC 510, New India Public School v HUDA]

9. A fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's OSs. It is a cheating intended to get an advantage. (See S.P, Chengalvaraya Naldu V. Jagannath ((1996) 2 SCC 405 Delhi Science Forum v Union of India.)

10. "Fraud" as Is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes or the other person authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation amounts itself relief against to fraud. Indeed, Innocent misrepresentation may also give reason to claim fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in taw if a party makes representations, which he knows to be false, and injury ensures therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although In a given case a deception may not amount to fraud, fraud is an anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. (See Ram Chandra Singh v. Savitri Devi ((2007) 10 SCC 674, Sunil Pannalal Banthia V City Industrial Development Corpn. Of Maharashtra Ltd..)

13. This aspect of the matter has been considered recently by this Court in Roshan Deen v. Preeti Lal ((1995) 5 SCC 482, LIC v Consumer Education & Research Centre, Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education ((1995) 2 SCC 161, Ministry of Information & Broadcasting Govt. of India v Cricket Assn. of Bengal, Ram Chandra Singh v. Savitri Devi ((20007) 1o SCC 674 Sunil Pannalal Banthia V City Industrial Development Corpn. Of Maharashtra Ltd..) and Ashok Leyland Ltd. v. State of T.N ((1993) 52 DLT 168, Home communication Ltd. v Union of India)

14. Suppression of a material document would also amount to a fraud on the court. (See Gowrishankar v. Joshi Amba Shankar Family Trust((1991) 2 SCC 48, Premchand Somchand Shah v Union of India and S.P. Chengalvaraya Naidu v. Jagannath ((1996) 2 SCC 405 Delhi Science Forum v Union of India.)

15. "Fraud" is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence of fraud; as observed in Ram Preeti Yadav ((1995) 2 SCC 161 Ministry of Information & Broadcasting, Govt. of India v Cricket Assn. of Bengal).

16. In Lazarus Estates Ltd. v. Beasley2, Lord Denning observed at QB pp. 712 and 713: (All ER p. 345 C)

‘No judgment of a court, no order of a minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.’

In the same judgment, Lord Parker, L.J. observed that fraud 'vitiates all transactions known to the law of however high a degree of solemnity' (All ER p. 351 E-F)."

(emphasis supplied)

75. In *A.V. Papayya Sastry* v. State of A.P, ((1987) 2 SCC 295 Sachidanand Pandey v State of W.B.) , this Court as to the effect of fraud on the Judgment or order observed thus: (SCC pp. 231 & 236-37, paras 21-22 & 38-39)

"21. Now, it is well-settled principle of law that If any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed:

'Fraud avoids all judicial acts, ecclesiastical or temporal."

22. It is thus settled proposition of law that a judgment, decree or order obtained Dy playing fraud on the court, tribunal or authority Is a nullity and non est in the eye of the law. Such a judgment, decree or order-by the first court or by the final court-has to

Decree treated as nullity by every court, superior or Inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.

38. The matter can be looked at from a different angle as well. Suppose, a case is decided by a competent court of law after hearing the parties and an order is passed in favour of the plaintiff applicant which is upheld by all the courts including the final court. Let us also think of a case where this Court does not dismiss special eave petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders passed by the courts/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order.

39. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or

playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as a nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every court, superior or inferior."

Supervisory jurisdiction of the court can be exercised in case of error apparent on the face of the record, abuse of process and if the issue goes to the root of the matter.

76. In S.P. Chengalvaraya Naidu v. Jagannath ((1996) 2 SCC 405, Delhi Science Forum v Union of India), this Court noted that the issue of fraud goes to the root of the matter and it exercised powers under Article 136 to cure the defect. The Court observed: (SCC p. 5, paras 5-6)

"5. The High Court ((1986) 2 SCC 594 Chaitanya Kumar v State Bank of Karnataka), in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that 'there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence'. The principle of 'finality of litigation' cannot be pressed to the extent of such an absurdity that It becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, the process of the court is being abused. Property-grabbers, tax evaders, bank loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to

say that a person, whose case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

6. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud Is an act of deliberate deception with the design of securing something by taking unfair advantage of another It is a deception in order to gain by another's loss. It Is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Ext. B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. We do not agree with the observations of the High Court that the appellant-defendants could have easily produced the certified registered copy of Ext. B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If the withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.

In addition, the Learned Counsel for the 1st Respondent refers to the decision of Hon’ble Supreme Court in Bhaurao Dagdu Paralkar V State of Maharashtra and Ors reported in (2005) 7 SCC 605 wherein at para 9-16 it is observed as under:

9. By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from ill will towards the other is

immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. [See Vimla (Dr.) v. Delhi Admn. ((2003) 8 SCC 319 Ram Chandra Singh V Savitri Devi) and Indian Bank v. Satyam Fibres (India) (P) Ltd. ((2003) 8 SCC 311 Ram Preeti Yadav V U.P Board of High School & Intermediate Education]

10 . A “fraud” is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See S.P. Chengalvaraya Naidu v. Jagannath ((2002) 1 SCC 100: (2002) SCC (L & S) (1997, Roshan Deen v Preeti Lal)

11. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letters or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letters, It is a well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An

act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would Ender the transaction void ab initio. Fraud and deception are synonymous. Although a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. (See Ram Chandra Singh v. Savitri Devi ((2001) 8 SCC 8: (2001) AIR SCW 3843, Gurdial Singh v Union of India).

12. In Shrisht Dhawan v. Shaw Bros. ((1996) 5 SCC 550, Indian Bank v Sathyam Fibres (India) (P) Ltd.,), it was observed as follows: (SCC p. 553, para 20)

"Fraud" and collusion vitiate even the most solemn proceedings in any civilized System of jurisprudence. It is a concept descriptive of human conduct. Michael Levi kens a fraudster to Milton's sorcerer, Camus, who exulted in his ability to, "wing me into the easy-hearted man and trap him into snares". It has been defined as an act or trickery or deceit. In Webster's Third New International Dictionary "fraud" in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Black's Law Dictionary "fraud" is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or Surender a legal right a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and if intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as Criminal Deception, use of false representation to gain unjust advantage; dishonest artifice or trick.

Accordingly to Halsbury's Law of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Contract Act, 1872 defines "Fraud" as an act committed by a party to a contract with intend to deceive another. From the dictionary meaning or even otherwise fraud arises out of a deliberate active role of the representator about the fact, which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false. In a leading English Case that is Derry v Peek ((1996) 3 SCC 310, Gowrisankar v Joshi Amba Sankar Family Trust what constitutes "Fraud" was described thus: (All ER P 22 B-C)

"Fraud' is proved when it is shown that your false representation has been made (I) knowingly , or (II) without belief in its truth, or (III) recklessly, careless whether if be true or false.:

But "fraud" in public law is not the same as 'fraud" in private law. Nor can the ingredients, which establishes "fraud" in commercial transactions, be of assistance in determining fraud in administrative law. It has been aptly observed by Lord Bridge in Khawaja V Secy. Of State for Home Dept.,((2004) 3 SCC 1 Ashok Leyland Ltd., v State of T. N) that it is dangerous to introduce maxims of common law as to the effect of fraud while determining the fraud in relation to statutory law. "Fraud" in relation to the statute must be a colorable transaction to evade the provisions of a statute.

"If statute has been passed for someone particular purpose, a court of law will not countenance any attempt which may be made to extend the operation of the act to something else which is quite foreign to its object and beyond its scope. Present day concept of fraud on statute has veered round abuse of power or malafide exercise of power. It may arise due to overstepping the limits of power

or defeating the provisions of statute by adopting subterfuge or the power may be exercise for extraneous or irrelevant consideration. The colour of fraud in public law or administrative law, as it is developing, is assuming differentiates. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or Tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. That is misrepresentation must be in relation to the conditions provided in a section on existence or non existence of which power can be exercised. But non disclosure of a fact not required by a statute to be disclosed may not amount to fraud. Even in commercial transactions non disclosure of every fact does not vitiate the agreement. ' In a contract every person must look for himself and ensure he acquires the information necessary to avoid bad bargain'. In public law the duty is not to deceive." (see Shrisht Dhawan v Shaw Bros) ((1996) 5 SCC 550, Indian Bank v Satyam Fibres (India) (P) Ltd., SCC P. 554, Para 20)

13. This aspect of the matter has been considered recently by this court in Roshan Deen V Preeti Lal ((1993) Supp (3) SCC 2 ; AIR 1993 SC 2127, Mukund Lal Bhandari v Union of India), Ram Preeti Yadav v U.P Board of High School and Intermediate Education0 ((1992) 1 SCC 534, Shrisht Dawan v Shaw Bros.), Ram Chandra Singh ((2001) 8 SCC 8 ; (2001) AIR SCW 3843, Gurudial Singh V Union of India) and Ashok Leyland Ltd. v State of T.N ((1983) 1 All ER 765; 1984 AC 74; (1982) 1 WLR 948 (HL) Khawaja v Secy. Of State of Home Deptt.)

14. Suppression of a material document would also amount to a fraud on the court. See *Gowrishankar* v. *Joshi Amba Shankar Family* Trust ((1963) Supp (2) SCR 585; AIR 1963 SC 1572, Vimla (Dr) v Delhi Admn. and S.P.

Chengalvaraya Naidu cases. ((2002) 1 SCC 100; (2022) SCC (L & S) 97, Roshan Deen v Preeti Lal)

15. “Fraud” is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud; as observed in Ram Preeti Yadav case ((1992) 1 SCC 534, Shrisht Dawan v Shaw Bros).

16. In Lazarus Estates Ltd. V. Beasley ((1956) 1 QB 702; (1956) 1 All ER 341; (1956) 2 WLR 502 (CA), Lazarus Estates Ltd., v Beasley , Lord Denning observed at QB pp. 712 and713: (All ER p. 345 C)

"No judgment of a court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything." Tn the same judgment Lord Parker, L.J. observed that fraud vitiates all transactions known to the law of however high a degree of solemnity. (pn722 These aspects were recently highlighted in State of A.P. v. T. Suryachandra Rao ((1886-90) All ER Rep 1 ; (1889) 14 AC 337; 61 LT 265 (HL) Derry V Peek.)

The Learned Counsel for the 1st Respondent seeks in aid of the Hon’ble Supreme Court in Shrisht Dhawan (SMT) V M/s. Shaw Brothers reported in (1992) 1 SCC 534 at para 534 wherein it is observed as under:

20. Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, 'wing me into the easy-hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In Webster's Third New International Dictionary fraud in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another.

In Black's Legal Dictionary, fraud is defined as an fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Contract Act defines fraud as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of a fact with knowledge that it was false. In a leading English case (Derry V Peek (1886-90) All ER 1: 1889 14 SC 337: 5TLR 625) what constitutes fraud was described thus: (All ER p. 22 B-C)

"[F]raud is proved when it is shown that a false representation has been made (*i*) knowingly, or (*ii*) without belief in its truth, or (*iii*) recklessly, careless whether it be true or false."

But fraud in public law is not the same as fraud in private law. Nor can the ingredients which establish fraud in commercial transaction be of assistance in determining fraud in Administrative Law. It has been aptly observed by Lord Bridge in Khawaja (Khawaja v Secy of State for Home Deptt., (1983) 1 All ER 765) that it is dangerous to introduce maxims of common law as to effect of fraud fraud while determining fraud in relation to statutory law. In *Pankaj Bhargav v*

Mohinder Nath, (1991) 1 SCC 556; AIR 1991 SC 1233) it was observed that fraud in relation to statute must be a colourable transaction to evade the provisions of a statute. A statute has been passed for some one particular purpose, a court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope." (Craies on Statue Law, 7th Edn., P.79). Present day concept of fraud on statute has veered round abuse of power or mala fide exercise of power. It may arise due to overstepping the limits of power or defeating the provision of statute by adopting subterfuge or the power may be exercised for extraneous or irrelevant considerations. The administrative law, as it is developing, is assuming different shades. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. That is misrepresentation must be in relation to the conditions provided in a section on existence or non-existence of which power can be exercised. But fraud. Even in fact not required by a statute to be disclosed may not amount to fraud. Even in commercial transactions non-disclosure of every fact does not vitiate the agreement. In a contract every person must look for himself and ensures that he acquire deceive. Information necessary to avoid bad bargain." (Anson's Law of Contract) In public law the duty is not to deceive. For instance non-disclosure of any reason in the application under e remises Act about its need after expiry of period or failure to give reason that the premises shall be required by son, daughter or any other family member does not result in misrepresentation or fraud. It is not misrepresentation under section 21 to state that the premises shall be needed by the landlord after expiry of the lease even though the premises in occupation of the landlord on the date of application or, after expiry or period were or may be sufficient. a non-disclosure of fact which

is not required by law to be disclosed does not amount to misrepresentation. section 21 does not place any positive or comprehensive duty on the landlord to disclose any fact except that he did not need the premises for the specified period. even the controller is not obliged with a pro-active duty to investigate. silence or non-disclosure of facts not required by law to be disclosed does not amount to misrepresentation. even in contracts it is excluded as is clear from explanation to section 17 unless it relates to fact which is likely to affect willingness of a person to enter into a contract. fraud or misrepresentation resulting in vitiation of permission in context of section 21 therefore could mean disclosure of false facts but for which the Controller would not have exercised jurisdiction.

The Learned Counsel for the 1st Respondent adverts to the Judgment of the Hon'ble Supreme Court in Venture Global Engineering V Tech Mahindra Limited reported in (2018) 1 SCC 656 wherein at para 76-83 it is observed as under:

76. The expression "fraud", what it means and once proved to have been committed by the party to the lis against his adversary then its effect on the judicial proceedings was succinctly explained by this Court in Ram Chandra Singh v. Savitri Devi ((2010) 8 SCC 660; (2010) 3 SCC (CIV) 523, Venture Global Engg. V Satyam computer Services Ltd.) in the following words: (SCC p. 322b-d)

"Fraud as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by word or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent m is representation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly

causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema principles and any affair tainted with fraud cannot be judicata." perpetuated or saved by the application of any equitable doctrine including res judicata."

77. Similarly, how the leading authors have dealt with the expressions "fraud", misrepresentation", suppression of material facts" with reference to various English cases also need to be taken note of. This is what the learned author Kerr in his book Fraud and Mistake has said on these expressions.

78. While dealing with the question as to what constitutes fraud, the learned author said, "What amounts to fraud has been settled by the decision of House of Lords in Derry Peek ((2010) 7 SCC 1, Reliance Natural Resources Ltd., v Reliance Industries Ltd., where Lord Herschell said: (AC p. 374)

'… fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false." (See *Kerr on Fraud and Mistake*, 7th Edn., pp. 10-11.)

79. The author has said that, Courts of Equity have from a very early period had jurisdiction to set aside awards on the ground of fraud, except where it is excluded by the statute. So also, if the award was obtained by fraud or concealment of material circumstances on the part of one of the parties so as to mislead the arbitrator or if either party be guilty of fraudulent concealment of matters which he ought to have declared, or if he wilfuly mislead or deceive the

arbitrator, such award may be set aside. (See *Kerr on Fraud and Mistake*, 7th Edn., pp. 424-25.)

80. The author said that, if a man makes a representation in point of fact, whether by suppressing the truth or suggesting what is false, however innocent his motive may have been, he is equally responsible in a civil proceeding as if he had while committing these acts done so with a view to injure others or to benefit himself. It matters not that there was no intention to cheat or injure the person to whom the statement was made. (See *Kerr on Fraud and Mistake,* 7th Edn., p. 7.)

81. This rule of law is applicable not only between the two individuals entering into any contract but is also applicable between an individual and a company and also between the two companies. (See *Kerr on Fraud and Mistake,* 7th Edn., p. 99.)

82. The author said that this principle is also not limited to cases where an express and distinct representation by words has been made, but it applies equally to cases where a man by his silence causes another to believe in the existence of a certain state of things, or so conducts himself as to Induce a reasonable man to take the representation to be true, and to believe that it was meant that he should act upon it, and the other accordingly acts upon it and so alters his previous position. (See *Kerr on Fraud and Mistake,* 7th Edn., p. 110.)

83. The author said that where there is a duty or obligation to speak, and a man in reach of that duty or obligation holds his tongue and does not speak and does not say the thing which he was bound to say, if that be done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, there is a fraud. (See *Kerr on Fraud and Mistake*, 7th Edn., p. 110).

Para 7. The Learned counsel of the 1st Respondent cites two decision of Hon'ble Supreme Court in Panther Fincap and Management Services Ltd V

Central Government through the Department of Company Affairs reported in (2005) SCC Online Bom 386 wherein at para 33 it is observed as under:

33. I have considered these rival submissions of the parties and I am of the opinion that the jurisdiction and the power of the various investigating authorities derived from the jurisdiction vested in them by the various legislations or statutes, the authority which is doing the inquiry and or conducting the investigation is required to carry out investigation keeping in mind the legal provisions and legal limitations which are stipulated under the respective statute. Undoubtedly it can be that there may be an overlapping investigation but in my opinion such an eventuality cannot prevent any investigating authority from carrying out investigation in respect of their jurisdiction conferred on them under the statute. I am also of the further opinion that the investigation in respect of the corporate fraud can be initiated and considered by the central government under section 237 (b)(i) of the companies Act. I have not been able to come across any provisions under the SEBI act in which any corporate fraud can be investigated by the SEBI. Undoubtedly it can be investigated under normal criminal law by the CBI. I am further of the opinion that merely because the material on the basis of which investigation is being undertaken is identical to the material which is subject matter of investigation by the other authority it cannot be stated that both the authorities cannot simultaneously investigate pursuant to power conferred on them under their respective statutes. I am of the opinion that every authority is entitled to investigate even may be in respect of the same material as well as from the angle and facet in which they have been asked to carry out investigation. It is possible that the SEBI may be investigating the same material on the ground of breach of the various provisions of the SEBI act and other security related legislations whereas the central government, department of company affairs can consider and/or investigate the fraud and/or breach of various provisions of law

in the light and context of the provisions of the companies act may be in respect of the same material. However, I am of the opinion that the contentions advanced by the learned counsel for the appellant cannot be accepted particularly in view of the fact that every authority has been conferred various powers in their respective legislation. A similar issue aroused before the English Court under the identical provisions of investigation under the Companies Law and the Court of Appeal in the case of Re London United Investments plc reported in1992 BCLC 285 equivalent to 1971 All England Law Reports page 849 it is held as under:

The power of the secretary of state to appoint inspectors to investigate the affairs of a company and to report is an important regulatory mechanism for ensuring probity in the management of companies' affairs. That of course is in the public interest. Since the Secretary of State's powers under s 432(2) are exercisable where there are circumstances suggesting fraud, it is likely that in many cases where inspectors are appointed an investigation by the police or the Serious Fraud Office could also be appropriate. But the code under the 1985 Act is a separate code even though it may overlap the field of criminal investigation."

Para 8. The Learned Counsel for 1st Respondent points out the decision of Hon'ble Supreme Court in Dharampal Satyapal Ltd V Deputy Commissioner of Central Excise, Gauhati & Ors reported ion (2015) 8 SCC 519 where in para 39 & 40, it is observed as under:

39. We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action. While emphasising that the principles of natural justice cannot be applied in straitjacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of procedural fairness, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason perhaps because

the evidence against the individual is thought to be utterly compelling it is felt that a fair hearing "would make no difference"-meaning that a hearing would not change the ultimate conclusion reached by the decision-maker-then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in Malloch v. Aberdeen Corpn.((1971) 1 WLR 1578; (1971) 2 All ER 1278 (HL), who said that: (WLR p. 1595: All ER p. 1294)

"… A breach of procedure. cannot give [rise to] a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain."

Relying on these comments, Brandon L.3 opined in Cinnamond v. British Airports Authority ((1980) 1 WLR 582; (1980) 2 ALL ER 368 (CA) that: (WLR p. 593: All ER p. 377)

"… no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing.

"In such situations, fair procedures appear to serve no purpose since the "right" result can be secured without according such treatment to the individual."

40. In this behalf, we need to notice one other exception which has been carved out to the aforesaid principle by the courts. Even if it is found by the court that there is a violation of principles of natural justice, the courts have held that it may not be necessary to strike down the action and refer the matter back to the authorities to take fresh decision after complying with the procedural requirement in those cases where non-grant of hearing has not caused any prejudice to the person against whom the action is taken. Therefore, every violation of a facet of natural justice may not lead to the conclusion that the order passed is always null and void. The validity of the order has to be decided on the touchstone of

"prejudice". The ultimate test is always the same viz. the test of prejudice or the test of fair hearing.

2nd Respondent's Pleas in Comp. APP.(AT) (CH) No.17 of 2021

125. It is represented on behalf of the 2nd Respondent that the 'Appellant' Company was set up by two individuals, one being a past employee of 'ISRO' Mr.D. Venugopal and the other is said to be a Professional Chartered Accountant, who became the first Director and Shareholders holding total equity of Rs.1,00,000 (Rupees One Lakh only) in the ratio of 9:1 respectively.

126. It is brought to the notice of this 'Tribunal' on behalf of the 2nd Respondent that the 1st Respondent/'Antrix Corporation Limited' had deceptively entered into an Agreement of which Clauses 12(a)(i) to (iv) presenting Agreement through ISRO/DOS without it being signed by ISRO/DOS, as persons in charge of these organisations are facing criminal action under the Preventions and Corruption Act.

127. It is pointed out on the side of the 2nd Respondent that in Clause 12(b)(iv), the 'Appellant'/'DMPL' mentioned that 'Devas' has the ownership and right to use the intellectual property used in the design of 'DMR' and 'CID' and the words used are ownership and right and in fact, the 'Appellant' did have no ownership rights.

128. It is contended that a company can be incorporated only for a lawful purpose as per Section 3 of the Companies Act, 2013 and further that Section 3 of the Companies Act, 2013 provides for the 'formation' of a company. Apart from that, the Learned Counsel for the 2nd Respondent adverts to Section 6 of the Companies Act, 2013 (old Section 9 of the Companies Act, 1956) which captions an Act to override Memorandum, Articles, etc.

129. On behalf of the 2nd Respondent it is brought to the notice of this 'Tribunal' that the Agreement was signed on 28.01.2005, just after 42 days

incorporation without any corroboration and background and that the awarding of the Contract was a fraudulent act, because of the fact that there was connivance between the then officials of 1st Respondent/'ACL' and the 'Appellant'/'DMPL'. In this regard, the Learned Counsel for the 2nd Respondent draws the attention of this 'Tribunal' that only a 'Director' or an 'Authorised Officer' of the Company can sign the contract on behalf of the Company as per section 21 of the Companies Act, 2013 (corresponding Section 54 of the Companies Act, 1956) and in as much as a clerk of a 'Chartered Accountant' is not an 'Officer of a company' and further, he cannot be an 'Authorised Officer' of the Company, the requirement of (Section 54 of the Companies Act, 1956) (corresponding to Section 21 of the Companies Act, 2013) are not satisfied.

130. It is submitted on behalf of the 2nd Respondent that in the Agreement, the 1st Respondent/'ACL' gave its full description the 'Appellant'/ 'DMPL' had not disclosed the real persons for whose benefit the contract was being obtained and does not give out its expertise or any vital particular i.e. required to sign a contract of this nature. Moreover, in the contract, it is explicitly agreed that the 'Appellant'/'DMPL' is responsible for obtaining the approvals and the 'burden' later, is passed on to the 1st Respondent/'ACL' through a subterfuge.

131. It is contended on behalf of the 2nd Respondent that the concealment of real identity of the persons behind the veil of the 'Appellant'/'DMPL', until the Agreement was so signed is another element of 'fraud'. In fact, the Appellant/DMPL was taken over by the real persons after the agreement was signed both in terms of shareholding as well as management.

132. It is brought to the notice of this 'Tribunal' on the side of the 2nd Respondent that at the time of negotiations, admittedly, for over two years with a foreign private entity, at the time of recommendation by a committee set up by the said management of 1st Respondent/ACL, which was accepted by the foreign

entity and the management of 1st Respondent/ACL, at the time of signing of the contact and until the media reports of irregularity came in, the management was in the hands of one set of persons. Further, that till this time, the 1st Respondent /ACL was in collusion with the foreign private entity and the Appellant in committing fraud against the ACL itself. Subsequently, after the cancellation of the agreement and the investigations commenced, the ex-management of ACL gave way to the subsequent dispensation, which gradually discovered and took remedial steps against the 'fraud' committed against ACL. At this time, ACL discovered that it was the victim of fraud, and eventually sought authorization from the Government to file the Petition to wind up the 'Appellant'.

133. It is submitted on behalf of the 2nd Respondent that on the strength of the contract of 2005, the 'Appellant'/'DMPL' obtained equity funding from foreign entities and further that the unlawful purpose of setting up the company, misuse of the corporate personality for unauthorized purposes contrary to law and public policy, dishonest and unfair practices are writ large on the face of the facts and there was sufficient material for the 'Tribunal' to come to a conclusion that the company deserved to be wound up under Section 271(c) of the Companies Act, 2013.

134. It is contended on behalf of the 2nd Respondent contends that 'honesty' and 'fair play' ought to be the basis of policies in any business and this is lacking in the affairs of the 'Appellant'/'DMPL'. Furthermore, in the decision of Hon'ble Supreme Court in Hari Shankaran v Union of India reported in (2019) 6 SCC at Page 584 at Special Pages 600-601, wherein at paragraph 12 the jurisdiction of the 'Tribunal' was reaffirmed to grant the relief prayed for.

135. On the side of the 2nd Respondent it is pointed out that the 'Appellant'/'DMPL' is a Private Limited company with the names of the subscribers (members) at the incorporation and that the 'Appellant'/DMPL as

per Article 15 of the 'Articles of Association' admits that it is subject to the Companies Act and thus Section 9 and 54 of the Companies Act, 1956 (corresponding to Section 6 and 21 of the Companies Act, 2013) are directly applicable. In short, it is the contention of the 2nd Respondent that the contract dated 28.01.2005 is in breach of the aforesaid Companies Act, Sections and as such it is 'void' and 'fraudulent' one.

136. On behalf of the 2nd Respondent it is pointed out that the 'Appellant' in Company Appeal (AT) CH 17 of 2021 has furnished its address for service as "No.29/1, Kaveriappa Layout, Opposite Jain Hospital, Vasanthnagar, Bangalore – 560 052" and further that the owner of the property "Kaveriappa Layout" had clearly denied having any office or registered of the company in its premise. Moreover, there is no valid Lease between the owner of the property and any representative or agent of the company and in the absence of any valid document, that the company is not maintaining registered office at the said address. Therefore, the 'Appellant' has not only made a misrepresentation to the 'Statutory Authorities' but also has given an incorrect address in the 'Memorandum of Appeal'.

2nd Respondent's Citations:

137. On behalf of the 2nd Respondent, the decision of Hon'ble Supreme Court in T.V. Venugopal v Ushodaya Enterprises Ltd. reported in (2011) 4 SCC at Page 85 at Special Pages 119 and 120 wherein at paragraph 92 (i) is cited wherein it is observed as under:

(i) "Honesty and fair play ought to be the basis of the policies in the world of trade and business"

138. On the side of the 2nd Respondent, a reference is made to the decision of Hon'ble Supreme Court in N Narayanan v Adjudicating Officer, Securities and Exchange Board of India reported in (2013) 12 SCC at Page 152 at Special Page 167 to 171 wherein at paragraph 27 to 42 it is observed as under:

27."The SEBI Act read with the Regulations of the Companies Act would indicate that the obligations of the Directors in listed companies are particularly onerous especially when the Board of Directors makes itself accountable for the performance of the company to shareholders and also for the production of its accounts and financial statements especially when the company is a listed company.

28. The Directors of the company or the person in charge directly or indirectly use or employ, in connection with the issue, purchase or sale of any securities listed in stock exchange, any manipulative or deceptive device o contrivance in contravention of the SEBI Act or the Regulations made thereunder have necessarily to be dealt with in accordance with the provisions of the Act and the Regulations which is absolutely necessary for the investor's protection and to avoid market abuse.

29. The facts clearly indicated that the Company had made false corporate announcement stating that it had entered into agreements with 802 theatres and that false corporate announcement gave false figures relating to advance, security deposit and income pertaining to the theatres which were not in existence. The deposits shown were turned out to be not genuine but mere book entries to hide receivables in the balance sheet.

30. Responsibility is cast on the Directors to prepare the annual records and reports and those accounts should reflect "a true and fair view". The overriding obligation of the Directors is to approve the accounts only if they are satisfied that they give a true and fair view of the profits or loss for the relevant period and the correct financial position of the company.

31. A company though a legal entity cannot act by itself, it can act only through its Directors. They are expected to exercise their power on behalf of the company with utmost care, skill and diligence. This Court while describing what is the duty of a Director of a company held in *official Liquidator v P.A. Tendolkar (1973) 1 SCC 602* that: (SCC p. 620, Para 45)

> "45… A Director may be shown to be so placed and to have been so closely and so long associated personally with the management of the Company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of the business of a Company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to

everyone who examines the affairs of the Company even superficially."

32. The facts in this case clearly reveal that the Directors of the Company in question had failed in their duty to exercise due care and diligence and allowed the company to fabricate the figures and make false disclosures. Facts indicate that they have overlooked the numerous red flags in the revenues, profits, receivables, deposits, etc. which should not have escaped the attention of a prudent person. For instance, profit as on quarter ending June 2007 was three times more than the preceding quarter, it doubled in the quarter ending December 2007 over the preceding quarter. Further, there was disproportionate increase in the security deposits i.e. Rs.36.05 crores in September 2007 to Rs. 270.38 crores in December 2007 as compared to increase in the number of theatres during the same period. They have participated in the Board meetings and were privy to those commissions and omissions.

Securities market – market abuse

33. Prevention of market abuse and preservation of market integrity is the hallmark of securities law. Section 12-A read with Regulations 3 and 4 of the 2003 Regulations essentially intended to preserve "market integrity" and to prevent "market abuse". The object of the SEBI Act is to protect the interest of investors in securities and to promote the development and to regulate the securities market, so as to promote orderly, healthy growth of securities market and to promote investors' protection. Securities market is based on free and open access to information, the integrity of the market is predicated on the quality and the manner on which it is made available to market. "Market abuse" impairs economic growth and erodes investor's confidence. Market abuse refers to the use of manipulative and deceptive devices, giving out incorrect or misleading information, so as to encourage investors to jump into conclusions, on wrong premises, which is known to be wrong to the abusers. The statutory provisions mentioned earlier deal with the situations where a person, who deals in securities, takes advantage o the impact of an action, may be manipulative, on the anticipated impact on the market resulting in the "creation of artificiality". The same can be achieved by inflating the company's revenue, profits, security deposits and receivables, resulting in price rise of the scrip of the company. Investors are then lured to make their "investment decisions"

on those manipulated inflated results, using the above device s which will amount to market abuse.

34. We have, on facts, clearly found that the Directors of the company have "created artificiality" by projecting inflated figures of the company's revenue, profits, security deposits and receivables and that the manipulation in the financial results of the company resulted in price rise of the scrip of the company and the promoters of the company then pledged their shares to raise substantial funds from financial institutions. The conduct of the appellant and others was, therefore, fraudulent and the practices they had adopted, relating to securities, were unfair, which attracted the penalty provisions contained in Section 15-HA readwith Section 15-J of the SEBI Act.

Disclosure and transparency

35. Gower and Davies in principles of Modern Company Law, 9th Edn. (2012) at p. 751, reiterated their views on the scope and rationale of annual reporting required under the Companies Acts, as follows:

> "On the basis that 'forewarned is forearmed' the fundamental principle underlying the Companies Act has been that of disclosure. If the public and the members were enabled to find out all relevant information about the company, this, thought the founding fathers of our company law, would be a sure shield. The shield may not have proved quite so strong as they had expected and in more recent times, it has been supported by offensive weapons."

36. The Companies Act casts an obligation on the company registered under the Companies Act to keep the books of accounts to achieve transparency. Previously, it was thought that the production of the annual accounts and their preparation is that of the accounting professional engaged by the company where two groups who were vitally interested were the shareholders and the creditors. But the scenario has drastically changed, especially with regard to the company whose securities are traded in public market. Disclosure of information about the company is, therefore, crucial for the accurate pricing of the company's securities and for market integrity. Records maintained by the company should show and explain the company's transactions, it should disclose with reasonable accuracy the financial position, at any time, and to enable the Directors to ensure that the balance sheet and profit and loss accounts will comply with the statutory expectations that accounts give a true and fair view. The

Companies (Amendment) Act, 2000 has added clause (iii) to Section 209-A(1) of the Companies Act, 1956 under which SEBI has also been given the power of inspection of listed companies or companies intending to get listed through such officers, as may be authorised by it.

37. So far as the company in question is concerned, books of accounts were maintained in the Tally accounting software and for the Financial Year 2007-2008 separate books of accounts were maintained for each region/unit. Books of accounts were reportedly maintained by the regions in their respective regional office and at the end of the year for the preparation of annual financial statement and for auditing purpose, those books of accounts were brought to the company's registered office. The auditors had informed that those books were audited at the registered office of the company.

38. As already indicated, after the declaration of financial results on 31-1-2008, containing inflated profits, revenues for the quarter ended on 31-12-2007, the Managing Directors of the company, his wife and the appellant had together pledged 72,75,455 shares of the company with various banks and financial institutions and raised Rs.97.30 Crores as loans. We have noticed that the Directors and the Chief Financial Officers of the company had caused to publish forged and misleading results of the company, various quarterly financial results and the annual results for the year 2007-2008 were reported to the stock exchanges containing inflated figures of the company's revenue, profits, security deposits and receivables and those financial statements which were relied upon by investors in making investment decisions, which did not reflect a true and fair view of the state of affairs of the company.

39. The appellant has taken the stand, as already stated, that even though he was a whole-time Director he was not conversant with the accounts and finance and was only dealing with the human resource management of the company, hence, he had no fraudulent intention to deceive the investors. We find it difficult to accept the contention. The appellant admittedly, was a whole-time Director of the company; as regards the preparation of the annual accounts, the balance sheet and financial statement and laying of the same before the company at the annual general meeting and filing the same before the Registrar of the Companies as well as before SEBI, the Directors of the company have greater responsibility, especially when the

company is a registered company. The Directors of companies, especially of the listed companies, have access to inside knowledge, such as financial position of the company, dividend rates, annual accounts, etc. The Directors are expected to exercise the powers for the purpose for which they are conferred. Sometimes they may misuse their powers for their personal gain and make false representations to the public for unlawful gain.

40. We have indicated, so far as this case is concerned, the subsequent conduct of pledging their shares at artificially inflated prices, based on inflated financial results and raising loan on them would indicate that they had deliberately and with full knowledge committed the illegality and hence the principle of "act a exteriora indicant interiora secreta" (meaning external actions reveal inner secrets) applies with all force, a principle which this Court applied in *Sahara case Sahara India Real Estate Corpn. Ltd. v SEBI, (2013)1 SCC1 : (2013) 1 SCC(Civ.) 1: 2013 1 SCC(Cri) 257*.

41. Above being the factual and legal position, we are of the view that SEBI has rightly restrained the appellant for a period of two years from the date of that order form buying, selling or dealing with any securities, in any manner, or accessing the securities market, directly or indirectly and from being Director of any listed company and that the adjudicating officer has rightly imposed a penalty of Rs.50 lakhs under Section 15-HA of the SEBI Act. The appeals are, therefore, dismissed. However, there will be no order as to costs.

The word of caution

42. SEBI, the market regulator, has to deal sternly with companies and their Directors indulging in manipulative and deceptive devices, insider trading, etc. or else they will be failing in their duty to promote orderly and healthy growth of the securities market. Economic offence, people of this country should know, is a serious crime which, if not properly dealt with, as it should be, will affect not only the country's economic growth, but also slow the inflow of foreign investment by genuine investors and also cast a slur on India's securities market. Message should go that our country will not tolerate "market abuse" and that we are governed by the "rule of law". Fraud deceit, artificiality. SEBI should ensure, have no place in the securities market of this country and "market security" is our motto. People with power and money and in management of the

companies, unfortunately often command more respect in our society than the subscribers and investors in their companies. Companies are thriving with investors' contributions but they are a divided lot. SEBI has, therefore, a duty to protect investors, individual and collective against opportunistic behaviour of Directors and insiders of the listed companies so as to safeguard market's integrity."

139. On behalf of the 2nd Respondent, a reliance is placed upon the decision of Hon'ble Supreme Court in Bangalore City Co.op. Housing Society Ltd. v State of Karnataka reported in (2012) 3 SCC at Page 727, at Special Pages 781 and 782 wherein at paragraph 123 and 129 it is observed as under:

123."The appellant's challenge to the finding recorded by the Division Bench that Respondent 3 had not been given opportunity of hearing under Section 5-A is well founded. We have carefully gone through the proceedings of the Special Land Acquisition Officer and find that Shri Sandip Shah (son of Respondent 3), had appeared along with his Advocate and after hearing him along with other objectors, the officers concerned submitted report to the State Government. However, this error in the impugned judgment of the Division Bench is not sufficient for nullifying the conclusion that the acquisition of land was not for a public purpose and that the exercise undertaken by the State Government was vitiated due to the influence of the extraneous considerations.

129. We have given serious though to the submission of the learned counsel but have not felt convinced that this is a fit case for invoking the doctrine of prospective overruling, which was first invoked by the target Bench in Golak Nath v State of Punjab AIR 1967 SC 1643 : (1967) 2 SCR 762 while examining the challenge to the constitutionality of the Constitution (Seventeenth Amendment) Act, 1964, That doctrine has been applied in the cases relied upon by the learned counsel for the appellant but, in our opinion, the present one is not a fit case for invoking the doctrine of prospective overruling because that would result in conferring legitimacy to the influence of money power over the rule of law, which is the edifice of our Constitution."

