Neutral Citation Number : 2023:DHC:1933-DB

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 17th MARCH, 2023

IN THE MATTER OF:

\+ **FAO(OS) (COMM) 289/2022 & CAV 321/2022, CAV 322/2022, CM APPLs. 44209/2022, 44211/2022**

DEVAS EMPLOYEES MAURITIUS PVT. LTD ..... Appellant

Through: Mr. Suhail Dutt, Sr. Advocate with Ms. Anuradha Dutt, Mr. Lynn Pereira, Ms. Ekta Kapil, Ms. Priyanka M. P., Mr. Chaitanya Kaushik, Mr. Amber Bhushan, Ms. Shivangi Sud, Mr. Azhar Alam, Mr. Sankalp Goswami and Ms. Srishti Prakash, Advocates.

versus

ANTRIX CORPORATION LIMITED & ORS ..... Respondents

Through: Mr. N. Venkataraman, ASG and Mr. Chetan Sharma, ASG with Mr. V. Chandrashekara Bharathi, Mr. Ajay Bhargava, Mr. Arvind Kumar Ray, Mr. Karan Gupta, Mr. S. Ram Narayan, Ms. Vanito Bhargava, Mr. Rahul Vijay Kumar, Mr. Aman, Advocates with Mr. Chinmoy Roy, Legal Officer.
Ms. Varuna Bhamral, Mr. Aubert Sebastian and Ms. Angelika Awasthi, Advocates for R-2.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J.

1. The instant appeal, under Section 37 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as "***the Arbitration Act***" or "***the A&C Act***"*), has been filed against the Judgment dated 29.08.2022 ("**Impugned Judgment**") passed by the Learned Single Judge in O.M.P. (Comm.) No. 11/2021, filed by Respondent No. 1 ("**Antrix**") under Section 34 of the Arbitration Act (*hereinafter referred to as* "**Section 34 Petition**") to challenge the ICC Arbitral Award dated 14.09.2015 (*hereinafter referred to as* "**the ICC Award**") passed in favour of the Respondent No. 2 ("**Devas**"). The Ld. Single Judge, *vide* the Impugned Judgment has set aside the ICC Award under Section 34 of the Arbitration Act on the grounds that it suffers from fraud, patent illegality and is in conflict with the public policy of India.

BRIEF BACKGROUND

2. The Appellant herein ("**Devas Employees Mauritius Pvt. Ltd.**" or "**DEMPL**") is a company incorporated under the laws of Mauritius and is a shareholder, owning 3.48% of the issued and paid-up equity share capital of Respondent No. 2/ Devas Multimedia Private Limited ("**Devas**"). Respondent No. 2 is a company incorporated under the Companies Act, 1956 which has since been wound up under the provisions of the Companies Act, 2013 and is represented in the present proceedings through its Official Liquidator.

3. The Respondent No.1/Antrix Corporation Limited, is a company incorporated under the Companies Act, 1956, and is the commercial arm of

the Indian Space Research Organisation (ISRO) which is wholly owned by the Government of India.

4. Respondent No.1/Antrix entered into a Memorandum of Understanding (MOU) with Forge Advisors, LLC, a Virginia Corporation, USA. Forge Advisors made a presentation to Respondent No.1/Antrix Corporation Limited proposing an Indian Joint Venture which has now came to be known as "DEVAS" (Digitally Enhanced Video and Audio Services). It was projected in the said proposal that DEVAS platform will be capable of delivering multimedia and information services via satellite to mobile devices tailored to the needs of various market segments. This presentation was followed by a proposal to form a strategic partnership to launch DEVAS that delivers video, multimedia and information services via satellite to mobile receivers in vehicles and mobile phones across India. Under the said proposal, it was contemplated to form a joint venture which would cast an obligation on the part of ISRO and Antrix, to invest in one operational S-Band satellite with a ground space segment to be leased to the joint venture. In return, ISRO and Antrix were to receive lease payments of USD 11 million annually for a period of 15 years. In pursuance of the said proposal, several meetings were held between the representatives of Forge and ISRO/Antrix. On 17.12.2004, Devas Multimedia Private Limited, Respondent No.2 herein, was incorporated as a private company under the Companies Act, 1956, and the Respondent No.1/Antrix entered into an Agreement with Respondent No.2/Devas Multimedia Private Limited on 28.01.2005. The said Agreement was titled as “Agreement for the lease of space segment capacity on ISRO/Antrix S-Band spacecraft by DEVAS”. The preamble of the said Agreement stated that Devas was developing a platform capable of delivering multimedia and information services via

satellite and terrestrial system to mobile receivers, tailored to the needs of various market segments in the country and in return Devas had requested Antrix for space segment capacity for the purpose of offering S-DMB service, a new digital multimedia and information service, including but not limited to audio and video content and information interactive services, across India that will be delivered via satellite and terrestrial system via fixed, portable mobile receivers including mobile phones, mobile video/audio receivers for vehicles etc. Antrix was to lease out to Devas five numbers of C X S transponders, each of 8.1 MHz capacity, and five numbers of S X C transponders, each of 2.7 MHz capacity, on the Primary Satellite 1 (PS1). It was agreed that the leased capacity would be delivered by Antrix to Devas, i.e. a fully operational and ready PS-1 satellite was to be delivered within 30 months of the agreement, with a further grace period of six months. Devas obtained approvals from the Foreign Investment Promotion Board (FIPB) during the period between May 2006 and September 2009. It is stated that Devas also obtained an Internet Service Provider (ISP) License from the Department of Telecommunications on 02.05.2008. Devas then also obtained permission from the Department of Telecommunications on 31.03.2009 for providing Internet Protocol Television (IPTV) Services within the scope of the terms and conditions of Internet Service Provider (ISP) License.

5. The Agreement dated 28.01.2005 was terminated by Antrix by a Communication dated 25.02.2011 which stated that the Government of India had taken a policy decision not to provide orbital slots in S-Band for commercial activities.

6. The termination of the Devas Agreement by Antrix was disputed by Devas which invoked Article 20(a) of the Devas Agreement to refer the

dispute to the senior management of both the parties. However, on 15.04.2011, Antrix wrote to Devas referring to the letter of termination of the Devas Agreement and enclosed with it a cheque of INR 58,37,34,000/- (approximately USD 13 million) as reimbursement of the Upfront Capacity Reservation Fee (UCRF) already paid by Devas under the Devas Agreement. Devas, returned the cheque and wrote to Antrix stating that it had failed to state a proper basis for termination of the Devas Agreement.

7. Eventually, on 01.07.2011, Devas initiated arbitration proceedings against Antrix under the rules of the International Chambers of Commerce ("**ICC**"), seeking damages for repudiatory breach of the Devas Agreement by Antrix. Between the period of July 2011 and March 2015, the arbitral tribunal was constituted, pleadings were completed by both the parties and hearing was concluded in the arbitral proceedings between Devas and Antrix. On 14.09.2015, an arbitral tribunal comprising of Dr. Adarsh Sein Anand (former Chief Justice of India), Mr. V.V. Veeder and Dr. Michael Pryles, published the ICC Award in favour of Devas for damages amounting to USD 562.5 million along with interest and costs, for wrongful repudiation of the Devas Agreement by Antrix. The operative part of the arbitral award is reproduced hereinbelow:

> *"**401.** For the foregoing reasons the tribunal unanimously finds and awards as follows:*
>
> *a. the tribunal has jurisdiction to hear and decide the claims in this arbitration;*
>
> *b. Antrix is to pay USD 562.5 million to Devas for damages caused by Antrix's wrongful repudiation of the Devas Agreement;*

> *c. Antrix is to pay simple interest on USD 562.5 million from 25 February 2011 to the date of this award at the rate of three month USD LIBOR + 4%:*
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> *d. Antrix is to pay simple interest at the rate of 18% per annum of the amounts in paragraphs 401(b) and (c) from the date of this award to the date of full payment; and*
>
> *e. each party is to bear its own legal costs of this arbitration, and the parties are to pay, in equal shares, the fees and expenses of the arbitrators and the ICC administrative expenses."*

8. During the pendency of proceedings before the ICC Arbitral Tribunal, the Central Bureau of Investigation ("**CBI**") registered an FIR on 16.03.2015 alleging criminal conspiracy, criminal misconduct, cheating and other corrupt practices on the part of Devas and its officers. A charge-sheet in respect of the FIR was filed against Devas, its officers and certain other individuals by the CBI on 11.08.2016. The CBI filed a supplementary charge-sheet in respect of the FIR on 08.01.2019.

9. Subsequent to the publishing of the ICC Award, on 19.11.2015, Antrix filed a petition under Section 34 of the Arbitration Act before the Addl. City Civil and Sessions Judge, Bengaluru, Karnataka, challenging the ICC Award. Subsequently, on 10.11.2016, Antrix filed an amendment application (*hereinafter referred to as the* "**first amendment application**") to incorporate subsequent events and take additional grounds. Thereafter, on 04.11.2020, the Hon'ble Supreme Court passed an order in SLP No. 28434/2018 to transfer the Petition filed by Antrix under Section 34 of the Arbitration Act from the Court in Bengaluru to the Delhi High Court and stayed the ICC Award in the interim. On 12.01.2021, Antrix filed another

amendment application (*hereinafter referred to as the* "**second amendment application**") seeking to add further subsequent events and additional grounds in its Section 34 Petition.

10. While the proceedings under Section 34 of the Arbitration Act were still pending, Antrix moved an application before the National Company Law Tribunal, Bengaluru Bench ("**NCLT**") under Section 271(c) read with Section 272(1)(e) of the Companies Act, 2013 for winding up Devas on the grounds that Devas was incorporated for fraudulent and unlawful purposes and the affairs of the company were being conducted in a fraudulent manner. *Vide* an order date 25.05.2021, the NCLT allowed the petition for winding up preferred by Antrix, declaring that Devas had been formed for fraudulent and unlawful purposes and its affairs had been conducted in a fraudulent manner. This order of the NCLT was challenged by Devas along with DEMPL before the National Company Law Appellate Tribunal ("**NCLAT**"), which dismissed the appeal *vide* an order dated 08.09.2021 and upheld the order dated 25.05.2021, passed by the NCLT. The order dated 08.09.2021, passed by the NCLAT, was challenged by Devas and DEMPL before the Apex Court and the Apex Court vide its judgment dated 17.01.2022 passed in Civil Appeal No.5766/2021 upheld the order passed by the NCLAT. The Apex Court rejected the claim of Devas that the proceedings before it were barred by Limitation. It further held that Antrix could not be estopped from pleading fraud and seeking winding up of Devas even if the plea of fraud was not used to terminate the Devas Agreement in 2011 or that it was not raised before the Arbitral Tribunal, as the fraud was discovered much later. The Court stated that it did not find any perversity in the findings on facts recorded by either the NCLT or NCLAT as they were borne out by documents which weren't challenged as fabricated or

inadmissible. The Apex Court further held that the seeds of the commercial relationship between Antrix and Devas were a product of fraud perpetrated by Devas and every plant that grew out of those seeds, including an arbitral award, would be infected with the poison of fraud. The Apex Court further observed that a product of fraud is in conflict with the public policy of any country including India. The basic notions of morality and justice are always in conflict with fraud and allowing Devas and its shareholders to reap the benefits of their fraudulent action, would send wrong message to international investors, namely that by adopting fraudulent means and by bringing into India an investment in a sum of INR 579 crores, the investors can hope to get tens of thousands of crores of rupees, even after siphoning off INR 488 crores.