140. On behalf of the 2nd Respondent a reference to the decision of Hon'ble Supreme Court is made in Delhi Development Authority v Skipper Construction reported in 1996 (4) SCC at Page 622 at Special Pages 639 and 643, wherein at paragraphs 28 and 33 it is observed as under:

> 28 "The Concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The fact that Tejwant Singh and members of his family have created several corporate bodies does not prevent this Court from treating all of them as one entity belonging to and controlled by Tejwant Singh and family if it is found that these corporate bodies are merely cloaks behind which lurks Tejwant Singh and/or members of his family and that the device of incorporation was really a ploy adopted for committing illegalities and/or to defraud people.
>
> 33. S/Shri Bobde and Dave, the learned counsel for the purchasers, contended that in as much as several top officials of the DDA had colluded with Skipper and connived at their wrongdoing, the DDA must be held equally liable to reimburse the purchasers. Indeed, their submission is that DDA stood by and took no action whatsoever While Skipper was issuing repeated advertisements (even after 29-1-1991, in open and brazen defiance of this Court's orders) and, therefore, it must be made equally liable to reimburse the said purchasers in full. We find it difficult to agree. Firstly, the said contention is not factually correct. As has been pointed out hereinabove, soon after the publication of an advertisement by Skipper in the newspapers inviting the citizens at large to come and purchase the space in the proposed building on 4-2-1991, the DDA came forward with a warning notice published in all the leading national dailies advising citizens not to purchase space in the building in view of the orders of this Court. It is true that even thereafter Skipper has been issuing similar advertisements but it cannot be said with any reasonableness that DDA should have responded to each such advertisement by publishing a

warning. It could have done that but it cannot be faulted for not doing it. It is, therefore, factually incorrect to say that DDA stood by and allowed Skipper to defraud the people by issuing advertisements. Secondly, even if there is any collusion between the officials of the DDA and Skipper as alleged by the learned counsel, the question still arises whether DDA can be held bound by such actions of its officials acting beyond their authority, indeed, acting adverse to the interests of DDA intentionally. We are not suggesting nor are we laying down the proposition that the DDA is not bound by the acts and deeds of its officials but are only saying that where the acts and deeds of the officials are not only beyond their authority but are done with a mala fide intent, it may not be just and fair to bind DDA with such mala fide acts and deeds. Be that as it may, it is not necessary for the purpose of this case to pursue this line of enquiry further or to express any definite opinion thereon."

141. On behalf of the 2nd Respondent the decision of Hon'ble Supreme Court in Tamil Nadu Mercantile Bank v State reported in (2014) 3 SCC at Page 755 at Special Pages 758, 759 and 760 wherein at paragraph 8, 11 and 13 is cited wherein it is observed that "an act can give rise to both civil and criminal proceedings; mere availability remedy under civil law does not mean criminal proceedings cannot continue. (vide paragraphs 8, 11 and 13)

142. On the side of the 2nd Respondent reliance is placed upon the decision of Hon'ble Supreme Court in Nova Ads v Metropolitan Transport Corporation reported in (2015) 13 SCC at Page 257 at Special Pages 281 to 287 wherein at paragraph 43, 48, 50, 54, 56 to 58 and 60 it is observed as under:

> 43. "In view of our foregoing analysis, the opinion expressed by the High Court that the Corporation has the power or authority to deal with the streets, subject to restrictions under the Act and MTCL has no power or authority to deal with the same on the basis of the government order, which has been referred to hereinabove, is absolutely justified in law.
>
> 48. In the case at hand, as we have concluded that it is the Corporation who has the authority to deal with the bus shelters and not MTCL, the equity has to yield to law. It is submitted by the learned Counsel for the

appellants that they have spent huge amount in erecting the structures and also doing certain ancillary things in that regard and, therefore, appropriate extension should be granted. Such a prayer, needless to say, is in the realm of equity. It cannot be granted as that will violate the law. The contract between MTCL and the appellants cannot bind the Corporation. Had there been an irregularity in the contract or any lapse, then the question of invoking the principle of equity could have arisen but as it is perceptible. It is an agreement between two parties in respect of an act, which one of the parties is not entitled to enter into as it has no legal authority.

'The claim of equity has also to be adjudged on the bedrock of truth. MTCL which is an undertaking of the State Transport Department that has been granted some benefits under the Act. Knowing fully well that it had no authority to enter into a settlement had proceeded to enter into an agreement in respect of bus shelters after the judgment of the High Court consciously and in fact did enter into an agreement. It would have been appropriate on its part from all spectrums to remain within its bounds. It failed to do so. It transgressed its power. When a power had not been conferred on MTCL to do so and it exercises that power under the cloak of a power conferred, it really paved the path of deviance. The appellants could not have legitimately entered into a settlement with MTCL. It could not have entered into an agreement with the State undertaking. This was a clear deceit on the part of the appellants in collusion with MTCL to frustrate the legal rights of the Corporation. It is a deception intended to get an advantage. It is another matter that the Corporation did not wake up to save its own interest. The writ petitioner, for his own individual interest, made a prayer to recall of the order and thereafter, the Corporation has woken from slumber. Be that as it may, it was a loss to the Corporation and the Corporation is a public body and it is expected to protect and handle its finances for the benefit of the persons who are covered under the Act. The conduct of the appellants from any angle is absolutely depreciable."

(Paras 50 and 54)

Dalip Singh v State of U.P. (2010) 2 SCC 114 : (2010) 1 SCC (Civ) 324 : Amar Singh v Union of India, (2011) 7 SCC 69 : (2011) 3 SCC (Civ) 560, State of Bihar v Kameshwar Singh, AIR 1952 SC 252, Westminister

Corpn. V London & North Western Railway Co., 1905 AC 426 (HL) relied on.

"Wherever a contract is to be awarded or a licence is sought to be given, it is obligatory on the part of the public authority to adopt a transparent and fair method. It serves two purposes, namely, participation of all eligible competitors and giving a fair opportunity to them and also generating maximum revenue. There can be a situation for good reasons a contract may be granted by private negotiation but that has to be in a very exceptional circumstance for in the absence of transparency the public confidence is not only shaken but shattered. In the case at hand, as the contract has been entered into by way of some kind of understanding reason of which is quite unfathomable, such a contract has to be treated as vitiated, applying this principle also.

(Paras 56 and 57)

"Thus, there was a deceit practised by the appellants in collusion with MTCL and the authorities of MTCL had acted with full knowledge against the statute and against the interest of the Corporation. The beneficiaries are the appellants. As far as MTCL functionaries are concerned it has been informed that certain proceedings are pending against them. The Corporation should have been vigilant to protect its own interests. However, it did not wake up for long. The State remained a silent spectator to all that was going on. Under these circumstances, the alternative submission of the appellants to show equity and allow them to continue at least for two years does not deserve consideration as by accepting such submission the Court would be adding a premium to the appellants who have crucified the law and played possum of the existence of the judgment of the High Court and in the ultimate eventuate designed the plan to have the benefit of 12 years: "a yuga" for availing illegal benefit, which is impermissible and belongs to the Corporation and required to be dealt with in accordance with law. The whole action is a fiscal pollution. It is an acid rain on finance that can really crumble and collapse the financial health of the Corporation, which in a democracy is impermissible. The skilfully designed scheme has the potentiality to bring in ruination in an orderly society governed by law: as if the appellant are determined to treat the proceedings in a court equivalent to experimentation in a laboratory or an adventure in a garden that has no boundary.

(Para 58)

60.As the Court has annulled the contract and the appellants conduct is decryable, the fact of spending amount of money in putting the structures and making certain arrangements whatever may be the extent is absolutely irrelevant.

(Para 60)

K.S. Kumara Raja v Commr., WP No. 318 of 2004 order dated 5-9-2006 (Mad.) affirmed Metropolitan Transport Corpn., v K.S. Kumara Raja. SLP (C) No. 16908 of 2006 order dated 30-6-2008 (SC); Nova Ads v Metropolitan Transport Corpn., WP(C) No. 223 of 2009, order dated 11-1-2011 (SC) referred to."

143. On the side of the 2nd Respondent the decision of Hon'ble Supreme Court in SEBI v Pan Asia Advisors Ltd. reported in (2015) 14 SCC at Page 71 is relied upon wherein it is held that:

> "By virtue of any malfeasance or misfeasance or misdeeds committed by any person against interests of investors in Indian securities and Indian securities market, SEBI is entitled to proceed against such persons who are involved in said allegations, even if such persons are based outside India and /or alleged misdeeds/malfeasance/misfeasance took place outside India as abovesaid Effects Doctrine is attracted."

144. On the 2nd Respondent, reference is made to the decision of Hon'ble Supreme Court in Madanlal Fakirchand Dudhediya v Shree Changdeo Sugar Mills Ltd. reported in AIR 1962 SC at Page 1543 wherein at paragraph 25 it is observed as under:

> 25 "That leaves one minor point still to be considered. It was urged in the courts below that the provisions of Section 76 cannot be invoked against the appellant because the agreement on which the appellant rests his claim was made prior to 1st April, 1956 when the Act came into force. The contention appears to have been that in invoking the provisions of Section 76, Respondent 1 was seeking to make the said provision retrospective which it is not. In our opinion, there is no substance in this argument. Section 9 of the Act is a clear answer to this contention. Under Section 9(a) any agreement executed by the Company cannot prevail if it is

inconsistent with the provisions of the Act and under Section 9(b) the articles shall likewise not prevail if they are inconsistent with the provisions of the Act. Section 645 leads to the same conclusion."

2nd Respondent's Pleas in Comp. Appeal AT (CH) No.24 of 2021:

145. The Learned Counsel for the 2nd Respondent submits that the Company Appeal (AT) (CH) No.24 of 2021 was not filed by the 'Appellant'/'Devas Employees Mauritius Pvt. Ltd. (in its capacity as a shareholder of Devas Multimedia Pvt. Ltd.)' in accordance with the Hague convention in respect of verification of the Affiant and further that it was not accompanied by the attestation by the County Clerk and the 'Apostillisation' by the Department of State, New York.

146. The Learned Counsel for the 2nd Respondent contends that the decisions cited by the 'Appellant' do not relate to 'winding up a company' on account of fraudulent conduct and instead, they relate to 'winding up of companies' on account of 'Non-Payment of Debt'.

147. The Learned Counsel for the 2nd Respondent submits that the Affidavits in support of the 'Company Appeal' (AT)(CH) No.24 of 2021 on the file of this 'Tribunal' were signed by Mr.Babbio JR Lawrence Thomas (Director of 'Devas Employees Mauritius Pvt. Ltd.), and they are invalid, for want of 'Apostillisation' and in short, 'the Affidavits' etc. emanating from foreign countries are required to be 'Apostilled'. Apart from that, the 'notarised documents' are to be certified by the 'county clerk' and be 'Apostilled' by the Department of State.

148. The Learned Counsel for the 2nd Respondent adverts to the Article 1 of the Hague Convention, 1961 which reads as under:

"The present Convention shall apply to public documents which have been executed in the territory of one Contracting State and which have to be produced in the territory of another Contracting State. For the purposes

of the present Convention, the following are deemed to be public documents.

a) documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server ("*huissier de justice").*
b) administrative documents;
c) notarial acts;
d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.

However, the present Convention shall not apply;

a) to documents executed by diplomatic or consular agents;
b) to administrative documents dealing directly with commercial or customs operations."

149. The Learned Counsel for the 2nd Respondent refers to the Article 3 of the Hague Convention, 1961, which runs to the following effect:

> "The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal of stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates.
>
> However, the formality mentioned in the preceding paragraph cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more Contracting States have abolished or simplified it, or exempt the document itself from legalisation."

150. The Learned Counsel for the 2nd Respondent points out Article 4 of the Hague Convention, 1961, which reads as follows:

> "The certificate referred to in the first paragraph of Article 3 shall be placed on the document itself or on an 'allonge', it shall be in the form of the model annexed to the present Convention.

It may, however, be drawn up in the official language of the authority which issues it. The standard terms appearing therein may be in a second language also. The title "Apostille (Convention de La Haya du 5 October 1961)" shall be in the French language."

151. The Learned Counsel for the 2nd Respondent seeks in aid of Articles 5 and 7 of the Hague Convention, 1961, which reads as under:

"The certificate shall be issued at the request of the person who has signed the document or of any bearer

When properly filled in, it will certify the authenticity of the signature the capacity in which the person signing the document has acted and, where appropriate the identity of the seal or stamp which the document bears. The signature, seal and stamp on the certificate are exempt from all certification."

"Each of the authorities designated in accordance with Article 6 shall keep a register or card index in which it shall record the certificates issued specifying:

a) the number and date of the certificate
b) the name of the person signing the public document and the capacity in which he has acted, or in the case of unsigned documents, the name of the authority which has affixed the seal or stamp.

At the request of any interested person, the authority which has issued the certificate shall verify whether the particulars in the certificate correspond with those in the register or card index."

152. The Learned Counsel for the 2nd Respondent refers to the document relating to information on website of Department of State, New York, downloaded from the website which deals with (i) Apostille, (ii) Normal Attestation and the same is extracted as under:

Apostille:

"India, since 2005, is a member of the Hague Convention of October 5, 1961 that abolished the requirement of legalisation of foreign public documents. Apostille is acceptable in all member-countries of the Convention (For more info please visit the website: www.hcch.net). Apostille is done for personal documents like birth/death/marriage

certificates, Affidavits, Power of Attorney, etc. and educational documents like degree, diploma, matriculation and secondary level certificates, etc. As India is a member of the Hague Apostille Convention, 1961, no further attestation or legalization of a document apostilled by a member country, should be required for using such apostilled document in India. An apostilled document should, therefore, be treated as legalized document for all purposes in India by all concerned, in accordance with the international obligation under the Convention (Countries under Hague Convention is available at the following link) (No further requirement of attestation of apostilled documents) (Enclosure: Issuing and Accepting Apostilles)

Normal Attestation:

"This is done for all the countries which are not a member of Hague Convention and where Apostille is not accepted."

153. The Learned Counsel for the 2nd Respondent submits that the 'Appellant' has not filed the apostilled certificate for the Affidavits in support of the 'Appeal' and as such the 'Appeal' preferred by the 'Appellant' in Company Appeal (AT) 24 (CH) 21 on the file of this 'Tribunal' is not in tune with the Hague Convention in so far as it relates to the 'Verification of Affidavit'.

AN APPRAISAL:

154. At the outset, this 'Tribunal' points out that the 1st Respondent / Petitioner in CP No.06/BB/2021 on the file of National Company Law Tribunal, Bengaluru after setting out necessary qualitative and quantitative details has sought the relief of passing of an order by the 'Tribunal' and prayed for an order in winding up the 'Appellant'/1st Respondent/Company and subsequent litigation thereof. Also that, the 1st Respondent/Petitioner has sought the relief of an appointment of ad-interim Provisional Liquidator and he be entrusted with the management of the affairs of the 'Appellant'/1st Respondent/Company, etc.

155. According to the 1st Respondent/Petitioner, the core of the main petition filed before the 'Tribunal' concerns an agreement that was executed by the Former Officials of 'Antrix' on 28.01.2005 to and in favour of the 'Appellant'/1st Respondent/Company (Devas Multimedia Pvt. Ltd.) in a completely fraudulent and corrupt manner. As a matter of fact, the agreement pertains to the leasing of scarce and valuable natural resource of the country viz. spectrum in the s-band to the 'Appellant'/1st Respondent Company for providing 'SDMB Services' i.e. digital and multimedia service utilising a combination of satellite and terrestrial systems.

156. It comes to be known that the 'Memorandum of Understanding' dated 28.07.2003 was entered into by 'Forge Advisors LLC Virginia Corporation, Virginia 20164, USA and 1st Respondent/Antrix Corporation Ltd. (Antrix) a Government of India Company, Bangalore, India. AS a matter of fact, the long-term objective is to build a strategic partnership that leverages Antrix's Satellite & Space Capabilities to enable new Social & Commercial Applications. Furthermore, there was a proposal for Indian Joint Venture to launch Devas™ Mobile Multimedia Service Delivered via Satellite dated 15.04.2004 under the auspices of MoU signed in July 2003 between Forge Advisors, LLC and it was believed that ISRO and Antrix and Forge Advisors, have a unique and compiling opportunity to form a strategic partnership to launch the 'Devas™ Service' in India. Apart from that 'Devas' has been considered as a new National Service, expected to be launched by the end of 2006 that delivers Video, Multimedia and Information Services, via Satellite to Mobile Receivers in Vehicles and Mobile Phones across India.

157. It is pertinently pointed out that 'Tribunal' makes a pertinent mention that the 'Appellant'/Devas Multimedia Pvt. Ltd. was incorporated on 17.12.2004 in Bangalore, State of Karnataka. As a matter of fact, the incorporation of

'Appellant'/'Devas Multimedia Pvt. Ltd.' was subsequent to the 'Memorandum of Understanding' signed in July 2003 between 'Forge Advisors LLC' and 'Antrix Corporation Ltd.' and also subsequent to the 'Joint Venture Proposal' dated 15.04.2004.

158. It is the stand of the 1st Respondent/Petitioner that the 'Appellant'/1st Respondent Company was incorporated on 17.12.2004, two months earlier to the 'Award of Contract' on 28.01.2005 by two individuals (including a Former Employee of 'ISRO' with a paltry share capital of INR 1 lakh). Furthermore, it is the plea of the 1st Respondent/Petitioner that the established rules and procedure relating to the award of Government contracts were violated in the instant case at the time of execution of the contract. Besides this, the project was concerned with a use of complex combination of technologies, which were not even in existence at the time when the contract was awarded. In fact, the technology was developed only years later by the 'French Scientists'.

159. It is the case of the 1st Respondent/Petitioner that the Former Officials of 'Antrix' were involved in fraudulent and corrupt practices vis-a-viz awarding this contract to the Appellant/1st Respondent Company and that the very existence of the contract was suppressed from Government Authorities, while seeking approvals for the project.

160. It is the version of the 1st Respondent/Petitioner before the 'Tribunal' that it was a victim of the 'Appellant'/1st Respondent Company's fraudulent and illegal acts and the existence of the 'Appellant'/1st Respondent's Company was to defraud the 1st Respondent/Petitioner and the Union of India. Hence, the 1st Respondent/Petitioner filed the main Company Petition before the 'Tribunal'.

161. Before the 'Tribunal' on behalf of the 'Appellant'/1st Respondent/ Company an 'Affidavit in Objection' dated 15.03.2021 was filed by one Dr.M.G. Chandrasekar (an ex-Director of the Appellant Company till 19.01.2021) stating

that the main Company Petition 06/BB/2021 on the file of the 'Tribunal' filed by the 1st Respondent/Petitioner is not maintainable either in law or on facts and further that the main Petition filed by the 1st Respondent/Petitioner is an endeavour to browbeat and harass the 'Appellant'/Company.

162. The Appellant's objection before this 'Tribunal' is that the main Company Petition 06/BB/2021 filed by the 1st Respondent/Petitioner is not maintainable, as it purports to be a one pursuant to a sanction order dated 18.01.2021 and since the ingredients of Section 272(3) of the Companies Act, 2013 have not been complied with, the main Company Petition is not a valid one in the 'eye of law'.

163. The 'Appellant'/'DMPL' has come out with a plea before this 'Tribunal' that 'no opportunity' was provided to the 'Appellant'/Company prior to the permission of sanction accorded by the Central Government. In this connection, on behalf of 'Appellant', a reference to second Proviso to Section 272(3) of the Companies Act is drawn to the attention of this 'Tribunal' to state that the said proviso is not only applies to the 'Registrar' but also any person authorised by the Central Government.

164. The stance of the 'Appellant' is that a winding up petition can be filed before this 'Tribunal' under Section 271(1) (C) of the Companies Act, 2013 only after an application of mind by the Government or its Agencies, like Serious Fraud Investigation Office ('SFIO' or Registrar of Companies) after an opportunity of 'Hearing' is provided to a Company. In short, the contention of the 'Appellant' is that the requirement of pre-filing opportunity of Hearing to the 'Appellant'/Company cannot be taken away by the Central Government, merely by an invocation of Section 272(1)(e) of the Companies Act, 2013.

165. It is projected on the side of the 'Appellant' that because of the 'ICC Arbitration Tribunal' Unanimous Award dated 14.09.2015 against the 'Appellant'/Petitioner for a sum of USD 562.5 million along with interest

became due and payable to the 'Appellant' by the 1st Respondent/Petitioner, the 1st Respondent/Petitioner became a debtor of the 'Appellant'. Also, that the filing of the main Company Petition by the 1st Respondent/Petitioner before the 'Tribunal' is to prevent the 'Appellant'/Company/Creditor from prosecuting its remedies in India, which is a mala fide one and is not to be countenanced. Besides these, the aspect of 'fraud' ought to have been raised at the stage of termination of 'Devas Agreement' on 25.02.2011 and the 1st Respondent/ Petitioner cannot take that plea at a later stage, post the 'ICC Award'.

166. Another contention of the 'Appellant' is that the 'Provisional Liquidator' who was appointed by the 'Tribunal' (a Central Government Employee) as per Section 359 of the Companies Act and further that, the sanction order dated 18.01.2021 was accorded by the Central Government to another arm of the Central Government itself viz. the 1st Respondent/Petitioner and as such, the Central Government is the 'judge' in its own cause which is impermissible.

167. According to the Appellant, no material was placed on record by the 1st Respondent/Petitioner before the 'Tribunal' to form an opinion that the affairs of the Appellant Company were conducted in a fraudulent manner and/or was formed for fraudulent and unlawful purposes and/or the persons concerned in the formation or managements of its affairs were guilty of fraud, misaivance or misconduct in connections therewith and further that it is proper that the company be wound up. Even the allegation of 'fraud' was not raised in the termination letter dated 25.02.2011 or in the statement of defence of the 1st Respondent/Petitioner dated 15.11.2013 before the 'ICC Arbitral Tribunal'. A Tribunal's 'jurisdiction' being summary in nature cannot form any opinion, unless the allegations relating to 'fraud' are adjudicated by the 'Competent Court of Law'.

168. It is represented on behalf of the 'Appellant' that the allegations made by the 1st Respondent/Petitioner in the main Company Petition are identical/similar to those pending before CBI Court, PMLA Court or the Enforcement Directorate and in law a person is deemed innocent until he is found 'guilty'.

169. In regard to the allegation that there was a concealment in the note prepared for 'Cabinet Approval', on behalf of the 'Appellant', a stand is taken that the 'Cabinet Note' was prepared by the Joint/Additional Secretary of the concerned Ministry and the Cabinet Secretary and further that no papers were filed by the 1st Respondent/Petitioner to exhibit that the contents of the materials were placed before the making of the said 'Cabinet Note'. Also that, it is contended on behalf of the 'Appellant' that there is no precedents of getting 'Cabinet Approval' for leasing of Satellite capacity including the terms of leasing.

170. According to the 'Appellant' from 2009 onwards, the new Secretary of DoS Dr. Radhakrishnan, lead a concerted effort to cancel the Agreement with the Appellant/Company and reserve for the Military, the Spectrum it had leased and even the 'Suresh Committee', had not recommended cancelling the contract on the basis of 'Military Necessity'.

171. On behalf of the 'Appellant', it is represented that on 16.06.2020 Dr. Radhakrishnan wrote to 'DoT' and the Ministry of Law and Justice seeking requiring their opinions on whether 'Antrix' 'Devas Contract' need be annulled invoking any of the provisions of the Contract in order to preserve the pressures S-band Spectrum' for the strategic requirement of the Nation and to ensure a level playing field for other service providers using 'terrestrial spectrum' and on 12.07.2010, the ' Learned Additional Solicitor General' on being asked for his advice by Dr. Radhakrishnan, advised the Government to rely on the 'Force Majeure' clause for terminating the 'Devas Agreement'.

172. It is projected on the side of the 'Appellant' that on 17.02.2011 Indian 'Cabinet Committee on Security' (CCS) officially had decided to terminate the 1st Respondent/'Antrix Agreement' and the 'Appellant' company received a letter dated 25.02.2011 from the 1st Respondent/Petitioner terminating the 'Devas Agreement' as per Article 7(c) and Article 11 of the 'Devas Agreement'.

173. Before the 'Tribunal', on behalf of the 'Appellant' Dr. M. G. Chandrashekar (Ex-Director of the 'Appellant'/Company) filed an Additional Affidavit dated 07.04.2021 inter alia stating that as evident from the 'Devas Agreement' 'Devas' never represented that it had or owned the DVB-SH Technology and further that 'Devas' represented that it was capable of delivery 'Hybrid Services'. Also that the 'Devas' represented it had the ability to design Digital Multimedia Receivers (DMR) and commercial Information Devices (CID), which were components used for providing 'Hybrid Services'.

174. Added further, it is represented on behalf of the 'Appellant' that DVB-SH Technology was developed in 2007 and what is known as 'Transmission System' and at the relevant time in 2004, there were other Transmission Systems in use for Digital Multimedia Services that were being provided in the United States of America, Japan and South Korea. Moreover, the concept of 'Hybrid Satellite Service' is not new to India and in fact, India has been actively pursuing use of 'Hybrid Satellite Multimedia Services', etc.

175. Apart from the above, in the further 'Affidavit' filed on behalf of the 'Appellant' dated 05.05.2021 before the 'Tribunal' Dr. M. G. Chandrashekhar (Ex-Director of the 'Appellant' Company) had averred that the 'Devas' had the technology as well as access to it and even otherwise, 'Devas' and its subsidiary Company had Scientists who were ready to implement all 'Devas Services'.

(i) **WINDING UP OF A COMPANY:**

176. It is to be pointed out that Section 271 of the Companies Act, 2013 speaks of the 'Circumstances in which a Company may be wound up by the Tribunal'. In fact, the right to file a petition for 'winding up a company, undoubtedly, is a 'statutory right' and the same is not to be excluded by the provisions in 'Articles of Association' of a Company. 'Winding up of a Company' is a process in and by which all the assets of the companies are realised and used to pay off the liabilities and members.

177. After the recovery of the assets of a Company, the liabilities are met, debts are paid and thereafter, if something remains, the same will be distributed among the members. Continuing further, this Tribunal relevantly points out that if a company abandons it main objects and it is not possible for it to pursue the main objects in future, the Company is said to have lost its 'Substratum', regardless of the fact that it pursues its other objects. In such a contingency a winding up order of a company based on 'just' and 'equitable' grounds can be passed by a 'Tribunal'.

178. At this stage, this Tribunal worth recalls and recollects the decision in Brinsmead C Thomas Edward and Sons 1897 Ch 406 wherein it is observed that a Company with a 'fraudulent inception' can be wound up by an order of court.

179. No wonder, the 'winding up jurisdiction' is a discretionary one. It cannot be brushed aside that the winding up of a company is the only option/alternative, if no other remedy is available. Also that, no person can seek a 'winding up order'

as a matter of fact. It is to be remembered that for filing of an application for winding up based on just and equitable ground is that there ought to be a justifiable lack of confidence in the conduct and management of the affairs. To put it succinctly, the lack of confidence must relate to the conduct of the directors in relation to company's business.

180. If a 'Report' is received from the Company Liquidator or the Central Government or any person that a 'fraud' has been committed in respect of the Company, the 'Tribunal' shall, without prejudice to the process of winding up, order for an investigation under section 210 of the Companies Act, 2013 and on consideration the Report of such investigation, it may pass an order and given directions as per section 339 to 342 or direct the Company Liquidator to file a criminal complaint against the persons who are involved in the commission of fraud in term of section 282(3) of the Companies Act, 2013.

(ii) **FRAUD:**

181. Section 17 of the Indian Contract Act, 1872 defines 'Fraud' and includes the suggestion as to a fact which is not true by one who does not believe to be true and active concealment of a fact by one possessing knowledge or belief of the fact. In fact, fraud stems from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke to exercise of the powers and procure an order from an Authority/Tribunal. To come within the ambit of fraud' and act must be confined to the acts committed by a person to a contract within

an intention to deceive another or his agent or to induce him to enter in to a 'contract'. The aspect of 'Fraud' vitiates the contract, must have a bearing relating to the acts of individuals before entering into the contract. If a consent is obtained by silence, it is 'fraudulent' within the meaning of Section 17 of the Indian Contract Act, 1872, as opined by this 'Tribunal'. Further, from the very commencement, the intention to cheat is evidenced, 'Criminal Complaint' is competent, in Law.

182. It is to be pointed out that in Law 'Fraud' is an act of trickery or deceit. To put it precisely, 'Fraud' and 'Collusion' vitiates even the most solemn proceedings in any civilised society.

183. In so far as misrepresentation is concerned it must relate to the conditions mentioned in section 18 of the Indian Contract Act, 1872 relating to an existence or non-existence of which the power can be exercised. The primordial difference between 'fraud' and misrepresentation' is that in case of fraud, the individual making the suggestion does not believe it to be true. However, in the case of 'misrepresentation', such person believes it to be true.

184. One has to 'bear in mind' that the term/word 'void' has different forms of facets in Law. In fact, one type of 'void acts' is 'Transactions', 'Decrees' in entirety without 'jurisdiction' are 'void abinitio' and for avoiding the same, no 'declaration' is necessary, Law is not disregarded in collateral proceeding or

otherwise, as opined by this 'Tribunal'. As a matter of fact, the respective parties cannot consent on 'Illegality'.

(iii) **MODE OF FORMING INCORPORATED COMPANY:**

185. A company can be incorporated for a lawful purpose as per section 12 of the Companies Act, 1956 (corresponding to section 3 of the Companies Act, 2013). A Company is a legal entity and a juristic person, as different from shareholders. They are not the owners of the assets of a company. They do have a right to share in profits and also to change the management of a company in accordance with law. A company is no longer considered as a property of the shareholders as a legal device adopted by shareholders for carrying on business or trade as properties.

(iv) **MEMBER:**

186. A person becomes a member of a Company, in any manner, as per Section 2(55) of the Companies Act, 2013. It cannot be forgotten that a 'member' is a 'shareholder' and a 'shareholder' is a 'member'. The right of a 'member' in the Company limited by shares is based on an undertaking to contribute capital to the Company. Further, this 'Tribunal' aptly points out the decision of Hon'ble Supreme Court in Wide Agencies (P) Ltd. v Margaret T. Desor reported in (1990) 67 Com. Cas. 607 SC wherein it is held that in certain situations the word 'member' may be holder of shares but a holder may not be necessarily be a 'member'.

187. It is relevantly pointed out that Section 2(55) of the Companies Act, 2013 does not distinguish between 'Equity Shareholder' and 'Preference Shareholder' and confers 'Membership' of the Company on the holder of all types of Shares that satisfy the requirement of an 'individual' whose name is entered in the 'Register of Members'.

(v) **SHARE:**

188. Further, as per Section 2(84) of the Companies Act, 2013 'share' means a share in the share capital of a company and includes stock. The term 'Shareholder' is not defined under the Companies Act. A 'share' in the 'share capital' of a Company is a 'tangible property'. A Share in a Company is an incorporeal property and consists of 'a bundle of rights and obligations'. At this juncture, this 'Tribunal' points out that 'Share' is a 'movable property' with all the attributes of such property as per decision of Hon'ble Supreme Court in 'Life Insurance Corporation of India v Escorts Ltd. reported in AIR 1986 Supreme Court Page 1370.

(vi) **OWNERSHIP OF SHARE:**

189. At this stage, this 'Tribunal' worth recalls and recollects the illuminating words of Salmond, which runs to the effect that 'ownership of a share' denotes the 'relation between a person' and any right that is vested in him. Further, in the decision in Boreland's Trustee v Steel Brothers and Company reported in (1901) 1 Ch at page 279 at Special Page 288 it is observed and held that "a 'share' is

not a sum of money settled in the way suggested, but is an interest measured by a sum of money and made of various rights contained in the contract, including the right to a sum of money of a more or less amount".

TRANSFER OF PROPERTY ACT:

190. It is pertinently pointed out that as per Section 6 of the Transfer of Property Act, 1882, the definition of 'Property' includes not merely 'shares' as movable property but also as a separate firm of property' a right to obtain shares which may be antecedent to the accrue of rights of a shareholder' upon the grant of share certificate' in accordance with the 'Articles of a Company' as per decision of Hon'ble Supreme Court in Vasudev Ramachandra Shelat v Pranlal Jayanand reported in AIR 1974 Page 1728 : 1975 4 Comp. Cas 43(SC).

(vii) **PREVAILING OF STATUTORY PROVISIONS:**

191. Section 9 of the Companies Act, 1956 (corresponding to Section 6 of the Companies Act, 2013) relates to 'Act to override Memorandum, Articles, etc. It cannot be gain said that if there is a conflict between statutory provisions contain in the Act and the provisions of the Memorandum and Articles Association of the Company, the Statutory provisions shall prevail over the Memorandum and Articles of a Company.

(viii) **AUTHENTICATION OF DOCUMENTS AND PROCEEDINGS:**

192. As per Section 54 of the Companies Act, 1956 (corresponding to Section 21 of the Companies Act, 2013) 'Authentication' must be done by a proper person

mentioned in the statue. Indeed, Authentication is something more than mere attestation as it certifies that the document is in proper form of law and executed by the individual duly authorised to do so on behalf of the company. As a matter of fact, unless provided otherwise in the Companies Act, 2013, a document or proceeding or a contract made on behalf of the Company which requires authentication may be singed by any key managerial personnel or any other officer who is duly authorised by the board of directors to authenticate the same.

(ix) **REOPENING OF ACCOUNTS:**

193. Section 130 of the Companies Act, 2013 which pertains to 'reopening of accounts' on court's or Tribunal's order is applicable when the accounts of a Company are prepared in a 'Fraudulent' manner or the 'Financial Statements' are unreliable. In this connection, as per section 447 of the Companies Act, 2013, the 'fraud' in relation to the affairs of the company or body corporate includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner within an intent to deceive to gain undue advantage from or to injure the interest of company or its shareholders or creditor or any other person whether or not there is wrongful gain or loss.

(x) **CIRCUMSTANCES FOR WINDING UP A COMPANY BY TRIBUNAL:**

194. By Virtue of clause (c) of Section 271(1) of the Companies Act, 2013, a petition can be presented by the Registrar or any other person authorized by the Central Government if the Tribunal is of the opinion that the affairs of the Company having been conducted in a fraudulent manner or the Company was formed for fraudulent or unlawful purpose or the persons concerned in the formation of the Company or management are guilty of fraud, misfeasance or misconduct in connection there with.

(xi) **PETITION FOR WINDING UP:**

195. As per section 272(1)(e) of the Companies Act, 2013 where a petition is to be presented by any person other than those specified in the section, it can be done only by the Central Government authorises him to do so.

(xii) **TRIBUNAL'S POWER:**

196. It is to be pointed out that where in a 'Petition' it is contended that the 'Company' was formed for a 'fraudulent' or 'unlawful' purpose and the 'Tribunal' is satisfied that the Company was incorporated with 'fraudulent' or 'unlawful' objects, it may be ordered to be 'wound up'. Likewise, if the persons concern in the formation or management of the Company's affairs have been 'guilty of fraud', misfeasance or misconduct, in connection therewith the 'Company' can be wound up.

197. It is pointed out that conversion/diversion/malversation of funds, with a view to make personal illegal gains with a view to jeopardise the substratum of a 'Company', lack of probity and confidence in the conduct of management of the Company's affairs by those in management are all good grounds which empower the 'Tribunal' to exercise its just and equitable jurisdiction to pass an 'order' of winding up a 'Company'.

198. There must be a lie a justifiable lack of confidence in the conduct of management of the Company's affairs. The 'Tribunal', in a summary jurisdiction is to exercise its due diligence while passing an order of winding up, based on just and equitable ground. Undoubtedly, the 'Tribunal' is to form an opinion about the equitable nature of a give case, at the time of passing an 'winding up order'. If the foundation of a 'Company' is gone/taken away ('Substratum') the entire edifice which stands on is to fall down.

199. In a given case, where the 'substratum' of the Company is lost, in law, it ought to be wound up, for failure to do so, would be detrimental to the interest of shareholders, creditors, etc. Also, that if a 'Company' is unable to carry out its object, it is held that the 'Substratum of the Company' is lost and an order of winding up based on the ground of 'fairness' can be passed by a 'Tribunal' in the considered opinion of this 'Tribunal'. The 'Tribunal' may also wind up a company which is carrying on an illegal business or whose business has become illegal, in law. No wonder, the jurisdiction of a 'Tribunal' to pass an order of

winding up is to be regulated by law, by exercise of its 'sound judicial discretion', mainly with a view to get rid of an abuse.

(xiii) **LIQUIDATOR'S POSITION:**

200. It is an axiomatic fact that 'Liquidators' represent the company which is being wound up. Everything which has to be performed by them, is to be performed in the name of the Company for safeguarding its interests and that of its 'Creditors and Shareholders'. Section 359 of the Companies Act, 2013 contains Provision pertaining to the appointment of an 'Official Liquidator'.

DISCUSSIONS:

201. According to the Learned Counsel for the Appellant the 'Tribunal' should not have rendered a finding on 'Fraud' without there being a full-fledged trial and that the 'Appellant' filed an application seeking cross-examination of the 'Antrix' officials and that the 'Tribunal' had failed to permit the cross-examination and proceeded to determine on the issues of 'fraud' in a summary manner.

202. The contention of the Learned Counsel for the 'Appellant' is that a private dispute of the Agreement dated 28.01.2005 executed between the 'Appellant' and the 1st Respondent cannot be a part of 'fraud' as per Section 271(c) of the Companies Act. In any event, no finding of 'fraud' based on an award against

the 1st Respondent and or its enforcement proceedings can form the basis of a winding up order.

203. It is represented on behalf of the 'Appellant' that the challenge of the ICC Award is subjudice before the Hon'ble High Court of Delhi, which is ceased of the matter and that the Arbitration Award is assailed in OMP (Comm) 11 of 2021 before the Hon'ble High Court of Delhi and in spite of the same, the 'Tribunal's finding of 'fraud' is a perverse one.

204. On behalf of the 'Appellant' a plea is taken that since the 1st Respondent had failed to plead 'fraud' in the 'ICC Arbitration Proceedings' and also failed to disclose the alleged 'fraud' in its financial statements and annual reports, the 1st Respondent is estopped from canvassing a plea of 'fraud'. In this connection, on behalf of the 'Appellant', it is pointed out that the financial statements of 1st Respondent had not reported any 'fraud' even after purported discovery of 'fraud' in 2016. Moreover, the 1st Respondent had not challenged the Balance Sheet Statements. As a matter of fact, the statements mentioned in the Balance Sheet are admission on the part of the company.

205. The Learned Counsel for the 'Appellant' points out that the 'Devas Agreement' was executed after protracted negotiations and in fact, discussions between Forge LLC (consisting of among other things, Indian Americans, Technocrats, Scientists, Satellite Experts commenced in 2003 with 'Antrix'/'ISRO'/'DoS', etc. and in short, the negotiations almost for two years

took place and only thereafter 'Devas' was made. In fact, it is 'Antrix'/'ISRO'/'DoS' which induce the 'Appellant' to be incorporated and as such, the 1st Respondent is estopped from challenging the incorporation as being 'fraudulent'.

206. It is the version of the 'Appellant' that the 1st Respondent informed the 'ICC Tribunal' that there were detailed negotiations that took place and in fact, they rejected the certain proposals of 'Devas' during negotiations phase and as such, no allegation can be made that 'Antrix' and 'Devas' were hand-in-glove and/or that any Provision of the 'Devas Agreement' proves any 'fraud' in any manner.

207. It is the stand of the 'Appellant' that the 'Devas Agreement' was a transparent one and that the 1st Respondent had the authority to enter into the 'Devas Agreement'. Added further, it is the case of 'Appellant' that the 'Devas Agreement' got terminated not on account of lack of authority on the part of 'Antrix' to execute the Agreement, but based on the opinion of the Learned Additional Solicitor General of India that the 'Devas Agreement' came to be terminated on the ground of 'force majeure'.

208. The Learned Counsel for the 'Appellant' advert to the fact that the Comptroller and Auditor General of India had audited the 1st Respondent/Antrix Accounts in which the amounts received from 'Devas' to an extent of more than 59 crores were recorded as 'Upfront Capacity Reservation Fees' arising from the

Agreement dated 28.01.2005 and he had stated in his 'Report' 'no comments'. Therefore, a contention is advanced on behalf of the 'Appellant' that the 1st Respondent/'Antrix' is directed to disclose all the contracts entered into between 'Antrix' and third parties during the year 2004 to 2009 and to prove that it has no authority to enter into any commercial contract for 'Antrix' or Department of Space.

209. It is the specific stand of the 'Appellant' that Gururaj ('Article Clerk' of a Chartered Accountant), (at the particular point of time undergoing 'Article Clerk' with a Chartered Accountant) prior to the execution of the 'Agreement' was authorised by the 'Board of Directors' of 'Devas' in their meeting dated 15.01.2005 to execute the 'Devas' Agreement.

210. The Learned Counsel for the 'Appellant' refers to the Statement of SK Das (who was a Senior IAS Officer, Director of Space Commission and not an Accused) dated 20.10.2005 to the effect that it would not have made a difference at the name of 'DMPL' was reflected in the 'note for Space Commission'. In fact, the minutes of a meeting contained only a summary of what was discussed in the meeting and in fact, on 02.02.2006, the 1st Respondent/'Antrix' wrote by stating that it had received all necessary approvals and that in 124th meeting of TAG on 20.02.2006 it was mentioned that since GSAT 6 and 7 were being made for a specific customer, it would not be part of INSAT Capacity and these are

minutes are not under challenge. As such, it is the plea of the 'Appellant' that all necessary approvals were taken by the 1st Respondent/'Antrix'.

211. It is represented on behalf of the 'Appellant' that by adverting to Clause-1 of the Agreement dated 28.01.2005, which enjoins that 1st Respondent/'Antrix' would help 'Devas' to obtain licences, it cannot be alleged there was 'fraud' because licences were obtained in stages. Also, that what are the stages for securing licences the 'Tribunal' is to cross-examine witnesses to render a finding. Besides this, only after being satisfied with the figure that in regard to the building a satellite the Ministry of Finance had approved the budget/proposal of 'DoS' for constructing the GSAT-6A Satellite.

212. The Learned Counsel for the 'Appellant' points out that there was no concealment before the 'Cabinet' and that the 'Cabinet' was aware that the 'Transponder Capacity' was among other things to be used by private parties and not the Government. In this regard, the Learned Counsel for the 'Appellant' submits that the 'Government Authorities' were aware of 'Devas' and that the 'Appellant' is a private company and a not a party to the Government Meetings/Discussions and also not involved in drawing notes for such meetings or minutes of such meetings.

213. It is the contention of the 'Appellant' that it never represented that it had a patented technology and it only represented that it was capable of delivering hybrid services, etc. Besides this, in the 'statement of defence' before the 'ICC

Tribunal', the 1st Respondent/'Antrix' had not whispered that 'Devas' have no technology and fraudulently entered into 'Devas Agreement'. Moreover, the 'Hybrid Services' was not implemented because the 'Devas Agreement' was terminated and India had not allowed it and these services were successfully rendered in other countries like USA, Japan and South Korea.

214. The Learned Counsel for the 'Appellant' points out that the clauses of the 'Devas Agreement' do not exhibit any 'fraud' and in regard to the dispute relating to minutes the 'Appellant' has no role in preparing the 'Minutes'.

215. The Learned Counsel for the 'Appellant' points out that after the successful experimental trial by the 'Appellant' in September 2009, the 'Appellant' prepared an elaborate and detailed application with description of the 'Appellants' integrated satellite system with all technical parameters for frequency authorization/'operating licence' to be submitted to 'WPC'/'DoT', which was submitted to the 1st Respondent/'ISRO' in 2010 for vetting and forwarding to 'WPC'/'DoT' and the said application to be submitted was finalized in consultation with the 1st Respondent/'ISRO' Personal and in February 2011, the 'Devas' Agreement was illegally terminated and the 'Appellant' Application were never sent by the 1st Respondent. As such, the 'Appellant' took all necessary steps in respect of application to 'WPC'/'DoT'.

216. The Learned Counsel for the 'Appellant' submits that whether the 'Appellant' provided services are not is a disputed question of fact and in the

absence of full-fledged trial, the same cannot be decided. Furthermore, the stand of the 'Appellant' is that payments to Lawyers to protect the interest of 'Devas' and its shareholders in 'Arbitration Proceedings' can never be alleged to be a case of 'Money Laundering' or Siphoning off.

217. It is projected on the side of the 'Appellant' that it was with the approval of the Board of Directors that a Business Agreement was entered into and the money owe to Devas Multimedia America Inc. (DMAI) was sent out through proper 'Banking channel' and at best, the said Act can be a 'FEMA' violation, but does not constitute 'Fraud'.

218. It is pointed out on the side of the Appellant' that the allegations of money laundering are being seized of by the 'Special Court' in Spl.CC.477 of 2018, where trial will be conducted and as such, without trial a finding cannot be rendered in this regard. Also, that only after the 'Devas' Agreement' was cancelled in February 2011, the investors who had put in money and the company itself used the funds to make payments admittedly to numerous Lawyers for various 'Arbitration Proceedings' including the 'ICC Arbitration Proceedings'.

219. The Learned Counsel for the 'Appellant' submits that till 31.03.2011 a sum of Rs.582.65 Crores was received by the Company and till the termination of the 'Agreement', the same was utilised and retained in India to implement the 'Devas Agreement' and a sum of Rs.69 Crores was invested in 'Devas

Subsidiary in America' viz. Devas Multimedia America Inc. ("DMAI") who was providing technical help to 'Appellant' for the purpose of 'Devas Agreement'. Also, that a sum of Rs.21 Crores was in 'Fixed Deposits' and Rs.114/- Crores was kept in mutual funds and that a sum of Rs.58 Crores was paid to the 1st Respondent as 'Upfront Capacity Reservation Fees'.

220. The Learned Counsel for the 'Appellant' contends that 'SDMB Multimedia Services' can be provided by an 'ISP' category and that as per 'ISP Licence' of the 'Appellant' the 'SDMB Multimedia Services' can be provided under the ISP Licence. Also, that the 'Devas' was to be a 'Service Provider' providing Devas Service under the satellite was to be established and operated by 'ISRO' and 'Devas' was merely leasing transponder capacity. Therefore, it is submitted on behalf of the 'Appellant' that 'Devas' was not required to apply Clause 27 of Pressnote-4 (2006 series).

221. The Learned Counsel for the 'Appellant' submits that the 'Appellant' moved to Manipal Center and later to a commercial building in Jayanagar as its regular office and that the 'Appellant' had an office in Metro Center in Washington and prior to the cancellation of 'Devas' Agreement there were more than 50 employees and once the 'Devas Agreement' was terminated most employees left and only a handful were left and added further Mr.Vinod Sunder was the Company Secretary which the 'Appellant' had. As a matter of fact, most of the records of the company were seized in January 2017 by the Enforcement

Directorate of which the Company has no record and the Central Burau of Investigation had also earlier raised and took several documents.

222. The Learned Counsel for the 'Appellant' points out that the recommendations of TRAI 2008 on Mobile TV were primarily meant for terrestrial mobile TV and that no real interest was shown by the private parties in Satellite Mobile TV and no one approached the DoS for capacity for such a service and therefore, it is the plea of the 'Appellant side that 2008 TRAI recommendations were not applicable to 'Devas'.

223. The Learned Counsel for the 'Appellant' takes an emphatic plea that the Winding up petition is not 'Bona fide' and the same is filed for an ulterior purpose and that too, after the order passed by the Hon'ble Supreme Court of India in IA No.107899/2020 in petition(s) for Special Leave to Appeal (c) No(s). 28434/2018 dated 04.11.2020, wherein it was observed that the 'Appellant' can move the Hon'ble Delhi High Court for deposit of monies by the 1st Respondent. As such, the whole petition is to thwart Enforcement Proceedings either before the Hon'ble Delhi High Court or outside India.

224. The other submission of the Learned Counsel for the 'Appellant' is that the authority which gave sanction to the 1st Respondent to file the winding up petition (2nd Respondent) is not only made party to the proceedings but has chosen to support the case of the 1st Respondent.

225. The Learned Counsel for the 'Appellant' points out that in the instant case the 1st Respondent/Antrix has not lost any property it is only the 'Appellant' who paid the 'Upfront Capacity Reservation Fee'. Moreover, the 1st Respondent has failed to disclose any act, omission concealment or abuse of position or any connivance with an intent to deceive to gain undue advantage and/or to injure the company or its shareholders or its Creditors or any other person.

226. The Learned Counsel for the 'Appellant' submits that the 'Appellant' has filed IA/328/2021 dated 25.07.2021, but filed on 26.07.2021 (through its ex-Director Dr. M. G. Chandrashekhar) seeking issuance of direction to the 'Antrix' and/or 2nd Respondent to produce all the files pertaining to the various meetings of ICC-TAG in relation to GSAT-6 and/or 'Devas Services' as well as all files and minutes of meetings of 'Space Commission' relating to 'GSAT-6' and/or of 'Devas Services' before the 'Tribunal' because of the fact that a serious question of fraud in collusion has been raised and this goes to the route of the matter and in the absence of entire material being placed on record, no finding can be rendered by this 'Tribunal', in this regard. Moreover, delay cannot be attributed, since 1st Respondent/Antrix had approached the Tribunal in January 2021 after the Hon'ble Supreme Court's order dated 04.11.2020. When the case of the Appellant is that 'Antrix' had all the approvals and when the Antrix dispute it, then all the files and correspondence should be provided with.

227. The Learned Counsel for the 'Appellant' contends that the 'Tribunal' had rejected an application praying for cross-examination of 1st Respondent/'Antrix' Officials because of the fact that the 1st Respondent had claimed that appellant had not possessed the technology to render 'Devas Services' which was disputed by the 'Appellant'. The 'Tribunal' had rejected the said application on the ground that the 'Appellant' was seeking to protract the proceedings and in the absence of evidence being led on the issue of technology, rendering a finding by the 'Tribunal' that the 'Appellant' had not possessed adequate experience and infrastructure is not tenable one.

228. The Learned Counsel for the 'Appellant' submits that there is no evidence, no trial, nothing has taken place and the allegations of 'fraud' rested on mere investigation by an Agency and/or charge sheet and/or other complaints which were not adjudicated upon and/or charges were not been upheld by any court of Law are only mere 'conjectures' and does not make the 'Appellant' guilty of 'conspiracy'.

229. The Learned Counsel for the 'Appellant' contends that although documents in the criminal proceedings (including charge sheets by the Central Bureau of Investigation, PMLA Proceedings, RoC investigation, etc.) were referred to by the 1st Respondent in its Winding up Petition before the 'Tribunal', these documents do not establish any 'fraud' by either the 'Appellant' and/or its officers and/or its shareholders. In fact, that a judgment has to be passed by a

Competent Court of Law before a person can be said to be guilty of any 'fraud', cheating, or any such Criminal and /or Civil offence.

230. The Learned Counsel for the 'Appellant' takes a plea that as per Section 19 of the Indian Contract Act, 1872, if a 'Contract' is secured by 'Fraud', then the same is a voidable one. As a matter of fact, the 'Contract' is not rendered 'void ab initio'. Furthermore, a person who was mislead by 'fraud' as an option either to cancel the 'contract' or seek his performance and claim damages as such the finding of 'Devas Agreement' being 'void ab initio' rendered by the 'Tribunal' is incorrect.

231. The Learned Counsel for the 'Appellant' points out that it was not the contention of the 'parties' before the 'Tribunal' that 'World Space India' was a subsidiary of 'Devas' and the contrary finding given by the 'Tribunal' is an incorrect one.

232. The Learned Counsel for the 'Appellant' contends that the money brought into India was only taken out of the 'Country' after the termination of the 'Devas Agreement' in 2011. Also, it was not the case of the Respondents that 'Devas' premeditated the termination of 'Devas Agreement' and in this regard, the 'Tribunal' had committed an error.

233. The Learned Counsel for the 'Appellant' submits that the Winding up Petition filed by the 1st Respondent is not maintainable in law.

234. The Learned Counsel for the 'Appellant' contends that the 2nd Respondent or the 1st Respondent has not shown any scheduled and/or predicated offence without which there cannot be any allegation of money laundering as per Section 3 of the Prevention of Money Laundering Act, 2002. In fact, the 'Foreign Investors' invested in 'Appellant' after meeting the Government Officials and after satisfying themselves about the 'Devas Agreement' and the seriousness of the Government to undertake its obligations under the 'Devas Agreement'. Unfortunately, the said Agreement was illegally and unlawfully terminated. As a result, thereof, the 'Shareholders' brought their own auctions against the 'Union of India'. In reality, the money was utilised for payment of lawyers and had not gone into the pockets of shareholders and therefore there is no question of any 'Money Laundering'. Apart from that, there is no complaint from any shareholders of the 'Appellant' of any 'fraud' and/or misappropriation or 'Money Laundering'.

235. The Learned Counsel for the 'Appellant' contends that any shareholder can protect the interest of the 'Appellant' and whether the shareholders are known to each other and/or interlinked is a factual examination needs to be examined and the said aspect is denied.

236. The Learned Counsel for the 'Appellant' submits that it is a usual commercial practice to incorporate a company with Limited Capital and the required capital is infused later on and the entire capital is not infused at the time

of incorporation itself, more 'capital' was infused at a later stage. In any event, it cannot be said that the 'Appellant'/Company was incorporated to indulge in any 'illegal' or 'unlawful purpose'.

EVALUATION:

(A)

237. At the outset, this 'Tribunal' points out that as per Clause 14 of Annexure-1 to the Agreement dated 28.01.2005 'Devas Services' means S-DMB Services that includes Subscriptions Multimedia Packages with digital audio, visual and textual data, delivered via satellite and terrestrial systems via fixed, portable and mobile receivers including mobile phones, mobile video/audio receivers for vehicles, etc. to subscribers' receivers, having capability to send back textual and audio-visual data, etc.

238. Furthermore, in the aforesaid Agreement dated 28.01.2005, a reference is made to 'Devas Services', which reads as under:

> "WHEREAS, DEVAS is developing a platform capable of delivering multimedia and information services via satellite and terrestrial systems to mobile receivers, tailored to the needs of various market segments.
> WHEREAS DEVAS has requested from ANTRIX space segment capacity for the purpose of offering a S-DMB service, a new digital multimedia and information service, including but not limited to audio and video content and information and interactive services, across India that will be delivered via satellite and terrestrial systems via fixed, portable and mobile receivers including mobile phones, mobile video/audio receivers for vehicles, etc. (Devas Services)."

239. From the above, a conjoint reading of Clause 14 with the recitals of the Agreement mentioned supra, it is quite clear that 'Devas' is to have accessibility of one Devas Services to Devas Technology and Devas Device and even if there is absence of one element from the requirements mentioned in the Agreement, it is crystalline clear that 'Devas' cannot give 'Devas Services'. In this connection, it is to be relevantly pointed out that it is the plea of the 1st Respondent/Petitioner that 'Devas' never possessed any of the three requirements to deliver the 'Devas Services' either at the time of entering into an Agreement dated 28.01.2005 or at the time of the termination of the 'Agreement'.

240. It cannot be forgotten that the service in the nature of 'Devas Services' was not within the ambit of 'SATCOM Policy 2000' because of the fact that the (i) Broadcasting (ii) Telecommunication services or Independent services. As a result, thereof no licencing regime that existed for a service in the character of 'Devas Services'. To put it succinctly, in the absence of licencing regime for 'Devas Services' there was no occasion for 'Devas' to obtain any 'Operating Licences' to provide 'Devas Services'.

241. Be it noted, that it is for 'Devas' to exhibit that it had 'Devas Technology' to deliver 'Devas Services' and when it has not established to the subjective satisfaction of this 'Tribunal' that such technology exists and it owns the same or possesses the 'Intellectual Property Rights', etc. consenting to provide 'Devas

Services' using 'Devas Technology' is unworthy of acceptance, in the considered opinion of this 'Tribunal'.

242. In regard to the stand of the 'Devas' that as per Article 12(b) of the Agreement dated 28.01.2005, it warranted the then Officials of 1st Respondent/Antrix that it had the 'Capability Design DMR and CID' (two of the other components required to develop 'Devas' Technology enabling an 'user' to receive 'Devas Services' in 'Devas Device') and also in terms of Clause 21 of Annexure-1 to the Agreement dated 28.01.2005 which includes within its purview, the 'capabilities of Devas' which may occur in the future is guarded as 'Intellectual Property Rights' is not acceded to by this 'Tribunal', because of the reason that in Article 12(b)(4) of the Agreement, the assertive words employed therein runs to the effect 'Devas has ownership and a right to use IPR'.

243. Dealing with the aspect of Article 17 of the Agreement whereby and whereunder 'Devas' had restated that 'Devas' may sub-licence, assign or sell any and all of its rights under this Agreement without any approvals from 'Antrix' and this, unerringly points out that it was not correct on the part of 'Devas' to state that it had the 'Devas Technology' as per Agreement dated 28.01.2005. In this connection, it is useful to make a reference to the 'Affidavit' dated 04.05.2021 of M.G. Chandrashekar filed before the 'Tribunal' on behalf of the 'Appellant'/'Devas' wherein it was mentioned that 'Devas' had ample time to develop the 'Devas Technology'. When 'Devas' had no 'Devas

Technology', mentioning contra as per Agreement dated 28.01.2005 in terms of Article 12(b) is an incorrect one.

244. In the instant case on hand, on behalf of the 'Appellant' no single approval, permission or licence or any kind of authorisation required to perform 'Devas Services' utilising 'Devas Technology' has been filed before this 'Tribunal' and on the other hand to state that 'Devas' had hired the 'satellite transponder capacity' from 'DoS' clearly indicates that the relevant 'Articles' and 'Clause of the Agreement' dated 28.01.2005 were not adhered to.

245. In so far as the 'Memorandum of Understanding' dated 28.07.2003 entered into between the then, the officials of 1st Respondent/Petitioner/'Antrix' with forge advises LLC, it is worthwhile to point out that 'Devas' had tacitly admitted that this 'Memorandum of Understanding' is not a binding one and in fact, Para-3 under the Caption "intent" of the said MoU reads as under:

> "We envision Antrix and Forge Advisors becoming strong and vital partners in evaluating and implementing major new satellite applications across diverse sectors including agriculture, education, media, and telecommunications, as per Antrix's specific requirements."

246. In the present case, on behalf of the 1st Respondent/Petitioner it is brought to the notice of this 'Tribunal' that the 'Forge Advisors' on 15.04.2004 prepared a proposal for 'Indian Joint Venture to launch Devas Mobile Multimedia Service delivered via satellite', but it did not result in any value. At this juncture, a reference is made on behalf of the 'Appellant' to the paragraph-1 of the Joint

Venture Proposal dated 15.04.2004 under the caption 'executive summary' wherein it is mentioned as under:

> "Under the auspices of the Memorandum of Understanding signed in July 2003 between our companies, we believe that ISRO & Antrix and Forge Advisors have a unique and compelling opportunity to form a strategic partnership to launch the DEVAS^{TM} service in India. DEVAS has been conceived as a new national service, expected to be launched by end of 2006, that delivers video, multimedia and information services via satellite to mobile receivers in vehicles and mobile phones across India, etc."

247. Coming to the aspect of the aforesaid service is only a 'Devas Services' as per Clause-14 of the Annexure to the 'Agreement' dated 28.01.2005 and in the absence of any relevant material being shown in regard to an 'Approval', 'Regulation', 'Licencing Regime'/policy allowing a service in the character of 'Devas Services' to be rendered unhesitatingly leads to a resultant conclusion that an incorrect representation was made, which is undoubtedly an unfavourable circumstance to and in favour of the 'Appellant', as opined by this 'Tribunal'.

248. In regard to the meetings held on 06.05.2004, 21.05.2004 and 24.05.2004 as relied on by the 'Appellant' it is to be pointed out that although discussions took place about 'Devas Services' they are conspicuously silent as to the policy and 'Licencing Regime', approved by the concerned 'Authority'.

249. At this juncture, this 'Tribunal' points out that the 'Shankara Committee' in its 'Report' while approving the 'Lease Agreement' with 'Devas' had not

delved into the aspect of rendering of 'Devas Services' based on a particular policy and a 'Licencing Regime'.

250. In regard to the TAG meeting dated 30.11.2004 under the Agenda item 11 captioned as 'Spectrum required for Devas Project', it was mentioned that 'Devas' is a USA based company run by Indians and it cannot be said that a reference was made to 'Appellant'/'Devas'. In this connection, this 'Tribunal' significantly points out that 'Devas' was not even incorporated when the 122nd TAG meeting took place on 30.11.2004. Per contra 'Devas' was incorporated only on 17.12.2004.

251. A perusal of the Agreement dated 28.01.2005 points out that on behalf of 1st Respondent / 'Antrix Corporation', the Executive Director, Mr. K.R. Sridhara Moorthy and on behalf of the 'Appellant' its Authorised Representative one Mr.S.R. Gururaj had signed, indeed, Mr.D. Venugopal and Mr.N. Umesh, Founding Directors of the 'Appellant' had not signed in the Agreement. In fact, the said Mr.S.R. Gururaj was not an employee of 'Devas' (but was an Article Clerk of Shri M. Umesh) and he had signed in the Agreement dated 28.01.2005 on behalf of the 'Appellant' as its 'Authorised Representative' by receiving a token commission as per his statement dated 15.01.2016 given before the Central Bureau of Investigation. It is sine qua non that the 'Authorised Representative' of the 'Appellant'/Devas Multimedia Pvt. Ltd. India is not the 'Authorised Officer' of the 'Appellant Company', (as per Section 54 of the Companies Act,

1956), unconnected with the Agreement dated 28.01.2005, had signed the same. Therefore, it is held by this 'Tribunal' that the said Agreement dated 28.01.2005 is not an 'authenticated document', in terms of the ingredients of Section 54 of the Companies Act, 1956, especially when the erstwhile Companies Act, 1956 had not visualised the 'authentication of document'/'proceedings'/an 'Authorised Representative' of a Company.

252. In so far as the stand of the 'Appellant' that GSAT-6/INSAT 4E Satellite was built by means of an Agreement dated 28.01.2005, a note of 104th Space Commission Meeting that took place on 26.05.2005 12HH and in para 5 under the caption 'Service Utilisation' it was stated that 'A significant portion of the capacity of the space craft will be committed or Lease to a service provider on an appropriate commercial term. In reality, the name of 'Devas' (service provider) was not mentioned in the note for space commission, which is an unfavourable circumstance to and in favour of the 'Appellant'.

253. It is to be remembered that when the 'Agreement' dated 28.01.2005 was signed by the 'Appellant' earlier to the 'Note for Space Commission' and that the Commercial Terms was already determined in the 'Agreement'. To put it candidly, the fixation of commercial terms was not mentioned in the note for space commission. Per contra, the employment of the words 'appropriate commercial terms' cocksurely shows that the note for 104th Meeting of the Space

Commission had not reflected the exact state of affairs, in the considered opinion of this 'Tribunal'.

254. In the instant case, it comes to be known that based on the incorrect note, the Space Commission had approved the building of the Satellite for 'Devas' in terms of the Agreement dated 28.01.2005 without referring to 'Devas' or the Agreement dated 28.01.2005. Indeed, the total cost of GSAT-6 (INSAT-4E) including satellite insurance and essential spare components was Rs.269/-Crores with FE Content of Rs.102/-Crores.

255. As regards the 'Cabinet Note' being prepared by the Department of Space on 17.11.2005 seeking the approval of the Cabinet for GSAT-6/INSAT-43 Satellite. The said note was made after the 'Agreement' dated 28.01.2005 was entered into by 'Devas'. Pursuant to the 'Agreement' dated 28.01.2005 the Leased capacity in the Satellites to 'Devas' was made by the earlier officials and when that be the case, of no other person sharing the capacity with 'Devas', the term employed in the 'Cabinet Note' was to the effect that 'ISRO is ready' in receipt of several firm expressions of interest by 'service providers' is opposed to fact and reality.

256. In the present case, on behalf of the 'Appellant' there is no material produced to point out that the 'Cabinet Approval' had mentioned the 'Devas Agreement' dated 28.01.2005 and apart from that, the Cabinet was not apprised that an 'Agreement' dated 28.01.2005 was signed with 'Devas'.

257. There is no two opinion of a fact that unless the 'ICC' (being the 'Agency' authorised to assign space segment for service stipulated under the SATCOM Policy) allocate spectrum for a private player, the same cannot be used. Really speaking, the Official Minutes, in the present case, mentions that the capacity in the 'GSAT-6 Satellite' is excluded from 'INSAT Capacity', because it was provided to a 'specific customer' and the same cannot be done without the ICC Official, allotting capacity. As such, it is held by this 'Tribunal that there is a contravention of the 'SATCOM Policy'.

258. As regards to the 'experimental licence' obtained by 'Devas' [from the 'Wireless Planning Committee' (WPC)], being a part of 'DoT' the said 'licence' has not bestowed any right to go ahead with the 'Commercial Operations' and in fact, 'Devas' had not fulfilled the conditions mentioned in the said 'Licence'.

259. It is to be pointed out that a Reply of 'TRAI' dated 08.11.2007 addressed to M&IB mentions that the recommendations for 'licencing' condition are yet to be made for 'Mobile TV Services' and the 'TRAI' mentions that 'Spectrum' should be allocated and 'DTT' and 'Mobile TV Service' after such licencing regime was developed. It is not out of place for this 'Tribunal' to make a mention that when 'DTT' and 'Mobile TV Services' are not 'Devas Services' in November, 2011 a service like 'Devas Services' was not anticipated.

260. According to the 1st Respondent, the procedure is that when a new service is contemplated at a 'policy level', the 'Nodal Ministry' writes to 'TRAI' looking

for recommendations/comments and later, after rumination by the 'Nodal Ministry', they are sent to the 'Government of India' for its approval as a policy and corresponding 'Licencing Regime' will ensue. When that be the fact situation, it passes beyond one's comprehension as to how the Agreement dated 28.01.2005 was executed by 'Devas', in the context of 'Mobile TV Service', a small portion of 'Devas Service', which was intended only in 2007-08, in the considered opinion of this 'Tribunal'.

261. In the instant case, 'Devas' not securing the licence from 'Wireless Planning Committee'(WPC) for 'Spectrum' and in the absence of any material to show that the 'Apex Committee' had approved the 'experimental plan' on 'Devas', certainly, these unsavoury/unfavourable circumstances go against the 'Devas' in the earnest opinion of this 'Tribunal'.

262. In so far as the original 'minutes' is concerned, it required 'Devas' to secure a 'Spectrum Licence' from 'Wireless Planning Committee' (WPC) and further that the said 'minutes' required the 'Appellant' to appear before the 'Apex Committee' with requisite technical details and to wait for the decision of the said 'Committee', in regard to an 'experimental plan'. However, the purported manipulated later minutes exempted this requirement. Further, it was mentioned in the original minutes that the 'terrestrial transmission' was not possible in the portion of s-Band lease to 'Devas' and the distorted/manipulated minutes had omitted this portion.

263. Furthermore, the original 'minutes' mentioned that 'ISRO'/'DoS' will perform the experiment for 'Devas', but the purported/distorted manipulated minutes permits 'Devas' to conduct the experiment under 'ISRO' guidance. Therefore, the plea of the 1st Respondent that in respect of discussions which were unfavourable to the 'Devas', those were removed or replaced in the 'machinated minutes' has considerable force.

(B)

264. In the present case, it transpires that when few members of the 'TAG sub-committee meeting' that took place on 06.01.2009 (which discussed the 'Devas' experimental plan) made an objection in writing to the 'Director' for restoration of the 'original minutes', since the distorted/manipulated minutes had not recorded the correct version of the happenings that took place during the meeting and ultimately, the original minutes came to be restored on 20.11.2009 as made mention of in the 'Suresh Committee Report'.

265. It comes to be known that 'Devas' was issued with an experimental licence dated 07.05.2009 and the fact of the matter is that original minutes came to be restored on 20.11.2009, subsequent to the grant of experimental licence to 'Devas' by the 'Wireless Panning Committee'(WPC). Also, that when the original minutes had not authorised 'Devas' to conduct an experimental trial 'Devas', the claim of 'Devas' it had done successfully is not a correct one. It is aptly pointed out that, when the deliberations relating to the experimental trial to

be performed was circulated on 20.11.2009, the grant of licence for the very same experimental trial, (not in commensurate with the discussions of 'TAG sub-committee') is not a justiciable and valid one.

266. Looking at from different perspective, this 'Tribunal' relevantly points out that the 'experimental licence' issued in favour of 'Devas' by the 'Wireless Planning Committee'(WPC) was a licence to establish, maintain and work an Experimental Wireless Telegraph Station India under the Indian Telegraph Act, 1885 and the validity of the said licence was till 30.09.2009. The logical conclusion to be arrived at is that even by the licence terms, 'Devas' could not have performed their experimental trials in a successful manner.

267. There is no dispute to the fact that 'Devas' was issued with an 'IPTV Licence', to be included as part of the 'ISP Licence' on 31.03.2009. The requirement of 'IPTV' is an internet and it is not concerned with the telecommunication or the broadcasting perspective which are required for 'Devas Services'. In the agreement dated 28.01.2005, there is no reference to 'IPTV' and hence, it cannot be construed that the 'Devas' had anything in mind to treat 'Devas Services' as an 'IPTV Service'.

268. It is to be pointed out that going by the definition of 'internet' coupled with the ambit of services as per clause 2.2 of the 'ISP Licence', it is evident that the 'Devas Services' cannot be provided under the 'ISP Licence'. Also that 'Devas' for providing the purported 'internet services', it had not obtained

clearance from the authorities like NOCC, SACFA and other authorities for satellite mode. In reality, the 'Devas Services' could not be provided with an 'ISP Licence' dated 02.05.2008 and therefore, the contra stand of the 'Appellant' in this regard is unworthy of acceptance.

269. It is brought to the fore that an amount of INR 579 Crores was invested in 'Devas' (throughout its existence) through the 'Foreign Investment Promotion Board'. As a matter of fact, the token application dated 02.02.2006 of 'Devas' shows that the purpose of applying to the 'FIBB' is for setting up 'ISP Services' and in the said application it had restated that: (i) It would provide 'value added internet services', (ii) It would be involved in developing fixed, mobile and wireless technologies, development of appropriate terminals and establishment of required infrastructure for delivery of 'internet services', (iii) It was mentioned that the investing companies had no existing Financial/Technical collaboration or trade mark in India, in the area of 'ISP Services', (iv) it shall be submitting for a service licence with DoT after obtaining funding and this was the 'ISP Licence', (v) It would be providing internet services' through 'Broadband Information Download Channel' and (vi) under the caption "FIBB Approval" the 'Devas' had requested for the 'FIBB Approval' for 100% FDI for 'ISP Service' not providing gateways.

270. When the 'ISP Licence' issued to 'Devas' has a longevity for 15 years and for 'ISP Services', 'FIBB' had approved the investment into 'Devas', the

'Devas' according to the 1st Respondent had rendered 'ISP Services' in a certain locality in Bengaluru for a few residents for a short period earning a revenue earned for INR 80,000 (towards 'ISP Services') in comparison with that of INR 579 Crores that was brought in as an investment for 'ISP Services'.

271. It is the version of the 1st Respondent/'Antrix' that INR 575 Crores was diverted by 'Devas' with a view to form an entirely owned subsidiary in America viz. Devas Multimedia America and the said amount was used for share subscription of 'DMAI'. The reason attributed for forming the American subsidiary is allegedly to lend business support services to 'Devas'. Furthermore, it is the stand of the 1st Respondent that INR 180 Crores was diverted to 'DMAI' by 'Devas' under the guise of 'business support services' received by 'Devas' from 'DMAI'. When 'Devas' never had any business in India, the act of diverting INR 255 Crores for 'Business Support Services' does not stand to reason, in the considered opinion of this 'Tribunal'.

272. Although, the 'Devas' has come out with a stand that the 'Appellant'/'DMAI' had entered into numerous contract with USA Companies and this indicate services were performed the relevant details pertaining to the contracts have not been produced. In any event, for the purpose of investment, 'ISP Services' are only the approved one, the diversion of INR 180 + 75 Crores for 'Devas Services' for a 'non-ISP' purpose is a dishonest act.

273. Dealing with the aspect of diversion of INR 233 Crores towards legal expenses viz., it had to contest the 'ICC Arbitration' against 1st Respondent/ 'Antrix' and this sum was meant to pay the lawyers defending 'Devas'. It is to be pointed out that the Income Tax Department had issued 'show cause notices' to 'Devas' for payment of tax on reverse charge basis towards the receipt of services from 'DMAI', (as recorded in the Books of 'Devas') and in fact, the dispute in the 'ICC Arbitration' was pertaining to the termination of the Agreement dated 28.01.2005. In this connection, it is to be mentioned that for 'ISP Services' the investment was brought in by 'Devas' and that the legal dispute relating to 'Devas' has no relevance to 'ISP Services', but it pertains to 'Devas Services'. As such, the plea of the 'Appellant' that INR 233 Crores was diverted to defend the 'Arbitration case' relating to 'Devas Services' (a non ISP purpose) is untenable.

274. More importantly, it is to be pointed out that from out of INR 579 Crores, INR 488 Crores was diverted by 'Devas' outside India and not for the purpose of 'ISP Service', being the approved purpose of investment. It is pointed out that the agreement dated 28.01.2005 had leased out space segment capacity in s-band to 'Devas' and the services that were visualised were 'Devas Services' and not 'ISP Services'. In fact, 'Devas' had to pay an upfront capacity reservation fee as per the agreement dated 28.01.2005 but the said sum of INR 58 Crores was paid to 'Antrix' and the 1st Respondent/'Antrix' returned this INR 58 Crores to

'Devas' subsequent to the termination of agreement dated 28.01.2005 and even then, the said act is a deviant one.

275. It comes to light that INR 21/- Crores (balance amount), lying in fixed deposit was seized by the Enforcement Directorate and further that INR 58 Crores paid to 'Antrix' for upfront capacity, which was given back by 'Antrix' to 'Devas', was also seized by the Enforcement Directorate. A sum of INR 12 Crores was utilised for the disbursement of salaries of the Directors of 'Devas'.

276. To be noted, that Clause 1.5 of the 'ISP Licence' pertains to the investment approval by 'FIPB' which enjoins that 'we shall envisage the conditionality that the company would adhere to 'Licence Agreement' and that the 'FIPB' approved the investment into 'Devas' for 'ISP Services'. Therefore, the investment brought in through 'FIPB' for 'ISP' is not a valid one'. In short, the diversion of INR 489 + 58 Crores for non-ISP purposes is contrary to Clause 1.5 of the 'ISP Licence' dated 02.05.2008 and this act/circumstance squarely comes within the ambit of Section 271(C) of the Companies Act, 2013 for winding up a 'Company' as opined by this 'Tribunal'.

277. In 'Devas' the Investors/Shareholders had the following Equity Structure:

S.No.	Name of shareholder	Indian/ Foreign	Percent of Equity held
1	M.G. Chandrasekhar	Indian	28.29%
2	D. Venugopal	Indian	07.05%
3	Other RI's	Foreign	00.39%
4	Columbia Capital	Foreign	23.16%
5	Telecom Ventures	Foreign	23.16%

6	R. Vishwanathan	Foreign	07.05%
7	P. Shah	Foreign	07.05%
8	J. Fox	Foreign	03.06%
9	Other FN's	Foreign	00.78%
	TOTAL		100%

Total Indian Equity = 35.73%

Total Foreign Equity = 64.27%

278. Indeed, the Agreement dated 28.01.2005 was executed in negation of the Article(s) of 'SATCOM Policy' and the said act is a deceptive one, besides being clearly unsustainable one, because of the fact that 'Devas' to avoid scrutiny of 'DoS/ISRO' had approached the 'FIPB' through the 'ISP Route' when the ambit of 'Agreement' relates to Satellite for 'Devas Services'.

279. The case of the 1st Respondent/'Antrix' is that the 'Devas' investors became the shareholders of 'Devas' and they had their nominees in the 'Devas Board' were responsible for functioning and conducting the affairs of 'Devas'. In fact, the Investors details are extracted hereunder:

Name of Investors	Invested amount	% of total investment received by Devas	Shareholding percentage
CC/Devas (Mauritius) Ltd	INR 70.97 Crore	12.18%	17.06%
Telecom Devas Mauritius Ltd.	INR 70.97 Crore	12.18%	17.06%
Devas Employees Mauritius Pvt. Ltd.	INR 6.81 Crore	1.17%	3.48%
Deutsche Telecom Asia PTE Ltd.	INR 429.97 Crore	73.81%	20%
Gary M Parson	INR 2.013 Crore	0.35%	0.43%
Lawrence Babbio Jr	INR 2,013 Crore	0.35%	0.43%

280. From the aforesaid chart, the facts that emerge are

i) 73.81% (INR 429.97 Crores) of the total investment came from Deutsche Telecom Asia, (DT Asia)
ii) 25.53% of the total investment came from three entities in Mauritius.
iii) Put together, these 4 entities are responsible for 99.34% of the total FDI investment into Devas.

281. It is represented on behalf of the 1st Respondent that CC/Devas Mauritius Ltd. was created by Columbia Capital Equity Partners (Columbia Capital) and 100% ownership of Columbia Capital is vested with one person Mr. Arun Kumar Gupta. The Telecom Devas Mauritius Ltd. was created by Telecom Devas LLC and Telecom Devas was a 'vehicle' used by Telecom Devas LLC to invest in 'Devas' and 100% ownership of Telecom Devas LLC vested with one person Mr. Rajendra Kumar Singh.