11. It is in the aforestated factual background that the Ld. Single Judge has pronounced the Impugned Judgment under Section 34 of the Arbitration Act by which the ICC Award has been set aside on the grounds that the ICC Award suffers from patent illegality, fraud and is in conflict with the public policy of India. The learned Single Judge has placed reliance upon the Judgment of the Apex Court passed in Civil Appeal No.5766/2021. The learned Single Judge held that the Judgment of the Apex Court passed in Civil Appeal No.5766/2021 deals with the same parties and the finding therein would operate as *res judicata*. The learned Single Judge also held that the Judgments are admissible and the Court is bound to take judicial notice of the same. The learned Single Judge held that the since the issue of fraud has been established by the Judgment of the Apex Court in Civil Appeal No.5766/2021, it would operate as *res judicata* between the parties, regardless of the fact that the applications to amend the petition under Section 34 of the Arbitration Act by Respondent No.1/Antrix were filed

beyond the statutory period prescribed under the Arbitration Act. The learned Single Judge has observed as under:

> "159. *After affirming the concurrent finding of fraud the Supreme Court has held that if the seeds of the commercial relationship between Antrix and Devas were a product of fraud perpetrated by Devas, every part of the plant that grew out of those seeds, such as the Agreement, the disputes, arbitral awards etc., are all infected with the poison of fraud. A product of fraud is in conflict with the public policy of any country including India. The basic notions of morality and justice are always in conflict with fraud. Further, allowing Devas and its shareholders to reap the benefits of their fraudulent action, would send another wrong message namely that by adopting fraudulent means and by bringing into India an investment in a sum of INR 579 crores, the investors can hope to get tens of thousands of crores of rupees, even after siphoning off INR 488 crores.*
>
> *160. The Judgments of the NCLT, NCLAT and the Supreme Court are inter party and as such the finding returned therein would operate as res judicata. Since the Judgments are admissible and court is bound to take judicial notice of the same, Antrix does not need to refer to the applications filed by it seeking to amend the objections filed under section 34 of the Act.*
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> *161. Mr. Venkataraman, Learned Additional Solicitor General has relied upon on the Judgments of the NCLT, NCLAT and the Supreme Court to address the issue of fraud played by Devas.*
>
> *162. Since the issue of fraud is established by the said Judgments and would also operate as res – judicata between the parties, the submission on behalf of DEMPL that Antrix cannot be permitted to amend the objections under section 34 of the Act as the*

application has been filed beyond the statutory period is of no consequence.

163. Accordingly, the judgments in the case of (i) P. Radha Bai & Others vs. P Ashok Kumar & Anr. (2019) 13 SCC 445; (ii) Bhaven Construction vs. Executive Engineer, Sardar Sarovar Narmada Nigam Limited (2022) 1 SCC 75 and (iii) State of Maharashtra vs. Hindustan Construction Company Limited (2010) 4 SCC 518 relied upon by Mr. Suhail Dutt learned Senior Counsel for DEMPL on the question of delay in seeking amendment of the objections are not applicable to the facts of the present case.

164. The Supreme Court of India in Delhi Airport Metro Express (P) Ltd. v. DMRC, (2022) 1 SCC 131 examined the scope of judicial interference with the arbitral awards and held as under:

> *"27. For a better understanding of the role ascribed to Courts in reviewing arbitral awards while considering applications filed under Section 34 of the 1996 Act, it would be relevant to refer to a judgment of this Court in Ssangyong Engg. & Construction Co. Ltd. v. NHAI [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] wherein R.F. Nariman, J. has in clear terms delineated the limited area for judicial interference, taking into account the amendments brought about by the 2015 Amendment Act. The relevant passages of the judgment in Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] are noted as under : (SCC pp. 169-71, paras 34-41)*
>
> > *'34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law"*

as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

35. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality

appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on

no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.'

28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality".

Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality".

30. Section 34(2)(b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression "public policy of India" and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act,

if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.

31. In Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , this Court held that the meaning of the expression "fundamental policy of Indian law" would be in accordance with the understanding of this Court in Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] . In Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , this Court observed that violation of the Foreign Exchange Regulation Act, 1973, a statute enacted for the "national economic interest", and disregarding the superior Courts in India would be antithetical to the fundamental policy of Indian law. Contravention of a statute not linked to public policy or public interest cannot be a ground to set at naught an arbitral award as being discordant with the fundamental policy of Indian law and neither can it be brought within the confines of "patent illegality" as discussed above. In other words, contravention of a statute only if it is linked to public policy or public interest is cause for setting aside the award as being at odds with the fundamental policy of Indian law. If an arbitral award shocks the conscience of the court, it can be set aside as being in conflict with the most basic notions of justice. The ground of morality in this context has been interpreted by this Court to encompass awards involving elements of sexual morality, such as prostitution, or awards seeking to validate agreements which are not illegal but would not be enforced given the prevailing mores of the day. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213]"

165. Supreme Court in Delhi Airport Metro Express (P) Ltd.(supra) has held that the grounds for setting aside an Arbitral Award are limited. If a domestic award is contrary to the fundamental policy of Indian law, and if there is a patent illegality in the award an award may be set aside. However, Patent illegality should be illegality which goes to the root of the matter and every error of law committed by the Arbitral Tribunal would not fall within the expression of "patent illegality". Similarly, erroneous application of law cannot be categorised as patent illegality. A contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality".

166. It is further held that it is impermissible for the Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. However, if an arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them or basing the conclusions on no evidence or conclusions have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality.

167. Contravention with the fundamental policy of Indian law or being in conflict with the most basic notions of morality or justice or contrary to national economic interest and disregarding the superior Courts in India would be antithetical to the fundamental policy of Indian law.

168. As noticed above the Arbitral Tribunal has incorrectly excluded the evidence pertaining to the pre-contractual negotiations which it could not have and

has thus committed a patent illegality in the award.

169. Further, as noticed hereinabove, the Arbitral Tribunal has committed patent illegality in the award as findings on some issues are contradicted by the findings on other issues and are also contradicted by the reasoning given to reach the said conclusions.

170. Additionally, findings on fraud returned by the Supreme Court by its Judgment dated 17.01.2022 clearly establish that award contravenes the fundamental policy of Indian law being in conflict with the most basic notions of justice and is also contrary to the national economic interest having also violated the 'FIPB Policies' and the provisions of 'FIMA' and 'PMLA' and thus antithetical to the fundamental policy of Indian law.

171. The Supreme Court by its judgment dated 17.01.2022 has held that the very seeds of the commercial relationship between Antrix and Devas were a product of fraud perpetrated by Devas and thus every part of the plant that grew out of those seeds, such as the Agreement, the disputes, arbitral awards etc., are all infected with the poison of fraud.

172. It has held that a product of fraud is in conflict with the public policy of any country including India. The basic notions of morality and justice are always in conflict with fraud and that allowing Devas and its shareholders to reap the benefits of their fraudulent action, would send another wrong message namely that by adopting fraudulent means and by bringing into India an investment in a sum of INR 579 crores, the investors can hope to get tens of thousands of crores of rupees, even after siphoning off INR 488 crores.

173. In view of the above, the objections filed by the Petitioner under Section 34 of the Act are allowed and it is held that the Impugned award dated 14.09.2015

> *suffers from patent illegalities and fraud and is in conflict with the Public Policy of India. The Petition is accordingly allowed and the impugned award dated 14.09.2015 is set aside.*
>
> *174. Pending applications are also disposed of accordingly. "*

12. It is this Judgment dated 29.08.2022 passed by the Learned Single Judge in O.M.P. (Comm.) No. 11/2021 which is the subject matter of the instant appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996.

SUBMISSIONS MADE BY THE PARTIES

Submissions by the Appellant/DEMPL

13. Mr. Suhail Dutt, Learned Senior Counsel appearing on behalf of the Appellant/DEMPL, submits that the Ld. Single Judge has erred in completely relying upon the Judgment of the Apex Court passed in Civil Appeal No.5766/2021 to decide the Petition under Section 34 of the Arbitration Act. He states that the Supreme Court therein was considering a matter arising out of Section 271(c) of the Companies Act, 2013. It is his contention that the Supreme Court while adjudicating upon a case arising out of Section 271(c) of the Companies Act, 2013 cannot be considered to be a competent court under Section 2(1)(e) of the Arbitration Act while deciding a petition challenging an arbitral award under Section 34 of the Arbitration Act.

14. Mr. Dutt further submits that the Hon'ble Supreme Court in the Civil Appeal No.5766/2021 has not given any findings to the effect that the ICC Award has been set aside, nor has it given any direction to the Ld. Single Judge that the ICC Award ought to be set aside, and therefore the Impugned

Judgment which solely relies upon the Judgment of the Apex Court passed in Civil Appeal No.5766/2021 is erroneous.

15. It is submitted by Mr. Dutt that the contents of paragraphs 13.5 and 13.6 of the of the Judgment of the Apex Court are at best *obiter dicta* and do not constitute *ratio decidendi* and as a result, are not binding upon the Ld. Single Judge or this Hon'ble Court. In support of this argument, he places reliance upon the decision in State of Gujarat v. Utility Users Welfare Association, **(2018) 6 SCC 21**. The said Judgment relies upon the inversion test propounded by Professor Wambaugh to identify the *ratio decidendi* of a judgment. The inversion test has been followed by courts to imply that the *ratio decidendi* includes those propositions which are absolutely necessary for the decision of the case. He, therefore, contends that paragraphs 13.5 and 13.6 of the judgment of the Apex Court do not constitute *ratio decidendi*, and hence was not binding upon the learned Single Judge while deciding a challenge to an award under Section 34 of the Arbitration Act.

16. Mr. Dutt further relies upon the decision of the Apex Court in Divisional Controller v. Mahadeva Shetty, **(2003) 7 SCC 197**, to argue that the scope and authority of a precedent should not be expanded by a court beyond the needs of a given situation and the only thing binding as an authority upon courts is the principle upon which the case is decided. Casual expressions by a Judge cannot be considered to be *ratio decidendi* and would at best constitute *obiter dicta* and thus cannot be considered to be binding upon Courts.

17. Mr. Dutt submits that the Apex Court, while deciding the Civil Appeal No.5766/2021, arising out of an Order passed by NCLAT, was concerned as to whether the ingredients under Section 271 of the Companies Act were satisfied in the facts of the case. It is his contention that if the

inversion test is applied to paragraphs 13.5 and 13.6 of the Winding Up SC Appeal, the said paragraphs can only be considered to be *obiter dicta* and not *ratio decidendi*, as even in the absence of those observations, the decision of the Hon'ble Supreme Court upholding the order of the NCLAT would still stand.

18. It is submitted by Mr. Dutt that Ld. Single Judge has made an error in stating that the principle of *res judicata* is applicable to the proceedings under Section 34 of the Arbitration Act for setting aside the Arbitral Award. He contends that one of the essential ingredients for applying the principle of *res judicata* is that the subject matter in the former proceedings should be directly and substantially in issue in the subsequent proceedings. He argues that the aforesaid condition is not satisfied in the facts of the present case as the subject matter in the former proceedings (i.e. the proceedings before the Apex Court in Civil Appeal No.5766/2021) was not "directly and substantially" in issue in the subsequent proceedings (i.e. the challenge to an award under Section 34 of the Arbitration Act). He relies upon the decision in Sajjadanashin Sayed v. Musa Dadabhai Ummer, **(2000) 3 SCC 350**, to substantiate this proposition.