282. It is projected on the side of the 1st Respondent that Devas Employees Mauritius Pvt. Ltd. had invested directly into 'Devas' and the aforesaid Mr. Arun Gupta had signed affidavits in India on behalf of the 'DEMPL'. Added further, Mr. Ramachandran Viswanathan also signed Affidavits on behalf of 'DEMPL' in India and he is in the Board of Directors of 'Devas' and as such there is a close link between 'DEMPL' and 'Devas' too. Further, it is the plea of the 1st Respondent that the entity DT Asia was the Singapore subsidiary of DT Germany and DT Germany used DT Asia as a vehicle to invest in 'Devas'.

283. The details relating to the persons who formed part of the Board of Directors of 'Devas' is runs as follows:

S.No.	Name of the Director of Devas	Corresponding Investor who is Represented
1	Shri. Arun Kumar Gupta	a) Columbia Capital/CC Devas b) DEMPL
2	Shri. Sajal Kumar Roy Chaudhuri	Columbia Capital/CC Devas
3	Shri. Ramachandran Viswanathan	DEMPL
4	Shri. Rajendra Singh	Telecom Devas/Telecom Devas LLC
5	Shri. Kevin Copp	DT Germany/Singapore
6	Shri. A. Muruggappan	DT Germany/Singapore

284. It is well settled that the affairs of a 'Company' are controlled by the Board of Directors of that 'Company' and the investors of 'Devas' and also shareholders (being part of the Board of 'Devas') were responsible for conducting the affairs of 'Devas'. As such, a plea is taken on behalf of the 1st Respondent that if 'Devas' is a fraudulent company, then its investors/ shareholders are also fraudulent.

285. It is submitted on behalf of the 1st Respondent that other than the aforesaid four entities (i) Mr. M.G. Chandrasekar, (ii) Mr. Ramachandran Viswanathan, (iii) Mr. James Fox, (iv)Mr. Paresh Shah and obtained shares of 'Devas'. Mr. M.G. Chandrasekar and Mr. Ramachandran Viswanathan were on the 'Devas Board' and they were responsible for the incorporation of the American Subsidiary 'DMAI'.

286. It is the plea of the 1st Respondent that after the incorporation of 'DMAI' the aforesaid persons had signed 'Employee contracts' with 'DMAI' and 'DMAI' was supposedly providing business support services to 'Devas' in India and they received salaries from 'DMAI', besides receiving salary from 'Devas'.

287. The substratum of the contention of the 1st Respondent is that when there was no business support that was received in India from 'DMAI' persons who were in the Board of 'Devas' and who incorporated 'DMAI' signed the employee contracts with 'DMAI' and the illegal diversion made from India through the acts of the Investors/Shareholders of 'Devas' are indeed, deceitful/'fraudulent in character'.

288. It transpires that after the appointment of 'Provisional Liquidator' by the 'Tribunal' on 19.01.2021 and later he being appointed as 'Official Liquidator' on 25.05.2021, the three Mauritian entities were interested in substituting itself in the place of 'Devas' and their main plan is to achieve the 'Award' even if 'Devas' is 'Liquidated'. In fact, DT Germany/DT Asia has not joined hands with the three Mauritian entities.

289. As regards the 'Share Subscription Agreements', a sample 'Share Subscription Agreement' dated 06.03.2006 is taken for 'Devas' entering into numerous 'Share Subscription Agreements'. Also that the 'Share Subscription Agreement' refers to 'Devas' as 'Company' and the Founder Members are (i) Mr.M.G. Chandrashekhar, (ii) Mr. Ramachandran Viswanathan, (iii) Shri James

Fox, (iv) Shri. Paresh Shah and (v)Shri. D. Venugopal. In fact, the Article-1 (Definition of 'Antrix Agreement') means the 'Agreement' for the Lease of Space Segment Capacity on ISRO/Antrix S-Band Spacecraft dated as of January 28, 2005 by and between Antrix Corporation Limited and the Company."

290. For fuller and better appreciation, Section 2.3 of the 'Antrix Agreement' concerns with use of Proceeds and the same runs as under:

> "The proceeds from the sale of the Subscribed Securities shall be used by the Company to pay the fees and expenses related to the sale and issuance of the Subscribed Securities contemplated hereunder and for working capital and general corporate purposes including payment of US$ 6,666,6667 for the first instalment of the upfront capacity reservation fees under the Antrix Agreement."

291. Indeed, Clause-1 of Section 3.14 of the 'Share Subscription Agreement' pertains to 'Material Contracts and Obligations' and the same is as follows:

> "The execution delivery and performance by the Company of the Antrix Agreement were duly authorized by all necessary Corporate and Shareholders actions. The Antrix Agreement is valid, in full force and effect and binding against the Company and to the knowledge of the Company, binding against Antrix…"

292. A mere running of the eye of the aforesaid definition of the 'Antrix Agreement' and the relevant Sections of the 'Share Subscription Agreement' it is quite evident that the shareholders/investors were aware of the Agreement dated 28.01.2005 and they also knew that the amount it invest would be used for

'Upfront Capacity Reservation Fee' as per Agreement dated 28.01.2005. Besides these, the 'Investors'/'Shareholders' approved the diversion of its investments for payments as per Agreement dated 28.01.2005.

293. In this regard, it is aptly pointed out by this 'Tribunal' that in the 'FIB Application' dated 02.02.2006 (i) 'Devas Services' (ii) the Agreement dated 28.01.2005 were not mentioned. It is crystalline clear that FIPB had not approved the investment for the requirement of obligation as per Agreement dated 28.01.2005. Conversely, it was given the nod for 'ISP Services' and the act of 'Devas' in signing 'Share Subscription Agreement' dated 06.03.2006 pertaining to the obligations in terms of the Agreement dated 28.01.2005 is nothing but a deceitful one, as opined by this 'Tribunal'.

294. To fortify the plea of 'fraud', on behalf of the 1st Respondent attention of this 'Tribunal' is drawn to Section 3.19 of the 'Share Subscription Agreement' dated 06.03.2006, which is extracted as under"

> "Except as set forth on schedule 3.19, the company has all Consents (including variances and exceptions) of Governmental Authorities, whether foreign, federal, state or local required to own and lease its properties and assets and to conduct its business as now conducted."
>
> "The Licences have been validly issued or assigned to the Company or each Subsidiary, as applicable and are in good standing and in, full force and effect."

295. From the above, it is to be necessarily pointed out by this 'Tribunal' that on 02.05.2008, 'ISP Licence' was only secured by 'Devas' and as on 06.03.2006

when the 'Share Subscription Agreement' was signed, 'Devas' had no 'Operating Licence', and as such, the contra stand of the 'Appellant' in the 'Share Subscription Agreement' that 'Licences' were validly issued is opposed to fact and existing ground reality.

296. Even otherwise, it is to be borne in mind, that by means of 'ISP Licence' dated 02.05.2008 'Devas Services' could not be rendered, pursuant to the 'Agreement' dated 28.01.2005. In short, the logical conclusion to be arrived at is that the 'Investors'/'Shareholders' had proceeded with the investment of 'Devas' 'under the guise of ISP Investment', to divert the money from out of the country.

LIMITATION PLEA:

297. In regard to the plea of 'limitation' for filing the 'winding up petition', the 'Appellant' takes a stand that the 'limitation' as per 1st Respondent's won case is that the same will run from 2016 and that the 'winding up petition' filed by the 1st Respondent before the 'Tribunal' in the year 2021 is time barred. Also, that the 1st Respondent had filed an amendment application dated 10.11.2016 before the Hon'ble High Court of Delhi in (OMP COMM) 11/2021 viz. proceedings for setting aside the 'ICC Award', among other things averring that they had found out 'fraud' in 2016.

298. The Learned Counsel for the 'Appellant' points out that to file a 'winding up petition' is 'three years' when the right to apply accrues as per Section 137

of the Limitation Act, 1963. In this connection, the Learned Counsel for the 'Appellant' points out that the finding of the 'Tribunal' that in cases of 'frauds'/ 'crimes' adverse possession against public property there cannot be any question of limitation and they are deemed to be 'continuous cause of action' and such a finding is incorrect in Law. Moreover, the 'supplementary charge sheet' filed in the year 2019 makes the 'cause of action' a continuous one is not correct, because of the fact that once time has begun to run, it runs continuously and without any break, till the whole specified period has run out. In any event, it is the plea of the 'Appellant' that the 'supplementary charge sheet' is only an 'additional evidence' and not the first date, when the purported 'fraud' was discovered by the 1st Respondent.

299. It is to be pointed out that to constitute 'fraud' there must be some deliberate concealment of facts or some intentional imposition or some abuse of a confidential status, in the considered opinion of this 'Tribunal'. As per Section 17(1) of the Limitation Act, the period of limitation shall not run against the 'Plaintiff' or the 'Applicant' until the 'Plaintiff' or the 'Applicant' discovered 'fraud' or could with reasonable diligence have discovered the 'fraud' or 'mistake'.

300. Be it noted, that in a 'fraud' planned and systematically carried out over a period of three years each act is linked with the other and forms part of a continuous chain and ought to be taken as components of entirety. Also, that in

the case of 'Suit' or 'Application', Limitation commenced from the date when the 'fraud' first came known to the person injuriously affected by the 'fraud', in the considered opinion of this 'Tribunal'.

301. At this juncture, this 'Tribunal' aptly points out that Section 17 of the Limitation Act applies to a 'juristic person' and it is not necessary to establish which particular officer acted in 'fraud' as per decision in Jogendra Nath Das v Corporation of Calcutta reported in ILR (1966)1 Cal 216. In fact, the knowledge is to be clear and definite pertaining to the facts constituting particular 'fraud' as per decision Sham Sudden v Lakshmi AIR 1951 Trav Co 107.

302. In the present case on hand, the 'Central Bureau of Investigation' had filed its charge sheet on 11.08.2016 and according to the 1st Respondent, this is how the 'Antrix' came to know of the 'frauds' committed by 'Devas' and this does not restrict to one particular fact or action or circumstance discovered by the 'Central Bureau of Investigation' in 2016. Per contra, a series of 'acts of fraud' committed over a period of numerous years involving plurality of violations of different provisions of Law (including Indian Penal Code, the Prevention of Corruption Act, Foreign Exchange Management Act, the Prevention of Money Laundering Act and the Arbitration Act), and also the winding up proceedings initiated under the Companies Act, 2013.

303. It is not in dispute that the 'Supplementary Charge Sheet' was issued on 08.01.2018 after the conclusion of investigation pertaining to the various aspects

of ‘fraud’, etc. Before the ‘Competent Court’ on 24.12.2018 a complaint was filed by the ‘PMLA Authorities’ pointing out the aspect of entire Spectrum of ‘Monetary Fraud’ including ‘Share Premium’, ‘Share Subscription Fraud’ coupled with ‘Money Laundering Aspects’. In fact, the offence of ‘Money Laundering’ is a standalone offence under PMLA Act, 2002 and its investigation alone is within the exclusive purview of ‘Enforcement Directorate’.

304. It comes to light that after the appointment of ‘Provisional Liquidator’ on 19.01.2021, three reports (i) OLR 14/2021 dated 03.02.2021, (ii) OLR 23/2021 dated 27.02.2021, (iii) OLR 31/2021 dated 11.03.2021 were submitted by the ‘Provisional Liquidator’ in which numerous information pertaining to ‘fraud’, viz. the ‘siphoning of funds’ outside the country, (part of the ‘PMLA Investigation’) has been traced out, pointing out the actual ‘diversion of funds’ into another entity in the United States of America post the laundering. However, according to the 1st Respondent, these were not pressed before the ‘Tribunal’ because of the fact that the available material on record displays the ‘frauds’ committed by ‘Devas’ beyond doubt.

305. It is to be pointed out that in the decision of Hon’ble Supreme Court, Krishna Kumar Sharma v Rajesh Kumar Sharma reported in AIR 2009 SC 3247 it is held that Article 137 of the Limitation Act, 1963 is not confined to applications contemplated by or under CPC.

306. One cannot ignore a vital fact that the 'First Charge Sheet' dated is 11.08.2016 and the Supplementary Charge Sheet is dated 08.01.2019. If three years period is computed from the date of the 'Supplementary Charge Sheet' dated 08.01.2019, the Company Petition No.06/BB/2021 filed by the 1st Respondent dated 18.01.2021 is well within time. Apart from that, the 'right to apply' 'accrues' as per Article 137 of the Limitation Act, 1963 is continuing to enlarge as additional information are brought in, including the one obtained from the 'Liquidator'.

307. Even though, a plea is taken on behalf of the 'Appellant' that the whole transaction relates back to the year 2005 and that the 'Limitation' comes to an end in the year 2008, at this stage, this 'Tribunal' pertinently points out that Article 137 of the Limitation Act, 1963 enjoins institution of a case on 'fraud' based on the date on which 'the right to apply accrues'. Viewed in that perspective, the 1st Respondent's right to apply arose in the year 2016 and thereafter, different dimensions of 'fraud' indulged by the 'Appellant' was gathered by it and hence, this 'Tribunal', without any haziness holds that C.P.No.06/BB/2021 filed by the 1st Respondent/Antrix Corporation Ltd. before the 'Tribunal' is not hit by the plea of 'limitation' and answered accordingly.

308. In so far as the aspect of 'fraud' is concerned 'fraud' vitiates every act. In law, 'fraud' is an element which clouds the reason that the person 'defrauded' cannot form a rational judgment, as opined by this 'Tribunal'. A concealment of

material fact, as a whole, will certainly amount to 'fraud' as per Section 17 of the Indian Contract Act, 1872. The aspect of 'fraud' is a concept descriptive of human conduct. Its stems from a 'deception' practised by disclosure of the incorrect facts knowingly and deliberately to invoke the exercise of power and to secure an order from an authority. In regard to 'misrepresentation' it must be in relation to the conditions provided under the Indian Contract Act on existence or non-existence of which the power can be exercised.

309. Furthermore, it is pertinently pointed out by this 'Tribunal' that the 'ICC Arbitration Proceedings' and the 'Termination of the Agreement' on 28.01.2005 were matters, earlier to the 'CBI Investigation', and in as much as the 1st Respondent came to know about the 'aspects of fraud' of the 'Appellant' in the year 2016, it is held by this 'Tribunal' that the 1st Respondent had no opportunity to raise/agitate the 'element of fraud'. Therefore, the contra plea taken by the 'Appellant' in this regard is not acceded to by this 'Tribunal'.

ADVERTISEMENT:

310. The contention of the 'Appellant' is that the 'Petition for winding up' should have been advertised and without an 'advertisement' a 'winding up order' cannot be passed by a 'Tribunal'. It is the stand of the 'Appellant' that in the absence of an 'advertisement', not being made in the instant case, the 'Impugned Order' of the 'Tribunal' is an incorrect one.

311. The Learned Counsel for the 'Appellant' by adverting to the Company Court Rules, 1959(earlier Rules) and also by referring to Rule 96 and 99, submits that 'Advertisement' was a mandatory requirement. But, as per Rule 24(2), there was power to dispense with the requirement of 'Advertisement' and that the said dispensation power cannot be exercised in winding up matters.

312. It is to be pointed out that in terms of the Winding Up Rules, 2020, Rule 5 and 7 deal with 'Advertisement'. There is no Provision under the new Winding up Rules, 2020 which permits the 'Tribunal' to dispense with an 'Advertisement'. Suffice it for this 'Tribunal' to make a pertinent mention that the Winding up Rules, 2020 does not visualise about the aspect of power of dispensation relating to an 'Advertisement'. As such, it is the plea of the 'Appellant' that the 'Tribunal' should have advertised the Petition and in the absence of the same, the 'Impugned Order', suffers from an 'Legal infirmity.

313. On behalf of the 1st Respondent it is projected before this 'Tribunal' that the 'Company Petition' was not filed by 'Devas' and it was filed by the 1st Respondent which comes within the ambit of Rule 5 of the Winding up Rules, 2020 viz., which is a Petition filed by a person other than Company. Therefore, it is submitted on behalf of the 1st Respondent that if the Petition is filed by a person other than the Company (1st Respondent/Antrix in the instant case) the term 'may' employed therein confers a 'discretion' to the 'Tribunal' either to advertise or not to advertise the Petition. In short, it is forcefully contended on

behalf of the 1st Respondent that Rule 5 of the Winding up Rules, 2020 is inherent by itself and hence a separate Rule like that of old Rule 24(2) is not framed under the 2020 Rules.

314. As a matter of fact, the words 'shall' and 'lawfully may' are in their ordinary import 'obligatory' as per decision Champman v Milvain reported in (1850) 155 ER.

315. At this juncture, this 'Tribunal' points out that a mandatory obligation on the 'Tribunal' arising from the use of 'shall' may be diluted to prevent hardship in an extraordinary/exceptional cases/matters, as the case may be.

316. It is to be remembered that the whole object behind an exercise of 'Advertisement' is to protect the interests of 'Creditors' and 'other persons', if any, to whom any dues are owed by the Company. In this connection, the Learned Counsel for the 1st Respondent submits that 'Devas' today exists only on paper in a small one room office in Bengaluru. As such, the aspect of 'advertisement' in the instant case would have been an otiose one. Apart from that, it is contended on behalf of the 1st Respondent that even when the Agreement dated 28.01.2005 was in force or thereafter 'Devas' never did any business operations worth its name. Besides this, it is the plea of the 1st Respondent that the 'Tribunal' had recorded in the 'Impugned Order' that during the last four years, the income of 'Devas' was less than 2 lakhs.

317. As far as the present case is concerned, the Rule 5 of the Winding up Rules, 2020 confers wide enough discretion to the 'Tribunal' to dispense with an 'Advertisement'. Viewed in that perspective, this 'Tribunal' is of the earnest opinion that in a given case, based on the attendant facts and circumstances, in an encircling fashion, it is empowered to dispense with the aspect of issuing 'Advertisement' in relation to the 'Winding up Petition' and the word 'shall' is to be construed only as mere 'directory' to prevent hardship. Hence, the contra plea taken on behalf of the 'Appellant' in this regard, is negatived by this 'Tribunal'.

318. In regard to the aspect of erstwhile Additional Secretary of DoS Mrs. Veena S. Rao (An accused in CBI Case) being affected by the Winding up of 'Devas' she is an alien to the instant case, not an 'investor'/'shareholder' of 'Devas' not a creditor by any means.

319. It is to be pointed out that the 'Winding up Proceedings' can be initiated before the 'Tribunal' under the Companies Act, 2013. One has to be bear in mind for the same set of facts a 'Civil' or 'Criminal' liability or simultaneous proceedings can be initiated for the act(s) of omissions or commissions under various enactments. In short, the 'Tribunal' is to form an independent and dispassionate opinion as per Section 271(c) of the Companies Act, 2013 based on the materials furnished by the parties.

320. According to the 1st Respondent/'Antrix' it had reported the 'fraud' on the company by 'Devas' based on the 'Annual Reports' (prepared this year), pursuant to the order passed by the 'Tribunal' to that effect.

321. In Law, it is incumbent on a person to discharge the 'onus of proof' which rest upon him. As a matter of fact, the 'burden of proof' lies on a person who asserts the affirmative of the issue. In this connection, this 'Tribunal' points out that Rule 39 of National Company Law Tribunal, Rule 2016 provides for 'Production of Evidence by Affidavit'. In as much as, the jurisdiction of the 'Tribunal' to decide a Company Petition is summary in nature, deciding a case by the 'Tribunal' based on 'Affidavits' filed by the respective parties (as per Form No. NCLT 7) cannot be found fault with in the considered opinion of this 'Tribunal'. As such the contra plea taken by the 'Appellant' is not accepted by this 'Tribunal'.

322. Also, that Rule 43 of NCLT Rules, 2016 pertains to 'Power of the Bench' to call for further information or 'evidence' Permitting a party to cross-examine a 'deponent' in respect of a particular point of conflict is a matter of exercise of subjective judicial discretion of the 'Tribunal', to be made by it as per Rule 39(2) of the NCLT Rules, 2016, of course, based on the facts and circumstances of a given case, which float on the surface.

FINDINGS IN COMP (AT)(CH) 17 OF 2021:

323. As far as the present case is concerned, it is crystalline clear that the Agreement dated 28.01.2005 entered into between the 'Appellant'/'Devas Multimedia Pvt. Ltd.' and the 1st Respondent/Antrix Corporation Ltd. is mired with controversy. As a matter of fact, the very incorporation of 'Devas' with its object to enter into an Agreement was signed by an 'Article Clerk' Mr.Gururaj of a 'Chartered Accountant' who admittedly received a token amount for signing the Agreement on behalf of 'Appellant'. The said Mr.Gururaj is not an authorised officer of the Company as required under Section 54 of the Companies Act, 1956 and as such, the said act is an 'illegal' and act of 'trickery', which cannot be countenanced in the 'eye of Law'.

324. It is significantly pointed out by this 'Tribunal' that the Agreement dated 28.01.2005 was entered into between 'Devas' and the 1st Respondent/'Antrix Corporation' do contain the undermentioned representations.

> "b. Devas hereby represents and warrants ANTRIX as under:
>
> i) DEVAS has the capacity and power to enter into and perform this Agreement in terms thereof;
> ii) DEVAS has the ability to design Digital Multimedia Receivers ("DMR");
> iii) DEVAS has the ability to design Commercial Information Devices ("CID");
> iv) DEVAS has the ownership and right to use the Intellectual Property used in the design of DMR and CID;
> v) The fulfilment of DEVAS obligations under this Agreement by DEVAS Will not violate any Laws;
> vi) DEVAS shall assign, transfer and or sub-let its rights and obligations hereunder in accordance with law.

vii) DEVAS shall be solely responsible for securing and obtaining all licences and approval (Statutory or otherwise) for the delivery of Devas Services via satellite and terrestrial network."

325. It transpires that on 14.01.2021, the 1st Respondent/Antrix Corporation Ltd. through its Chairman cum Managing Director had written a letter to the Secretary of 'Ministry of Corporate Affairs' mentioning that 'Devas' had committed 'fraud' in collusion with past officers of the 1st Respondent, Department of Space and ISRO, which resulted in heavy financial loss to the Union Government.

326. Admittedly, the approval from 'FIPB' was only for 'ISP Services' and the 'Department of Telecommunication' had only issued an 'ISP Licence' and therefore the Investments of the overseas shareholders could not be utilised for payment of 'upfront capacity fee' for the proposed 's-Band' transponder, in breach of 'FIBB' approval and the 'Department of Telecommunication Licence'. Out of Rs.579/- Crores of Foreign Investment amounts of Rs.76,19,04,563/- share subscription/investment in 'Devas' America Inc (subsidiary of the 1st Respondent Company) and Rs.180,77,58,989/- were laundered out of the country under the garb of 'Service Fee' towards business support services. In between 2006-October 2010 the 1st Respondent Company, in the absence of Agreement had paid nearly Rs.40 Crores and it must be borne in mind that Agreement with the US Subsidiary was entered into only in October 2010.

327. In fact, a sum of Rs.256,96,63,544/- was sent out of India into the United States of America amounting to an extent of Rs.230,11,14,734/- (Towards legal fees to American Firms) a total of Rs.487,07,78,278/- was migrated into the US Entities thereby taking the same out of India, etc. The money trail had violated 'FIPB Policies', 'FIMA' and 'PMLA'. In short, the investments of Rs.579/- Crores were collected by the 1st Respondent mentioning the 1st Respondent Agreement dated 28.01.2005 and not for 'Internet Services'. Apart from that, the 1st Respondent was not competent to render 'Hybrid Services' such as 'Devas Services'. Moreover, no technology whatsoever was developed/made/owned/ leased by the 'Appellant' and this claim was untrue.

328. It is relevant to point out that the 'Appellant' projected 'ISP Licence' before 'FIPB' and the Telecommunication Department issued a Licence to 'Devas' for 'ISP Services' only. To put it differently, the application projected before 'FIPB' does not refer to Multimedia Services to be employed in the use of S-Band Transponder facility for which the 1st Respondent/'Antrix Corporation' and Devas had entered into an Agreement on 28.01.2005.

329. It is to be pointed out that 'no authority' other than 'Company Court' (now 'Tribunal') can pass an 'order' which has the effect of 'Winding up a Company as per decision in Hoosen Kasam Dada (India) Ltd. v Custodian Evacuee Property reported in (1951) 21 Comp Case 274 (Mad). It cannot be gain said that

in a Petition for winding up, the case for 'winding up' cannot look into subsequent events supporting the Petition.

330. Wherever 'lack of confidence' is based on 'lack of probity' in the conduct of Company affairs of a particular Company, it can be considered as a 'ground' to 'wind up' that Company on a 'fair', 'just and equitable' ground/basis.

331. Be that as it may, on a careful consideration of respective contentions, in the light of detailed qualitative and quantitative discussions, this 'Tribunal' taking note of the entire gamut of the facts and circumstances of the present case, keeping in mind the origin and the whole object/purpose of the incorporation of the 1st Respondent/Company on 17.12.2004 as a 'Corporate entity', just a little one month before the Agreement dated 28.01.2005, the Agreement being in violation of 'SATCOM Policy' of India, the resultant action(s) of the said 'Company' including the obtaining of 'fraudulent'/'distorted FIPB Approvals', the illegal/foreign investments brought into India and then, taken out of India into United States of America, entering into an illegal Agreement dated 28.01.2005 'for services' which were not in trend, utilising technologies, not in the ownership of the 1st Respondent/Company, by way of suppression/ concealment of material facts, coupled with the act of conspiracy indulged with the 'officials of 1st Respondent'/Company, 'Department of Space', and others, make out a prima-facie, genuine/reasonable ground/circumstances for the invocation of 'Winding up Proceedings' before the 'Tribunal' by filing of

necessary Petition by the 1st Respondent/'Antrix Corporation Ltd.' against the 'Appellant'/ 'Devas Multimedia Pvt. Ltd.' (after termination of the Agreement is not carrying on its Business operations) as per Law (duly authorised by the Central Government) and to seek passing of necessary 'winding up orders'.

332. In the present case, this 'Tribunal' on going through the 'Impugned Order' dated 25.05.2021 passed by the 'National Company Law Tribunal, Bengaluru' in CP No.06/BB/2021 on the basis of relevant attendant facts and circumstances of the instant case, which float on the surface (of course in an encircling manner and holistic fashion) is of the considered view that the order of 'winding up' of the 'Appellant'/'Devas Multimedia Pvt. Ltd.' by exercising its 'powers' as per Section 273 of the Companies Act, 2013 read with Companies Winding up Rules, 2020 and appointing the 'Provisional Liquidator' (who was appointed earlier by it through its Interim Order dated 19.01.2021) as the 'Official Liquidator' to take steps to 'Liquidate' the 'Appellant' is undoubtedly, cemented on, just, fair, reasonable and equitable ground to relieve an 'abuse' and the same is free from any legal flaws. Consequently, the Company Appeal (AT) (CH) No.17 of 2021 fails.

DISPOSITION:

333. In fine, the Company Appeal (AT)(CH) No.17 of 2021 is dismissed, of course for the reasons ascribed by this 'Tribunal' in this 'Appeal'. No costs. IA Nos.167 of 2021 and 168 of 2021 are closed.

COMPANY APPEAL (AT)(CH) 24 OF 2021:

334. The 'Appellant'/'Devas Employees Mauritius Pvt. Ltd.' (Appellant in Company Appeal (AT) (CH) No. 24 of 2021 on the file of this 'Tribunal') is only a diminutive 3.48% shareholder of 'Devas' who has filed the 'Appeal' and majority of the other shareholders have not approached the 'Tribunal' as 'Aggrieved'.

335. The Learned Counsel for the 'Appellant' refers to the decision of the Hon'ble Supreme Court in National Textile Workers Union v P.R. Ramakrishnan reported in 1983(1) SCC 228 wherein it is observed that the 'Workers' have a Right to be Heard before and after admission of the Winding up Petition.

336. At this stage, this 'Court' significantly points out that 'stock' and 'shares' are included in the definition of Sale of Goods Act, 1930. It represents a bundle of rights, like right to 'elect Directors', vote on the 'Resolution of the Company', 'enjoyment of profits' as and when distributed and 'share in surplus' if any, on 'Liquidation'.

337. As a matter of fact, the right of 'ownership of shares' confers powers, privileges, immunities, and burdens like duties, liabilities and disabilities in the considered opinion of this 'Tribunal'.

338. In fact, in the Writ Petition No.6191 of 2021 (filed by the 'Appellant'/ Devas Employees Mauritius Pvt. Ltd. as 'Petitioner') the Hon'ble High Court of

Karnataka, on 28.04.2021 at paragraph 50 had observed inter alia that … "Thus, having elected the appropriate forum to oppose the Company petition, this writ has been filed a day prior to the date fixed for final hearing namely March 22, 2021. This amounts to abuse of process of law and a proxy war on behalf of 'Devas'."

339. It is to be pertinently pointed out by this 'Tribunal' that the prevailing scenario is that 'Devas' is now with the 'Liquidator' who conducts its affairs and that the 'Shareholders', therefore cannot represent the 'Company' and indulge in 'shadow boxing' in law. Therefore, the 'Company Appeal' (AT)(CH)No.24 of 2021 filed by the 'Devas Employees Multimedia Pvt. Ltd.' on the file of this 'Tribunal' is not per se maintainable in law, taking into account of the prime fact that the 'Appellant'/Devas Multimedia Private Limited has preferred the 'Company Appeal' (AT) (CH) No.17 of 2021 on the file of this 'Tribunal', as an 'aggrieved person' in respect of the 'Impugned Order' dated 25.05.2021 passed by the 'National Company Law Tribunal', Bengaluru Bench, in CP No.06/BB/2021.

340. In view of the fact that this 'Tribunal' has come to a consequent conclusion that the 'Company Appeal' (AT)(CH)No.24 of 2021 is not maintainable in law, the aspect of requirement of apostilling the 'Affidavits' because of the Global Pandemic relegates to the background, all the more, when the 'Appellant' (Mr. Babbio JR Lawrence Thomas, Director) had signed at New

York USA on 27.05.2021 before Angel Arias, Notary Public, State of New York. Viewed in that perspective, the Company Appeal (AT)(CH)No.24 of 2021 sans merits.

RESULT:

341. In fine, the Company Appeal (AT)(CH) 24 of 2021 is dismissed. No order as to costs. IA Nos.278 of 2021 and 279 of 2021 are closed.

[Justice M. Venugopal]
Member (Judicial)

08.09.2021
SE

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH

Company Appeal (AT) (CH) No. 17 of 2021

AND

Company Appeal (AT) No. 24 of 2021

INDEX

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH

Company Appeal (AT) (CH) No. 17 of 2021

[Arising out of Common Order, dated 25th May 2021 passed by the Adjudicating Authority/National Company Law Tribunal, Bengaluru Bench, Bengaluru in CP No. 06/BB/2021]

IN THE MATTER OF:

Devas Multimedia Private Limited
(Through Ex-Director)
A Company within the meaning of
Companies Act, 2013
Having its office at:
No. 29/1, Kaveriappa Layout,
Opposite Jain Hospital, Vasanthnagar,
Bangalore- 560 052.
Represented by its Ex-Director,
Dr MG Chandrasekhar **Appellant**

Versus

1. **Antrix Corporation Limited**
   A Government Company within the meaning of the Companies Act, 2013
   Having its registered office at:
   Antariksh Bhavan Campus, Near New BEL Road, Bengaluru 560 094, Karnataka.
   Represented by its Chairman and Managing Director.

2. **Ministry of Corporate Affairs**
   5th Floor, 'A' Wing, Shastri Bhavan,
   New Delhi – 110 001.
   Represented by its Secretary **Respondents**

Present:

For Appellant : M/s Anuradha Dutt, Advocate

For Respondent : Mr N Venkataraman, Addl. Solicitor General and Mr Arjun Krishnan, Advocates for Respondent No.1

Mr Sanjay Shorey, Director of Legal and Prosecution, MCA (Respondent No.2)

AND

Company Appeal (AT) No. 24 of 2021

IN THE MATTER OF:

Devas Employees Mauritius Private Limited
(As a shareholder of Devas Multimedia Private Limited)
A company incorporated under the laws of the Republic of Mauritius, bearing Company No. C087664,
Having its registered office at:
C/o International Proximity
5th Floor Ebene Esplanade
24 Cybercity, Ebene 72201
Republic of Mauritius
Represented by its Director,
Mr. Babbio JR Lawrence Thomas **Appellant**

Versus

1. **Antrix Corporation Limited**
   A Government Company within the meaning of the Companies Act, 2013
   Having its registered office at:
   Antariksh Bhavan Campus,
   Near New BEL Road,
   Bengaluru 560 094, Karnataka.
   Represented by its Chairman and Managing Director.

2. **Ministry of Corporate Affairs**
   5th Floor, 'A' Wing, Shastri Bhavan,
   New Delhi – 110 001.
   Represented by its Secretary

3. **Devas Multimedia Private Limited**
   (in liquidation)
   A company within the meaning of the Companies Act, 2013
   Having its registered office at:

First Floor, 29/1, Millers Tank Bunk Road,
Bengaluru -560 052
Represented by the Official Liquidator,
Office of Official Liquidator,
Attached to the High Court of Karnataka,
No. 26-27, 12th Floor, Raheja Towers, Respondents
West Wing, MG Road, Bengaluru – 560 001.

Present:

For Appellant : M/s Anuradha Dutt, Advocate

For Respondent : Mr N Venkataraman, Addl. Solicitor General and Mr Arjun Krishnan, Advocates for Respondent No.1

Mr Sanjay Shorey, Director of Legal and Prosecution, MCA (Respondent No.2)

J U D G M E N T
(VIRTUAL MODE)

[Per; V. P. Singh, Member (T)]

1. I have had the privilege of going through the judgment being passed by my Learned Colleague Hon'ble Mr Justice Venugopal M., Member (Judicial). The Hon'ble Member (Judicial) has painstakingly referred to the respective cases along with the parties' facts. Thus, I am not reproducing the same. Learned brother Member Hon'ble Justice Venugopal has recorded reasons in support of the order dismissing the Appeal. I am also of the view that the present Appeal deserves to be dismissed. However, I am dismissing the Appeal for the reasons which I am proceeding to record in brief as follows.

A. Whether the Petition is barred by Limitation?

2. The Ld Counsel for Respondent has raised the issue of Limitation on the following grounds;

a) Under the Limitation Act, 1963, the limitation period to present a winding-up petition is three years from the date the right to apply accrues in terms of Article 137 of the schedule therein.

b) Antrix, in their Company Petition, conceded that they became aware of the fraud through the CBI Charge sheet dated 11.08.2016, and therefore the period of limitation, which is three years, expires in 2019. Since the Company Petition was filed in 2021, the same is time-barred.

c) On 10.11.2016, Antrix brought an amendment to their Application in the ICC Award set aside proceedings. It is currently pending adjudication before the Hon'ble Delhi High Court, wherein certain aspects of fraud were alleged. Therefore, the limitation period expired in 2019.

d) Devas relied on the judgment of the Hon'ble Supreme Court in Jignesh Shah v. Union of India, 2019 10 SCC 750, wherein at Para 38 of the judgment, the Hon'ble Supreme Court had declared that a winding-up petition is to be time-barred if it was filed after more than three years as prescribed by Article 137 of the schedule to the Limitation Act, 1963.

e) Devas relied on Section 3 of the Limitation Act, 1963, which provides that irrespective of whether limitation has been raised in defence, the Tribunal must examine whether the Petition is barred by

limitation. The Respondent No. 1 Company has stated that although the fraud occurred in 2005, the Petitioner discovered the fraud in August 2016. It is well-established law that only the Petition as a whole has to be examined to determine whether it is within limitation. The petitioner failed to disclose that the limitation to file a winding-up petition is three years from when the right to apply accrues. Furthermore, Section 433 of the Companies Act, 2013 provides that the Limitation Act 1963 applies to proceedings before this Tribunal.

3. Hon'ble Supreme Court in case of **Jignesh Shah v. Union of India, (2019) 10 SCC 750 : (2020) 1 SCC (Civ) 48: 2019 SCC OnLine SC 1254 at page 772 has held that;**

> *"**28.** A reading of the aforesaid provisions would show that the starting point of the period of limitation is when the Company is unable to pay its debts, and that Section 434 is a deeming provision which refers to three situations in which a company shall be deemed to be "unable to pay its debts" under Section 433(e). In the first situation, if a demand is made by the creditor to whom the Company is indebted in a sum exceeding one lakh then due, requiring the Company to pay the sum so due, and the Company has for three weeks thereafter "neglected to pay the sum", or to secure or compound for it to the reasonable satisfaction of the creditor. "Neglected to pay" would arise only on default to pay the sum due, which would clearly be a fixed date depending on the facts of each case. Equally in the second situation, if execution or other process is issued on a decree or order of any court or tribunal in favour of*

a creditor of the Company, and is returned unsatisfied in whole or in part, default on the part of the debtor company occurs. ***This again is clearly a fixed date depending on the facts of each case.*** *And in the third situation, it is necessary to prove to the "satisfaction of the Tribunal" that the Company is unable to pay its debts. Here again, the trigger point is the date on which default is committed, on account of which the Company is unable to pay its debts.* ***This again is a fixed date that can be proved on the facts of each case****. Thus, Section 433(e) read with Section 434 of the Companies Act, 1956 would show that the trigger point for the purpose of limitation for filing of a winding-up petition under Section 433(e) would be the date of default in payment of the debt in any of the three situations mentioned in Section 434."*

(verbatim copy along with emphasis supplied)

4. In the above-mentioned case, Hon'ble Supreme Court has held that the trigger point for limitation for filing a winding-up petition on the ground of default in debt payment is three years from the date of default. However, this winding up Petition is not filed by the creditor of the Company based on a default in payment. Instead, it is filed on the ground that the Company's affairs have been conducted fraudulently. The Company was formed for a fraudulent and unlawful purpose, or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct.

5. Section 17 of the Limitation Act 1963 deals with the effect of fraud or mistake. Section 17 begins to operate only when a period of limitation in the

case of any Suit or Application is as prescribed under the Limitation Act, 1963. Since there is no provision setting out any period of limitation for fraud, one has to take guidance from Article 137 of the schedule to the Limitation Act, 1963, which provides three years as the period of limitation, which runs from the time when the right to apply accrues.

6. According to Devas, the right to accrue arose to Antrix in 2016 and, in the alternative, in 2005 or 2011. In any case, the limitation period expired in 2019. Article 137 of the Schedule to the Limitation Act, 1963 reads as under:

Article 137	Any other application for which no period of limitation is provided elsewhere in the division.	Three Years	**When the right to apply accrues.**

7. The proceedings show that it is not a case of fraud alleged or limited to any particular situation or circumstance. It is not a transaction-specific act that occurred on a particular date, which becomes the basis for filing the Company Petition. Antrix had stated a case that Devas had committed a series of frauds at various points of time, and these had been unearthed again at different points of time. Neither the event was one, nor everything connected to fraud has been found on one specified date. According to Antrix, the CBI and ED have sought information connected to these acts committed by Devas from various jurisdictions outside India, and the necessary information or inputs are awaited. Antrix had submitted before this Tribunal that the CBI had issued Letters of Rogatory to different Nations seeking particulars of

certain transactions, including Singapore. When the appropriate authorities could have issued these documents, one of the Shareholders/Investors of Devas had taken the matter to Court in Singapore, resulting in the exchange of information getting delayed in connection with the money trails, beneficial owners and related fraudulent activities.

8. It is on record that Antrix had referred not only to the first charge sheet of the CBI dated 11.08.2016 but also the supplementary charge sheet dated 08.01.2019 wherein several new facts had come into the light, necessitating the same to be supplemented to the main charge sheet dated 11.08.2016 in the very same proceeding.

9. Devas also raised a contention that the supplementary charge sheet dated 08.01.2019 only supported the facts discovered in 2016. The period of limitation starts from the date of discovery of the new facts. It cannot be interpreted to be applicable to subsequent transactions supporting the original discovery of the fact. Again, this contention of Devas may not be the correct position of law.

10. Article 137 nowhere stipulates the starting point of limitation to be the date of first discovery or knowledge. It only states that the period of limitation would commence running when the right to apply accrues. Based on the arguments submitted by the parties before this Tribunal, this seems to be an ongoing proceeding even today. Devas had not disputed any of the facts stated

above during the proceedings before this Tribunal or their Written Submissions.

11. In addition to the above, The PMLA Authorities had also lodged a complaint on 24.12.2018 alleging financial frauds on the aspects of money laundering.

12. Therefore, the Company Petition filed on 18.01.2021 is well within the period of limitation of three years, if the same is reckoned from the Supplementary Charge Sheet dated 08.01.2019 or the Complaint lodged in the PMLA Court on 24.12.2018, instead of limiting it only to the first charge sheet dated 11.08.2016. Therefore, the Limitation ground raised by Devas is not sustainable.

13. In light of the above, the Company Petition filed by Antrix on 18.01.2021 before the NCLT is not barred by limitation and the first preliminary issue raised by Devas on limitation is rejected.

B. Whether relief of winding up u/s 271 (c) can not be granted for not following the procedure prescribed under Rule 5 and 7 of the Companies Winding-up Rules,2020 to advertise the Petition for inviting objections?

(a) The learned Counsel for the Appellant submits that the final hearing in a winding up Petition could only take place after advertisement of the Petition, as an advertisement of the Petition is mandatory before any final winding-up order is passed. ANTRIX

countered that the DEVAS had taken this defence belatedly. Devas submit that this is not a defence of the DEVAS. But something which ANTRIX ought to have pointed out. The Tribunal's duty is under the provisions of law to direct the Petition advertisement at an appropriate stage, but definitely, before any final winding-up order is passed.

(b) The Appellant contends that in the exercise of powers under Section 468(2)(i) of the Companies Act 2013, the Central Government framed the **Companies (Winding Up) Rules, 2020**, which specifies the procedure for hearing and process for winding up proceedings. Rule 5 and 7 of the said Rules are as under;

> ***Companies (Winding Up) Rules, 2020***
>
> *Rule 5 -* ***Admission of Petition and directions as to advertisement****.*
>
> *Upon filing of the Petition****, it shall be posted before the Tribunal for admission of the Petition and fixing a date for the hearing thereof and for appropriate directions as to the advertisements to be published and the persons, if any****, upon whom copies of the Petition are to be served, and where the Petition has been filed by a person other than the Company****,*** *the Tribunal may, if it thinks fit, direct notice to be given to the Company and give an opportunity of being heard,* ***before giving directions as to the advertisement of the Petition, if any,*** *and the petitioner shall bear all costs of the advertisement.*

Rule 7 - ***Advertisement of Petition***

Subject to any directions of the Tribunal, notice of the Petition shall be advertised not less than fourteen days before the date fixed for hearing in any daily newspaper in English and vernacular language widely circulated in the State or Union territory in which the registered office of the Company is situated, and the advertisement shall be in Form WIN 6.

FORM WIN 6 [See rule 7]

(verbatim copy with emphasis supplied)

(c) The Appellant contends that, before passing a final winding-up order and after admission of the Petition, the mandatory requirement is to invite the objections through the publication of advertisement of winding up Petition by giving not less than 14 days notice before the hearing. Therefore, the Tribunal Has to hear and consider all the objections filed/received in pursuance of the said advertisement before passing a final winding-up order. The format of the winding-up order given in form WIN 11 establishes that advertising the Petition is a mandatory prerequisite before passing a final winding-up order.

(d) Devas placed reliance on the judgement of Hon'ble High Court of Gauhati in MVI v The Registrar of Companies, (1973) 43 Company cases 522 wherein it is held that since there are no advertisement before winding up of a Company, the winding up order was liable to be set aside and proceeded to set aside the same.

(e) Appellant DEVAS further placed reliance on the observation made by the Hon'ble High Court of Rajasthan in the case of Falcon Gulf Ceramics Ltd vs Industrial Designs Bureau, (1996) 86 Company Cases 207. In this case, there were two winding up Petitions; one of the Petitions was advertised and winding up order followed. The 2nd winding up Petition was admitted without advertisement and tagged with the 1st winding up Petition. However, the division bench of the Hon'ble High Court held that the mere fact that the 1st Petition was advertised was not sufficient to comply with the mandatory provisions of advertisement under company law as regards the 2nd winding up Petition. Accordingly, the winding-up order in the 2nd Petition was set aside.

(f) DEVAS also submits that Hon'ble High Court of Delhi in the case "Jag Jeet Singh Industries Limited Vs Jag Jeet Brown Forman India Limited", Appeal No. 5 of 2004, decided on 21st September 2004, has held that the requirement of advertisement are mandatory, there could be no division of procedure prescribed under rules 96, 99 and 24 (2) of the Companies Court (Rules) 1959.

(g) In reply to the submissions of the Appellant, the learned ASG for the ANTRIX submits that the contentions of Devas on the strength of the above-mentioned judgements would no longer hold good in view of the vital changes that had taken place through the new Companies

(Winding-Up) Rules, 2020 and in the IBC 2016. In light of the same, the above referred two judgements become inapplicable to the present Companies Act 2013. The competitive chart of the corresponding Rules provided by the Devas is as under;

"**Annexure R-101**

Chart of advertisement rules under Companies (Court) Rules, 1959 and Winding Up Rules 2020

Sl. No.	**Provision under C.C.R. 1959**	**Provision under W.U.R. 2020**
1.	**Rule 96: Admission of Petition and directions as to advertisement** - Upon the filing of the Petition, **it shall be posted before the Judge in Chambers for admission of the Petition and fixing a date for the hearing thereof and for directions as to the advertisements to be published** and the persons, if any, upon whom copies of the Petition are to be served. The Judge may, if he thinks fit, direct notice to be given to the Company before giving directions as to the advertisement of the Petition.	**Rule 5 :Admission of Petition and directions as to advertisement.**- Upon filing of the Petition, **it shall be posted before the Tribunal for admission of the Petition and fixing a date for the hearing thereof and for appropriate directions as to the advertisements** to be published and the persons, if any, upon whom copies of the Petition are to be

		served, and where the Petition has been filed by a person other than the Company, the Tribunal may, if it thinks fit, direct notice to be given to the Company and give an opportunity of being heard, before giving directions as to the advertisement of the Petition, **if any,** and the petitioner shall bear all costs of the advertisement.
2.	**Rule 99: Advertisement of Petition** - Subject to any directions of the Court, the Petition **shall be advertised within the time and in the manner provided by rule 24** of these rules. The advertisement shall be in **Form No. 48**. **Rule 24**: (1) Where any petition is required to be advertised, it shall, unless the Judge otherwise orders, or	**Rule 7: Advertisement of Petition**- Subject to any directions of the Tribunal, notice of the Petition **shall be advertised not less than fourteen days before the date fixed for hearing in any daily newspaper in English and vernacular language**

	these rules otherwise provide, **be advertised not less than fourteen days before the date fixed for hearing** in one issue of the Official Gazette of the State or the Union Territory concerned, **and in one issue each of a daily newspaper in the English language and a daily newspaper in the regional language circulating in the State or the Union Territory concerned**, as may be fixed by the Judge. (2) Except in the case of a petition to wind- up a company the Judge may, if he thinks fit, dispense with any advertisement required by these rules.	**widely circulated in the State or Union territory in which the registered office of the Company is situated, and the** advertisement shall be in **Form WIN 6**." <no corresponding provision>

(h) Devas contends that the 2020 Rules, which deals exclusively with winding up cases, makes advertisement mandatory under Rule 5 therein. Therefore, this Tribunal needs to find whether or not the power to dispense with the advertisement is enshrined under Rule 5 of the 2020 Rules.

(i) The Ld. ASG for Antrix pointed out that Rule 5 categorizes the persons who can file the petition into two. The first category deals with a petition filed by the company itself, and the second category deals with a petition filed by a person other than the company.

(j) Under Rule 5, there is no parity in treatment to the two categories, and the Rule intends to treat the two categories differently. When the petition is filed by the company itself, which is the first category, Rule 5 mandates the following upon filing of the petition:

1) it shall be posted before the Tribunal for admission of the petition

2) and fixing a date for the hearing thereof

3) and for appropriate directions as to the advertisements to be published

4) and the persons, if any, upon whom copies of the petition are to be served.

When Rule 5 is read in the context of advertisement alone, it reads:

> *"Upon filing of the petition, it shall be posted before the Tribunal for appropriate directions as to the advertisement to be published."*

(k) Therefore, under Rule 5, the expression 'shall' used in cases where the company filed the petition makes it mandatory that an advertisement has to be published. However, the expression

'appropriate' employed in Rule 5 would grant the discretion to the Tribunal to only prescribe how such advertisement is to be carried. Therefore, there is no discretion to dispense with an advertisement when the company files the petition by itself.

(l) The reasoning behind such a construction is that a company cannot be allowed to be wound up silently by itself as it is a conscious decision of the company to do so. The Tribunal has to take into consideration all categories of creditors of the company, and other stakeholders, before an order of winding up is passed, especially when the company has come forward to wind up itself.

Therefore, Rule 5 makes publication mandatory in the first category.

(m) However, the present case is not concerning the first category as it is not a case where Devas has come forward to wind up itself. On the contrary, it falls under the second category as the petition has been filed by a person other than the company. In this case, the person other than the company is Antrix.

(n) When the petition is filed by a person other than the company, which is the second category, Rule 5 mandates the following upon filing of the petition:

1) the Tribunal **may if it thinks fit**

2) direct notice to be given to the company and give an opportunity of being heard

3) before giving directions as to the advertisement of the petition **if any**.

(o) The expression 'may if it thinks fit' while dealing with the second category grants the Tribunal wide discretion. However, there are two other vital differences between the first and the second category apart from the expressions 'shall' and 'may':

1) The expression employed for the first category is 'appropriate direction'. This means that a direction is mandatory, and the same has to be appropriate. However, the expression 'appropriate' is conspicuous by its absence when the Rule addresses the second category. The reason behind this absence is the second vital difference between the first and the second category. The expression 'if any' is used both while addressing the first and the second category. The expression 'if any' would always mean that the Rule grants absolute discretion to the Tribunal.

2) For example, a close reading of Rule 5 would reveal that the expression 'if any' used while addressing the first category would mean that the Tribunal can choose to or not choose to pass orders directing copies of the petition to be served upon specific persons. Similarly, the expression 'if any' used while addressing the second category would mean that the Tribunal can choose to

or not choose to give directions as to advertisement of the Petition.

(p) Therefore, there is an inherent discretion vested with the Tribunal under Rule 5 itself to dispense with the requirement of advertisement when the petition has been filed by a person other than the company. In the present case, since the company petition was filed by Antrix, the Tribunal has the discretion to dispense with advertisement under Rule 5.

(q) Therefore, under Rule 5 and in particular, when the petition has been filed by a person other than the company, the Tribunal has first to exercise its discretion to advertise the petition due to the employment of the expression 'if any'. In the event the Tribunal chooses to do so, it can, if it thinks fit, grant an opportunity to the company to be heard before doing so, or it can dispense with this requirement also. Such discretion is also vested with the Tribunal under Rule 5

(r) Having held that the NCLT has the discretion to dispense with an advertisement when a petition for winding up is filed by a person other than the company, it is settled law that such discretion has to be a reasonable one after application of mind. In view of this Tribunal, the NCLT rightly exercised its discretion in not advertising the petition as it would have made no difference to the outcome of the case. As the Ld.

ASG for Antrix rightly pointed out, the requirement of advertisement is an empty formality in the present case.

(s) The Ld. ASG representing ANTRIX submits that the plea of Devas need to be rejected on facts as there are only three parties involved in these proceedings, namely Devas as a Company and its Shareholders and Directors.

(i) Devas is a non-performing company since day one and does not involve any creditors, bankers or any other stakeholders.

(ii) All the above 3 parties are duly aware of the winding up proceeding is under Section 271 (c) and the shareholders as pleaded itself before the Hon'ble tribunal and the shareholders are pursuing enforcement action in various jurisdictions because of the appointment of Provisional liquidator by this tribunal vide its order dated 19th January 2021.

(iii) All the parties connected to the case are aware of the present proceedings. ANTRIX seeks to rely on the decision of Hon'ble Supreme Court in case of Dharampal Satyapal Ltd. V Deputy Commissioner of Central Excise, (2015) 8 SCC 519 wherein it has laid down the legal principle '**Useless Formality**'.

(iv) The learned ASG representing ANTRIX submits that the decision rendered under the erstwhile section 433 (e) of the Companies Act, 1956 wherein all the 3 cases, MVI v the Registrar of Companies, Falcon Gulf Ceramics Ltd (supra), and National Conduits(supra) involved winding-up proceeding initiated on account of recovery of debt, and the court had held that all the creditors should be made aware of. Therefore advertisement is a mandatory requirement under section 433 (e) of the Companies Act 1956.

(t) The other decision in Jag Jeet Singh Industries Limited (supra) is one rendered under Section 433 (f) of the erstwhile Companies Act, 1956, which permits winding up just on equitable reasons and the court therefore held that advertisement is necessary to comply with the doctrine of equity and fairness.

(u) The learned ASG further submits that erstwhile Section 433 (e) has not been incorporated in the new Companies Act 2013 as this has been incorporated in IBC 2016, and therefore, these decisions will not have any applicability.

14. Hon'ble Supreme Court in case of **Dharampal Satyapal Ltd. v. CCE, (2015) 8 SCC 519 : 2015 SCC OnLine SC 489 at page 538 has held;**

*"**39.** We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action.*

While emphasising that the principles of natural justice cannot be applied in straitjacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of procedural fairness, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason—perhaps because the evidence against the individual is thought to be utterly compelling—it is felt that a fair hearing "would make no difference"—meaning that a hearing would not change the ultimate conclusion reached by the decision-maker—then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in Malloch v. Aberdeen Corpn. [(1971) 1 WLR 1578 : (1971) 2 All ER 1278 (HL)] , who said that: (WLR p. 1595 : All ER p. 1294)

"… A breach of procedure … cannot give [rise to] a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain."

Relying on these comments, Brandon L.J. opined in Cinnamond v. British Airports Authority [(1980) 1 WLR 582: (1980) 2 All ER 368 (CA)] that: (WLR p. 593: All ER p. 377)

"… no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing."

In such situations, fair procedures appear to serve no purpose since the "right" result can be secured without according such treatment to the individual."

15. The learned ASG further submits that the Hon'ble Supreme Court had time and again reiterated the principle that if failure to carry out the conditions of the provision is not visited with any panel consequences, then such provision ought to be read and interpreted as the only directory in nature. Reliance is placed on the decision of Hon'ble Supreme Court in Ram Deen Maurya vs state of Uttar Pradesh, (2009) 6 SCC 735, May George v Special Tehsildar (2010) 13 SCC 98 and Delhi Airtech services private limited v state of Uttar Pradesh (2011) 9 SCC 354.

16. It is further argued that it is a well-settled principle of law that procedures are handmade of justice and not a mistress. Technicalities cannot interfere with the course of justice. (Sarah Mathew v Cardiovascular Diseases, 2014 2 SCC 62 and Rosy v State of Kerala (2000) 2 SCC 230.

17. Based on the above discussion, the position that emerges, Devas' decisions are no longer valid as provisions relating to recovery of debt by creditors have been shifted to the IBC 2016. The saved significant changes in the 2020 Rules have not been brought to the notice of the Tribunal by Devas. Therefore, any compliance with the fall within the ambit of 'useless formality' need not be complied with. If any non-compliance of provisions is not encountered with adverse consequences, including a penalty, the provision must be read or interpreted as a directory. Further, no prejudice has been caused to Devas, its Shareholders or Directors.

18. In reply to the above submissions, the learned Counsel for the Appellant submits that under the new regime, there are two separate Rules governing the powers of the National Company Law Tribunal under the Companies Act, 2013. One body of Rules exclusively govern winding-up proceedings, i.e. Companies (winding up) Rules, 2020. They do not empower this tribunal to dispense with the requirement of publication. However, the Tribunal is vested with the power to dispense advertisement in all cases (except winding up Petition), which are governed by the general rule, i.e. National Company Law Tribunal Rules 2016. The said rules empowered the Tribunal to dispense with any advertisement required and published under the said general rule. The relevant Rule 35 of the **NCLT Rules** is reproduced as under;

> ***"National Company Law Tribunal Rules, 2016***
>
> ***35. Advertisement detailing Petition.-***
>
> *(1) Where any application, Petition or reference is required to be advertised, it shall, unless the Tribunal otherwise orders or these rules otherwise provide, be advertised in Form NCLT-3A, not less than fourteen days before the date fixed for hearing. At least once in a vernacular newspaper in the principal vernacular language of the district in which the company's registered office is situated, and at least once in the English language in an English newspaper circulating in that district.*
>
> *(2) Every such advertisement shall state;-*
>
> *(a) the date on which the application, Petition or reference was presented;*

(b) the name and address of the applicant, petitioner and his authorised representative, if any;

(c) the nature and substance of application, Petition or reference;

(d) the date fixed for hearing;

(e) a statement to the effect that any person whose interest is likely to be affected by the proposed Petition or who intends either to oppose or support the Petition or reference at the hearing shall send a notice of his intention to the concerned Bench and the petitioner or his authorised representative, if any, indicating the nature of interest and grounds of opposition so as to reach him not later than two days previous to the day fixed for hearing.

(3) Where the Company is giving the advertisement, then the same may also be placed on the Company's website, if any.

(4) An affidavit shall be filed to the Tribunal, not less than three days before the date fixed for hearing, stating whether the Petition has been advertised by this rule and whether the notices, if any, have been duly served upon the persons required to be served:
Provided that the affidavit shall be accompanied with such proof of advertisement or the service, as may be available.

(5) Where the requirements of this rule or the direction of the Tribunal, as regards the advertisement and service of Petition, are not complied with, the Tribunal may either dismiss the Petition or give such further directions as it thinks fit.

(6) ***The Tribunal may, if it thinks fit, and upon an application being made by the party, may dispense with any advertisement required to be published under this rule.”***

19. Appellant contends that even under the new regime, the power of this Tribunal to dispense with the publication is restricted only to non-winding up matters. Hence all the judgements relied upon by DEVAS are applicable to the facts in hand. This Tribunal had no power to dispense with the publication of an advertisement for a winding-up Petition.

20. Based on the above discussion, it leaves no doubt that statutory rules provide discretion with the National Company Law Tribunal to pass an order to advertise the Petition for winding up. Thus the contention of the Appellant that the winding-up Petition is not maintainable on the sole ground of advertisement as provided under rules 5 and 7 of Companies Winding- Up Rules 2020 sans merit.

C. Can the Tribunal adjudicate private lis in exercising powers under Sec 271(c) of the Companies Act, 2013?

21. The preliminary objection is raised by Devas that the dispute between the parties is a private lis, and Section 271(c) of the Companies Act, 2013 does not contemplate that a private dispute can be a part of the fraud. Therefore, this Tribunal cannot interpret the terms of the agreement date 28.01.2005 as it is a private agreement between the parties.

22. Section 271(c) of the Companies Act 2013 refers to the circumstances in which the National Company Law Tribunal may wind up a company. Sub-clause (c) deals with the winding up of the company on the ground of its fraudulent activities. So, to attract Section 271(c), there should be two ingredients. There must be a company, and such a company should satisfy Section 271(c) ingredients. Section 271(c) does not limit the contours of fraud or the mode in which such fraud should be committed. This is purely for the reason that there cannot be a straight-jacket formula for the same. The provision is attracted whenever a company satisfies the ingredients of Section 271(c).

23. ANTRIX contends that Devas is a company, and it is alleged that Devas have committed multiple aspects of fraud. Ld. ASG for Antrix has contended that the aspects of fraud revolve around the agreement dated 28.01.2005 and has classified the contentions of fraud under seven categories. Therefore, since Devas is a company, there are allegations of fraud against Devas. An interpretation of the Agreement dated 28.01.2005 is the sine qua non to test whether the allegations against Devas satisfy the ingredients of Section 271(c). Therefore, the contention of Devas that this Tribunal cannot appreciate the terms of the Agreement dated 28.01.2005 is rejected.

24. There are two more reasons available to reject this contention of Devas. The first is that if this interpretation of Devas is accepted, then it would set a

wrong precedent in company law jurisprudence. This Tribunal would have rendered a finding which permits all companies to commit fraud in a private fashion and later claim the benefit that it was done in a private manner. The same cannot be the scope for adjudication by the Tribunal. This Tribunal cannot permit such an interpretation which will have far-reaching consequences. Therefore, this contention of Devas is rejected.

25. Devas, during arguments and through their written submissions has admitted before this Tribunal that the sole intention behind the incorporation of Devas was to enter into the Agreement dated 28.01.2005. This Tribunal has also inferred through the documents produced before us and the contentions raised by the parties before us during arguments and the written submissions that all transactions entered into by Devas were in furtherance of the agreement dated 28.01.2005. Therefore, outside of the agreement dated 28.01.2005, Devas does not exist, and also there cannot be any transactions that can be identified. Thus, the agreement dated 28.01.2005 is so intricate to the existence of Devas. It, therefore, cannot be divorced by this Tribunal while testing the allegations of fraud raised by Antrix against the ingredients of Section 271(c) of the Companies Act 2013.

D. Whether this tribunal must await the outcome of other pending proceedings, on the same set of facts, pending adjudication before several other forums and must not proceed with the adjudication in the present matter?

26. The learned Senior Counsel for Devas submits that there are other pending proceedings on the same set of facts presented before this Tribunal. Therefore, when different courts and Tribunals are seized of the matter, this Tribunal must await the outcome in other pending proceedings and then adjudicate the present case. Undisputedly CBI Trial, PMLA Trial, FEMA Adjudication and Proceedings under Section 34 of the Arbitration Act to set aside the ICC Arbitral Award are pending against DEVAS and its ex-directors and shareholders/investors in India.

27. Before proceeding under Section 271(c) of the Companies Act 2013, the Tribunal has to form an opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for a fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud or misfeasance or misconduct in connection therewith and that it is proper to wound up independently, irrespective of the outcome of other proceedings relating to Devas. Therefore, the consequences of the above pending proceedings cannot result in the winding up of Devas. Therefore, this Tribunal is the only competent forums to adjudicate a matter u/s 271(c) of the Companies Act, 2013, that can result in the winding up of Devas.

28. The NCLT and this Tribunal alone have exclusive jurisdiction to decide the winding-up issue. It has to do independently and judiciously without being influenced in any manner over any other proceedings. When exclusive

and independent power is vested with this Tribunal, the Tribunal has to exercise its jurisdiction by the provisions of the Act and, after application of mind, decide whether Devas needs to be wound up or not. This decision can be arrived at and given only by the NCLT and this Tribunal.

29. The Ld. ASG further elaborated on how the same set of facts can form the basis of multiple proceedings under different enactments. Because the facts overlap, and it cannot affect the process enshrined under each enactment for adjudicating the breaches by a party. The Ld. ASG also reiterated the well-settled principle of law that civil and criminal liability can run parallelly. Therefore the liabilities can be based on the same set of facts. The Ld. ASG, to bolster its contention, also placed reliance on the decision of the Hon'ble High Court of Judicature of Bombay in Panther Fincap and Management Services Ltd v. Union of India**,** 2005 SCC Online Bom 386. In this case, Hon'ble Bombay High Court held;

> *"33. I have considered these rival submissions of the parties and I am of the opinion that the jurisdiction and the power of the various investigating authorities derived from the jurisdiction vested in them by the various legislations or statutes, the authority which is doing the inquiry and or conducting the investigation is required to carry out investigation keeping in mind the legal provisions and legal limitations which are stipulated under the respective statute. Undoubtedly it can be that there may be an overlapping investigation but in my opinion such an eventuality cannot prevent any investigating authority from carrying out*

investigation in respect of their jurisdiction conferred on them under the statute. I am also of the further opinion that the investigation in respect of the corporate fraud can be initiated and considered by the central government under section 237(b)(i) of the companies Act. I have not been able to come across any provisions under the SEBI act in which any corporate fraud can be investigated by the SEBI. Undoubtedly it can be investigated under normal criminal law by the CBI. ***I am further of the opinion that merely because the material on the basis of which investigation is being undertaken is identical to the material which is subject matter of investigation by the other authority , it can not be stated that both the authorities can not simultaneously investigate pursuant to power conferred on them under their respective statutes. I am of the opinion that every authority is entitled to investigate even may be in respect of the same material as well as from the angle and facet in which they have been asked to carry out investigation****. It is possible that the SEBI may be investigating the same material on the ground of breach of the various provisions of the SEBI act and other security related legislations whereas the central government, department of company affairs can consider and/or investigate the fraud and/or breach of various provisions of law in the light and context of the provisions of the companies act may be in respect of the same material. However, I am of the opinion that the contentions advanced by the learned counsel for the appellant cannot be accepted particularly in view of the fact that every authority has been conferred various powers in their respective legislation. *****"*

(emphasis supplied)

30. We find merit in the submission of the Ld. ASG and find it appropriate to apply the finding of the Hon'ble Bombay High Court in the present case. We do not find substance in the argument advanced by Devas that this Tribunal ought to wait for the outcome of other pending proceedings on the same facts, which cannot be accepted.

E. Whether the petition filed u/s 271(c) of the Companies Act, 2013 is barred by 'estoppel'?

31. The Ld Sr. Counsel representing DEVAS submits that ANTRIX is estopped from raising grounds of fraud for three reasons. Firstly, the Agreement dated 28.01.2005 was terminated on the grounds of Force Majeure and not on the grounds of fraud. Secondly, Antrix did not pursue the grounds of fraud before the ICC Arbitral Proceedings. Lastly, even as late as in 2019, the auditor's report of Antrix states that there has been no fraud against the Company.

32. Regarding the first ground, the Ld ASG representing ANTRIX submits that when the facts of the case suggest that fraud was unearthed by investigating agencies only in 2016 and subsequently in 2018 and 2019. These were the sources of information for Antrix to get knowledge on the aspects of fraud, Antrix could not have terminated the agreement dated

28.01.2005 in 2011 on the grounds of fraud. The apparent reason being that Antrix was not aware that such fraud existed in 2011.

33. Similarly, regarding the second ground on estoppel, the ICC Arbitral award came to be passed on 14.09.2015. Therefore, the proceedings before the ICC Arbitral Tribunal commenced and concluded before 14.09.2015. Therefore, when aspects of fraud came to the knowledge of Antrix only in 2016 and subsequently in 2018 and 2019, they could not have raised the grounds on fraud before the ICC Arbitral Tribunal. In the present case, the fraud came to be discovered, and Antrix gained knowledge of the same only after the ICC Arbitral Award dated 14.09.2015.

34. As regards the third ground, it is submitted that the reports of the auditors of Antrix are public documents that can be viewed by anybody from any corner of the world. Therefore, the contents of the same have to be carefully loaded with utmost precision, and most importantly, the contents must be true.

35. Ld. ASG submits that undisputed fact is that various proceedings on the basis of multiple angles of fraud were initiated and are pending under multiple provisions of law under multiple statutes. It is not the case of Devas that Antrix is not fighting any of these cases or had given up these cases. On the contrary, Antrix or the respective agencies are pursuing proceedings that

are either pending or progressing. A final verdict is yet to be declared by any competent Courts/adjudicating forums dealing with the issues.

36. Therefore, without any judicial/quasi-judicial forum rendering a finding on fraud, Antrix was not in a position to state that there has been a fraud on Antrix in the auditors' reports. Therefore, the same cannot act as an estoppel against Antrix from raising grounds of fraud. Accordingly, the conclusions to be arrived at under Section 271(c) of the Companies Act, 2013 by this Tribunal are not on the strength of the observation in the auditors' reports.

37. This Tribunal has powers to examine the case under Section 271(c) based on the materials and evidence available before it. Accordingly, the auditors' report observations cannot eclipse or prevent this Tribunal from examining the allegations of fraud in concluding whether a company needs to be wound up or not in a given case.

38. The estoppel is not available against fraudulent acts since fraud vitiates everything, including the most solemn proceedings. Even concluded proceedings could be reopened if substantiated or proved that acts of fraud had been suppressed or not brought to the notice of the judicial/quasi-judicial forum seized on the matter. If the contention of Devas is accepted, then every company which wishes to allege fraud played on it, irrespective of whether it is true or not, can make available statements to that effect in public documents of the company. If later the allegations are not satisfactory/ frivolous by a judicial/quasi-judicial forum, the company would be liable for

misrepresentation. Therefore, we cannot accept this contention as valid in the eyes of the law.

Based on the above discussion, we find no estoppel against Antrix in raising the grounds of fraud in 2021, and also, the issue raised by Devas on estoppel cannot be accepted.

F. Whether there are justifications for winding up 'DEVAS' under Section 271(c) of the Companies Act, 2013?

39. A company can be wound up under Section 271(c) on any one of the three grounds, namely;

a) Affairs of the company have been conducted in a fraudulent manner, or

b) The company was formed for a fraudulent and unlawful purpose, or

c) Persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith.

40. As far as the present case is concerned, this Tribunal will test the allegations of Antrix against Devas on the first two grounds stated above. However, since Antrix makes the allegations levelled against DEVAS and has classified them under eight categories, we deem it fit to test the allegations against the ingredients of Section 271(c) under each category.

A. First category: **Devas Services and its Dispensation**

41. The Ld. ASG contended that under the Agreement dated 28.01.2005, it was agreed between DEVAS and the then officials of ANTRIX that ANTRIX would provide space segment capacity in S-Band Spectrum in Primary Satellite 1 (**PS1**), with an option available to Devas to lease the segment available through Primary Satellite 2 (**PS2**) also. This contention of the Ld. ASG is an undisputed fact. In addition, it was agreed between Devas and the then officials of ANTRIX that a satellite would be made available for Devas to render a service called "Devas Services".

42. The Ld. ASG has drawn this Tribunal's attention to the definition of 'Devas Services' found under the agreement dated 28.01.2005. Since electronic copies of all the documents relied on by the parties were made available to this Tribunal, we deem it fit to extract the definitions as submitted before us. Accordingly, 'Devas Services' is defined under Clause 14 of Annexure 1 to the Agreement dated 28.01.2005, and it reads as:

> *"Devas Services" means S-DMB Services that include subscription multimedia packages with digital audio, visual, and textual data, delivered via satellite and terrestrial systems via fixed, portable, and mobile receivers including mobile phones, mobile video/audio receivers for vehicles, etc. to subscribers' receivers, having capability to send back textual and audio visual data, with additional related activities such as service design, production, packaging and encoding,*

providing multimedia content that consist of channels of audio, video, internet and text content in various packages, sourced and customized as required by the audio, video and internet content producers and service providers with additional content related activities such as content selection, sourcing, editing, production and programming.

43. The 3rd and 4th recital of the Agreement dated 28.01.2005, which also refers to Devas Services, reads as:

"WHEREAS, DEVAS is developing a platform capable of delivering multimedia and information services via satellite and terrestrial systems to mobile receivers, tailored to the needs of various market segments.

WHEREAS, DEVAS has requested from ANTRIX space segment capacity for the purpose of offering a S-DMB service, a new digital multimedia and information service, including but not limited to audio and video content and information and interactive services, across India that will be delivered via satellite and terrestrial systems via fixed, portable, and mobile receivers including mobile phones, mobile video/audio receivers for vehicles, etc. ("Devas Services")

44. The Ld. ASG has contended that based on the definition of Devas Services from the above, read with the recitals of the Agreement dated 28.01.2005 in parts; 'Devas' could not have delivered 'Devas Services' on the following grounds:

a) For Devas to successfully render Devas Services in India, there are three pre-requites that Devas must-have, and these three pre-

requites must co-exist at all times, and only such coexistence can aid Devas to deliver Devas Services. Therefore, even in the absence of one pre-requisite, the rendition of Devas Services will be a failure. The Ld. ASG contended that Devas never had one of the three pre-requisites required to render Devas Services.

b) The first pre-requisite is the type of service, a bouquet of services bundled as one service called **Devas Services**. Devas intended to offer a new digital and multimedia service that is interactive across India that includes subscription multimedia packages with digital audio, visual and textual data, with several other additional related activities being bundled into one service called Devas Services. This is an undisputed fact.

c) The second pre-requisite is the mode through which Devas Services will be transmitted to a subscriber. As found in the above definition and recitals, Devas Services were planned to be delivered through a hybrid model of transmission using both satellite and terrestrial systems. This is yet another undisputed fact. For convenience, the Ld. ASG has termed the second prerequisite as 'Devas Technology'.

d) The third pre-requisite is the manner through which a subscriber of Devas Services receives the services. As found in the above definition,

Devas Services would be received by a subscriber through fixed, portable and mobile receivers, including mobile phones, mobile video/audio receivers for vehicles etc., having the capability to send back textual and audiovisual data. This fact is also undisputed. For convenience, the Ld. ASG has termed the third pre-requisite as Devas Devices.

e) The Ld. ASG contended that a merger of the above mentioned three pre-requisites, i.e., the bundle of services called Devas Services, being transmitted through Devas Technology and capable of being received in a single user device called Devas Device, and it was impossible on 28.01.2005, which is the date on which the agreement was signed. Furthermore, the Ld. ASG contended that even at the time of termination of the Agreement dated 28.01.2005, the merger of the three pre-requisites was not possible.

45. It is submitted that answers to the following questions will address the first set of allegations levelled by Antrix against Devas:

a) **Whether Devas could have provided the bouquet of services bundled as one service called Devas Services? – First pre-requisite**

(i) In the written submissions of Antrix filed before this Tribunal, the Ld. ASG elaborated on the types of services that are

bundled as one and called as Devas Services. The same is extracted:

> Devas Services can be bifurcated into one way non-interactive services and two way interactive services.

<u>One Way Non-Interactive Services (Services providing only broadcast of audio, video or textual data)</u>

1. Satellite Digital Sound (Radio) Broadcasting
2. Satellite Digital Video (Television) Broadcasting
3. Terrestrial Digital Sound (Radio) Broadcasting
4. Terrestrial Digital Video (Television) Broadcasting
5. Satellite Digital Textual Data (Messages) Broadcasting
6. Terrestrial Digital Textual Data (Messages) Broadcasting

<u>Two Way Interactive Services</u>

1. Satellite Internet Services
2. Terrestrial Internet Services
3. Transmission of audio, video ad textual data from Devas Device via satellite and terrestrial return

(ii) Through the above bifurcation of Devas Services, the Ld. ASG contends that Devas Services is a combination of broadcasting and telecommunication service as a subscriber of Devas Services can not only receive such services but also has the capability to send back audio, video and textual data from the Devas Device. This fact is not disputed by Devas. The Ld. ASG

contends that this was not possible in India on the following grounds:

a) India's SATCOM Policy, 2000 was a comprehensive policy framework for satellite based communications in India and was adopted by the Government of India. Since this was the governing policy on 28.01.2005 when the agreement was signed, the Articles enshrined therein would become pertinent.

b) Under Article 2.4 of the SATCOM Policy, which classifies the user sectors, broadcasting and telecommunication are conceived as independent dispensations and mutually exclusive services. The Ld. ASG argued that since a combination of broadcasting and telecommunication service is not conceived under the SATCOM Policy and Devas Service combines both, it could not have been rendered in India due to the lack of policy framework.

c) Devas Services did not have a corresponding licensing regime in India, and due to the lack of a licensing regime, such services could not have been rendered in India.

d) Devas Services is admittedly a new service in the world, and when new services are introduced in India, the government has a set protocol to decide the licensing framework for a new

service. The Ld. ASG has contended that no such deliberations were made for service in the nature of Devas Services by the Government of India. Therefore, Devas could not have delivered Devas Services.

(iii) The undisputed fact is that before Devas was incorporated, Forge Advisors LLC, a USA based entity, entered into talks with the then officials of Antrix for rendering Devas Services in India. Based on the documents submitted before us, which contain the non-binding Memorandum of Understanding dated 28.07.2003 between Forge Advisors LLC and the then officials of Antrix, and the proposed Joint Venture dated 15.04.2004 between Forge and the then officials of Antrix, the parties have always considered Devas Services to be a new national service which means **such a service was not existing in India** and Devas Services was the first of its kind.

(iv) Since Devas Services involves an element of broadcasting undisputedly, the nodal Ministry for the same is the Ministry of Information and Broadcasting, the Ld. ASG had invited our attention to a series of transactions that had taken place in 2007 when the Ministry of Information and Broadcasting took measures to introduce a new service called “Mobile Television” in

India. The Antrix, in its written submissions, submits that the following steps were taken to introduce a new service by M&IB :

a) On 21.06.2007, M&IB addressed a letter to TRAI indicating there was no policy in India for Mobile Television service. However, since stakeholders show interest, it is desirable to frame a policy as early as possible.

b) On 08.11.2007, TRAI replied to M&IB and made specific recommendations on the broad outline of the scope of the policy. However, TRAI indicated that licensing conditions would be worked out separately.

c) On 23.01.2008, TRAI gave its detailed recommendations on the introduction of Mobile TV services.