19. It is further submitted by Mr. Dutt that another ingredient for the principle of *res judicata* to be applicable to a case is that the court in the former proceedings should be a court of competent jurisdiction to decide the issues in the subsequent proceedings. He states that the Hon'ble Supreme Court, while deciding the Civil Appeal No.5766/2021, cannot be considered to be a court of competent jurisdiction to decide the issues raised in a Petition under Section 34 of the Arbitration Act because it is not a Court as defined under Section 2(1)(e) of the Arbitration Act. He places reliance upon the decisions in Srihari Hanumandas Totala v. Hemant Vithal Kamat

& Ors., **(2021) 9 SCC 99**, and Jamia Masjid v. Sri KV Rudrappa, **(2022) 9 SCC 225**, in support of his contention.

20. Mr. Dutt further submits that every statement made by the Apex Court in Civil Appeal No.5766/2021 would also not be binding upon the High Court under Article 141 of the Constitution of India. He places reliance on the decision of the Apex Court in Municipal Committee, Amritsar v. Hazara Singh, **(1975) 1 SCC 794**. He states that statements in the Judgment which constitute *obiter dicta* would not be binding upon the High Court under Article 141 of the Constitution of India. He states that the findings on fraud arrived at by the Supreme Court, being findings of fact would not be binding upon the Ld. Single Judge under Article 141 of the Constitution while dealing with a petition under Section 34 of the Arbitration Act. It is his submission that as a consequence of the aforesaid, the applicability of Section 57 of the Evidence Act to the proceedings under Section 34 of the Arbitration Act would not arise.

21. It is stated by Mr. Dutt that the decision of the Hon'ble Supreme Court in Peerless General Finance and Invest Company Ltd. v. CIT**, (2020) 18 SCC 625**, is consistent with the decision in Hazara Singh (supra). He submits that the statement in Peerless (supra) that a pronouncement of law, even though not the ratio of the judgment of the Hon'ble Supreme Court, would be binding upon a High Court, is in the context of Article 141 of the Constitution of India, and cannot be interpreted in a manner to mean that *obiter dictum* would become binding as the same would then be contrary to decision given by coordinate benches of the Hon'ble Supreme Court.

22. It is further stated by Mr. Dutt that Article 144 of the Constitution of India would be inapplicable to the facts of the present case as the Judgment passed by the Apex Court in Civil Appeal No.5766/2021 does not command

any particular form of obedience as neither has the Supreme Court passed an order of setting aside the ICC Award, nor has it issued any directions or order to set aside the ICC Award. He relies upon the decision in Kantaru Rajeevaru v. Indian Young Lawyers Association, **(2020) 2 SCC 1**, in support of his argument.

23. Mr. Dutt submits that Respondent No. 1 did not raise the ground pertaining to fraud before the Arbitral Tribunal, nor was it raised when the application under Section 34 was filed on 19.11.2015. He submits that the challenge to the ICC Award on the ground of fraud was raised only in the amendment applications filed by Antrix, which have not been adjudicated upon by the Ld. Single Judge. He argues that a party alleging fraud must plead material facts in respect of it and the Court cannot return a finding on fraud *sans* any specific pleadings on fraud. He relies upon the decision in Bijendra Nath Srivastava v. Mayank Srivastava, **(1994) 6 SCC 117**, in support of his argument.

24. Mr. Dutt further submits that Section 34 of the Arbitration Act does not permit a Court to *suo motu* discover grounds of fraud or public policy and set aside an arbitral award on this basis. He argues that since the application for the amendment of the petition under Section 34 of the Arbitration Act has not been adjudicated by the learned Single Judge, the learned Single Judge could not have considered the grounds of fraud without any specific pleadings pertaining fraud while allowing the petition under Section 34 of the Arbitration Act. In support of this argument, he places reliance upon the decision in State of Maharashtra v. Hindustan Construction, **(2010) 4 SCC 518,** and State of Chhatisgarh v Sal Udyog, **(2022) 2 SCC 275**.

25. It is submitted by Mr. Dutt that all material facts in relation to fraud were known to Antrix prior to the termination of the Devas Agreement, and the failure of Antrix to make any pleadings regarding the same before the Arbitral Tribunal or in its Petition filed under Section 34 of the Arbitration Act on 19.11.2015, indicate that Antrix had elected not to take fraud as a ground to challenge the ICC Award.

26. It is further submitted by Mr. Dutt that while the CBI registered its FIR against Devas and its officials on 16.03.2015, the Petition under Section 34 was filed by Antrix only on 19.11.2015, that is eight (8) months after the date of registration of the FIR. He states that while the first amendment application was filed on 10.11.2016, the second amendment application was filed on 12.01.2021 to introduce the ground of fraud as a challenge to the ICC Award in the Section 34 Petition, and the same has not been decided by the learned Single Judge. He submits that the FIR registered by the CBI contains all the material facts that Antrix sought to introduce by way of its two amendment applications. He further submits that the learned Single Judge has overcome the argument of delay in introducing the grounds of fraud by placing reliance on the findings of the Apex Court in its Judgment passed in Civil Appeal No.5766/2021. He submits that had the application for amendment of petition under Section 34 of the Arbitration Act been argued, the same was liable to be dismissed on grounds of delay alone.

27. It is submitted by Mr. Dutt, that despite having prior knowledge of the alleged fraud, instead of seeking to void the Agreement under Section 17 read with Section 19 of the Indian Contract Act, 1872, Antrix elected to affirm the Devas Agreement and the Agreement was terminated under the terms of the Agreement. He places reliance upon the decision in Ningawwa v. Byrappa, **(1968) 2 SCR 797**, in support of this argument. He therefore

submits that it is apparent from the aforesaid facts that Antrix has elected to not take fraud as a ground to challenge the ICC Award under Section 34 of the Arbitration Act.

28. Mr. Dutt has put forth a contention that the principle "*fraud vitiates all solemn acts*", while being a salutary principle cannot override express provisions of law applicable to the facts of a particular case. He places reliance upon the decision in J.K. Cotton Spinning and Weaving Mills Co. Ltd. v. State of U.P., **AIR 1961 SC 1170**, wherein the Apex Court stated that when there is a conflict between a specific provision and a general provision, the specific provision prevails over the general provision. He contends that in the present case, Section 17 & 19 of the Indian Contract Act, 1872 would be the specific provisions which provide that a contract which has been induced by fraud is voidable at the option of the party whose consent has been obtained by fraud. He further contends that Explanation 1(i) to Section 34(2)(b)(ii) of the Arbitration Act is another specific provision of law which would be applicable to the facts of the present case which states that an arbitral award can be challenged on the ground of being contrary to the public policy of India if the making of the award has been induced or affected by fraud or corruption or is in violation of Section 75 or 81 of the Arbitration Act. He therefore contends that the application of the principle of "*fraud vitiates all solemn acts*" would be misconceived in the present case.

29. Mr. Dutt contends that there must be a causative link established between the fraud relied upon and the making of the award under challenge and that Antrix has failed to establish any such causative link. He places reliance upon the decision by the Singapore Court of Appeal in Bloomberry

Resorts & Hotels Inc. v. Global Gaming Philippines LLC, **(2021) SGCA 9**, to buttress his argument.

30. Mr. Dutt argues that the ground of fraud to challenge the ICC Award under the Section 34 Petition has been introduced by Antrix by way of two amendment applications, both of which have been filed beyond the prescribed period of 3 months and 30 days provided for under Section 34(3) of the Arbitration Act has passed, and the applications are thus barred by limitation. He submits that for setting aside an arbitral award under Section 34 of the Arbitration Act, no ground of challenge can be raised after the time limit prescribed under Section 34(3) Arbitration Act. He relies upon the decision in Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., **(2022) 1 SCC 75**, and P. Radha Bai v. P. Ashok Kumar, **(2019) 13 SCC 445**, in support of this argument. Mr. Dutt submits that the limitation period under Section 34(3) of the Arbitration Act commences from the date on which a party receives the arbitral award and has knowledge of the award. The only relevant fact in consideration, therefore, is the date of the receipt of the award and whether there was any fraud in the delivery of the award. He submits that the receipt of a chargesheet, supplementary chargesheet etc. is an irrelevant consideration when considering the aspect of limitation under Section 34(3) of the Arbitration Act. He further submits that the chargesheets filed by the CBI do not allege fraud in relation to the ICC Award. It is submitted by Mr. Dutt that an amendment application seeking to introduce a ground which amounts to a fresh application under Section 34 of the Arbitration Act for setting aside an arbitral award is impermissible if it is filed beyond the period of limitation prescribed under Section 34(3) of the Arbitration Act. He further submits that even if the amendments proposed by a Respondent are not impermissible, the belated nature and

circumstance in which the introduction of new grounds is sought by Antrix is peculiar and not such that the "interests of justice" would warrant allowing such an amendment. In support of this argument, he relies upon the decision in State of Maharashtra v. Hindustan Construction, **(2010) 4 SCC 518**.

Submissions by Respondent No. 1/Antrix

31. Mr. N. Venkataraman, Learned Additional Solicitor General of India, appearing on behalf of Respondent No. 1/Antrix, submits that the decision of the Hon'ble Supreme Court in Civil Appeal No. 5766/2021 would be binding upon the Ld. Single Judge and this Court on the principle of *res judicata*.

32. Ld. ASG submits that the Apex Court in various judgments has laid down five (5) conditions which must be satisfied for the principle of *res judicata* to be applicable and the same have been fulfilled in the present case. He submits that *firstly*, there should be a former proceeding, which in this case is the winding up petition before the NCLT that had been filed on the ground that the company was incorporated for fraudulent and unlawful purposes and the affairs of the company were being conducted in a fraudulent manner. The order of the NCLT in these proceedings has been upheld by the NCLAT and the Apex Court. In these proceedings, the Apex Court has held that the commercial relationship between Antrix and Devas was a product of fraud purported by Devas and the plant which has grown out of the fraud including the arbitral award is infected by the poison of fraud. *Secondly*, the subject matter in both the proceedings are the same and in the present case the winding up proceedings and the petition under Section 34 are primarily dealing with the fraudulent actions of Devas.

Thirdly, the contesting parties in both the proceedings are the same since the parties in the winding up proceedings and in the present case are Devas, Antrix and DEMPL. *Fourthly*, the decision in the former proceedings was made by a competent court. He states that the Apex Court being the highest court in the country was competent to decide the appeal filed against the order of the NCLAT which had upheld the order of the NCLT which in turn had allowed the application under Section 271 of the Companies Act, 2013 for winding up of Respondent No.2 on the ground that the company had been formed for a fraudulent purpose and that the affairs of the company were being conducted in a fraudulent manner. *Lastly*, the decision of the Hon'ble Supreme Court dated 17.01.2022 in Civil Appeal No.5766/2021 has attained finality and had been delivered after hearing all the parties. The learned ASG, therefore, submits that the law laid down by the Apex Court in various cases applies to the present case. He states that the findings of the Apex Court pertaining to the fraudulent actions of Devas, the Devas Agreement and the Arbitral Award, in the decision of the Apex Court in Civil Appeal No.5766/2021 arising out of proceedings under Section 271 of the Companies Act, would operate as *res judicata* while dealing with an application under Section 34 of the Arbitration Act while answering the question as to whether the making of arbitral award is vitiated by fraud and the arbitral award is in conflict with the public policy of India.