(v) Devas have not produced any document to support its case that the new national service conceived as Devas Services underwent similar deliberations at the Ministry level to be translated into a policy. Consequently, Devas has also not placed any corresponding licensing or policy regime for a service like Devas Services to be rendered in India. Therefore, devas could not have delivered Devas Services in India, thereby failing the first pre-requisite in the absence of a policy.

(vi) Further, It is undisputed that the present case between the parties involves the allocation of spectrum. In this context, Section 5.2.1 of the TRAI recommendations dated 23.01.2008, which deals with allocation of spectrum for Mobile TV service, becomes pertinent, and the same is extracted:

> *"5.2.1 The Ministry of Information & Broadcasting should co-ordinate with the Department of Space and Department of Telecom regarding availability of satellite capacity and frequency for satellite based mobile television services. As and when such satellite capacity is available and if the Government intends to issue such licenses, then the matter may be referred again to the Authority for its recommendations u/s 11(1)(a)(i) and (ii) of the Telecom Regulatory Authority of India Act, 1997 on the licensing framework* for satellite based mobile television service."

(vii) It is evident from the above that introduction of licensing framework for new services must be preceded by the intention of the Government to issue such licenses. However, DEVAS have failed to produce any such document that indicates the Government's intention to develop a policy framework for a service like Devas Services to be rendered in India. Therefore, Devas could not have delivered Devas Services in India.

(viii) In the alternative, assuming Devas did not require a policy framework combining both satellite and telecommunication services and Devas could deliver its service through independent licenses under each regime, Devas has failed to produce any permission or license from the Ministry or Information and Broadcasting. In India, the telecommunication service is overseen by the Department of Telecommunications under the Ministry of Communications and broadcasting is overseen by the Ministry of Information and Broadcasting. Admittedly, Devas has not obtained any license or permission from the Ministry of Information and Broadcasting. In the absence of the same, Devas could not have delivered Devas Services in India.

(ix) In light of the above, we hold that Devas could not have delivered Devas Services in India due to the lack of policy framework and licensing regime for a new service like Devas Services and thereby failing the first pre-requisite.

b) Whether Devas had Devas Technology to transmit Devas Services through a hybrid method combining both satellite and terrestrial mode of transmission? – Second pre-requisite

46. The Ld. Counsel for Devas elaborated on this hybrid transmission system of Devas and contended that:

a) Devas Device would be used by a subscriber to receive Devas Services as well as send back audio, video and textual data.

b) The receiving of Devas Services is bifurcated into two segments. One is the through space segment, and the other is through the terrestrial segment.

c) The Ld. Counsel for Devas contended that ordinarily, Devas Device would seek to receive the transmission through the space segment. This means that Devas Device held the capability to communicate directly with satellites.

d) It was only if Devas Device would attempt to receive its signal through the terrestrial segment due to tall buildings and other geographical issues. The terrestrial segment is provided by mobile towers that receive the signals from the satellite and re-transmit them because the Devas Device cannot primarily connect to the satellite in such an event.

47. The above functioning of the mode of transmission of Devas Services is undisputed. However, the Ld. ASG for Antrix argued that a technological capability of this transmission is available only on paper and is unheard of and is non-existent in the world as the entire bundle of services called Devas Services could not be delivered through this transmission.

48. In response to this contention of the Ld. ASG, Ld. Counsel for Devas submitted the following as examples to state hybrid transmission systems existed in the world prior to 28.01.2005 also:

a) ITU-DS and ITU-DH transmission system used by World Space in 1998.

b) ITU-E transmission system used by MB-SAT

c) TDM-QPSK and TDM-COFMD transmission system used by XM Radio and Sirius Radio in 1998

d) Geo-synchronous satellites used by Sirius Radio in 2002

e) Geo-stationary satellites used by MB-SAT in 2004

49. In the opinion of this Tribunal, references to these transmissions systems will not aid in the case of Devas as it may have misunderstood the submission of Antrix. Antrix was not contending that hybrid technologies did not exist. On the contrary, Antrix argued that a hybrid technology capable of delivering Devas Services did not exist in the world.

50. Before the NCLT, Devas referred to these transmission systems and explained it to the NCLT vide their affidavits dated 07.04.2021, 04.05.2021 and 05.05.2021. It is not even Devas' case that these transmission systems were utilized before 28.01.2005 to deliver a service like Devas Services. As rightly pointed out by the Ld. ASG, this was conceded by Devas in their Affidavit dated 04.05.2021. Therefore, the relevant portion of Devas' contention before the NCLT is extracted:

"Devas was not aiming to just repeat the services that were being offered by others (In India or elsewhere). It was clear that Devas was trying to introduce several new services which were not existing. The onus was on Devas to develop the required equipment, get licenses required, market the services and provide the services. Antrix had no responsibility in terms of technologies or licenses. The satellite was providing only transponder capacity and does not process the signals or data, except for some routing and thus a garbage in garbage out system. It is the ground equipment and technologies that are more relevant and Devas had ample time to develop all the required equipment and technologies."

51. Even according to Devas, the hybrid transmission systems used elsewhere by others were not delivering Devas Services, and Devas did not intend to repeat the services offered by others. Admittedly, the services provided using the mentioned transmission systems were small parts of the bundle called Devas Services and not the entire bundle as intended by Devas. This is also obvious as Devas called Devas Services as a new national service. When it is a new service, it could not have been delivered before by others in the world. Therefore none of the transmission systems mentioned by Devas has a bearing on the present case.

52. Alternatively, assuming these technologies could deliver Devas Services, Devas contended access to these transmission systems. However, access can mean two things. Either Devas owns these technologies mentioned by them, or Devas has the right to use them. Devas have failed to convince

this Tribunal by not producing any record proving that Devas owns these technologies or has the right to use these technologies. In the absence of such documents, this Tribunal holds that Devas did not access these technologies.

53. We have so far held that none of the hybrid technologies that existed prior to 28.01.2005 could deliver Devas Services. Such a position is admitted by Devas through their affidavit dated 04.05.2021 before the NCLT. What remains is to be tested is whether Devas built a technology capable of delivering Devas Services. The answer to this question is also in the negative.

54. The Agreement was entered into on 28.01.2005. Through their affidavit dated 04.05.2021 before the NCLT again, Devas conceded that it had ample time to develop all the required equipment and technologies, implying that as of 28.01.2005, it did not have any technology. Furthermore, it was conceded by the Ld. Counsel for Devas before this Tribunal that Devas does not have patents. In the opinion of this Tribunal, it is unlikely that Devas would develop a cutting edge technology that is the first of its kind, and no IPR protects it.

55. Even before this Tribunal, the pursuit of the Ld. Counsel for Devas to establish Devas had the technology to show presentations it had made to then officials of Antrix, which explains how Devas Technology functions. This Tribunal cannot rely on presentations to hold Devas had the technology. To a pointed question as to whether these presentations that projected the possible technology translated in reality as Devas Technology and if so when Devas did

not answer. Secondly, to a pointed question as to whether Devas had acquired any IPR for Devas Technology, it was conceded that there is no such IPR. When technology is neither owned nor acquired for the use nor IPR registered nor an iota of evidence produced to show its existence and capabilities, the only irresistible conclusion one can reach Devas Technology was both unknown and non-existent during the entire contract period 2005-2011. No evidence was produced of such an existence even later. Since Devas failed to provide any record or proof, we hold that Devas fails the second pre-requisite for not possessing Devas Technology.

C. Whether Devas had the Devas Device, a single user device that can receive Devas Services? Third pre-requisite

56. It is contended that Devas Device can connect and receive transmission directly from satellites using the space segment. Only when it is unable to do so, it would seek to receive a transmission from towers using the terrestrial segment. It is equally undisputed that Devas Device could be fixed, portable or fitted in moving vehicles, and a subscriber holding Devas Device can enjoy Devas Services. Another undisputed fact is that the Devas Device can receive Devas Services and send back audio, video, and textual data.

57. The Ld. ASG for Antrix distinguished a normal mobile phone used by the general public and a device capable of connecting directly to satellites. However, the normal mobile phones used by the public can receive signals

only from mobile towers and cannot connect to satellites. Therefore, to connect with satellites, a satellite phone is required.

58. Similar to Devas Technology, Devas Device is also a cutting edge device that is the first of its kind, and it is unlikely Devas did not IPR protect it. Further, Devas Device is an instrument, and Devas has failed to produce any document which would conclusively show this Tribunal that Devas developed the Devas' Device. Devas could not show any record before this Tribunal, even remotely suggesting that Devas developed Devas Device. It was once again conceded before us by the Ld. Counsel for Devas that no patents were granted to Devas for either Devas' Technology or Devas Device.

59. The Ld. ASG for Antrix repeatedly insisted that Devas produce Devas' Device if it had developed it. In the event, it is not able to do so, the Ld. ASG demanded Devas to show a document that would suggest Devas developed Devas Device. The best defence that Devas argued before this Tribunal was to say it could develop the Devas Device. Since Antrix failed to deliver its satellite, whether or not Devas developed Devas Device is immaterial.

60. Once again, referring to the affidavit dated 04.05.2021 filed by Devas before the NCLT, Devas conceded that Antrix had nothing to do with technologies or licenses. It was Devas's responsibility to develop the same. Therefore, irrespective of whether satellites are ready or not, Devas must have developed Devas Device. But had failed to do so and has not produced any

proof before this Tribunal that Devas developed Devas Device; it fails the third pre-requite.

61. In light of the above, this Tribunal finds merit in the submissions of the Ld. ASG for Antrix that Devas Services could not have been delivered in India due to the non-existence of policy framework and licensing regimes for a service like Devas Services in India. This Tribunal is also convinced that Devas did not own or have the right to use Devas Technology which could deliver Devas Services, and this Tribunal is satisfied with the submissions of the Ld. ASG that Devas did not develop Devas Device has failed to provide any document suggesting the contrary. Therefore, Devas did not possess all the three pre-requisites to render Devas Services.

62. In the opinion of this Tribunal, when Devas is incapable of delivering Devas Services, entering into an agreement dated 28.01.2005 to provide the same satisfies the ingredient of Section 271(c) of the Companies Act, 2013 as a company whose affairs have been conducted in a fraudulent manner and a company which was formed for a fraudulent and unlawful purpose.

B. Category 2: Misrepresentation in the Agreement DT. 28.1.2005

63. ANTRIX proceeds to allege that when Devas did not possess the Devas' Device, the agreement dated 28.01.2005 was fraudulently based on the misrepresentation that it had the IPR of the Devas' Device. The Ld. ASG invited the attention of this Tribunal to Articles 12(a) and 12(b) of the agreement dated 28.01.2005 to support his contention.

64. Article 12(a) and 12(b) of the agreement dated 28.01.2005 deal with representations and warranties of Antrix and Devas. In Article 12(a)(iii), Antrix represented it has the ability to make/build, manufacture, launch and operate the Satellites and provide the Leased Capacity as provided under the agreement through ISRO and in Article 12(a)(v), Antrix represented it has the ownership and right to use the intellectual property used in the manufacture and launch of the satellites and provision of the leased capacity under the agreement through ISRO.

65. The Ld. ASG contended that the expression 'has the ability and 'has the ownership and right to use the intellectual property' employed in Article 12(a)(iii) and (v) indicates the position existing on 28.01.2005. It was contended since Antrix had built, launched and operated several satellites before 28.01.2005, the representation through Article 12(a)(iii) and (v) conveys meaning through the expression 'has the ability and 'has the ownership and right to use that such a representation was true on 28.01.2005 and has to be read in the present tense.

66. Similar to Article 12(a), which dealt with the representations and warranties of Antrix, Article 12(b) dealt with the representations and warranties of Devas. In Article 12(b)(ii) and (iii), Devas represented it 'has the ability to design Digital Multimedia Receivers (DMR) and Commercial Information Devices (CID) and in Article (12)(b)(v), Devas represented 'it has

the ownership and right to use the intellectual property used in the design of DMR and CID.

67. The Ld. ASG compared Article 12(a) and 12(b) and rightly pointed out to this Tribunal that the expressions 'has the ability and 'has the ownership and right to use the intellectual property is appearing in both Articles 12(a) and 12(b). It was contended that when these expressions are interpreted in the present tense under Article 12(a), the same interpretation should also extend to Article 12(b). Based on this contention, it was argued by the Ld. ASG that on 28.01.2005, when the parties signed the agreement, Devas did not have the ownership and right to use the intellectual property in the design of DMR and CID.

68. However, to counter this submission of Antrix, Ld. Sr.Counsel for Devas contended that Clause 21 of the annexure to the Agreement dated 28.01.2005 contained the definition of 'intellectual property. Under the definition of intellectual property, according to the Ld. Counsel for Devas, discoveries and ideas, know-how and concepts are considered to be intellectual property. So on 28.01.2005, since the ability/capability of Devas to design DMR and CID is covered under the definition of Intellectual property under the agreement dated 28.01.2005, Devas had correctly represented, and there are no fraudulent representations.

69. We are not convinced with the submissions of the Ld. Counsel for Devas because by pressing this ground, Devas concedes that the design of DMR and CID was at a conceptual level and were to be developed at a future date. It is also not disputed that DMR and CID are portions of the Devas' Device and not the Devas' Device itself. Based on the record available before us, we have already held that even in 2021 and especially during 2005-2011, Devas' did not develop the Devas Device and has failed to convince this Tribunal otherwise. Devas have not produced any material to show that the Devas' Device was successfully developed.

70. When the Devas' Device was not developed, and portions of it, DMR and CID, were to be developed at a future date, they do not have a bearing on the present case. On the contrary, it only shows the lack of intention of Devas to develop even portions of the Devas' Device, if not the Devas' Device itself. This finding has a direct bearing on the representation made by Devas under Article 12(b)(ii), (iii) and (iv).

71. On 28.01.2005, Devas had represented that it would design and build DMR and CID at a future date, thereby hoping to develop the Devas' Device also at a future date. However, Devas, even until 2021 and especially between 2005-2011, has not done so. Therefore, the representations made by Devas under Article 12(b) in the opinion of this Tribunal was far away from reality and was improbable.

72. Therefore, Devas never had the intention to develop the Devas' Device, and Devas has not produced any material before this Tribunal to convince otherwise or to say it had taken some/any measures to develop the Devas' Device. In light of the same, representing otherwise through Article 12(b) of the Agreement dated 28.01.2005 is a clear misrepresentation and a fraudulent act.

73. Based on the above, this allegation of Antrix also attracts the ingredients of Section 271(c) to show that Devas is a company whose affairs have been conducted in a fraudulent manner, and the company was formed for a fraudulent and unlawful purpose.

C. Category 3; <u>The Agreement dated 28.01.2005 violates the SATCOM Policy</u>

74. Before analysing the issue of violation of SATCOM Policy it is necessary to go through the various provisions of SATCOM Policy which are allegedly violated. The relevant provisions of SATCOM Policy of 2000 are as follows :-

<u>Agreement dated 28.01.2005 violates the SATCOM Policy</u>

Article 1	**Article 2.1**	**Article 2.3.1**
Government of India has decided that the Satellite Communications Policy should be implemented in such a manner that while operations from Indian soil may be allowed with both Indian and Foreign Satellites, proposals envisaging use of	The Satellite Communications Policy framework for Indi as approved by the Government states : **(i) "Authorize INSAT capacity to be leased to non-government (Indian**	As a baseline making the INSAT capacity available to the Commercial Sector should be based on sound business lines i.e…., this activity should be on a 'for profit' basis and at the same time consistent with the

Indian satellite will be accorded preferential treatment. The norms for operating with Satellite from Indian soil shall be formulated by the respective Administrative Ministry/Department in accordance with the above directive and also in accordance with the Articles-2,3 and 4 of this Satellite Communication norms, Guidelines and Procedures....	**and foreign) parties following certain well defined norms."** **(ii) "Allow Indian parties to provide services including TV up linking through Indian Satellites, subject to certain terms and conditions which are to be spelt out;**	Government policies in the concerned user sectors.
Article 2.3.2 **All the policies regarding INSAT system shall be determined by the INSAT Coordination Committee (ICC) keeping in view Policy Frame-work for Satellite Communication in India.**	**Article 2.4.1** The user sectors can be broadly classified as; (a) Telecommunications, (b) Broadcasting, (c) Education and developmental communication and, (d) Security Communications for Defense Ministry /Services.	**Article 2.5.2** ICC shall year mark atleast certain percentage of capacity for use by the non-governmental users who have been authorized by law to provide various telecom services using broadcasting.
Article 2.5.3 With reference to other users ICC may evolve the procedures from time to time taking into the account the capacity available and the prevailing situation in the satellite communication market.	**Article 2.5.5** Use of INSAT capacity for users in India will be based on the existing provisions. **ICC may review at any time as required.**	**Article 2.5.6** The responsibility for obtaining the necessary licenses to offer a service in a particular territory (in India or in other countries) shall be that of the party which has taken the capacity on lease.
Article 2.5.7 **Operations with INSAT and providing the services in India will be subject to the Party obtaining the requisite operating and**	**Article 2.6.2** Once Capacity is earmarked by ICC for non-governmental users, department of Space/INSAT is	**Article 2.6.5** The use of the INSAT capacity by non-governmental parties will be based on a formal lease agreement signed

frequency/siting license from the concerned authorities.	authorized to provide this capacity to the non-governmental users for services other than telecommunications, following its own procedures……	between the department of Space/INSAT and the party which will spell out the technical, financial, contractual and management clauses. **In so far capacity to non-governmental users through DOT will continue**. ICC may review the arrangement at any time as required.
Article 3.1 **Authorized Indian administration in consultation with department of space and other concerned regulatory authorities to inform, notify, coordinate and register satellite systems and networks by and for Indian private parties following certain well defined and transparent norms. The satellite systems of all government agencies to be established by department of Space.**	**Article 3.4 -Licenses Required** For establishing Indian satellite systems three distinct authorization/licenses will be required.	**Article 3.4.3** Operating licenses for the services to be provided by the system/network. In so far in India is concerned, these will be dealt with in accordance with the regulations in the particular sector as defined in Article 1. For instance, for broadcasting the Broadcast Act will apply and for telecommunication, the Telegraph Act will apply. The Administrative Ministry for Telecommunication is the Department of Telecommunications and for the Broadcasting, it is the Ministry of Information and Broadcasting.
Article 3.5 – Responsible Authority For Issue of Licenses **In so far as the first two authorizations/licenses of 3.4 above are concerned a committee consisting of Secretaries to the**	**Article 3.6.1** Only Indian Registered Companies may be allowed to establish and operate an Indian Satellite system. The application for notifying, registering	**Article 3.6.10** For 3.6.7(e) above, INSAT Coordination Committee (ICC), through its secretariat resident in DOS, **shall announce its intention to make the orbit spectrum available**

Government of India in the Department of Space, Department of Telecommunications, Ministry of Information and Broadcasting, Ministry of Home Affairs, Secretary (R), Ministry of Defense and Ministry of Industry (Department of Industrial Policy and Promotion) with Wireless Advisor to the Government of India as Permanent Invitee shall be the single window for clearing the systems. The committee shall be chaired by the Secretary, Department of Space. The Secretariat of the Committee for authorizing the Establishment and Operations of India Satellite System (CAISS) shall be resident in the Department of Space. After the CAISS approval the authorization /licenses for the establishment and operation of the satellite System shall be issued by Department of Space following its normal procedures. WPC shall also indicate the intersystem and terrestrial coordination as request.	and operating an Indian satellite system must be on behalf of a company registered in India…**The CAISS may also consider authorizing the registration of systems/networks of foreign companies as Indian Satellite Systems/Network in the interest of attracting advanced services or foreign investment.**	**for non-governmental applicants and invite applications giving a fixed closing date. Following this, the procedure described for 3.6.7.(a) and 3.6.7.(b) above shall be adopted.**

75. The ANTRIX further proceeds to allege that the agreement dated 28.01.2005 was signed by willful circumvention of the process contemplated under the SATCOM Policy, 2000. It is contended that the SATCOM Policy, which existed as the governing policy on 28.01.2005, i.e. at the time of the agreement, was a comprehensive policy on satellite communications and has

prescribed a step by step approach to being followed by a private user before procuring a lease for space segment.

76. In reply to the above learned senior counsel representing DEVAS contends that the SATCOM Policy, 2000 was not the governing policy for the Agreement dated 28.01.2005 for the following reasons;

a) Under Article 2.5.2, Insat Coordination Committee (**ICC**) is mandated to earmark spectrum for use by non-governmental users. The expression 'use' implies the allocation of the spectrum could be done only after the lease period begins to run, and it begins to run after the user has obtained all licenses. Since allocation happens after the lease is granted, SATCOM Policy **need** not have been complied with while finalising the **Agreement** dated 28.01.2005.

b) Article 3 of the SATCOM Policy is regarding norms, guidelines and procedures for satellite establishments and operations. Since Devas is not establishing and operating the satellite, all the sub-articles under Article 3 does not apply to Devas.

c) Shri. S.K Das retired IAS officer, stated the CBI on 20.10.2015 stating that SATCOM Policy was not considered a relevant factor for earmarking capacity for the private sector. ICC at no point earmarked spectrum for private sectors, ICC approval was not taken seriously.

77. Regarding Article 2.5.2 of the SATCOM Policy, the Ld ASG highlighted the contention of DEVAS stated in Para 134 of the written submissions filed before this Tribunal. Devas contended that the lease begins to operate only after requisite licenses are obtained by the user from DoT/M&IB and WPC, and the 'use' of spectrum under Article 2.5.2 is earmarked by ICC after such licenses are obtained. However, it is an admitted position that Devas never held any licenses from M&IB, and the WPC license it obtained did not permit Devas to carry out any commercial operations.

78. In the opinion of this Tribunal, the WPC license also has no bearing on the case. However, Devas' argument cannot be accepted because it concludes that the lease period under the agreement dated 28.01.2005 never commenced. Therefore, when the lease period never commenced, Devas does not have any right under the agreement dated 28.01.2005, and the same is a non-starter.

79. The objection raised under Article 3 also cannot be sustained. No doubt Article 3 deals with satellite establishments and operations but as rightly pointed out by the Ld. ASG, a closer look at Article 3 would reveal it deals with satellite establishments and operations 'by and for Indian Private Parties.' The expression 'by and for' appearing in Article 3 conceives a transaction where such a satellite is established for a private party. It is not disputed that 97% of the satellite capacity was allocated to Devas under the Agreement dated 28.01.2005, and therefore, it is clear that a satellite was to

be established 'for' Devas and therefore, Devas cannot escape the clutches of Article 3 of the SATCOM Policy.

80. Further, from a perusal of the sub-clauses of Article 3 of the SATCOM Policy, several obligations are cast on non-governmental users, which shows that such an establishment and operation of a satellite requires the cooperation of the non-governmental user for whom the satellite is being established. In this case, it is Devas.

81. The Ld. ASG submits that SATCOM Policy is a Government Policy and is sacrosanct, and the subjects governed by it do not have the option to dispense with its applicability. Mr S K Das, a retired IAS officer statement made to CBI, is a matter of serious concern. It was not within the domain of any party to disagree with the applicability of the particular policy or law to them. The SATCOM Policy, in exact words, governs non-governmental users also, and Devas is a non-governmental user. Therefore the SATCOM Policy would apply to the Agreement dated 28.01.2005.

82. The Ld. ASG for Antrix, based on the Articles of the SATCOM Policy, made a two-fold submission under the SATCOM Policy category. They are:

a) SATCOM Policy conceives broadcasting and telecommunication services as two independent and mutually exclusive services. Therefore, a combination of both, Devas Services, is not permissible under the SATCOM Policy.

b) SATCOM Policy prescribes in detail the step by step process to be carried out by a non-government user to obtain a lease for spectrum, and the Agreement dated 28.01.2005 was signed by violating this mandate of the SATCOM Policy.

83. The answers to the following questions will address the allegations of Antrix under the SATCOM Policy Category:

a) Whether the SATCOM Policy conceived broadcasting and telecommunication as independent services and did not permit a combination of both?

b) Whether the Agreement dated 28.01.2005 was signed by violating the procedure conceived under the SATCOM Policy before a lease could be granted to a non-governmental user?

A. Whether the SATCOM Policy conceived broadcasting and telecommunication as independent services and did not permit a combination of both?

84. Ld ASG for ANTRIX submits that they have already stated why Devas Services could not be rendered in India while addressing the first pre-requisite.

85. From a perusal of the Articles of the SATCOM Policy, it emerges that;

a) The broad classification of user sectors under the SATCOM Policy conceived broadcasting and telecommunication independently. (Article 2.4.1)

b) DoS/INSAT is authorised to provide the capacity earmarked by ICC for services other than telecommunications to non-governmental users. To deviate from this procedure, ICC has to review the arrangement. (Article 2.6.2)

c) For telecommunication services, DoS/INSAT will not provide the capacity earmarked by ICC to non-governmental users. It will be provided through DoT. To deviate from this procedure, ICC has to review the arrangement. (Article 2.6.5)

d) The Broadcast Act will apply for Broadcasting, and Telegraph Act will apply for Telecommunications and is handled by the Ministry of Information and Broadcasting and Department of Telecommunications, respectively. (Article 3.4.3)

86. It is evident from the SATCOM Policy that allocation of capacity for telecommunication services has a separate procedure. Admittedly, Devas Services includes a telecommunication aspect to it. Two inferences are therefore possible and pertinent. First, treating telecommunication services on a separate pedestal and prescribing a separate procedure for telecommunication services has excluded any bundle that combines another

service with telecommunications. Therefore, Devas Services, a bundle of services combining broadcasting and telecommunication services, is not conceived in the SATCOM Policy. This is another reason to support the finding of this Tribunal that Devas did not possess the first pre-requisite to deliver Devas Services, which is the bundle of services combined as one service, as the policy governing the Agreement dated 28.01.2005 did not conceive such a service.

87. Article 3.4.3 further clarifies by establishing the governing regime for Broadcasting and Telecommunication Service as independent legislation and Ministries. This is sufficient for this Tribunal to conclude that the SATCOM Policy conceived Broadcasting and Telecommunication Services as independent and mutually exclusive dispensations.

88. The Ld. Counsel for Devas submitted in Defense that SATCOM Policy is generic and flexible and does not contain an exhaustive list of services. Therefore, as and when new services are made available, the SATCOM Policy is accommodative enough to accept such new services. Since Devas Services was a new service, the SATCOM Policy's flexible nature permitted the same.

89. We find no merit in this argument. There is no doubt that SATCOM Policy does not contain the list of permitted services, but it certainly prescribes the nature of services that can be rendered. There is a lot of difference between a list of services and the nature of services. In the present

case, we are concerned with the nature of Devas Services. On merits, it is not disputed that Devas Services is a combination of broadcasting and telecommunication services. However, after perusing the SATCOM Policy, this Tribunal has concluded that the SATCOM Policy has always intended to treat telecommunication services separately from other services. For this reason, any combination of service along with telecommunication services is not permitted under the SATCOM Policy. This is more so when Devas has not produced any material on record to state that this procedure under the SATCOM Policy has been reviewed and changed by the ICC.

B. Whether the Agreement dated 28.01.2005 was signed by violating the procedure conceived under the SATCOM Policy before a lease could be granted to a non-governmental user?

90. The Ld. ASG for Antrix took this Tribunal through several Articles of the SATCOM Policy. After perusing the same, the following step by step process is enumerated for a private, non-governmental user regarding satellite communications:

a) The criteria for making the capacity available to the commercial sector should be based on sound business lines, i.e., the activity should be on a for-profit basis, and at the same time consistent with the Government Policies in the concerned user sectors. (Article 2.3.1)

b) ICC shall determine all policy frameworks for SATCOM in India. (Article 2.3.2)

c) The responsibility for obtaining the necessary licenses to offer a service in India is cast on the party interested in the lease. Without these operating and other licenses, a party cannot proceed with its operations. (Article 2.5.6 and 2.5.7)

d) ICC shall earmark individual capacity only to non-governmental users authorised by law. (Article 2.5.2)

e) Once ICC earmarks the capacity to non-governmental users authorised by law, DoS/INSAT is authorised to provide the earmarked capacity to non-governmental users for services other than telecommunications. (Article 2.6.2)

f) DoS/INSAT will sign the formal lease agreement after the party spells out its technical, financial, contractual and management clauses. For telecommunication services, the lease agreement will be through DoT. (Article 2.6.5)

91. Based on the above discussion, it can be concluded that under SATCOM Policy;

a) The capacity can be made available to the private sector, and the SATCOM Policy permits the same. However, it should be done by the

Government Policies in the respective user sectors. This Tribunal has already rendered a finding that for Devas Services, there is no corresponding policy or a Governmental Licensing regime as a service like Devas Services were never deliberated by the Government of India in 2005. Therefore, we hold that the capacity could not have been made available to Devas due to the lack of licensing and policy regime in the corresponding user sectors.

b) The operations being carried out by non-governmental users is subject to satisfying the INSAT that all licenses (operating and frequency licenses) have been obtained by such a party. It is undisputed that the only operating license Devas obtained was an Internet Service Provider License (**ISP**) on 02.05.2008. However, Devas could not have rendered Devas Services in India with this ISP license. Therefore, Devas did not possess any operating licenses to carry out its intended Devas Services in India. This is obvious because there was no licensing regime for a service like Devas Services, and Devas could not have obtained such licenses. Even assuming otherwise, the undisputed fact is that Devas Services involves a great extent of the Broadcasting element. Devas have not placed on record any licenses and approvals it had obtained from the Ministry of Information and Broadcasting. Devas could not have rendered their services in India

c) The earmarking of capacity by ICC is subject to the non-governmental user being authorised by law. There was no such authorisation placed before this Tribunal by Devas. Therefore, Devas fails the threshold criteria prescribed by the SATCOM Policy in India to be eligible for earmarked capacity.

d) As held before, Devas Services included telecommunication services also and the allocation of spectrum for telecommunication service contemplates a separate procedure through DoT. However, this procedure was not followed by Devas before obtaining the leased capacity.

92. On 28.01.2005, when the Agreement was signed, none of those mentioned above procedures was followed and complied with; therefore, this Tribunal holds that the Agreement dated 28.01.2005 was signed in complete contravention to the SATCOM Policy.

93. Antrix referred to a few other Articles of the SATCOM Policy, and this Tribunal infers the following procedures enumerated therein to be followed before a lease agreement is formalised and before a satellite is established:

a) The SATCOM Policy is introduced for informing, notifying, coordinating and registering satellite systems and networks by and for Indian private parties following certain well defined and transparent norms. (Article 3.1)

b) For establishing an Indian satellite system, three distinct licenses are required: (Article 3.4)

i) Authorisation from DoS

ii) Authorisation by WPC

iii) Operating Licenses for the services to be provided by the system/network. These will be by the regulations in the particular sector. For example, broadcasting services will be governed by the Broadcasting Act. For telecommunication services, it will be the Telegraph Act, monitored by the Ministry of Information and Broadcasting and the Department of Telecommunications, respectively.

c) For authorisation from DoS and WPC as per Article 3.4, the following Secretaries forming a Committee of Secretaries must grant a single-window clearance: (Article 3.5)

i) Department of Space

ii) Department of Telecommunications

iii) Ministry of Information and Broadcasting

iv) Ministry of Home Affairs

v) Ministry of Defence

vi) Ministry of Industry (Department of Industrial Policy and Promotion)

vii) Wireless Advisor to the GoI as a permanent invitee.

d) If the coordination process is set up already for the frequency band and orbital slots, ICC through DoS should announce its intention to make the orbit spectrum available for non-governmental applications and invite applications indicating a fixed closing date. (Article 3.6.7 (e) r/w Article 3.6.10)

95. Based on the above Articles of the SATCOM Policy, as rightly pointed out by the Ld. ASG, this Tribunal thinks that Article 3 of the SATCOM Policy mandates dual obligations. Accordingly, specific commitments are cast on the Government Departments, and certain obligations are cast on the non-governmental user intending to use the satellite system to render a service.

96. The case of Devas is peculiar. The present facts do not indicate a satellite already built and launched, and Devas was approaching the then officials of Antrix for capacity in the already launched satellite. On the contrary, under the Agreement dated 28.01.2005, it was agreed that a satellite would be built and launched for Devas to render Devas Services. It is not disputed that 97% capacity of the satellite was allotted to Devas under the Agreement dated 28.01.2005.

97. When these are the apparent facts of the case, the obligations cast on Devas cannot be excluded for interpreting Article 3 of the SATCOM Policy, especially when the satellite is going to be notified, registered, coordinated and launched so that 97% of the capacity in the satellite can be enjoyed and

utilised by Devas. The fulfilment of obligations on the part of Devas under Article 3 is sine-qua-non as argued by the Ld. ASG. In the above-mentioned background, the Articles of the SATCOM Policy were analysed, and it is observed that:

a) For the primary Act of establishing an Indian Satellite System, one of the licenses required is the operating license for the service to be rendered using the satellite, as evident from Article 3.4.3. However, on 28.01.2005, it is undisputed that Devas did not either have any operating licenses nor did Devas apply for any license and was awaiting approval for the same. Therefore, Devas fails the primary threshold requirement for establishing a satellite.

b) Article 3.4.3 further states that the operating licenses should be by the regulations in the particular sector. However, as held by this Tribunal earlier, there was no policy or licensing regime for a service like Devas Services. There were no deliberations by the Government of India to introduce a new service like Devas Services. The Ministry of Information and Broadcasting never approved and granted Devas licenses at any point in time, even until 2011. Therefore, Devas fails the primary threshold requirement for establishing a satellite.

c) There are two other licenses required for establishing the satellite, and they are approvals from DoS and WPC. Approvals from DoS and WPC are granted by a Committee of Secretaries (CoS) from seven

Ministries are recorded by this Tribunal earlier. Devas have not submitted any material before us that the CoS has granted the approval from DoS and WPC in the case of Devas for the satellite to be launched so that Devas can enjoy 97% of the capacity in the satellite.

98. Devas neither submitted operating licenses authorising it to render Devas Services nor submitted the CoS approvals for establishing the satellite. In light of this obvious fact, the Agreement dated 28.01.2005 was signed in contravention to the Articles of the SATCOM Policy.

99. Devas raised a peculiar argument through their main company appeal. Devas argued that the International Telecommunication Union (**ITU**) granted the S-Band spectrum to the Government of India, and due to non-utilisation of the same, the Government of India was at the risk of losing its right to utilise the same. It was only to use the spectrum and mitigate the risk of losing it; Forge Advisors LLC proposed to Antrix that Devas Services could be delivered.

100. Going by Devas' case before this Tribunal certainly attracts Article 3.6.7(e) of the SATCOM Policy as rightly pointed out by the Ld. ASG. Once Article 3.6.7(e) is attracted, Article 3.6.10 mandates the ICC through DoS to announce its intention to make the orbit spectrum available for non-governmental applicants. In other words, a tender process is enshrined in the SATCOM Policy. Even according to Devas, if the Government of India already

had the S-Band spectrum to be utilised and intended to make it available for private players, it ought to have invited applications as enshrined under the SATCOM Policy. Since the Government of India did not do so, it is presumed that it never had such an intention. When the Government of India did not have such an intention to offer the S-Band spectrum for the commercial sector, Devas could not have and ought not to have signed the Agreement dated 28.01.2005 with the then officials of Antrix, which offered the very same S-Band spectrum which the Government of India did not have the intention to make it available for the commercial sector and private players.

101. In light of all the above, this Tribunal is satisfied that the Agreement dated 28.01.2005 has been signed in complete contravention of the SATCOM Policy, 2000 and the step by step procedure enshrined therein. Since Devas fully knowing such a policy exists and has failed to comply with it, the ingredients of Section 271(c) are attracted.

D. Category 4: Perspective of Devas

102. The Ld. Counsel for Devas never made any submission before this Tribunal on the various Articles of the SATCOM Policy mentioned above by this Tribunal. On the contrary, it was argued that the SATCOM Policy does not govern the agreement dated 28.01.2005, which submissions have already been dealt with.

103. However, the Ld. Counsel for Devas pursued this Tribunal that the agreement dated 28.01.2005 resulted from protracted negotiations for two years. Therefore it cannot be said that the agreement was signed by surpassing the Government Departments. The Ld. Counsel for Devas argued that every Government Department was fully aware of the negotiations and that an agreement would be signed, and the same was signed on 28.01.2005.

104. In support of the above contentions, Ld. Counsel for Devas invited our attention to the following sequence of events which, according to Devas, is the negotiations that happened for two years:

a) Forge did presentations on 22.03.2004, 02.10.2004 to DoS, ISRO and Antrix regarding rendition of Devas Services in India. Initially, it was decided there would be a Joint Venture between Forge and Antrix. However, since it was agreed it would be entered with an Indian company only, Devas was incorporated in December 2004.

b) In May 2004, various meetings were held between Forge and the officials of DoS/ISRO and Antrix. Before Devas was incorporated, a USA based entity, Devas LLC was negotiating the key terms of the agreement dated 28.01.2005. The persons constituting Forge and Devas LLC were experts in Satellite Communications.

c) The 54th Board meeting of Antrix approved the proposal of Forge. Antrix constituted the Shankara Committee, and it supported the

Agreement dated 28.01.2005. A further sub-committee, namely the K. Bandyopadhyay committee, was formed to review the project's technical feasibility. The 57th Board meeting of Antrix approved the Shankara Committee report and approved the agreement dated 28.01.2005.

d) The 122nd TAG meeting was aware of the Devas' project, and officials from several Ministries attended it. The 62nd meeting of the ICC approved transponder capacity to be used by non-governmental users. The Ld. Counsel for Devas also placed reliance on the 64th meeting of the ICC.

e) The Bhatt Committee report regarded Antrix to be an integral part of ISRO/DoS. On 28.01.2005, Antrix had 117 ongoing contracts, which shows that Antrix could enter into Agreements.

f) Even the Suresh Committee constituted by the subsequent management of Antrix found no fault with the Agreement dated 28.01.2005.

105. This Tribunal had already held that the SATCOM Policy governs the agreement dated 28.01.2005, and the steps prescribed therein was violated. Therefore, the testing parameter set by this Tribunal to appreciate the arguments of Devas is that whether the negotiations as stated by the Ld. Counsel for Devas is per the SATCOM Policy. After perusing the SATCOM Policy once again, this Tribunal believes that the negotiations, as shown by

Devas before us, are not approved or authorised by the SATCOM Policy, the governing regime. Therefore we reject the submissions made by the Ld. Counsel for Devas.

106. It is settled law that when something has to be done in a particular manner, it has to be done in that manner and not otherwise. When the SATCOM Policy prescribes the specific procedure to be followed, Devas cannot cite negotiations outside the ambit of the SATCOM Policy and persuade this Tribunal to hold that even if the SATCOM Policy is violated, due to these negotiations, it would indicate the Agreement dated 28.01.2005 was signed after many deliberations. This Tribunal cannot accept such an interpretation.

107. Even on the merits of these negotiations, in the opinion of this Tribunal, the position that emerges is;

a) Antrix may be in a position to enter into agreements. However, such agreements are preceded by the steps prescribed in the SATCOM Policy. First, the ICC has to earmark the capacity and then, DoS/INSAT should allot the capacity. Next, the user must satisfy licensing requirements, and then the lease is granted, among other procedures.

b) ANTRIX is the commercial arm of the ISRO, was authorised to take steps only in compliance with the SATCOM Policy and after following the procedure established by law to enter into the agreement. These procedures were not complied with before signing the agreement

dated 28.01.2005. It is not even Devas' case that the 117 ongoing contracts were for service like Devas Services or that those contracts granted capacity in a satellite that was not even built but was going to be made at a future date. How many ongoing contracts Antrix had will have no bearing on the present case.

c) Clearance for satellites under the SATCOM Policy is granted by the CoS from seven Ministries. **One pre-requisite is that the user intends to utilise the capacity to have the operating licenses**. It is undisputed Devas did not have the required operating licenses on 28.01.2005. Further, when the CoS is authorised under the SATCOM Policy, the Shankara Committee report, Suresh Committee report, or the Bandyopadhyay committee report has no relevance and significance on the case's merits. They are not the body constituted under the SATCOM Policy to approve these transactions.

d) To get over the fact that the ICC and TAG were unaware of the agreement dated 28.01.2005 or about Devas, the Ld. Counsel for Devas invited the attention of this Tribunal to several minutes of the ICC and TAG Meetings. A closer look would reveal that in none of these meetings, approval or permission was granted to Devas. Devas have failed to show this Tribunal that ICC earmarked capacity for service like Devas Services. Devas have failed to show this Tribunal that it was authorised

by law to utilise such earmarked capacity. Devas have failed to show this Tribunal that DoS/INSAT allotted the capacity to Devas.

108. In light of the above, any reliance on these negotiations against the SATCOM Policy will have no bearing on the present case. Therefore, this Tribunal believes that the agreement dated 28.01.2005 was signed in complete violation of the SATCOM Policy, 2000.

E. Category 5: <u>Suppression and Misrepresentation leading to the approval of Cabinet.</u>

109. The Ld ASG for ANTRIX emphasised the following points to show that material facts were deliberately suppressed ;

a) The Note for the 104th Space Commission Meeting to be held on 26.05.2005.

b) Minutes of the 104th Space Commission Meeting held on 26.05.2005.

c) Cabinet Note dated 17.11.2005 prepared by DoS.

d) Approval of the Union Cabinet dated 01.12.2005.

e) The minutes of the 124th TAG meeting held on 20.02.2006.

110. The Ld. ASG contended <u>that the outcome of all these meetings and events resulted in a benefit for Devas under the agreement dated 28.01.2005</u>. However, in none of these meetings and events, especially when they all took place after 28.01.2005, **<u>neither the Agreement dated 28.01.2005 nor the existence of Devas was mentioned and deliberated</u>**. Therefore, the

contention of the Ld. ASG is that the benefit, if any, that accrued to Devas in light of the above meetings and events resulted from fraudulent activities flowing out of the suppression of material facts.

111. The Ld. ASG further argued that when the Agreement dated 28.01.2005 and the existence of Devas is suppressed at crucial decision-making stages, any negotiation that had happened to arrive at the agreement dated 28.01.2005 is irrelevant.

112. It is an undisputed fact that the satellite that was going to be built under the Agreement dated 28.01.2005 was called GSAT-6/INSAT-4E satellite. All the five crucial developments were placed by Antrix before us.

A. Note for the 104th Space Commission Meeting

113. The subject of the 104th meeting of the Space Commission was '*A Multimedia Mobile S-Band Satellite Mission (GSAT-6/INSAT-4E)-Approval For*'. Therefore, it is beyond doubt that the note was prepared for the approval of the satellite, which was proposed to be built under the agreement dated 28.01.2005. A closer look at agenda item No 5 would reveal that it was regarding 'Services Utilisation'. Under agenda item No 5, it was stated:

> *"A significant portion of the capacity of the Spacecraft will be committed for lease to a service provider on appropriate commercial terms. DoS has already been approached by a service provider who had undertaken to lease the capacity over life period."*

114. We find merit in the submission of the Ld. ASG that neither Devas nor the agreement dated 28.01.2005 is mentioned in the note for the Space Commission, and the existence of both the crucial aspects is suppressed. Further, when an Agreement dated 28.01.2005 had already been signed after fixing the terms therein, it was fraudulently misrepresented that the capacity would be committed on appropriate commercial terms. **The expression 'a service provider' clearly establishes the concealment of the existence of Devas.** This prevented the Space Commission from knowing for whom it was approving the satellite.

115. For not indicating the Agreement dated 28.01.2005 and for not pointing out the 'service provider' as Devas, especially when this note was prepared after the agreement dated 28.01.2005 was signed, the note prepared is suppressing material facts and is a fraudulent activity. Therefore, in the opinion of this Tribunal, no benefit can arise from this note for the Space Commission as it is an act of fraud and suppression.

B. Minutes of the 104th Space Commission Meeting

116. Based on the above note, the Space Commission also deliberated on the approval and the agenda prepared for GSAT-6/INSAT-4E was considered at length. As a result, the Space Commission, after deliberations, has approved the design, manufacture and launch of the GSAT-6/INSAT-4E satellite and allotted budgetary support of INR 269 Crores of public money to be utilised for the satellite.

117. What is evident is, the satellite was going to be designed, built and launched under the agreement dated 28.01.2005 exclusively for Devas as the only private player enjoying the capacity. **However, the Space Commission neither reviewed the Agreement dated 28.01.2005 nor knew who was going to utilise the capacity. It was misrepresented that 'a service provider' would utilise the capacity instead of spelling out Devas explicitly.**

118. Since the approval of the Space Commission flows from fraudulent notes prepared, which suppresses material information and fraudulently misrepresents, the same cannot be a valid approval in the eyes of the law. Therefore, any benefit accruing on Devas in light of the Space Commission approval cannot stand the scrutiny of law.

C. Cabinet Noted dated 17.11.2005

119. After the approval of the Space Commission, things moved forward, and the approval of the Union Cabinet was required, and for this purpose, the DoS prepared a note for the Union Cabinet on 17.11.2005. The subject of the Cabinet Note was '*Multimedia Mobile S-Band Satellite Mission (GSAT-6/INSAT-4E) Approval-Reg.*'

120. Under Item No 5 of the Cabinet Note, which dealt with 'Services Utilisation', it was stated:

"ISRO is already in receipt of several firm expressions of interest by service providers to utilise this Satellite capacity on commercial terms."

121. This Note was prepared again after the agreement dated 28.01.2005, and similar to the note for the Space Commission, neither the agreement dated 28.01.2005 nor the existence of Devas is mentioned. What is more important is the expression *'several firm expressions of interest by service providers.'* It is an undisputed fact that Devas was the only player to utilise the capacity in the GSAT-6/INSAT-4E satellite. After completely knowing this undisputed fact, fraudulent misrepresentation is made in the Cabinet Note that there are other service providers and several firm expressions. The contents of the Cabinet Note do not reflect the actual state of affairs. The commercial terms had already been agreed and an agreement dated 28.01.2005 had already been signed, and it was wilfully concealed in the Cabinet Note.

122. This Tribunal also finds another stark contradiction between the Note for the Space Commission and the Note for the Cabinet. The expression employed in the note for the Space Commission **'a service provider'** and the expression employed in the Cabinet is '**several firm expressions of interest by service providers**. So from a single service provider before the Space Commission, it had been fraudulently misrepresented that it was no longer a single service provider. Still, many others are showing several firm expressions of interest. It is an undisputed fact that 97% of the capacity in

the GSAT-6/INSAT-4E satellite had been allotted to Devas fraudulently when this Cabinet Note was prepared. This fact, however, is concealed and suppressed in the note for the Cabinet.

123. Therefore, when the Cabinet Note prepared by DoS was forwarded for the approval of the Union Cabinet, the Union Cabinet was under the pretext that other service providers were showing several firm expressions of interest, which was factually false. In light of the above, this Tribunal believes that the Cabinet Note prepared by DoS suffers from suppression of material facts and fraudulent misrepresentations. Consequently, the same cannot confer any benefit on Devas under the agreement dated 28.01.2005.

D. Cabinet Approval Dated 01.12.2005

124. The Cabinet considered and deliberated upon the fraudulent Cabinet Note prepared by DoS on 17.11.2005 and approved the GSAT-6/INSAT-4E satellite. The irresistible conclusion is when the document based on which the approval is given is fraudulent, the Cabinet approval cannot be valid in the eyes of the law as it flows from fraudulent activity.

125. The Ld. ASG rightly pointed out two possibilities, and we find merit in the submissions. First, it was argued that Devas could not claim any right over the GSAT-6/INSAT4-E satellite for two reasons. First, since the Cabinet generally approved the satellite as there were several firm expressions of interest by services providers, Devas cannot claim a right as it was not

approved for them specifically by the Cabinet. Secondly, if Devas argues that it has a right over the satellite approved by the Cabinet, the approval was for Devas in particular. Afterwards the Cabinet would have approved the satellite without knowing it was approved for Devas. Neither the agreement dated 28.01.2005 nor the existence of Devas was cited before the Cabinet for consideration. When the Cabinet is neither aware of the agreement dated 28.01.2005 nor aware of Devas, in the opinion of this Tribunal, it certainly could not have approved the satellite for Devas.

126. This Tribunal is satisfied that when the Cabinet Note is fraudulent, the approval based on the Cabinet note cannot be valid, and there can be no benefits flowing to Devas from such approval.

E. 124th TAG Meeting

127. The Ld. ASG argued that after the Cabinet approval was obtained by the suppression of material facts and fraudulent misrepresentations, a significant development happened in the 124th TAG meeting held on 20.02.2006. This meeting recorded in the minutes that the GSAT-6 satellite is made for a specific customer and will not be part of the INSAT capacity.

128. In the opinion of this Tribunal, it raises serious concerns and further strengthens the view that the Cabinet approval was obtained fraudulently. We find that the Cabinet was misled by stating there were several players. Once the approval was obtained from the Cabinet on such misrepresentations, it was stated before TAG that the satellite is being made for a specific customer.

However, that specific customer is not spelt out as Devas, and the Agreement dated 28.01.2005 is not mentioned. The contradictions between the Cabinet approval and the 124th TAG meeting minutes brings to light the conspectus of fraud played that conferred fraudulent benefits to Devas.

129. The expressions 'a service provider', 'several firms expressions of interest by service providers' and 'specific customer' appearing in the Note for Space Commission, Cabinet Note and the 124th TAG meeting ought to have been 'Devas Multimedia Private Limited', thereby informing the decision making authorities for whom such decisions are being made.

130. In Defense, the Ld. Counsel for Devas argued that the Cabinet need not to know Devas or the Agreement dated 28.01.2005. It was approving the Devas' Project, and it is enough if the Cabinet was aware of that. We find no merit in this submission of the Ld. Counsel for Devas.

131. In another context, to establish the experience of Devas, it relied on the judgment of the Hon'ble Supreme Court in *New Horizons Limited v. Union of India*, 1995 1 SCC 478, to argue that the experience of a company can mean only the experience of the persons constituting the company. Applying the same in the present case, it is not enough if the Cabinet knew about the Devas' project; it ought to know who will render such services in India, especially when it is a new service and nobody had done it before. Therefore, we are not satisfied with the contention offered by Devas that the Cabinet ought to have been informed about Devas and the Agreement dated

28.01.2005, especially when almost the entire capacity is allotted to one user, namely Devas.

132. In light of the above, we find merit in the submissions of Antrix that at every crucial decision-making stage that has conferred some benefit to Devas under the Agreement dated 28.01.2005, the existence of Devas and the agreement dated 28.01.2005 was suppressed, and other fraudulent misrepresentations were made.

133. Devas is entirely aware of the above fraudulent activities and has taken advantage of the same. For this very reason, the ingredients of Section 271(c) are attracted.

F. Category 6: <u>The ISP License Dated 02.05.2008</u>

134. The Ld. ASG argued that from 2005 till 2011, Devas obtained only one operating license, and this was an ISP license from DoT on 02.05.2008. It was contended that with this license, Devas could render only internet services, and internet services are a portion of the bundle of services called Devas Services and not the whole bundle. Therefore, it was argued that Devas held no operating license at any point in time that permitted them to render Devas Services.

135. On the other hand, Ld. Counsel for Devas argued that under the ISP License dated 02.05.2008, which also included approvals for rendering IPTV services, it could have achieved rendition of Devas Services had Antrix

provided the satellite it promised. Therefore, Devas was again shifting the burden on Antrix to argue that it was only because the satellite was not delivered that it could not deliver Devas Services.

136. Both the parties have relied on the terms of the ISP license dated 02.05.2008 to support their arguments. Accordingly, this Tribunal has formulated its opinion after considering the arguments of both sides and, of course, after a perusal of the terms of the ISP license dated 02.05.2008.

137. In Clause 16 of the Annexure to the Agreement dated 02.05.2008, the definition of 'Internet' is contained, and the scope of services that could be rendered under the ISP license dated 02.05.2008 is enshrined under Clause 2.2. A closer look at Clause 2.2 would reveal that digital multimedia services are not part of the scope of services. Therefore Devas Services could not have been delivered by Devas under the ISP license dated 02.05.2008.

138. In Defence, Ld. Counsel for Devas invited our attention to sub-clause (i) of Clause 2.2, which states Devas could provide 'Internet Access'. It was further argued that Internet Access means using any device/technology/methodology to provide access, including IPTV. Therefore, it was the case of Devas that it could deliver internet access through Satellite. Furthermore, the ISP license authorises Devas to provide access through any device/technology/methodology and combining this with IPTV service; it could have delivered Devas Services.

139. Tribunal formulates the following questions to address the contentions of Devas:

a) Whether IPTV was forming part of the initial bundle of Devas Services as contemplated on 28.01.2005 when the agreement was signed?

b) If Devas can deliver internet services through satellite, has it satisfied the other conditions relating to satellite use under the ISP License dated 02.05.2008?

c) Could Devas provide internet services without satellite also?

A. Whether IPTV was forming part of the initial bundle of Devas Services as contemplated on 28.01.2005 when the agreement was signed?

140. On 28.01.2005, when the agreement dated 28.01.2005, IPTV services were not in vogue in India. The Ministry of Information and Broadcasting had come out with policy guidelines for operating IPTV services only in 2008. This very fact is enough for this Tribunal to conclude that IPTV services were never visualised by Devas when it initially planned its bundle of services called Devas Services.

141. Therefore, after the Ministry of Information and Broadcasting introduced IPTV services, the Board of Devas thought it would be beneficial if IPTV service were included as one of its offerings in the bundle. Therefore,

this Tribunal thinks that when IPTV services were not even conceived initially on 28.01.2005 by Devas to form part of Devas Services, contending that it could deliver Devas Services by rendering IPTV service is illusionary.

B. If Devas can deliver internet services through satellite, has it satisfied the other conditions relating to satellite use under the ISP License dated 02.05.2008?

142. The Ld. Counsel for Devas placed heavy reliance on the expression 'any device/technology/methodology' to argue that it could have chosen a satellite mode of dispensation to deliver its ISP services. However, the clauses of the ISP license 02.05.2008 would reveal that Devas have not complied with a few threshold conditions, which would make them eligible for the satellite method of rendering ISP services.

143. The Ld. ASG rightly invited the attention of this Tribunal to clauses 36.6 and 36.7 of the ISP license dated 02.05.2008. Clause 36.6 mandates Devas to abide by the prevalent Government Orders, regulations or directions on the subject like SATCOM Policy. In compliance with Clause 36.7, Devas was to obtain clearance from SACFA and NOCC to use the space segment. However, devas have not received these clearances and permissions and have violated almost all the Articles of SATCOM Policy.

144. Under the SATCOM Policy as held before, space segments for telecommunication services were also allotted by DoT. However, Devas have

no permission or allotment from DoT for the space segment, and therefore, it could not have provided internet service using satellite due to lack of approvals.

C. Could Devas provide Internet Services without Satellites also?

145. Antrix argued that after obtaining the ISP License on 02.05.2008, Devas provided these services for a handful of people for hardly a few months and earned a minimum revenue of INR 80,000 only. Devas did not dispute this fact. This shows that Devas could deliver ISP services even without satellites.

146. Devas submitted that since the satellites were not handed over, it was forced to start ISP services in a limited manner. This contention raises serious concerns because it shows that Devas never intended to render ISP services, as Devas concedes that it rendered ISP services only because it was forced to do so. Still, to the contrary, it voluntarily procured the ISP license.

147. Therefore, we find no merit in the submission of Devas that only because the satellite was not handed over, it did not render its services under the ISP license dated 02.05.2008. The satellites under the agreement dated 28.01.2005 had nothing to do with the ISP license dated 02.05.2008, and Devas agreed that it could have rendered the ISP services without the satellite. However, it was Devas' own choice not to do it.

148. This Tribunal has already held that Devas Services could not be rendered under the ISP license dated 02.05.2008 because the same is not

covered in the scope of services under Clause 2.2 of the ISP license. Clause 7.1 of the ISP License will also strengthen the view of this Tribunal. It states that a DTH service provider under the ISP license can only provide and receive internet services. If an ISP service provider wishes to allow downloading data through DTH, it must obtain necessary licenses from the competent authority. Therefore, the ISP license clarifies that it is only for internet services and any service beyond internet services, requiring the approval of other competent authorities. Internet services is a small portion of the host of bundled services called Devas Services. Therefore, DEVAS could not have delivered Devas Services by providing internet services. Devas do not have any approvals or licenses for the remaining services in the bundle, assuming it could provide Devas Services after independently procuring operating licenses for each bundled service. Except for the ISP license, Devas had no other operating license from 2008 to 2011.

149. Further, as held before, since Devas Services involved a broadcasting aspect, the Ministry of Information and Broadcasting license is the sine qua non as it is the nodal Ministry. Devas have not submitted any licenses or approvals granted by the Ministry of Information and Broadcasting. Therefore, the ISP license was not wide enough to cover the host of bundled services called Devas Services.

150. As rightly pointed out by the Ld. ASG, Devas' conduct would also reveal that the ISP license is not fit enough to cover Devas Services. After obtaining

the ISP license dated 02.05.2008, Devas obtained an experimental license dated 07.05.2009 and conceded that it had applied for other operating licenses on 20.07.2010 to the WPC wing.

151. If the ISP license was wide enough to cover the host of bundled Devas Services, Devas did not need to obtain an experimental license on 07.05.2009 and apply for other operating licenses to WPC 20.07.2010. The very fact that Devas needed it to shows that the ISP license was not wide enough to cover all the bundled services called Devas Services. Therefore, ISP services are not Devas Services, and it is only a tiny portion of the entire bundle of services. By rendering ISP services, Devas could not have delivered Devas Services.

152. Being fully aware that it was not competent to deliver Devas Services through the ISP License and Devas has not obtained any capable license to render Devas Services from 2005 to 2011 and shifting the burden on Antrix is a fraudulent act by itself and attracts the ingredients of Section 271(c) of the Companies Act 2013.

G: Category 7:<u>The Experimental License obtained by Devas is fraudulent</u>

153. The Ld. ASG referred to an argument of Devas which stated it had successfully experimented with the Devas' Technology under the experimental license granted by WPC on 07.05.2009. The submissions of Antrix are two-fold. Devas could not have successfully experimented with the Devas'

Technology due to the inherent limitations in the experimental license, and two, the experimental license was obtained fraudulently.

154. The following questions arise to address the allegations of Antrix:

a) Whether Devas could have successfully experimented with Devas Technology under the experimental license dated 07.05.2009?

b) Whether Devas obtained the experimental license fraudulently?

A. Whether Devas could have successfully experimented with Devas Technology under the experimental license dated 07.05.2009?

155. The experimental license that Devas heavily relies on to argue it had successfully experimented with the Devas' Technology was granted by the WPC on 07.05.2009. This was a 'License to Establish, Maintain and Work an Experimental Wireless Telegraph Station in India under the Indian Telegraph Act, 1885.' This license did not grant Devas any right as it was granted with a caveat that Devas could not claim any regular user/assignment through the experimental license.

156. The experimental license had a column for 'Conditions Common to Experimental Wireless Telegraph Station", and Condition X therein stated that:

> *"Broadcast Reception: This license does not cover the reception of broadcast programmes for which a separate broadcast receiver license of the appropriate category must be obtained."*

157. In the huge bundle of services called Devas Services, the broadcasting element occupies a significant portion, and this is an undisputed fact. Without the broadcast limb of Devas Services, the Devas' project is a failure. The experimental license of Devas did not permit Devas to receive broadcast programmes. This goes to show that Devas could not have successfully experimented with the alleged Devas Technology. This finding certainly strengthens the view of this Tribunal that Devas certainly did not possess the second pre-requisite, which is Devas Technology.

158. This Tribunal believes that having in the knowledge that the experimental license did not permit broadcasting. Without broadcasting, Devas Services cannot exist, strongly contending it successfully experimented the Devas' Technology is a misrepresentation and fraudulent activity by itself.

B. Whether Devas obtained the experimental license fraudulently?

159. The Ld. ASG narrated the sequence of events that had led to the grant of experimental license and contends that the experimental license dated 07.05.2009 was obtained fraudulently. It was contended that the 'Devas Experimental Plan' was deliberated in the meeting of the TAG sub-committee dated 06.01.2009. Subsequent to this meeting, the minutes of this meeting came to be circulated twice. For convenience, the Ld. ASG has termed it as the 'original minutes' and the 'manipulated minutes'.

160. The Ld. ASG contended that after the meeting, the draft minutes of the meeting was circulated to the attendees. It is claimed that the draft minutes that was circulated was the original minutes of the meeting. However, when it was officially circulated, the manipulated minutes came to be circulated. Since the attendees felt that the minutes did not capture what had transpired in the meeting, the original minutes were restored after much protest. Thus, the Ld. ASG argues that the experimental license granted to Devas was granted under the pretext of the manipulated minutes of the meeting and not the original minutes.

161. A comparison of the original minutes and the manipulated minutes is therefore essential. Accordingly, after going through the original minutes, this Tribunal infers the following:

a) The TAG sub-committee requested Devas to list all the services it intended to carry out through the experimental plan and remarked that voice and virtual private networks are not permitted in the ISP License obtained by Devas. Therefore, the TAG cast doubt on the ISP license Devas held to render its bundle of services called Devas Services.

b) The TAG sub-committee observed that Devas would have to obtain a license for spectrum from WPC and submit a proposal to the Apex Committee for the experimental plan along with all technical details and results expected.

c) Representatives from the WPC cast certain doubts that terrestrial transmission was not permitted in the S-Band spectrum allotted to Devas. However, it is undisputed that without terrestrial transmission, rendition of Devas Services is impossible, and the doubts cast by the WPC representatives goes to the root of the matter and question the capability of Devas to render Devas Services.

d) DDG(DS) and DoT observed that the experimental plan would have to be reviewed as Devas is a private party, and clearance for experiments is usually given to a Government Agency or organization like ISRO/DoS.

e) Finally, it was agreed by the TAG sub-committee that the experimental plan would be carried out by ISRO/DoS on behalf of Devas and not by Devas itself. For this purpose, ISRO/DoS would have to obtain a license from WPC and other regulatory permissions. Therefore, to carry out experiments, even ISRO/DoS were mandated to obtain the necessary permissions.

162. **In contrast to the original minutes, the manipulated minutes deleted and removed all the mandates and observations of the original minutes and replaced it with the wordings *'After a detailed deliberation on various aspects of the proposed experimental plan; the review team***

recommended that the experiment can be conducted under the ISRO guidance.'

163. After protest by the attendees, **the original minutes were restored. But it was restored only on 20.11.2009,** and the TAG sub-committee meeting was held on 06.01.2009. So the original minutes were restored nearly after 11 months from the date of the meeting. Even the Suresh Committee report on which Devas places heavy reliance has recorded that the original minutes were restored. However, the experimental license granted to Devas was on 07.05.2009, which was before the original minutes were restored. **This means that the experimental license was granted based on the manipulated minutes of the meeting.**

164. The difference between the original minutes and manipulated minutes is significant and raises serious concerns:

a) The original minutes mandated Devas to obtain a spectrum license from WPC. However, the manipulated minutes they dispensed with this mandate.

b) The original minutes mandated Devas to appear before the Apex Committee with technical details and await the decision of the Apex Committee for an experimental plan. However, the manipulated minutes dispensed with this mandate.

c) The original minutes recorded that terrestrial transmission was impossible in the S-Band leased to Devas. The manipulated minutes deleted this portion.

d) The original minutes stated that ISRO/DoS would experiment with Devas. The manipulated minutes permitted Devas to experiment under ISRO guidance.

165. The consequence of the restoration of the original minutes is also significant. **Restoration of the original minutes implies that the manipulated minutes never existed**. **If the manipulated minutes never existed, then any benefit or license conferred under the manipulated minutes ceases to exist.**

166. In defence, the Ld. Counsel for Devas contended that there is no significant difference between the two minutes except that one stated Devas itself would experiment and the other stated ISRO/DoS would conduct it for Devas. According to the Ld. Counsel for Devas, it makes no difference as, in the end, its technology was successfully tested. It was also contended that it is standard practice to circulate minutes and receive inputs and then eventually send corrected versions, and there is nothing fraudulent about it.

167. This submission of Devas raises serious concerns and is rejected by this Tribunal. Devas fail to note that if the original minutes are restored, it cannot experiment by itself. ISRO/DoS would do it on Devas' behalf. But

before ISRO/DoS could do so, Devas needs to obtain a spectrum license from WPC. Devas needs to obtain the approval of the Apex Committee on the experimental plan. Devas needs to convince the representatives that the S-Band spectrum allotted to it can host terrestrial transmission, without which Devas Services is impossible to be rendered. Finally, before ISRO/DoS could experiment on Devas' behalf, ISRO/DoS needs to obtain necessary regulatory approvals and other permissions.

168. Further, standard practice is to circulate draft minutes and receive comments and then circulate them officially once and for all. It is not common to officially circulate a manipulated version and restore the original version 11 months after the meeting was conducted under protest. It concerns to note that Devas deems these transactions as standard practice.

169. None of the above was followed by Devas, and conveniently, the experimental license was obtained on 07.05.2009 under the pretext of the manipulated minutes. This Tribunal believes that the experimental license was certainly obtained fraudulently. After the original minutes were restored, Devas has no locus to contend it successfully experimented with its technology as it was never permitted to do so. We hold that taking advantage of a fraudulent activity certainly satisfies the ingredients of Section 271(c) of the Companies Act 2013.

H. Category 8:<u>The FIPB approvals and the Money Trail</u>

170. The Ld. ASG invited our attention to the Foreign Direct Investment poured into Devas by its investors, who also became shareholders of Devas. It is contended that;

a) An amount of INR 579 Crores was invested in Devas, and the money was brought in through the Foreign Investment Promotion Board (**FIPB**). These investments were brought in for ISP services, but even Devas conceded it never did any ISP services and did so in a limited way as it was forced to.

b) After bringing INR 579 Crores for ISP services, it earned hardly INR 80,000 from ISP services. So, the investments were never utilized for ISP services.

c) Instead of utilizing all the investments for the approved purposes, ISP services, the Board of Devas approved the diversion of its investments for non-ISP purposes in four tranches of INR 75 Crores, INR 180 Crores INR 233 Crores and INR 58 Crores, respectively.

d) These diversions were all made for obligations under the Agreement dated 28.01.2005 for Devas Services. Devas Services and ISP services are not the same, and by rendering ISP services, Devas cannot render Devas Services.

e) FIPB authorities were not informed about the agreement dated 28.01.2005. Instead, the FIPB application of Devas mentioned its service purely as ISP services.

171. Answers to the following questions arise for our consideration under this head.

a) For what purposes did Devas apply for the FIPB approvals?

b) Did Devas mention Devas Services or the agreement dated 28.01.2005 in its FIPB application?

c) Are ISP services and Devas Services the same?

d) How was the investment of INR 579 Crores used by Devas?

A. **Purpose for which Devas applied for the FIPB approvals?**

172. From the FIPB application of Devas dated 02.02.2006, Devas mentioned the following:

a) The subject is mentioned as 'FIPB Approval for setting up ISP services (not providing gateways).'

b) In Para 2, Devas mentions it would be rendering value-added internet services.

c) In Para 9, Devas mentions applying for a service license from DoT for ISP services.

d) In Para 10, Devas mentions it would provide internet service through broadband information download channels.

e) Finally, in the request for approval section, Devas requested the FIPB for approval in 100% FDI for ISP service not providing gateways.

173. Therefore it is evident that **Devas sought FIPB approval for ISP services only.**

B. **Did Devas' mention Devas Services or the Agreement dated 28.01.2005 in its FIPB application?**

174. From a perusal of the FIPB application of Devas, this Tribunal believes that the agreement dated 28.01.2005 and nature of services as Devas Services is not mentioned. Furthermore, the list of bundled services included as one service called Devas Services was also not mentioned.

175. In defence, the Ld. Counsel for Devas contended that in the FIPB application, Devas had mentioned the nature of services to be multimedia services, including various systems, and it would be delivered through satellite and terrestrial methods. Therefore, even though the agreement dated 28.01.2005 is not mentioned. The nature of Devas Services is mentioned, and therefore it makes no difference if the agreement dated 28.01.2005 is mentioned in the FIPB application or not.

176. In light of the same, it was contended in the Written Submissions filed by devas that since the FIPB application mentions the nature of Devas

Services, its approval is extended to Devas Services also. We are not in agreement with the submission.

177. Devas requested what can be considered in a prayer clause of the FIPB application is approved for 100% FDI for ISP services not providing gateways. Devas might have mentioned any number of facts and information, but in the end, the approval was requested only for ISP services.

C. **Whether ISP services and Devas Services the same?**

178. This Tribunal has already rendered a finding earlier while dealing with the ISP License that ISP services are a small portion of the vast Devas Services bundle. Therefore, by rendering ISP services, Devas cannot render Devas Services, and it would be correct to state that it would be rendering one service in the bundle of service called Devas Services.

179. Devas Services cannot be delivered without satellites as that is the primary mode of dispensation. However, Devas conceded that it rendered ISP services as limitedly as it was forced to, thereby indicating that ISP services could be delivered without satellites also. This fact by itself shows Devas Services and ISP services are not the same.

180. Devas place heavy reliance on the IPTV service to contend that the ISP service when combined with the IPTV service under the ISP License dated 02.05.2008, will enable Devas to render Devas Services. This Tribunal has already rejected this contention as IPTV was introduced only in 2008. When the Agreement dated 28.01.2005 was signed, IPTV service was not in the

Devas Services bundle as conceived by Devas. At the maximum, after it was introduced, the Board of Devas might have deemed it fit to include it in the bundle, and making it one of the services in the bundle. Therefore, it is too far-fetched to argue with IPTV services, Devas could render Devas Services.

181. When Devas can deliver ISP services under the ISP license without satellites, it can also render IPTV services without satellites as the same license covers it. But at no point in time could Devas have delivered Devas Services without a satellite, thereby establishing that ISP/IPTV services are very different from Devas Services and are not the same. Therefore, this Tribunal rejects the argument of Devas which treats ISP/IPTV services and Devas Services on the same pedestal.

D. How was the investment of INR 579 Crores used by Devas?

182. The Ld. ASG argued that the amount was invested in Devas for rendering ISP services. Still, in three enormous tranches, it was diverted outside India for a purpose that had no relevance to ISP services. Finally, in one significant tranche, it was diverted in India for a purpose that had no relevance to ISP services.

183. The Ld. Counsel for Devas contended that whether or not this amount was laundered and what purpose it was spent is something this Tribunal lacks the jurisdiction to inquire. Further, it was contended that all the investments had FDI approval and payments outside India were done through proper banking channels, and there can be nothing fraudulent about it.

184. We find no merit in these submissions of Devas. This Tribunal is not testing whether the diversion of money amounts to the offence of money laundering. That is for the respective authorities empowered to carry out that adjudication. This Tribunal is analyzing the affairs and conduct of Devas. If we do find merit in the submissions of the Ld. ASG would automatically mean that Devas had no intention of carrying out any business in India and the invested amounts that never stayed in India. Such a finding would have a direct bearing on the case. It would amount to financial fraud under Section 271(c), as an Agreement dated 28.01.2005 was signed by Devas when it had no intention to conduct any business.

185. Moreover, Devas admitted that they were incorporated only to function under the Agreement dated 28.01.2005, thereby questioning the entire incorporation of Devas. Therefore, this Tribunal is empowered to analyze the conduct and affairs of Devas and test it against the ingredients of Section 271(c). For this purpose, in the opinion of this Tribunal, a fact-finding exercise can be carried out to render a finding on whether the invested amounts have stayed in India and have been used for the approved purposes, which is ISP services.

186. Regarding the issue of diversion of the fund, the Ld. Counsel for Devas contended that the invested amounts have always stayed in India. Only after the Agreement dated 28.01.2005 was terminated in 2011, the investments were taken out of India for paying lawyers to defend the Arbitration against Antrix. The investments taken out of India have not benefited the

shareholders, and the shareholders have not complained about why the investments were taken out of India. Therefore, there is nothing fraudulent about it. We find no merit in these submissions.

Tranche 1 and 2- Creation of the American Subsidiary and Business Support/Technical Help

187. Antrix argued that an American subsidiary in Devas Multimedia America Incorporation (**DMAI**) was incorporated. An amount of INR 75 Crores was diverted in the creation of the subsidiary. Devas do not dispute this fact. Antrix further argued that INR 180 Crores were diverted to DMAI for the alleged business support services/technical help Devas received from DMAI. Again, devas do not dispute this fact concerning the creation of DMAI for providing technical help/business support for Devas in India and have elaborated on the alleged support Devas received. Therefore, the Ld. ASG contended that when there was no business in India at any point in time, what was the need for Devas to divert INR 256 Crores outside India to DMAI.

188. The entire investment into Devas was for ISP services. It is an admitted position by Devas that it rendered ISP services in a limited manner as it was forced to, thereby indicating Devas never had the intention to render ISP services. It is also an undisputed fact the income generated by Devas through ISP services is insignificant compared to the investment of INR 579 Crores for the same purpose. We find it rather strange that such a huge amount was invested in Devas, and Devas never carried out ISP services in India. Devas

explained the creation of DMAI and elaborated on the alleged services it received from DMAI.

189. Devas contended DMAI was created to engage in international partnerships and maintain employment contracts with US-based employees. According to Devas, DMAI provided strategic partnerships, market development, business development, market research, industry analysis, financial analysis and business modelling. Further, DMAI also, under a service agreement, agreed to provide technical and commercial inputs for the development of products and services, which among other things includes design inputs for the development of hardware and software, development and inputs on the development of service concept both in terms of technology and commercialization perspective, identification scoping and monitoring of strategic partners and other business development activities. Devas finally argued that it could not provide its services only because Antrix did not deliver the satellite.

190. It is an undisputed fact that the same set of persons were employees in both Devas and DMAI, and they were drawing salaries from both Devas and DMAI under different colours. The list of services that Devas stated DMAI agreed to render was not about ISP services and was not received in India. After sending such a massive amount of money to DMAI, Devas never showed any benefit in India. It remained a company without business operations despite the alleged business support/technical help. This Tribunal believes that no business support or technical help was received in India, and Devas

has not submitted anything to the contrary to convince this Tribunal otherwise. Devas never conducted any business operations in India for its amount of business support/technical help.

191. Devas also submitted details of the contracts that DMAI had entered to render its alleged business support/technical help to Devas. This fact has no bearing on the present case as mere contracts cannot aid Devas or DMAI, and it is the performance under the contract that has a bearing. Devas have consistently failed to convince this Tribunal that Devas received business support/technical help from DMAI. We reiterate that nothing was received.

192. This Tribunal also noticed certain contradictions in the stance taken by Devas itself at various stages. First, it was argued that the investments always remained in India when the agreement dated 28.01.2005 was in force and was taken out only after its termination. This Tribunal thinks that the purpose of the investment had no relevance to the agreement dated 28.01.2005 as the investments were for ISP services, and the agreement dated 28.01.2005 was for the rendition of Devas Services. Under the agreement dated 28.01.2005, Devas required satellites and for a rendition of ISP services. Even today, the ISP license is valid and good up to 2023, and nothing prevented Devas from rendering ISP services. ISP services had a policy and licensing regime, and Devas brought in approved investments for ISP services and could have very well rendered ISP services. Therefore, the termination of

the agreement dated 28.01.2005, which dealt with Devas Services, has no relevance to Devas rendering ISP services.

193. Another way to look at this view of the Tribunal is, under the agreement dated 28.01.2005, where ISP services were a part of the bundle of services called Devas Services and did not cover the entire bundle. However, it is also not the case that ISP services could not be delivered independently. It could very well be done. The investments were approved only for this independent dispensation and not to render the entire bundle called Devas Services due to the lack of policy and licensing regimes as held before. Therefore, the agreement dated 28.01.2005 has no relevance to Devas rendering ISP services.

194. Second, the incorporation of DMAI and all the agreements and employment contracts with DMAI were before 2011, when the agreement dated 28.01.2005 was terminated. Therefore, it is evident that the investments were diverted even before the termination of the agreement dated 28.01.2005.

195. Third, Devas represented before the FIPB in its application dated 02.02.2006 that it would be developing all its technology and systems indigenously in India. After describing the same, we find it surprising that DMAI, an American entity, was incorporated to develop hardware and software and development in terms of technology.

196. Above all, Devas conceded before this Tribunal that it had paid the amounts to DMAI to satisfy the obligations under the agreement dated 28.01.2005 through their written submissions.

197. Based on the above discussion, this Tribunal finds that after bringing in an amount of INR 579 Crores for ISP services and not rendering any ISP services and instead diverting vast portions of the same for non-ISP purposes amounts to illegal diversion of funds and financial fraud that attracts the ingredients of Section 271(c) Companies Act, 2013.