33. The Ld. ASG places reliance upon the decision in K. Arumuga Velaiah v. P. R. Ramasamy, **(2022) 3 SCC 757** and Mathura Prasad Sarjoo Jaiswal v. Dossibai N.B. Jeejeebhoy, **AIR 1971 SC 2355**, to submit a matter in issue, even if it is a pure question of fact, and has been decided in an earlier proceeding by a competent court and attained finality, will operate as *res judicata* in a subsequent litigation between the same parties. He submits

that the same principle will also apply when it is a case of mixed question of law and fact. It is the contention of the Ld. ASG that the Hon'ble Supreme Court in its decision dated 17.01.2022, while upholding the order of the NCLT dated 25.05.2021 and the order of NCLAT dated 08.09.2021, did not find any perversity in the findings recorded by both the Tribunals. He states that the conclusions which were arrived at by the NCLT and NCLAT were borne out by documents which weren't challenged by either Devas or DEMPL as being inadmissible or fabricated and these findings have attained finality, the learned Single Judge has not erred in relying on those facts while adjudicating the petition under Section 34 of the Arbitration Act.

34. It is submitted by the Ld. ASG that the findings rendered by the Hon'ble Supreme Court in paragraphs 13.5 & 13.6 of its decision in Civil Appeal No.5766/2021 constitutes the ratio of the judgment as in the absence of these findings, the conclusion of winding up of a company on the ground that the purpose of incorporating the company was fraudulent and that the affairs of the company were being conducted in a fraudulent manner could not have been arrived at. He, therefore, states that the contention of the Appellant that these findings are only obiter are erroneous. He further submits that these observations are not standalone observations but rather form part of a string of findings on fraud made by the Hon'ble Supreme Court commencing from paragraph 12.8 of the decision in Civil Appeal No.5766/2021. The said paragraphs should thus be read in the context of the rest of the judgment and not as standalone paragraphs. He places reliance upon the decision in Director of Settlements, A.P. and Others v. M.R. Apparao, **(2002) 4 SCC 638**, and State of Haryana v. Ranbir Alias Rana, **(2006) 5 SCC 167**, to buttress his argument.

35. Without prejudice to the aforesaid argument, the Ld. ASG argues that even an obiter of the Hon'ble Supreme Court is binding under Article 141 of the Constitution on the High Courts. He relies upon the decision in Peerless General Finance and Investment Company Ltd. v. CIT, **(2020) 18 SCC 625**, to support this argument. The learned ASG, therefore, submits that the learned Single Judge was bound by the findings of the Apex Court on fraud under Article 141 of the Constitution of India. He states that the contention of the Appellant that these are only findings on fact and, therefore, would not be covered by Article 141 of the Constitution of India, is not tenable.

36. The Ld. ASG has directed the attention of this Court towards paragraphs 12.8(i), 12.8(iii), 12.8(vi), 12.8(vii), 12.8(viii) and 12.8(ix) of the decision of the Apex Court in Civil Appeal No.5766/2021wherein the Supreme Court has upheld certain findings on fact made by the NCLT and NCLAT in their Orders dated 25.05.2021 and 08.09.2021 respectively. The aforesaid paragraphs indicate that *firstly*, the Devas Agreement was signed in contravention of Indian laws, namely the SATCOM Policy of India, and Devas undertook to perform the impossible under the terms of the Devas Agreement; *secondly*, the Devas Agreement was signed without a tender auction process which is the normal procedure when granting public largesse; *thirdly*, Devas did not possess the pre-requisites to deliver the services ("**Devas Services**"), devices ("**Devas Devices**") or the technology ("**Devas Technology**") it promised to deliver under the terms of the Devas Agreement; *lastly*, the Devas Services it promised to deliver were a combination of telecommunication and broadcasting services, which at the relevant point of time were impermissible under Indian law. He submits that the observations made by the Hon'ble Supreme Court made in the aforesaid

paragraphs highlight the illegality of the arbitration agreement dated 28.01.2005.

37. Further, the Ld. ASG has directed the attention of this Court to paragraphs 12.8(x) and 12.8(xii) of the decision of the Apex Court in the Winding Up SC Appeal. These two paragraphs indicate that *firstly*, the Union Cabinet was kept completely in the dark about the Devas Agreement and material information was suppressed to obtain the approvals from the Union Cabinet; and *secondly*, the Union Cabinet was misled to believe that there are several firm expressions of interest before ISRO and therefore the approvals from the Union Cabinet were also obtained through misrepresentation. The Ld. ASG therefore submits that the aforesaid findings on facts made by the Hon'ble Supreme Court in its decision in Civil Appeal No.5766/2021 highlight the fraudulent and illegal actions of Devas which are final and binding upon the High Court.

38. It is submitted by the Ld. ASG that the arguments made by Mr. Dutt apropos the aspect of limitation are barred by the principle of *res judicata*. The Hon'ble Supreme Court in paragraph 8 of its decision in Civil Appeal No.5766/2021 has dealt with the question of whether the discovery of fraud being subsequent to the termination of the Devas Agreement would render the proceedings under Section 271 of the Companies Act barred by limitation. He submits that the grounds pertaining to fraud before the Hon'ble Supreme Court and before the learned Single Judge are the same, and if the plea of limitation has been rejected by the Apex Court, the learned Single Judge has not made an error as the question of limitation is a mixed question of fact and law.

39. Learned ASG submits that the initial application under Section 34 of the Arbitration Act was filed within the time period specified under Section

34(3) of the Arbitration Act. He submits that the Arbitration Act does not prescribe a time period within which an amendment application to a Petition under Section 34 of the Arbitration Act must be filed. He submits that the aforesaid provision applies only to the initial application filed under Section 34(1) of the Arbitration Act and not to amendment applications filed subsequently.

40. The Ld. ASG places reliance upon the decision of the Hon'ble Supreme Court in State of Maharashtra v. Hindustan Construction Company Limited, **(2010) 4 SCC 518**, to submit that the Courts have discretion to permit an amendment application in a petition under Section 34 of the Arbitration Act if the initial application has been filed within time and allowing the amendment application would be in the interest of justice. It cannot be the intention of the legislature to not allow any amendment after the period of limitation prescribed under Section 34(3) of the Arbitration Act has expired. He submits that in the present case, the amendment applications filed by Antrix bring on record pleadings pertaining to fraud which have been upheld by the Apex Court and, thus, it is an appropriate case for the Court to exercise its discretion to permit the amendment applications in the interests of justice.

41. The Ld. ASG submits that there is a significant difference between raising a fresh ground and filing an amendment application before a Court to bring to its notice a relevant fact/development for consideration by this Hon'ble Court. He states that on 04.11.2020, the Ld. Attorney General for India informed the Hon'ble Supreme Court that the dispute between the parties could not be settled through mediation as the Union of India has discovered fraud of serious nature in the transactions leading up to the dispute between Devas and Antrix. It is on the basis of this statement that

Antrix filed the second amendment application on 12.01.2021 bringing on record the elements of fraud committed by Devas and its shareholders. Further, the decision of the Apex Court holding that Devas and its shareholders have committed acts of fraud becomes a relevant and material aspect for consideration by this Court and thus cannot be stated to be a fresh ground. He further submits that the aspects of fraud were uncovered only after investigation and, therefore, applications were filed in two stages.

42. It is submitted by the Ld. ASG that the Hon'ble Supreme Court in Civil Appeal No.5766/2021 has observed that three kinds of fraud have been perpetrated by Devas, its shareholders and its officers. These three types of fraud are as follows:

a. Contractual Fraud – The Ld. ASG submits that the Hon'ble Supreme Court has held that Devas Services, Devas Technology and Devas Devices are all non-existent. Devas, by offering these through Devas Agreement when they were non-existent and misrepresenting that the IPR for it exists with Devas, has committed contractual fraud. The Apex Court has also held that the Devas Agreement was in contravention of the SATCOM Policy.

b. Statutory Fraud – The Ld. ASG submits that the findings on fraud rendered by the Hon'ble Supreme Court in its decision attract all the five clauses of Section 17 of the Indian Contract Act, 1872 read with Section 271(c) of the Companies Act, 2013, and thus constitutes statutory fraud.

c. Public Fraud against the Nation and its exchequer – The Ld. ASG submits that the Apex Court in paragraphs 9.13, 9.15, 13.1 and 13.5 of its Judgment passed in Civil Appeal No.5766/2021

establish that Devas and DEMPL have committed a public fraud against the nation and its exchequer and, thus, cannot be permitted to reap the benefit of their fraud.

He, therefore, submits that the findings on fraud rendered by the Apex Court in its Judgment passed in Civil Appeal No.5766/2021 staring at its face, the learned Single Judge was bound by those findings and could not have upheld an award which is the outcome of an agreement which was fraudulent in nature from its inception.

43. The Ld. ASG has contended that the award is in conflict with the public policy of India which is a ground to set aside an Arbitral Award under Section 34 of the Arbitration Act. He submits that the phrase "conflict with the public policy of India" found in Section 34(2)(b) of the Arbitration Act was first interpreted by the Hon'ble Supreme Court in ONGC v. Saw Pipes, **(2003) 5 SCC 705**, which has read "patent illegality" into the ambit of public policy. The phrase came up for interpretation again in Associate Builders v. Delhi Development Authority, **(2015) 3 SCC 49**, wherein the Apex Court held that an arbitral award is in "conflict with the public policy of India" when it is either *firstly*, against the fundamental policy of Indian law; *secondly*, against the interest of India; *thirdly*, against justice; *fourthly*, against morality; and *lastly*, patent illegality. The Ld. ASG submits that in 2015, Section 34 of the Arbitration Act was amended and an explanation was added to Section 34(2)(b)(ii) to define the contours of "public policy of India". As per the said amendment, an arbitral award could be set aside if it was against the fundamental policy of India or against the most basic notions of morality and justice. It also introduced an additional ground for setting aside an arbitral award i.e., Section 34(2A), which allowed the Court to set aside an award if it was patently illegal. The learned ASG has placed

reliance on the judgments of the Supreme Court in Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI), **(2019) 15 SCC 131**, and Patel Engineering Limited v. North Eastern Electric Power Corporation Limited, **(2020) 7 SCC 167,** both of which have been delivered subsequent to the 2015 Amendment.

44. The Ld. ASG submits that in 2019 there was a further amendment to Section 34(2)(a) of the Arbitration Act wherein in place of the words "furnishes proof that" the words "*establishes on the basis of the record of the arbitral tribunal that*" was substituted. He, therefore, contends that the words "*establishes on the basis of the record of the arbitral tribunal that*" was carefully not included in Section 34(2)(b) and 34(2A) of the Arbitration Act. He, therefore, states that a Court can on its own, even in the absence of pleadings and even when the record of the Tribunal does not establish a fraud, find that the Arbitral Award is in conflict with the public policy of India. He places reliance upon the decision in State of Chhattisgarh v Sal Udyog, **(2022) 2 SCC 275**, to buttress his argument.

45. The Ld. ASG further submits that an interpretation where the Court is not permitted to act on its own under Section 34 would run contrary to the intention of the Legislature which has given the power to the Court to go into the question as to whether the making of the award was induced or affected by fraud or corruption or is in contravention with the public policy of Indian law without any pleadings or any findings by the Tribunal or any pleading in the application moved under Section 34 of the Arbitration Act. He suggests that the power of the Court is not circumscribed by pleadings while deciding the question arising under Section 34(2)(b) of the Arbitration Act. He submits that fetters cannot be put upon the exercise of this power when the Parliament has not placed any such limitation on it. He submits

that the powers of the Court under Section 34 and 37 are broad and should not be interpreted in a narrow manner.