Tranche 3- Diversion for legal services

198. The Ld. ASG contended that a further sum of INR 233 Crores was pushed out for defending the Arbitration arising under the agreement dated 28.01.2005. Devas do not dispute this fact and, in fact, openly conceded it.

199. We have already held that the agreement dated 28.01.2005 has no relevance to Devas rendering ISP services which is the approved purpose of investment. When the agreement does not have relevance, any dispute arising under the said agreement will also not have any relevance. The dispute arising under the agreement dated 28.01.2005 is for Devas Services and not ISP services, and they are not the same. As agreed under the agreement dated 28.01.2005, Devas Services is entirely distinct and separate from ISP services. Devas conceded that INR 233 Crores were taken out of India to defend the Arbitration relating to the agreement dated 28.01.2005 for Devas Services.

This agreement dated 28.01.2005 was never shown or referred to the FIPB authorities for any approval. The investment approval was for ISP services. Though Devas did not refer agreement dated 28.01.2005 before the FIPB authority, the share subscription agreement entered into by Devas with its shareholders refers to this agreement dated 28.01.2005 and also endorsed the fact that Devas would be utilizing the investment for paying the upfront capacity reservation fee to Antrix.

200. The representation by Devas with FIPB never referred to the agreement dated 28.01.2005, and it sought approval for ISP services. On the contrary, the share subscription agreement between Devas and its shareholders endorses this diversion, which is illegal in the absence of a proper validation by the FIPB authority and proves that the shareholders were well aware of this diversion and had accepted the same. Devas could not have diverted INR 233 Crores out of India, and the shareholders through their Directors could not have endorsed it or remained mute spectators. Therefore, this Tribunal believes that this diversion is illegal and amounts to financial fraud, which attracts the ingredients of Section 271(c) of the Companies Act, 2013.

Tranche 4- Diversion for Upfront Capacity to Antrix

201. Lastly, the Ld. ASG argued that the last tranche was paid to Antrix as an upfront capacity reservation fee out of the total investment. An amount of INR 58 Crores was born for this purpose under the Agreement dated 28.01.2005. Given the opinion of this Tribunal that the agreement dated

28.01.2005 has no relevance to the approved purpose of investment, ISP services, this diversion is also a financial fraud committed by Devas under Section 271(c).

202. Cumulatively, this Tribunal, in its fact-finding exercise, has noticed a pattern. The FIPB was led to believe that ISP services will be rendered in India, and to the contrary, all the investments were used for Devas Services under the agreement dated 28.01.2005. Therefore, the FIPB approved the investments for one purpose, but Devas used them for another.

203. As rightly pointed out by the Ld. ASG, if Devas wished to utilize its investments for Devas Services, which involved establishing a satellite for Devas, a separate FIPB approval was available for the same, and Devas ought to have moved under that route. We find merit in these submissions. Under the FIPB Press Note 4 2006 Series, which governed the FIPB applications when Devas applied for its FIPB approvals, Item 27 contained FIPB approvals for 'Satellite Establishments and Operations'. There is absolutely no doubt that the GSAT-6/INSAT-4E satellite was going to be built, and 97% of the capacity was going to be utilized by Devas. This indeed amounts to satellite establishment and operations, and therefore Devas ought to have approached the FIPB under this route.

204. We also find merit in the submissions of Antrix as to why Devas took a conscious decision not to move under this route. For FIPB approvals under

Satellite Establishments and Operations, the approval was subject to sectoral guidelines issued by DoS/ISRO. However, there were no guidelines for a service like Devas Services. Therefore, Devas flouted even the general procedures applicable to leasing and allotting capacity before signing the agreement dated 28.01.2005. Therefore, this Tribunal believes that Devas misled the FIPB authorities and moved under the ISP route only to circumvent the approval process for satellite establishments and operations, which is subject to sectoral guidelines by ISRO/DoS. This by itself is a fraudulent activity and satisfies the ingredients of Section 271(c).

205. The very ISP license dated 02.05.2008 under Clause 1.5 supports the view of this Tribunal. Clause 1.5 states that the investment approval by FIPB **shall envisage the conditionality that Devas would adhere to the license agreement.** It is evident Devas never did any ISP services under the license agreement and utilized its funds elsewhere and not under the ISP license agreement dated 02.05.2008, thereby violating Clause 1.5 also.

203. In light of the above, bringing in investments of INR 579 Crores and not utilizing it for ISP services and instead diverting it for non-approved purposes is illegal and a financial fraud that attracts the ingredients of Section 271(c) of the Companies Act, 2013.

I. <u>Participation of the Shareholders in the Fraud</u>

206. The Ld. ASG argued that each investor of Devas also procured shares in Devas and thereby became a shareholder of Devas. Each shareholder had

a representative in the Board of Directors of Devas. The Board of Directors runs the affairs of Devas. Therefore, whatever fraud has been committed, the shareholders of Devas were equally responsible as they were the entities who took the decisions through the Board of Devas. In support of this contention, the Ld. ASG took this Tribunal through the shareholding structure, and the members of the Board of Devas, including the share subscription agreement Devas, signed with its investors.

207. We find merit in the submissions of the Ld. ASG. The case of Devas is peculiar. It is undisputed that Devas had four entities that invested 99.34% of its FDI amount. 25.53% (INR 148.75 Crores) came from three Mauritian Entities, CC Devas (Mauritius) Ltd, Telecom Devas Mauritius Ltd and Devas Employees Mauritius Private Limited. 73.81% (INR 430 Crores) came from Deutsche Telecom Asia (DT Asia).

208. It is equally undisputed that out of the four entities, except for DEMPL, the remaining three entities were only investment vehicles for some other entities/individuals. The following would make this evident:

a) Colombia Capital Equity Partners, which was 100% owned by one individual Shri. Arun Kumar Gupta created CC Devas and invested in Devas.

b) Telecom Devas LLC, which was 100% owned by Shri. Rajendra Singh created Telecom Devas Mauritius Ltd and invested in Devas.

c) Deutsche Telecom Germany invested in Devas through its subsidiary in Singapore, namely Deutsche Telecom Asia.

209. Now each of these investors/shareholders of Devas had a representative in the Board of Devas. Therefore, we deem it appropriate to extract the chart provided by the Ld. ASG.

S. No	**Name of the Director of Devas**	**Corresponding Investor who is Represented**
1.	Shri. Arun Kumar Gupta	a) Colombia Capital/CC Devas b) DEMPL
2.	Shri. Sajal Kumar Roy Chaudhuri	Colombia Capital/CC Devas
3.	Shri. Ramachandran Viswanathan	DEMPL
4.	Shri. Rajendra Singh	Telecom Devas/ Telecom Devas LLC
5.	Shri. Kevin Copp	DT Germany/Singapore
6.	Shri. A. Muruggappan	DT Germany/Singapore

210. From the above, it is clear that the investors/shareholders of Devas controlled the Board of Devas and the Board of Devas conducted the affairs of Devas. This Tribunal has already rendered findings on how Devas has committed fraudulent activities in all the six categories mentioned above, thereby attracting Section 271(c). When it is evident that the investors/shareholders of Devas were responsible for running the affairs of

Devas, they also automatically become accountable for the fraudulent actions of Devas.

211. It is appropriate to now address the submission of Devas raised by them through their written submissions. Devas argued that it could be understood if a shareholder makes an allegation against Devas to divert its investment, but Antrix lacks the locus to raise the issue. We find no merit in this submission as it is absurd a shareholder in the capacity of a Director of Devas will approve an action and later question the same in the capacity of a shareholder.

212. Devas raised an argument through their written submissions that the shareholders cannot be found at fault. It argued that the foreign investors, also shareholders, invested in Devas after meeting Government officials and satisfying the Agreement dated 28.01.2005. In other words, Devas contended its investors invested after due diligence. This submission of Devas deserves to be rejected in light of the shareholder's conduct and the various clauses of the share subscription agreement Devas signed with its investors.

213. As far as the shareholders' conduct is concerned, the FIPB application was dated 02.02.2006, and the share subscription agreement was dated 06.03.2006. Under the FIPB application, the purpose of the investment was ISP services. Under the share subscription agreement, the investments were planned to utilise Devas Services under the agreement dated 28.01.2005. We

have already held they are not the same service. The shareholders were fully aware of the FIPB application dated 02.02.2006 since the share subscription agreement was signed later, and without the FIPB approval, they could not have invested. Thoroughly knowing the FIPB application was for ISP services, agreeing through the share subscription agreement on 06.03.2006 for diverting its funds for Devas Services under the Agreement dated 28.01.2005 is indeed a fraudulent act. The shareholders were responsible for diverting the funds for non-approved purposes. Suppose the shareholders intended to utilize their investments for Devas Services. In that case, they should have explicitly mentioned it in the FIPB application and should have gone under a different route, as mentioned earlier.

214. Now, after going through the various clauses of the share subscription agreement dated 06.03.2006, we infer the following:

a) The agreement dated 28.01.2005 is mentioned in the Definition Clause as 'Antrix Agreement'.

b) The proceeds of the investments were decided to pay the upfront capacity reservation fee to Antrix. (Section 2.3)

c) The agreement dated 28.01.2005 was declared valid and explicitly mentioned that the performance of Devas under the Agreement dated 28.01.2005 was duly authorized by all necessary corporate and shareholder actions. (Section 3.14)

d) It declares that Devas has the consent of all Governmental Authorities, and all the Licenses have been validly issued or assigned to the company. (Section 3.19)

e) It makes a further declaration that the IPR created or developed by the founders of Devas have been validly assigned to Devas. (Section 4.4)

f) The investors represented that they have completed all legal accounting and business due diligence reviews of Devas, and the results have satisfied the investors. (Section 7.11)

215. By mentioning the agreement dated 28.01.2005 and approving its investments to be diverted for paying the upfront capacity reservation fee under the agreement dated 28.01.2005, it has explicitly violated the FIPB and gone against the representations made by Devas in FIPB applications.

216. Had the investors/shareholders perused the SATCOM Policy, it would have become evident that the agreement dated 28.01.2005 was signed in violation of the same. Devas do not meet even the barest threshold requirements.

217. Had the shareholders enquired into India's governing policies and licensing regimes, it would have become evident that no such policy exists for Devas Services. No Governmental Department ever approved the Agreement

dated 28.01.2005. It was signed by forming committees outside the ken of the SATCOM Policy and by making mere presentations without showing anything in reality. When Devas has nothing to show this Tribunal even today, it raises serious concerns about how on 06.03.2006, it is boldly recorded that Devas has all requisite licenses. Governmental Departments have validly issued it.

218. Even in 2021 and especially for the period 2005-2011, Devas cannot show it has developed Devas Technology and Devas Device. The only argument placed by Devas in defence was that it experimented with its technology. We have already held that it could not have successfully experimented with Devas Technology as the experimental license was obtained fraudulently, which did not permit broadcasting. Without broadcasting, Devas Services is a failure. When it is evident to this Tribunal, it raises serious concerns about how the shareholders of Devas have boldly recorded that Devas have been assigned all the IPR.

219. When the shareholders have overlooked all the above facts, this Tribunal believes that the Investors/Shareholders of Devas have not done their due diligence but have aided Devas in perpetuating their fraudulent activities by controlling the Board of Devas and taking all their activities and the decisions of Devas.

220. The fact that none of the shareholders and directors of Devas had come forward either to plead lack of knowledge or innocence of the acts of Devas

and instead have chosen to follow the line of Devas either before this Tribunal or elsewhere in other proceedings, in other jurisdictions, only strengthens the conclusion that the investors/shareholders of Devas along with Devas have colluded in the commission of various fraudulent actions satisfying the requirement of Section 271(c).

221. A small 3.48% shareholder DEMPL has been front-ending the litigation in India to fight alongside Devas against the winding up. The remaining 97% of shareholders are not fighting any litigations even after knowing about the winding-up proceedings. DEMPL has filed memos and written submissions both before the NCLT and this Tribunal and have adopted the same line of arguments as Devas and has not offered anything new for this Tribunal to consider.

222. Because the Board of Devas is controlled by the Investors/Shareholders, who took all the fraudulent decisions and perpetuated fraudulent activities or took undue advantage of the fraudulent activities, they are also responsible for Devas in attracting the ingredients of Section 271(c). Further, after completely knowing its investment was for ISP services and being aware that Devas had an unbridled right to carry out ISP services even until 2023, not questioning Devas as to why it did not render ISP services and instead of aiding Devas in diverting the investments for other non-approved purposes shows collusion and malafides and indeed qualifies as acts of fraud.

223. In light of the above acts of fraud committed by Devas and its investors/ shareholders, this Tribunal believes that Section 271(c) is undoubtedly satisfied. Devas deserves to be wounded up. It is a well-settled principle of law that fraud vitiates everything and goes to the root of the matter, and any transaction flowing from a fraudulent activity cannot stand the scrutiny of law. This Tribunal believes that every benefit or advantage that has accrued to Devas under the agreement dated 28.01.2005, including the Agreement dated 28.01.2005 itself, has been through acts of fraud or suppression or fraudulent misrepresentations. None of these can survive as fraud vitiates everything.

224. Spectrum/Space Capacity is a natural resource, and the laws of India have always declared the Government of India to be holding such natural resources in the public trust of its citizens. Since the public trust doctrine is involved, the law laid down by the Hon'ble Supreme Court consistently applies to the present case. Therefore, in the opinion of this Tribunal, the agreement dated 28.01.2005 was signed arbitrarily without following the due process applicable to granting largesse when natural resources are concerned.

225. **Hon'ble Supreme Court while dealing with issue about the right to alienate, transfer or distribute natural resources/national assets** in case of ***Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 1 : 2012 SCC OnLine SC 111 at page 53 has held:**

Question 1

(i) Whether the Government has the right to alienate, transfer or distribute natural resources/national assets otherwise than by following a fair and transparent method consistent with the fundamentals of the equality clause enshrined in the Constitution?

"74. *At the outset, we consider it proper to observe that even though there is no universally accepted definition of natural resources, they are generally understood as elements having intrinsic utility to mankind. They may be renewable or non-renewable. They are thought of as the individual elements of the natural environment that provide economic and social services to human society and are considered valuable in their relatively unmodified, natural form. A natural resource's value rests in the amount of the material available and the demand for it. The latter is determined by its usefulness to production. Natural resources belong to the people but the State legally owns them on behalf of its people and from that point of view natural resources are considered as national assets, more so because the State benefits immensely from their value.*

75. *The State is empowered to distribute natural resources. However, as they constitute public property/national asset, while distributing natural resources the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest. Like any other State action, constitutionalism must be reflected at every stage of the distribution of natural resources. In Article 39(b) of the Constitution it has been provided that the ownership and control of the material*

resources of the community should be so distributed so as to best subserve the common good, but no comprehensive legislation has been enacted to generally define natural resources and a framework for their protection. Of course, environment laws enacted by Parliament and State Legislatures deal with specific natural resources i.e. forest, air, water, coastal zones, etc.

76. [Ed.: Para 76 corrected vide Official Corrigendum No. F.3/Ed.B.J./9/2012 dated 6-2-2012.]. *The ownership regime relating to natural resources can also be ascertained from international conventions and customary international law, common law and national constitutions. In international law, it rests upon the concept of sovereignty and seeks to respect the principle of permanent sovereignty (of peoples and nations) over (their) natural resources as asserted in the 17th Session of the United Nations General Assembly and then affirmed as a customary international norm by the International Court of Justice in the case of Democratic Republic of Congo v. Uganda [**Ed.**: Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ICJ Reports 2005, p. 168.] . Common law recognises States as having the authority to protect natural resources insofar as the resources are within the interests of the general public. The State is deemed to have a proprietary interest in natural resources and must act as guardian and trustee in relation to the same. Constitutions across the world focus on establishing natural resources as owned by, and for the benefit of, the country. In most instances where constitutions specifically address ownership of natural resources, the sovereign State,*

or, as it is more commonly expressed, "the People", is designated as the owner of the natural resources.

77. *Spectrum has been internationally accepted as a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient utilisation. It has a high economic value in the light of the demand for it on account of the tremendous growth in the telecom sector. Although it does not belong to a particular State, right of use has been granted to the States as per international norms.*

78 [Ed.: Paras 78 and 80 corrected vide Official Corrigendum No. F.3/Ed.B.J./9/2012 dated 6-2-2012.]. *In India, the courts have given an expansive interpretation to the concept of natural resources and have from time to time issued directions, by relying upon the provisions contained in Articles 38, 39, 48, 48-A and 51-A(g) for protection and proper allocation/distribution of natural resources and have repeatedly insisted on compliance with the constitutional principles in the process of distribution, transfer and alienation to private persons.*

79. *The doctrine of public trust, which was evolved in Illinois Central Railroad Co. v. People of the State of Illinois [36 L Ed 1018 : 146 US 387 (1892)] , has been held by this Court to be a part of the Indian jurisprudence in M.C. Mehta v. Kamal Nath [(1997) 1 SCC 388] and has been applied in Jamshed Hormusji Wadia v. Port of Mumbai [(2004) 3 SCC 214] , Intellectuals Forum v. State of A.P. [(2006) 3 SCC 549] and Fomento Resorts and Hotels Ltd. v. Minguel Martins [(2009) 3 SCC 571 : (2009) 1 SCC (Civ) 877] .*

80. [Ed.: Paras 78 and 80 corrected vide Official Corrigendum No. F.3/Ed.B.J./9/2012 dated 6-2-2012.]. *In Jamshed Hormusji Wadia case [(2004) 3 SCC 214], this Court held that the State's actions and the actions of its agencies/instrumentalities must be for the public good, achieving the objects for which they exist and should not be arbitrary or capricious. In the field of contracts, the State and its instrumentalities should design their activities in a manner which would ensure competition and non-discrimination. They can augment their resources but the object should be to serve the public cause and to do public good by resorting to fair and reasonable methods.*

81. *In Fomento Resorts and Hotels Ltd. case [(2009) 3 SCC 571 : (2009) 1 SCC (Civ) 877] , the Court referred to the article of Prof. Joseph L. Sax and made the following observations: (SCC pp. 614-15, paras 53-55)*

> *"53.* ***The public trust doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. This doctrine puts an implicit embargo on the right of the State to transfer public properties to private party if such transfer affects public interest, mandates affirmative State action for effective management of natural resources and empowers the citizens to question ineffective management thereof.***

*54. The heart of the public trust doctrine is that it imposes limits and obligations upon government agencies and their administrators on behalf of all the people and especially future generations. For example, renewable and non-renewable resources, associated uses, ecological values or objects in which the public has a special interest (i.e. public lands, waters, etc.) are held subject to the duty of the State not to impair such resources, uses or values, even if private interests are involved. The same obligations apply to managers of forests, monuments, parks, the public domain and other public assets. Professor Joseph L. Sax in his classic article, 'The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention' (1970) [**Ed.**: 68 MICH L REV 471 (1970)] , indicates that the public trust doctrine, of all concepts known to law, constitutes the best practical and philosophical premise and legal tool for protecting public rights and for protecting and managing resources, ecological values or objects held in trust.*

55. The public trust doctrine is a tool for exerting long-established public rights over short-term public rights and private gain. Today every person exercising his or her right to use the air, water, or land and associated natural ecosystems has the obligation to secure for the rest of us the right to live or otherwise use that same resource or property for the long-term and enjoyment by future generations. To say it another way, a landowner or lessee and a water right holder has an obligation to use such resources in a manner as not to impair or

diminish the people's rights and the people's long-term interest in that property or resource, including down slope lands, waters and resources."

82. *In Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal [(1995) 2 SCC 161] , the Court was dealing with the right of organisers of an event, such as a sport tournament, to its live audio-visual broadcast, universally, through an agency of their choice, national or foreign. In para 78, the Court described the airwaves/frequencies as public property in the following words: (SCC p. 226)*

"78. There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies."

83. [Ed.: Para 83 corrected vide Official Corrigendum No. F.3/Ed.B.J./9/2012 dated 6-2-2012.]. *In Reliance Natural Resources Ltd. v. Reliance Industries Ltd. [(2010) 7 SCC 1], P. Sathasivam, J., with whom Balakrishnan, C.J., agreed, made the following observations: (SCC p. 64, para 114)*

"114. It must be noted that the constitutional mandate is that the natural resources belong to the people of this country. The nature of the word 'vest' must be seen in the context of the public trust doctrine (PTD). Even though this doctrine has been applied in cases dealing with

environmental jurisprudence, it has its broader application."

84. *The learned Judge then referred to the judgments, Special Reference No. 1 of 2001, In re [(2004) 4 SCC 489] , M.C. Mehta v. Kamal Nath [(1997) 1 SCC 388] and observed: (Reliance Natural Resources Ltd. case [(2010) 7 SCC 1] , SCC p. 65, para 116)*

"116. This doctrine is part of Indian law and finds application in the present case as well. It is thus the duty of the Government to provide complete protection to the natural resources as a trustee of the people at large."

The Court also held that natural resources are vested with the Government as a matter of trust in the name of the People of India; thus it is the solemn duty of the State to protect the national interest and natural resources must always be used in the interests of the country and not private interests.

85. As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the State in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects: first, it regulates the rights and obligations of the State vis-à-vis its people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and second, it regulates the rights and obligations of the State vis-à-vis private parties seeking to acquire/use the

resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties.

86. *In Akhil Bhartiya Upbhokta Congress v. State of M.P. [(2011) 5 SCC 29 : (2011) 2 SCC (Civ) 531] , this Court examined the legality of the action taken by the Government of Madhya Pradesh to allot 20 acres of land to an institute established in the name of Kushabhau Thakre on the basis of an application made by the Trust. One of the grounds on which the appellant challenged the allotment of land was that the State Government had not adopted any rational method consistent with the doctrine of equality. The High Court negatived the appellant's challenge. Before this Court, the learned Senior Counsel appearing for the State relied upon the judgments in Ugar Sugar Works Ltd. v. Delhi Admn. [(2001) 3 SCC 635] , State of U.P. v. Chaudhari Ran Beer Singh [(2008) 5 SCC 550] , State of Orissa v. Gopinath Dash [(2005) 13 SCC 495 : 2006 SCC (L&S) 1225] and Meerut Development Authority v. Assn. of Management Studies [(2009) 6 SCC 171 : (2009) 2 SCC (Civ) 803] and argued that the Court cannot exercise the power of judicial review to nullify the policy framed by the State Government to allot nazul land without advertisement.*

87. *This Court rejected the argument, referred to the judgments in Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] , S.G. Jaisinghani v. Union of India [AIR 1967 SC 1427] , Kasturi Lal Lakshmi Reddy v. State of J&K [(1980) 4 SCC 1] , Common Cause v. Union of India [(1996) 6 SCC 530] , Shrilekha*

Vidyarthy v. State of U.P. [(1991) 1 SCC 212 : 1991 SCC (L&S) 742], LIC v. Consumer Education and Research Centre [(1995) 5 SCC 482] and New India Public School v. HUDA [(1996) 5 SCC 510] and held: (Akhil Bhartiya Upbhokta Congress case [(2011) 5 SCC 29 : (2011) 2 SCC (Civ) 531] , SCC p. 60, para 65)

> *"65. What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State."*

88. *In Sachidanand Pandey v. State of W.B. [(1987) 2 SCC 295], the Court referred to some of the precedents and laid down the following propositions: (SCC p. 330, para 40)*

> *"40.* ***State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism."***
>
> ***89. In conclusion, we hold that the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good."***
>
> *(emphasis supplied)*

226. Further, the Hon'ble Supreme Court in case of *Nova Ads v. Metropolitan Transport Corpn.*, (2015) 13 SCC 257: 2014 SCC OnLine SC 1005 at page 285 has reiterated the law laid down in the case of *Nagar Nigam, Meerut v. Al Faheem Meat Exports (P) Ltd. [(2006) 13 SCC 382 and* held that wherever a

contract is to be awarded or license is sought to be given public authorities should adopt a fair and transparent method. The Hon'ble Supreme Court has held thats:

> ***"56. It is well settled in law that wherever a contract is to be awarded or a licence is sought to be given, it is obligatory on the part of the public authority to adopt a transparent and fair method. It serves two purposes, namely, participation of all eligible competitors and giving a fair opportunity to them and also generating maximum revenue****. In this context, we may profitably refer to a two-Judge Bench in Nagar Nigam, Meerut v. Al Faheem Meat Exports (P) Ltd. [(2006) 13 SCC 382], wherein it has been held as follows: (SCC p. 395, para 16)*
>
> > *"16.* ***The law is well settled that contracts by the State, its corporations, instrumentalities and agencies must be normally granted through public auction/public tender by inviting tenders from eligible persons and the notification of the public auction or inviting tenders should be advertised in well-known dailies having wide circulation in the locality with all relevant details such as date, time and place of auction, subject-matter of auction, technical specifications, estimated cost, earnest money deposit, etc. The award of government contracts through public auction/public tender is to ensure transparency in the public procurement, to maximise economy and efficiency in government procurement, to promote healthy competition among the tenderers, to provide for fair and***

equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution."

57. Needless to say, there can be a situation, for good reasons a contract may be granted by private negotiation but that has to be in a very exceptional circumstance, for in the absence of transparency the public confidence is not only shaken but shattered. In the case at hand, as the contract has been entered by way of some kind of understanding reason of which is quite unfathomable, such a contract has to be treated as vitiated, applying this principle also.

58. *From the aforesaid analysis, it is luculent that there was a deceit practised by the appellants in collusion with MTCL and the authorities of MTCL had acted with full knowledge against the statute and against the interest of the Corporation.* ***The beneficiaries are the appellants****. As far as MTCL functionaries are concerned, we do not intend to say anything as we have been apprised by Mr Subramonium Prasad, learned Additional Advocate General for the State of Tamil Nadu that certain proceedings are pending against the functionaries of MTCL. We will be failing in our duty if we do not take note of the fact that the Corporation should have been vigilant to protect its own interests. However, as is perceived, it did not wake up for long. The State remained a silent spectator to all that was going on. Under these circumstances, prayer has been made on behalf of the appellants to show equity and allow them to continue at least for two years. Needless to emphasise, it has*

been canvassed as an alternative submission. The said alternative submission does not deserve consideration. To think of acceptation of such a submission, we will be adding a premium to the appellants who have crucified the law and played possum of the existence of the judgment of the High Court and in the ultimate eventuate designed the plan to have the benefit of 12 years; "a yuga" for availing illegal benefit, which is impermissible and belongs to the Corporation and required to be dealt with in accordance with law. ***The whole action, as we perceive, is a fiscal pollution. It is, if we allow ourselves to say so, an acid rain on finance that can really crumble and collapse the financial health of the Corporation, which, in a democracy, is impermissible****. It compels us to say that the skilfully designed scheme has the potentiality to bring in ruination in an orderly society governed by law; as if the appellants are determined to treat the proceeding in a court equivalent to experimentation in a laboratory or an adventure in a garden that has no boundary*.

60. *At this juncture,* ***we may note that a submission was canvassed by the appellants that they have spent huge amount of money in putting the structures and making certain arrangements. As we have annulled the contract and their conduct is decryable, the said facet of spending, whatever may be the extent, is absolutely irrelevant and we so hold."***

(emphasis supplied)

227. It is surprising to note that in this case, ANTRIX agreed with DEVAS regarding the use of satellite to provide Satellite Digital Multimedia Broadcasting Service **("SDMB")** to cities and villages in India. How the then

officials of ANTRIX entered into this contract of this magnitude with a private entity incorporated just two months before the agreement, without following the due process as per SATCOM Policy and the established rules and procedure relating to the Government contract is unimaginable.

228. It is pertinent to mention that **Article 3.6.10 of the SATCOM Policy establishes that there must be an intention to make available spectrum, and non-governmental applicants must send an application. Furthermore, such intention must contain a fixed/closing date for sending applications. So, when a tender process is contemplated under the SATCOM Policy itself, it was not under the discretion of the concerned authorities to say that Government policies and rules were not applicable in the instant case.**

229. When the above-mentioned process of invitation to utilise spectrum was not carried out for Devas. Therefore, Devas can not canvass that there was no competitor, so the invitation process was not required.

230. At the outset, Antrix is reiterating its case that the then officials of Antrix connived with Devas in granting this Agreement dated 28.01.2005 to Devas. It is too well settled a principle of law that when something has to be done in a particular manner and by a specific authority, it has to be done only in that manner. Anything to the contrary is wrong in law.

231. Antrix is undoubted, is the business arm that carries out commercial operations for DoS/ISRO. However, it is still governed by well-established law principles that a company is separate from its shareholders. Devas harps on the very Award continuously, finding that DoS/ISRO and Antrix are not the same. They are separate as Antrix is an individual legal entity with its seal and can sue and could be sued. Therefore, Antrix is a separate legal entity, and Antrix cannot perform the functions of DoS/ISRO, and vice versa is also not possible.

232. The role of officials of ISRO/DoS is completely different from what has been argued. It must be placed on record**;** in what capacity they are part of Antrix. They are part of Antrix for the value addition, which they can do to Antrix and not bind DoS/ISRO in the process. When they represent Antrix, their role is limited to Antrix alone, and they do not represent DoS/ISRO.

233. As stated earlier, Antrix is a company independent of its shareholders. DoS/ISRO are Departments under the Government of India working under a nodal Ministry. Antrix is not a Government Department. This fact is not in dispute. When the SATCOM Policy mandates seven Secretaries of the GoI from seven different Ministries, after following a transparent process to grant space segment to private players, with this point ,a question arises that how can Devas argue today stating instead of following the mandate under the SATCOM Policy, it did presentations, wrote letters and shared insights about

the Devas' project to a handful of officials from ISRO/DoS/Antrix who conspired with Devas in granting this agreement dated 28.01.2005.

234. If the interpretation of Devas is assumed, it would mean Antrix can perform the functions of DoS/ISRO. However, this is not allowed under the laws of India as the scope of work is allocated to each Department individually and independently. Therefore, the argument that any communication with Antrix is deemed to have been made to DoS/ISRO is bad in law and not in accordance with well-established principles of Company Law.

235. Wherever the role of DoS/ISRO is defined, that role has to be carried under the seal of DoS/ISRO. Therefore, Antrix cannot state anywhere that since certain documents have the seal of Antrix, it should be presumed that it is the seal of DoS/ISRO. This would lead to a dangerous interpretation.

236. Devas raised a set of objections stating that all the allegations of Antrix raises triable issues and requires a trial, and this Tribunal cannot entertain these allegations without a full-fledged trial. Devas further argued for this purpose that it filed an IA before the NCLT for cross-examining the present officials of Antrix. Finally, devas contended that once it raised triable issues and shows its defence is not moonshine but substantial, this Tribunal must allow Devas' appeal and set aside the impugned order. We find no merit in these submissions. In support of this contention, Devas relied on the following citations:

a) *Pradheshiya Industrial & Investment Corp of UP v. North India Petro Chemicals Ltd*, 1994 3 SCC 348.

b) *Mediquip Systems Pvt Ltd v. Proxima Medical System GMBH*, 2005 7 SCC 42

237. It is a well-settled principle of law that a document speaks for itself. Accordingly, this Tribunal has rendered its findings based purely on the documents submitted before us. Such documents on the face of record have convinced this Tribunal that there has been massive large scale fraudulent activities committed by Devas and its investors/shareholders.

238. The documents relied on by Antrix were not disputed either before the NCLT or before this Tribunal by Devas. On the contrary, both the parties before us relied on the same documents and offered their interpretations. The fact that fraud has been committed is apparent on the face of every record available before this Tribunal. As far as this Tribunal is concerned, the scope of adjudication is whether there is fraud for which perusal and interpretations of the documents are enough, wildly when Devas has not disputed the documents but has relied on the same set of documents substantially or relied on similar documents. A trial would indicate who was responsible for committing the fraud with which this Tribunal is not concerned. This Tribunal has exercised its fact-finding powers under Section 271(c) of the Companies Act, 2013. It has rendered elaborate findings on fraud purely based on

undisputed documents; therefore, Devas's ground on triable issues is rejected.

239. This Tribunal deems it fit to elaborate further in the following manner:

a) For violation under the SATCOM Policy, this Tribunal had to interpret the Articles of the SATCOM Policy, and Devas did not disputed the policy. Devas only argued it does not apply to them, which submission we rejected.

b) For misrepresentations under the agreement dated 28.01.2005, this Tribunal had to interpret the agreement, which Devas cannot and did not dispute as it is a signatory to the agreement.

c) To arrive at a finding that the Cabinet approval was obtained fraudulently, this Tribunal had to peruse the notes prepared by DoS and ISRO, which Devas did not dispute. On the contrary, Devas relied on the same cabinet note prepared by DoS and offered a counter interpretation, which we rejected.

d) To arrive at a finding that Devas could not have successfully tested their technology, this Tribunal had to interpret the experimental license dated 07.05.2009. Devas could not have disputed this document as it placed heavy reliance on the same to argue that it successfully experimented with Devas Technology, which we rejected.

e) To arrive at a finding that the ISP license dated 02.05.2008 permitted only ISP services and not Devas Services, and they are not the same, this Tribunal had to interpret the ISP license. Devas could not have disputed the same, as they offered a counter interpretation relying on the same license, which we rejected.

f) To arrive at a finding on the purpose of investments into Devas, we had to interpret the FIPB applications filed by Devas. Devas could not have disputed the same as it placed heavy reliance on the same to state its investments had the necessary approvals.

g) To arrive at a finding that the shareholders of Devas were also indulging in fraudulent activities, we had to interpret the shareholding structure of Devas and the share subscription agreement dated 06.03.2006. Devas could not have disputed and did not dispute the same as it is in their documents.

h) Other than the above-mentioned list of documents, Devas and Antrix relied on official minutes of meetings, which neither party before us denied but offered opposite contentions for the consideration of this Tribunal.

240. The fact that Devas did not dispute any of the documents and thought it fit to defend itself by interpreting the same documents in another manner to save itself from winding up goes to show that there are no triable issues,

and Devas raise this issue only to escape the clutches of Section 271(c). In the opinion of this Tribunal, the IA filed by Devas before the NCLT was one of the many schemes which Devas devised to delay the proceedings before the NCLT, which certainly is an abuse of process.

241. Devas further argued that the winding-up petition is not bonafide. Devas submitted that it had raised an issue on 04.11.2020 when the Hon'ble Supreme Court stayed the operation of the Arbitral Award, which ruled in favour of Devas and transferred the said proceedings to the Hon'ble Delhi High Court. It also permitted Devas to seek a deposit of the sum before the High Court of Delhi, and it is only for this purpose the said winding-up petition has been filed. Based on the findings of this Tribunal on the issues raised by the parties, the contention raised by the Appellant cannot be accepted.

242. Devas have also raised the issue of granting sanction for initiating winding up proceedings. The MCA is the sanctioning authority, and it granted a sanction to Antrix on 18.01.2021 under Section 272(1)(e). This sanction has been upheld by the Hon'ble High Court of Karnataka vide Order dated 28.04.2021 in W.P 6191/2021, and the same order is binding on this Tribunal. Further, the Writ Appeal filed against this order has also been withdrawn. Therefore, Devas cannot raise the issue before this Tribunal as the sanction order has been upheld by a Constitutional Court. When the sanction order is valid, the winding-up petition filed by Antrix cannot be questioned.

243. Further, this Tribunal is not concerned with the events taking place in the Award set aside proceedings, and it is for the parties to litigate before the Hon'ble Delhi High Court. Therefore, this additional issue raised by Devas is also rejected.

244. Antrix pointed to this Tribunal that the agreement dated 28.01.2005 was signed on behalf of Devas by one Shri. S.R. Gururaj, an Article Clerk, worked in the office of the then Chartered Accountant of Devas Shri M. Umesh, a founding director of Devas and an accused in the CBI Trial. Antrix further argued that Shri. S.R Gururaj confirmed before the CBI that he had received a token amount for signing the agreement dated 28.01.2005.

245. In defence, Devas argued that Shri. S.R Gururaj was duly authorized, and therefore, there is nothing wrong with him signing the agreement dated 28.01.2005.

246. In the opinion of this Tribunal, this issue must not be viewed in isolation. Still, it must be analyzed in the whole conspectus of events that had taken place surrounding the agreement dated 28.01.2005. Every benefit and every advantage that accrued to Devas under the agreement dated 28.01.2005 was through fraud, misrepresentation or suppression. According to Devas, this agreement intended to achieve was the first of its kind and tremendous innovation. As a result, devas introduced and utilized technologies like never before and was a huge revenue generator for Antrix.

247. This Tribunal finds it rather strange that such a vast and vital agreement dated 28.01.2005 was allowed to be signed by an Article Clerk who had no background in science and technology, especially with the functioning of Devas Services and was given remuneration for signing the agreement. When this undisputed fact is read along with the findings rendered above on the aspects of fraud committed by Devas, in the opinion of this Tribunal, the key responsible personnel of Devas remained backstage until the signing of the agreement dated 28.01.2005. It sprang up to commit its frauds full-fledged after the agreement was signed. This undisputed fact pointed out by Antrix has certainly cast a stronger case against Devas.

248. It is surprising to this Tribunal that either of the founding Directors did not sign the agreement dated 28.01.2005. It is also surprising to note that the then officials of ANTRIX also did not object to it when the agreement from the DEVAS was not being signed by the Director or employee of the company but was being signed by an Article Clerk of the then Chartered Accountant of the Company. ANTRIX is undisputedly the commercial arm of the ISRO, and its entire shareholding is with the Government of India. Therefore, when ANTRIX signed such an agreement of vital importance on its behalf, the signatory to the agreement and their authority to sign it was also important.

249. This Tribunal has elaborately discussed the defence raised by Devas in the winding-up petition. This Tribunal believes that the defence raised by

Devas is not substantial, and Devas deserves to be wound up on the grounds of Section 271(c) of the Companies Act, 2013. Accordingly, the finding of the Ld National Company Law Tribunal needs no interference from this Appellate Tribunal, and both the Appeals deserves to be dismissed.

[V. P. Singh]
Member (Technical)

CHENNAI
8th SEPTEMBER, 2021

pks

ORDER
(Through Virtual Mode)

08.09.2021. Separate Judgments are being passed with reasons ascribed therein.

For the reasons assigned by us individually and separately, following operative order is passed.

The Company Appeal (AT)(CH) No. 17 of 2021 and Company Appeal (AT)(CH) No.24 of 2021 are dismissed. There shall be no order as to costs.

(Justice M. Venugopal)
Member (Judicial)

(V.P. Singh)
Member (Technical)

08.09.2021
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