46. It is submitted by the Ld. ASG that in the facts of the present case, Section 34(2)(b)(ii) is clearly applicable and the Ld. Single Judge has correctly set aside the award for being in conflict with the public policy of India. He submits that when the Impugned Award is read with the judgment of the Hon'ble Supreme Court in Civil Appeal No.5766/2021. He states that the finding arrived at by the Arbitral Tribunal in the award is contrary to the finding of the Supreme Court. He further states that the SATCOM Policy has the force of law and in view of the finding of the Apex Court that the Devas Agreement is in contravention of the SATCOM policy, the award could not be sustained. He states that the ICC Award therefore is contrary to the fundamental policy of Indian law. He further submits that the ICC Award is contrary to the interests of India. He states that the Apex Court in paragraph 13.5 of its judgment in Civil Appeal No.5766/2021 has explicitly held that the fraud is in conflict with the most basic notions of morality and justice. He relies upon the decision in Associate Builders (supra) in support of his contention.

47. It is further submitted by the Ld. ASG that when the findings of the ICC Award are read with the findings of the Hon'ble Supreme Court in its decision in Civil Appeal No.5766/2021, it becomes apparent that the ICC Award is in conflict with the public policy of India. Further, the Hon'ble Supreme Court in its Judgment passed in Civil Appeal No.5766/2021 has given multiple findings regarding the actions of Devas being tainted by fraud and Devas has misled the Arbitral Tribunal fraudulently. It is thus evident that the making of the ICC Award is induced and affected by fraud and corruption.

48. The Ld. ASG further submits that it is a settled principle that "fraud vitiates everything". He places reliance upon the decisions in S.P. Chengalvarayan Naidu v. Jagannath and Others, **(1994) 1 SCC 1**, Ram Chandra Singh v. Savitri Devi and Others, **(2003) 8 SCC 319**, Bhaurao Dagdu Paralkar v. State of Maharashtra, **(2005) 7 SCC 605**, and Satluj Jal Vidyut Nigam Ltd vs. Raj Kumar Rajinder Singh, **(2019) 14 SCC 449**, in support of this argument.

49. It is submitted by the Ld. ASG that the Apex Court in its decision in Civil Appeal No.5766/2021 has made several findings on the fraudulent conduct of Devas and DEMPL, including that Devas was formed for a fraudulent purpose and its affairs were being conducted in a fraudulent manner. Consequently, all actions, transactions and agreements entered into by Devas are also affected by fraud and would stand vitiated. The Hon'ble Supreme Court has made this observation in paragraphs 13.5 & 13.6 of its decision in Civil Appeal No.5766/2021, which as stated earlier, are findings binding upon the Ld. Single Judge and this Court.

50. It is further submitted by the Ld. ASG that if Devas and DEMPL are permitted to reap the benefits of the ICC Award, after the Apex Court has given a finding that Devas was formed for a fraudulent purpose and its affairs were being conducted in a fraudulent manner, it would lead to an absurdity. He submits that the facts surrounding the fraudulent actions of Devas and DEMPL have attained finality and the parties must face the consequences.

51. The learned ASG further contended that Article 144 of the Constitution of India mandates that all authorities shall act in aid of the Supreme Court of India. He states that once the Apex Court had given a finding that the company was incorporated for a fraudulent and unlawful

purpose and the affairs of the company have been conducted in a fraudulent manner, then while testing the correctness of an award which has decided the rights and liabilities of parties to an agreement which has been held to be affected by fraud, the learned Single Judge could not have proceeded as if the award is valid in the eyes of law as this would go against the grain of Article 144 of the Constitution of India.

Rejoinder submissions by the Appellant/DEMPL

52. It is submitted by Mr. Dutt that Respondent No. 1 cannot be permitted to rely upon the decision in State of Chhatisgarh v Sal Udyog, **(2022) 2 SCC 275**, to argue that additional grounds can be introduced in a Section 34 petition as the Court in that case was concerned with an alleged patent illegality which is manifest on the face of an Arbitral Award. In the present case, the Respondent No. 1 seeks to introduce a ground of fraud which can never be apparent on the face of the ICC Award as Antrix elected not to raise the issue of fraud in the arbitration proceedings.

ANALYSIS

Whether the findings of the Apex Court in Civil Appeal No.5766/2021 are binding on the Single Judge under Article 141, Article 144 of the Constitution of India and principle of res judicata.

53. The question which arises for consideration is whether the learned Single Judge was correct in setting aside the award by primarily relying on the findings of the Apex Court in Civil Appeal No.5766/2021. The Apex Court had passed the said judgment in proceedings which had arisen in a

winding up petition filed under Section 271(c) of the Companies Act, 2013 for winding up Devas on the ground that the company had been incorporated for fraudulent purposes and that the affairs of the company were being conducted in a fraudulent manner. The NCLT had allowed the application and the order of the NCLT was upheld by the NCLAT and by the Apex Court.

54. The Appellants before this Court have argued that the Ld. Single Judge has erred by relying upon the decision in Civil Appeal No.5766/2021, primarily on the basis that the decision of the Supreme Court is not binding upon the High Court while deciding the Section 34 Petition. The argument of Mr. Dutt in this regard can be divided into the following aspects:

a. Paragraphs 13.5 and 13.6 of the decision in the Winding Up SC Appeal constitute *obiter dicta* and not *ratio decidendi* and are thus not binding upon the High Court

b. The principle of *res judicata* is inapplicable in the present case as the issues in the petition under Section 34 of the Arbitration Act were not "directly and substantially" in issue in Civil Appeal No.5766/2021. Further, the Supreme Court while deciding an appeal arising out of proceedings initiated under Section 271(c) of the Companies Act, 2013 cannot be considered to be a Court competent to decide a challenge to enforcement of an award under Section 34 of the Arbitration Act.

c. Article 144 of the Constitution of India is inapplicable to the present case.

55. In order to decide the issue at hand in a constructive manner, it is only appropriate that this Court deals with the each of the aforesaid aspects individually.

56. It is the submission of the Appellants that paragraphs Nos.13.5 & 13.6 of the judgment passed by the Apex Court in Civil Appeal No.5766/2021 only constitute *obiter dicta* and not *ratio decidendi*. Paragraph 13 of the said judgment reads as under:

> *"**13**. Miscellenous Grounds*
>
> ***13.1** Apart from the above main grounds of attack, which we have dealt in extenso, the learned senior counsel for the appellants also made a few supplementary submissions. One of them was that a lis between two private parties cannot become the subject matter of a petition under Section 271(c). But this argument is to be rejected outright, in view of the fact that the claims of Devas and its shareholders are also on the property of the Government of India. The space segment in the satellite proposed to be launched by the Government of India, is the property of the Government of India. In fact, the shareholders have secured two awards against the Republic of India under BIT. Therefore, it is neither a lis between two private parties nor a private lis between a private party and a public authority. It is a case of fraud of a huge magnitude which cannot be brushed under the carpet, as a private lis.*
>
> ***13.2** Another contention raised on behalf of the appellants is that the petition under Section 271(c) should have been preceded, at least by a report from the Serious Fraud Investigation Office, which has now gained statutory status under Section 211 of the Companies Act, 2013. But this contention is un-acceptable, in view of the fact that under the 2013 Act there are two different routes for winding up of a company on allegations of fraud. One is under Section 271(c) and the other is under the just and equitable clause in Section 271(e), read with Section 224(2) and Section 213(b). What was Section 439(1)(f) read with Section 243 and Section 237(b) of*

the 1956 Act, have now taken a new avatar under Section 224(2) read with Section 213(b). It is only in the second category of cases that the report of the investigation should precede a petition for winding up.

13.3 *Yet another contention raised on behalf of the appellants is that the criminal complaint filed for the offences punishable under Section 420 read with Section 120B IPC, has not yet been taken to its logical end. Therefore, it is contended that in case the officials of Antrix and shareholders of Devas are acquitted after trial, the clock cannot be put back, if the company is now wound up. Attractive as it may seem at first blush, this contention cannot hold water, if scrutinised a little deeper. The standard of proof required in a criminal case is different from the standard of proof required in the proceedings before NCLT. The outcome of one need not depend upon the outcome of the other, as the consequences are civil under the Companies Act, 2013 and penal in the criminal proceedings. Moreover, this argument can be reversed like the handle of a dagger. What if the company is allowed to continue to exist and also enforce the arbitration awards for amounts totalling to tens of thousands of crores of Indian Rupees (The ICC award is stated to be for INR 10,000 crores and the 2 BIT awards are stated to be for INR 5,000 crores) and eventually the Criminal Court finds all shareholders guilty of fraud? The answer to this question would be abhorring.*

13.4 *Lastly, it was contended that the actual motive behind Antrix seeking the winding up of Devas, is to deprive Devas, of the benefits of an unanimous award passed by the ICC Arbitral tribunal presided over by a former Chief Justice of India and the two BIT awards and that such attempts on the part of a corporate entity wholly owned by the Government of India would send a wrong message to international investors.*

> ***13.5*** *We do not find any merit in the above submission. If as a matter of fact, fraud as projected by Antrix, stands established, the motive behind the victim of fraud, coming up with a petition for winding up, is of no relevance. If the seeds of the commercial relationship between Antrix and Devas were a product of fraud perpetrated by Devas, every part of the plant that grew out of those seeds, such as the Agreement, the disputes, arbitral awards etc., are all infected with the poison of fraud. A product of fraud is in conflict with the public policy of any country including India. The basic notions of morality and justice are always in conflict with fraud and hence the motive behind the action brought by the victim of fraud can never stand as an impediment.*
>
> ***13.6*** *We do not know if the action of Antrix in seeking the winding up of Devas may send a wrong message, to the community of investors. But allowing Devas and its shareholders to reap the benefits of their fraudulent action, may nevertheless send another wrong message namely that by adopting fraudulent means and by bringing into India an investment in a sum of INR 579 crores, the investors can hope to get tens of thousands of crores of rupees, even after siphoning off INR 488 crores."*

A perusal of the abovementioned paragraphs shows that while deciding the issues as to whether Devas must be wound up or not on the ground that Devas was incorporated for fraudulent purposes and its affairs were being conducted in a fraudulent manner, the Apex Court has in no uncertain terms held that if the seeds of the commercial relationship between Antrix and Devas were a product of fraud purported by Devas, then every part of the plant that grew out of its seeds, such as the Agreement, the disputes, arbitral awards, etc. are all infected with the poison of fraud. The Apex Court further

observed that a product of fraud is in conflict with the public policy of any country including India and the basic notions of morality and justice are always in conflict with fraud. These findings are in fact the heart of the judgment and without these findings, the Apex Court could not have dismissed the appeals and affirmed the orders of the NCLT and NCLAT, which have allowed the applications for winding up of Devas on the ground that it was incorporated for a fraudulent purpose and the affairs of the company were being conducted in a fraudulent manner.

57. The Apex Court in several judgments has laid down the test to determine as to what would constitute an *obiter* in a judgment and what constitutes its *ratio*. One of the earliest decisions by the Hon'ble Supreme Court on this aspect was delivered by a Constitution Bench in State of Orissa v. Sudhansu Sekhar Misra, **(1968) 2 SCR 154**, wherein the Court, relying upon the decision of the House of Lords in Quinn v. Leathem, **[1901] A.C. 495,** stated as under:

> *"**12.** ...*
>
> ***What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it**. On this topic this is what Earl of Halsbury L.C. said in Quinn v. Leathem [[1901] AC 495]:*
>
> > *"Now before discussing the case of Allen v. Flood, [1898] AC 1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that **every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and***

> ***qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides.*** *I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."*
>
> *It is not a profitable task to extract a sentence here and there from a judgment and to build upon it…."*
>
> (emphasis supplied)

58. Thereafter, in Municipal Committee v. Hazara Singh, **(1975) 1 SCC 794**, upon which Mr. Dutt has placed heavy reliance during the course of the proceedings, it has been held:

> *"**4.** It is plain from submission of counsel that the appellant's grievance is not so much against the acquittal as against a passing reference by the Sessions Court to an obiter observation of this Court in Malwa Cooperative Milk Union Ltd., Indore v. Biharilal [Cri.As. No. 235 and 236 of 1964, decided on 14-8-1967] . Obviously, the Sessions Judge had concluded that a minor error in the chemical analysis might have occurred. He was perhaps not right in saying so.* ***Anyway, a reading of his judgment shows that the mention of this Court's unreported ruling (supra) was meant to fortify himself and not to apply the ratio of that case. Indeed, this Court's decision cited above discloses that Hidayatullah, J. (as he then was) was not laying down the law that minimal deficiencies in the milk components justified acquittal in food adulteration cases.*** *The point that arose in that case was whether the High Court was justified in upsetting an acquittal in revision, when the jurisdiction was invoked by a rival trader, the alleged adulteration having been so negligible that the State had withdrawn*

the prosecution resulting in the acquittal. Certainly, ***the revisional power of the High Court is reserved for setting right miscarriage of justice, not for being invoked by private persecutors. Such was the ratio but, in the course of the judgment, Hidayatullah, J. to drive home the point that the case itself was so marginal, referred to the microscopic difference from the set standard. To distort that passage, tear it out of context and devise a new defence out of it in respect of food adulteration cases, is to be grossly unjust to the judgment.*** *Indeed, the Kerala case cited before us by counsel viz. State of Kerala v. Vasudevan Nair [Cr.A. No. 89 of 1973, decided by the Kerala High Court on July 18, 1974 — All India Prevention of Food Adulteration Cases Reporter, 1975 Part I, p. 8] itself shows that such distortion of the passage in the judgment did not and could not pass muster. When pressed with such misuse of this ruling, the High Court repelled it. The law of food adulteration, as also the right approach to decisions of this Court, have been set out correctly there:*

> *"****Judicial propriety, dignity and decorum demand that being the highest judicial tribunal in the country even obiter dictum of the Supreme Court should be accepted as binding. Declaration of law by that Court even if it be only by the way has to be respected. But all that does not mean that every statement contained in a judgment of that Court would be attracted by Article 141. Statements on matters other than law have no binding force.*** *Several decisions of the Supreme Court are on facts and that Court itself has pointed out in Gurcharan Singh v. State of Punjab [1972 FAC 549] and Prakash Chandra Pathak v. State of Uttar Pradesh [AIR 1960 SC 195 : 1960 Cri LJ 283] that as on facts no two cases could be similar, its own decisions which were essentially on questions of fact could not be relied upon as precedents for decision of other cases…."* (emphasis supplied)

59. In Krishena Kumar v. Union of India, **(1990) 4 SCC 207**, another Constitution Bench of the Hon'ble Supreme Court highlighted how the *ratio decidendi* of a judgment may be ascertained. The Court in its decision held as under:

> *"**20.** In other words, the enunciation of the reason or principle upon which a question before a court has been decided is alone binding as a precedent. **The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it**. In the words of Halsbury (4th edn., Vol. 26, para 573)*
>
> > *"The concrete decision alone is binding between the parties to it but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which when it is clear it is not part of a tribunal's duty to spell out with difficulty a ratio decidendi in order to bound by it, and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi.""*
>
> (emphasis supplied)

60. The Apex Court in Union of India v. Dhanwanti Devi, **(1996) 6 SCC 44**, while discussing the principle of *stare decisis* under Article 141 of the Constitution of India has held as under:

> *"**9.** ... **The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi**. According to the well-settled theory of precedents, every decision contains three basic postulates—(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. **A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein**. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. **The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the***

> ***judgment that is binding law under Article 141 of the Constitution.*** *A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason, and the precedent by long recognition may mature into rule of stare decisis.* ***It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi.***
> ***10.*** *Therefore, in order to understand and appreciate the binding force of a decision* ***it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law.*** *Law cannot afford to be static and therefore, Judges are to employ an intelligent technique in the use of precedents. ...”*

61. The Apex Court in Director of Settlements, A.P. v. M.R. Apparao, **(2002) 4 SCC 638**, further expounded the principles regarding the distinction between *obiter dictum* and *ratio decidendi*. The Court in Paragraph 7 of its stated as follows:

> *“**7.** So far as the first question is concerned, Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar.* ***But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or***

sentence. *To determine whether a decision has "declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered.* ***An "obiter dictum" as distinguished from a ratio decidendi is an observation by the Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case.*** *So far as constitutional matters are concerned, it is a practice of the Court not to make any pronouncement on points not directly raised for its decision. The decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court (see Ballabhadas Mathurdas Lakhani v. Municipal Committee, Malkapur [(1970) 2 SCC 267 : AIR 1970 SC 1002] and AIR 1973 SC 794 [(sic)]).* ***When the Supreme Court decides a principle it would be the duty of the High Court or a subordinate court to follow the decision of the Supreme Court. A judgment of the High Court which refuses to follow the decision and directions of the Supreme Court or seeks to revive a decision of the High Court which had been set aside by the Supreme Court is a nullity.*** *(See Narinder Singh v. Surjit Singh [(1984) 2 SCC 402] and Kausalya Devi Bogra v. Land Acquisition Officer [(1984) 2 SCC 324] .) ..."* (emphasis supplied)

62. In Divisional Controller, KSRTC v. Mahadeva Shetty, **(2003) 7 SCC 197**, the Hon'ble Supreme Court discussed the scope and authority of a binding precedent. The relevant paragraph of the said decision is reproduced hereunder:

> *"**23.** ... The decision ordinarily is a decision on the case before the court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. Therefore, while applying the decision to a later case, the court dealing with it should carefully try to ascertain the principle laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is rendered.* ***The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as without an investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made as a measure of social justice. Precedents sub silentio and without argument are of no moment. Mere casual expressions carry no weight at all, nor every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement having the weight of authority****."* (emphasis supplied)

63. In the same year, a Constitution Bench of the Hon'ble Supreme Court in Islamic Academy of Education v. State of Karnataka, **(2003) 6 SCC 697**, has considered the question of what constitutes the true ratio of a judgment. Khare, C.J., speaking for the majority held as under:

> *"**2.** Most of the petitioners/applicants before us are unaided professional educational institutions (both*

> *minority and non-minority). On behalf of the petitioners/applicants it was submitted that the answers given to the questions, as set out at the end of the majority judgment, lay down the true ratio of the judgment. It was submitted that any observation made in the body of the judgment had to be read in the context of the answers given. We are unable to accept this submission. The answers to the questions, in the majority judgment in Pai case [(2002) 8 SCC 481] are merely a brief summation of the ratio laid down in the judgment.* ***The ratio decidendi of a judgment has to be found out only on reading the entire judgment. In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment.*** *We, therefore, while giving our clarifications, are disposed to look into other parts of the judgment other than those portions which may be relied upon."*

Sinha, J., speaking for himself, gave a concurring decision and stated as under:

> *"**139. A judgment, it is trite, is not to be read as a statute. The ratio decidendi of a judgment is its reasoning which can be deciphered only upon reading the same in its entirety. The ratio decidendi of a case or the principles and reasons on which it is based is distinct from the relief finally granted or the manner adopted for its disposal.** (See Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj [(2001) 2 SCC 721] .)*
>
> *xxx*
>
> ***143.** It will not, therefore, be correct to contend, as has been contended by Mr Nariman, that answers to the*

> *questions would be the ratio to a judgment. The answers to the questions are merely conclusions.* ***They have to be interpreted, in a case of doubt or dispute with the reasons assigned in support thereof in the body of the judgment, wherefor, it would be essential to read the other paragraphs of the judgment also. It is also permissible for this purpose (albeit only in certain cases and if there exist strong and cogent reasons) to look to the pleadings of the parties****.''*

64. Emphasising upon the principle that the binding nature of a precedent must be understood from the facts of the decision, the Apex Court in State of Orissa v. Mohd. Illiyas, **(2006) 1 SCC 275**, has held as under:

> *''**12.** When the allegation is of cheating or deceiving, whether the alleged act is wilful or not depends upon the circumstances of the case concerned and there cannot be any straitjacket formula. The High Court unfortunately did not discuss the factual aspects and by merely placing reliance on an earlier decision of the Court held that prerequisite conditions were absent. Reliance on the decision without looking into the factual background of the case before it, is clearly impermissible****. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi.*** *According to the well-settled theory of precedents, every decision contains three basic postulates : (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect*

> *of the above.* ***A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment****. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. (See State of Orissa v. Sudhansu Sekhar Misra [(1968) 2 SCR 154 : AIR 1968 SC 647] and Union of India v. Dhanwanti Devi [(1996) 6 SCC 44] .)* ***A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in an Act of Parliament****. In Quinn v. Leathem [1901 AC 495 : 85 LT 289 : (1900-03) All ER Rep 1 (HL)] the Earl of Halsbury, L.C. observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be the exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides."*
>
> (emphasis supplied)

65. The Hon'ble Supreme Court in State of Haryana v. Ranbir, **(2006) 5 SCC 167**, has expounded upon the meaning and binding effect of *obiter dicta* in a decision. The relevant extracts of the decision read as under:

> *"**12.** It is in that context the Court clearly came to the opinion that the provisions of sub-section (1) of Section 50 were not required to be complied with. The said conclusion was arrived at, inter alia, upon noticing the provision of sub-section (4) of Section 50 of the Act. It was, therefore, not necessary for the Bench, with utmost respect, to make any further observation. It was not warranted in the fact of the said case****. A decision, it is well settled, is an authority for what it decides and not what can logically be deduced therefrom. The***

distinction between a dicta and obiter is well known. Obiter dicta is more or less presumably unnecessary to the decision. It may be an expression of a viewpoint or sentiments which has no binding effect*. See ADM, Jabalpur v. Shivakant Shukla [(1976) 2 SCC 521].* ***It is also well settled that the statements which are not part of the ratio decidendi constitute obiter dicta and are not authoritative****. (See Divisional Controller, KSRTC v. Mahadeva Shetty [(2003) 7 SCC 197 : 2003 SCC (Cri) 1722].)*

*****

14. *We may usefully refer to an observation of Devlin, J. made in Behrens v. Bertram Mills Circus Ltd. [(1957) 2 QB 1 : (1957) 1 All ER 583 : (1957) 2 WLR 404] which is in the following terms: (All ER pp. 593 I-594 C)*

> *"****[I]f the judge gives two reasons for his decisions, both are binding. It is not permissible to pick out one as being supposedly the better reason and ignore the other one; nor does it matter for this purpose which comes first and which comes second. But the practice of making judicial observation obiter is also well established. A judge may often give additional reasons for his decision without wishing to make them part of the ratio decidendi; he may not be sufficiently convinced of their cogency as to want them to have the full authority of the precedent, and yet may wish to state them so that those who later may have the duty of investigating the same point will start with some guidance. This is the matter which the judge himself is alone capable of deciding, and any judge who comes after him must ascertain which course he has adopted from the language used and not by consulting his own preference****."*

15. *Although the said observation of Devlin, J. has been subjected to some criticism, it throws some light*

> *on the subject; but may not be treated to be an authority."* (emphasis supplied)

66. In Laxmi Devi v. State of Bihar, **(2015) 10 SCC 241**, apropos the principles relevant in ascertaining *ratio decidendi* and *obiter dictum*, the Hon'ble Supreme Court has stated as under:

> *"**21.** Since heavy reliance has been placed by the State on Satendra Prasad Jain v. State of U.P. [Satendra Prasad Jain v. State of U.P., (1993) 4 SCC 369] and Lt. Governor of H.P. v. Avinash Sharma [Lt. Governor of H.P. v. Avinash Sharma, (1970) 2 SCC 149], we must sedulously determine their ratios. This would, therefore, be the apposite time and place for a brief discussion on the contours and connotations of the term "ratio decidendi", which in Latin means "the reason for deciding". According to Glanville Williams in Learning the Law, this maxim "is slightly ambiguous. It may mean either (1) rule that the Judge who decided the case intended to lay down and apply to the facts; or (2) the rule that a later court concedes him to have had the power to lay down". In G.W. Paton's' Jurisprudence, ratio decidendi has been conceptualised in a novel manner, in that these words are "almost always used in contradistinction to obiter dictum.* ***An obiter dictum, of course, is always something said by a Judge. It is frequently easier to show that something said in a judgment is obiter and has no binding authority. Clearly something said by a Judge about the law in his judgment, which is not part of the course of reasoning leading to the decision of some question or issue presented to him for resolution, has no binding authority however persuasive it may be, and it will be described as an obiter dictum". Precedents in English Law by Rupert Cross and J.W. Harris states—"First, it is necessary to determine all the facts of the case as seen by the Judge; secondly, it is necessary to discover which of those facts were treated as material by the Judge."***

> *Black's Law Dictionary, in a somewhat similar vein to the aforegoing, bisects this concept, firstly, as the principle or rule of law on which a court's decision is founded and secondly, the rule of law on which a latter court thinks that a previous court founded its decision; a general rule without which a case must have been decided otherwise."*

67. The Apex Court in State of Gujarat v. Utility Users' Welfare Assn., **(2018) 6 SCC 21**, has referred to the inversion test as propounded by Professor Eugene Wambaugh as a test to determine the *ratio decidendi* of a decision. The relevant extracts of the decision read as under:

> *"**113.** In order to determine this aspect, one of the well-established tests is "the Inversion Test" propounded inter alia by Eugene Wambaugh, a Professor at The Harvard Law School, who published a classic text book called The Study of Cases [Eugene Wambaugh, The Study of Cases (Boston: Little, Brown & Co., 1892).] in the year 1892. This textbook propounded inter alia what is known as the "Wambaugh Test" or "the Inversion Test" as the means of judicial interpretation. "the Inversion Test" is used to identify the ratio decidendi in any judgment. The central idea, in the words of Professor Wambaugh, is as under:*
>
> > *"In order to make the test, let him first frame carefully the supposed proposition of law. Let him then insert in the proposition a word reversing its meaning. Let him then inquire whether, if the court had conceived this new proposition to be good, and had it in mind, the decision could have been the same. If the answer be affirmative, then, however excellent the original proposition may be, the case is not a precedent for that proposition, but if the answer be negative the case is a precedent for the original proposition and possibly for other propositions also. [Eugene*

> *Wambaugh, The Study of Cases (Boston: Little, Brown & Co., 1892) at p. 17.] "*
>
> ***114. In order to test whether a particular proposition of law is to be treated as the ratio decidendi of the case, the proposition is to be inversed i.e. to remove from the text of the judgment as if it did not exist. If the conclusion of the case would still have been the same even without examining the proposition, then it cannot be regarded as the ratio decidendi of the case. This test has been followed to imply that the ratio decidendi is what is absolutely necessary for the decision of the case. "In order that an opinion may have the weight of a precedent", according to John Chipman Grey [Another distinguished jurist who served as a Professor of Law at Harvard Law School.] , "it must be an opinion, the formation of which, is necessary for the decision of a particular case****".""***

68. Recently, in Peerless General Finance & Investment Co. Ltd. v. CIT**, (2020) 18 SCC 625**, it has been expressed that in a judgment of the Supreme Court, even pronouncements which may not strictly be construed to be *ratio*, would be binding upon the High Court. The relevant extract of the aforesaid decision reads as under:

> *"**11.** While it is true that there was no direct focus of the Court on whether subscriptions so received are capital or revenue in nature, we may still advert to the fact that this Court has also, on general principles, held that such subscriptions would be capital receipts, and if they were treated to be income, this would violate the Companies Act. It is, therefore, incorrect to state, as has been stated by the High Court, that the decision in Peerless General Finance & Investment Co. Ltd. [Peerless General Finance & Investment Co. Ltd. v. RBI, (1992) 2 SCC 343 : (1992) 75 Comp Cas 12] must be read as not having laid down any absolute*

> *proposition of law that all receipts of subscription at the hands of the assessee for these years must be treated as capital receipts.* ***We reiterate that though the Court's focus was not directly on this, yet, a pronouncement by this Court, even if it cannot be strictly called the ratio decidendi of the judgment, would certainly be binding on the High Court.*** *Even otherwise, as we have stated, it is clear that on general principles also such subscription cannot possibly be treated as income. Mr Ganesh is right in stating that in cases of this nature it would not be possible to go only by the treatment of such subscriptions in the hands of accounts of the assessee itself. In this behalf, he cited a decision of the Division Bench of the Allahabad High Court in CIT v. Sahara Investment (India) Ltd. [CIT v. Sahara Investment (India) Ltd., 2003 SCC OnLine All 1688 : (2004) 266 ITR 641] in which the Division Bench followed Peerless General Finance& Investment Co. Ltd. [Peerless General Finance & Investment Co. Ltd. v. RBI, (1992) 2 SCC 343 : (1992) 75 Comp Cas 12] , and then held as follows : (Sahara Investment case [CIT v. Sahara Investment (India) Ltd., 2003 SCC OnLine All 1688 : (2004) 266 ITR 641] , SCC OnLine All paras 12-15 & 19)"*

69. From a reading of the aforesaid decisions, the following principles emerge pertaining to the contours, connotations, meaning, ambit, scope and binding nature of *ratio decidendi* and *obiter dicta*:

69.1 It is the *ratio decidendi* of a judgment which has the binding force of law under Article 141 of the Constitution of India and not *obiter dicta*. An *obiter* may however carry considerable weight which ought to be examined by the subsequent judge.

69.2 The *ratio* of a decision must be understood within the context of the facts of the decision, and it is essentially the application of law to the facts of a particular case. An observation on facts by a Court cannot be considered

to be the *ratio* of a judgment. It is the general principles on which the decision is based and would include a pre-existing rule/law, which may be statutory or judge-made, and a minor premise of the facts of the particular case in consideration. Every point raised in issue before the court which is argued and decided by the Court would form a part of the ratio of the decision.

69.3 A judgment is not to be read in the manner in which a statute is to be read, and thus a judgment may not explicitly spell out the *ratio* of a particular decision. It is not necessary for a judge to expressly state what the *ratio* of a particular decision is, it can be abstract in nature and must be inferred or interpreted by reading the judgment as a whole, and in certain cases, the pleadings of the parties.

69.4 A judgment may be based on multiple reasons, in which case all such reasons assigned by a Judge for giving a decision would form a part of the *ratio* of the decision. The subsequent Judge cannot choose one reason to constitute the *ratio* of the judgment and leave out the other reasons. It is therefore inappropriate to take one or two extracts from a decision and treat them as being the *ratio* of a particular decision.

69.5 The scope and authority of a decision should not be expanded beyond the needs of a given situation. The *ratio* of a judgment can be considered only an authority on what the judgment actually decides, and not what follows from it.

69.6 An *obiter dictum* has been understood to be an observation by the Court on a legal question which arose before the Court in the case before it, but not in a manner to necessarily require a decision. It may constitute the opinion or viewpoint of a Judge which is not necessary for the final

determination of the issue. As a general rule, statements that do not constitute the *ratio* of a decision are considered to constitute *obiter dictum*.

69.7 Judicial propriety, dignity and decorum demands that even an *obiter dictum*, or pronouncements and observations of the Apex Court that do not strictly constitute the *ratio* of a judgment delivered by the Supreme Court of India, although not strictly binding, ought to be accepted as binding by courts subordinate to the Supreme Court.

70. Applying the aforesaid principles to the facts of the present case, it is evident that the findings rendered by the Apex Court in paragraph 13.5 and 13.6 it its Judgment passed in Civil Appeal No.5766/2021 was in response to the contention raised by Devas therein that the actual motive of Antrix in seeking winding up of Devas was to deprive Devas of the benefit of the unanimous award passed by the ICC Arbitral Tribunal presided over by a former Chief Justice of India and two BIT awards, and such attempts on the part of a corporate entity, wholly owned by the Government of India, would send a wrong message to international investors. This argument was specifically rejected by the Apex Court by holding that if the seeds of the commercial relationship between Antrix and Devas were a product of fraud perpetrated by Devas, then every part of the plant that grew out of those seeds, such as the agreement, disputes, awards, etc., would be infected with the poison of fraud. It can, therefore, be said that the observations made by the Supreme Court in paragraph 13 of its Judgment passed in Civil Appeal No.5766/2021 were made in response to issues which were raised and agitated before it.

71. It is also pertinent to mention at this juncture that the Apex Court had also analysed the facts and the documents which were placed before the NCLT/NCLAT, the authenticity of which were never questioned or denied

by Devas. This is apparent from a reading of Paragraph 12.8 of the Apex Court's Judgment passed in Civil Appeal No.5766/2021 Relevant portions of Para 12.8 of the said judgment reads as under:

> ***"12.8.*** *.....*
>
> *(iii) But the documents filed by the appellants themselves show that a power point presentation was made by Forge LLC on 22.03.2004, proposing an Indian joint venture to launch what came to be known as DEVAS (which perhaps ultimately turned out to be ASURAS23). It was claimed in the said proposal that DEVAS platform will be capable of delivering multimedia and information services via satellite to mobile devices tailored to the needs of various market segments such as consumer segment, commercial segment and social segment. This presentation dated 22.03.2004 was followed by a proposal dated 15.04.2004, about which we have made a brief mention in paragraph 3.4 above. This proposal obliged ISRO/Antrix to invest in one operational S-band Satellite with a ground space segment to be leased to a joint venture between Forge and Antrix. What was to be reserved for the joint venture was 97% of the space. The consideration receivable by ISRO/ Antrix upon such a lease, was to be US $ 11 million annually for a period of 15 years.* ***At least at this stage the proposal to invest in an operational S-band satellite and the lease of nearly the entire space of such satellite to a joint venture, should have come to the public domain, to see, (a) if the technology existed; and (b) if the proposal was commercially viable. But it was not done;***
>
> *(iv) On 14.05.2004, a Committee headed by one Dr. K.N. Shankara, Director, Space Applications Centre was constituted purportedly to examine the technical feasibility, risk*

management including possibilities of alternate uses of space segment, financial and market aspects and time schedule. According to the Report submitted by this Committee, DEVAS was conceived as a new national service expected to be launched by the end of 2006 that would deliver video, multimedia and information services via high powered satellite to mobile receivers in vehicles and mobile phones across India. ***The catch here lies in the fact that while it was possible to deliver some of these services via terrestrial mode, it was not possible at that point of time to provide this bouquet of services via satellite. Even today satellite phones are beyond the reach of a common man. Mobile receivers or devices which can simply receive audio and video content are different from mobile phones, which are capable of providing a two way communication. The technology for providing the services through mobile phones was not in existence at that time, which is why the proposal made by Forge Advisors included an expectation that such a service may be launched by the end of 2006. It was with this expectation/promise that an Agreement was entered into on 28.01.2005 but this so-called new national service was never launched as promised in 2006. The launch of the services was not linked to the provision of a S-band satellite by Antrix, at least at the time when negotiations took place;***

*****

(vi) Therefore, the finding of the Tribunal, ***(a) that a public largesse was doled out in favour of Devas, in contravention of the public policy in India; (b) that Devas enticed Antrix/ISRO to enter into an MoU followed by an Agreement by promising to provide something that was not in existence at that time and which did not come into existence even later;*** *(c) that the licenses and*

approvals were for completely different services; and (d) that the services offered were not within the scope of SATCOM Policy etc. are actually borne out by records;

(vii) There is no denial of the fact that Devas offered a bouquet of services known as (a) Devas Services through a device called (b) Devas device in a hybrid mode of transmission, which is a combination of satellite and terrestrial transmissions, and which is called (c) Devas Technology but none of which existed at the relevant point of time or even thereafter*;*

(viii) Devas did not even hold necessary intellectual property rights in this regard though they claimed to have applied*;*

(ix) ***That the formation of the company, namely, Devas Multimedia Private Limited was for a fraudulent and unlawful purpose is borne out by the fact that the company was incorporated in December-2004, as a result of preliminary meetings held at Bangalore in March-2003 and in USA in May-2003, followed by the signing of the MoU on 28.07.2003, the presentation made on 22.03.2004 and the discussions held thereafter. The ground work was clearly done during the period from March-2003 to December-2004 before the company was formally incorporated. Immediately after incorporation, the Agreement dated 28.01.2005 was signed.*** *Therefore, the first ingredient of Section 271(c) of the Companies Act, 2013, namely, the formation of the company for a fraudulent and unlawful purpose was clearly made out;*

(x) ***The kind of licenses obtained such as ISP and IPTV licenses and the object for which FIPB approvals were taken but showcased as those***

sufficient for fulfilling the obligations under the Agreement dated 28.01.2005 demonstrated that the affairs of the company were conducted in a fraudulent manner*. This is fortified by the fact that a total amount of Rs.579 crores was brought in, but almost 85% of the said amount was siphoned out of India, partly towards establishment of a subsidiary in the US, partly towards business support services and partly towards litigation expenses. We do not know if the amount of Rs.233 crores taken out of India towards litigation services, also became a part of the investment in a more productive venture, namely, arbitration. The manner in which a misleading note was put to the cabinet and the manner in which the minutes of the meeting of TAG sub-committee were manipulated, highlighted by the Tribunal, also shows that the affairs of the company were conducted in a fraudulent manner. Thus, the second limb of Section 271(c), namely, the conduct of the affairs of the company in a fraudulent manner, also stood established.*

(xi) SATCOM Policy perceived telecommunication and broadcasting services to be independent of each other and also mutually exclusive. Therefore, a combination of both was not permitted by law. It is especially so since no deliberation took place with the Ministry of Information and Broadcasting. Moreover, unless ICC allocates space segment, to a private player, the same becomes unlawful. This is why the conduct of the affairs of the company became unlawful;

****

(xiii) It is on record that the minutes of the meeting of the Sub Committee dated 06.01.2009 were manipulated and the experimental licence was

> ***granted on 07.05.2009. Only thereafter, the original minutes were restored on 20.11.2009 and that too after protest*****.....”**
>
> (emphasis supplied)

72. In order to determine as to what is the ratio of a particular decision, the Courts have applied the “inversion test” which has been propounded by Eugene Wambaugh, a Professor at the Harvard Law School, who published a classic text book called The Study of Cases in the year 1892. The Apex Court has taken aid of this test in State of Gujarat v. Utility Users' Welfare Assn (supra) wherein after applying the said test the Apex Court has held that in order to test whether a particular proposition of law is to be treated as the *ratio decidendi* of the case, the proposition is to be inversed i.e. to be removed from the text of the judgment as if it did not exist and if the conclusion of the case would still have been the same even without examining the proposition, then it cannot be regarded as the *ratio decidendi* of the case. The Apex Court has held that the test has been followed to imply that the *ratio decidendi* is what is absolutely necessary for the decision of the case. The Apex Court has also made reference to John Chipman Grey, another distinguished jurist who served as a Professor of Law at Harvard Law School, who has opined that for a proposition to be the *ratio decidendi* it must be an opinion, the formation of which, is necessary for the decision of a particular case.

73. A perusal of paragraphs No.12.8 & 13 of the judgment of the Apex Court in Civil Appeal No.5766/2021 would show that all the documents were analysed by the Apex Court and it is only after analysing the documents that the Apex Court has upheld the findings recorded by the NCLT and NCLAT that the incorporation of Devas was done with the

fraudulent intention to grab the prestigious contract in question i.e., the Devas Agreement, in connivance and collusion with the then officials of Antrix. The Apex Court also upheld the finding of the NCLT that at the time of entering into the Devas agreement, Devas did not have the technology, infrastructure or experience to perform their obligations under the Devas Agreement and that the incorporation of Devas was with a fraudulent motive and an unlawful object, to bring money into India and divert it by dubious methods. The Apex Court has also held that the objective of Devas was hardly to do any business in India, except grabbing Primary Satellite-I (PS-I) and Primary Satellite-II (PS-II) for itself.

74. Sans the observations of the Apex Court in paragraph No.13.5 & 13.6, the Apex Court could not have upheld the findings of the NCLT and NCLAT and these observations, as stated earlier, were rendered in light of the submissions made by the learned Counsel for Devas that the petition for winding up of Devas was filed only to deprive Devas of the benefits of the Arbitral Award. Reading paragraphs 13.5 and 13.6 with paragraph 12.8 and within the larger context of the judgment as a whole, it is apparent that the observations made in paragraphs 13.5 and 13.6 are an application of law to the facts of the case, and thus ought to be construed as being a part of the *ratio decidendi.* The observations made by the Apex Court cannot be considered to be stray observations on issues which were not necessary to be adjudicated upon by the Court while dealing with the issues which were under consideration before the Apex Court. The observations of the Apex Court in paragraph Nos.13.5 & 13.6 are, therefore, in the nature of ratio and are binding on the learned Single Judge under Article 141 of the Constitution of India.

75. In view of the above, the submission of the learned Senior Counsel for the Appellant herein that the findings in Civil Appeal No.5766/2021 have been rendered in the context of deciding an application under Section 271(c) of the Companies Act, 2013, and, therefore, were in a completely different context which are inapplicable while deciding an application under Section 34 of the Arbitration Act and, therefore, are not binding, cannot be accepted.

76. Having dealt with the first aspect of the argument put forth by the Learned Senior Counsel for the Appellant-herein on the binding nature of the the judgment in Civil Appeal No.5766/2021, we shall now proceed to decide the second aspect of his submission that the principle of *res judicata* will not be applicable in the present case. It is trite law, that for the principle of *res judicata* to apply to the facts of a particular case, the following conditions must be fulfilled [See: Syed Mohd. Salie Labbai v. Mohd. Hanifa**, (1976) 4 SCC 780**; Srihari Hanumandas Totala v. Hemant Vithal Kamat**, (2021) 9 SCC 99**; and Jamia Masjid v. K.V. Rudrappa, **(2022) 9 SCC 225**]:

a. There exists a former suit/proceeding between the same parties or between parties under whom any of them claim, litigating under the same title;

b. The matter in the subsequent suit/proceeding was directly and substantially in issue in the former suit/proceeding;

c. The Court in which the former suit/proceeding was instituted is competent to try the subsequent suit/proceeding in which the issue has been subsequently raised; and

d. The matter has been heard and finally decided by the Court in the former suit/proceeding.

77. Before applying the aforesaid principles to the present case, it is pertinent to understand the meaning and scope of the phrase "matter directly and substantially in issue". A Bench of three Judges of the Hon'ble Supreme Court, in its decision in Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy, **(1970) 1 SCC 613**, has clarified the position in the following terms:

> *"**11.** It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent Court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11 of the Code of Civil Procedure means the right litigated between the parties i.e. the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land."*

78. Recently, the Apex Court in Jamia Masjid (supra) has laid down the twin test to determine whether an issue has been conclusively decided in the

previous suit/proceeding. The relevant paragraphs of the aforesaid decision are reproduced as under:

> *"**48.** In view of the authorities cited above, the twin test that is used for the identification of whether an issue has been conclusively decided in the previous suit is:*
> *A. Whether the adjudication of the issue was "necessary" for deciding on the principle issue ("the necessity test"); and*
> *B. Whether the judgment in the suit is based upon the decision on that issue ("the essentiality test")."*

79. We shall now apply the principles discussed above to the facts of the present case. It cannot be denied that the Judgment of the Apex Court passed in Civil Appeal No.5766/2021 is a former proceeding between the same parties, i.e., Devas, DEMPL and Antrix. The proceedings in Civil Appeal No.5766/2021 and the present case arise out of the same factual matrix. The issue pertaining to the fraudulent actions of Devas is common in both cases. The question which arises is whether the observations made by the Apex Court in its Judgment passed in Civil Appeal No.5766/2021, pertaining to the effect of fraudulent actions of Devas will operate as *res judicata* and whether the learned Single Judge was correct in applying the principle of *res judicata* while deciding the application under Section 34 of the Arbitration Act.

80. One of the major contentions raised before the Apex Court in Civil Appeal No.5766/2021 was that the proceedings for winding up were instituted only to get over the award that has been passed in favour of Respondent No.2. The Apex Court was, therefore, conscious of the existence of an award and that a petition under Section 34 of the Arbitration Act was pending before this Court and still the Apex Court went ahead and adjudicated on the issues touching on fraud, corruption, fundamental policy

of Indian law, notions of morality and justice, each of them individually constituting a ground to set aside an arbitral award. In such a situation, it cannot be said that the findings rendered by the Apex Court upholding the findings of the Tribunal will not constitute as *res judicata* in the present proceedings. The observations of the Supreme Court were rendered as a consequence of the issue being raised and agitated before the Court. The issue in the present proceedings pending before the learned Single Judge, i.e. under Section 34 of the Arbitration Act, was directly and substantially in issue in the former proceedings before the Apex Court in Civil Appeal No.5766/2021. It cannot be said that the Hon'ble Supreme Court of India was not competent to render the findings on the issue pending before it. The Apex Court has thus heard and finally decided the issues pertaining to fraud, fundamental policy of Indian law, notions of morality or justice in its Judgment passed in Civil Appeal No.5766/2021. Therefore, upon applying the well-established stated above, to the facts of the present case, it is clear that the principle of *res judicata* will apply in the present case and is binding upon the parties.

81. As a natural consequence of the principle of *res judicata* in the present case, the findings and observations of the Supreme Court in Paragraphs No.12 and 13 of its Judgment passed in Civil Appeal No.5766/2021, pertaining to the fraudulent actions and affairs of Devas and its shareholders would become binding between the parties and cannot be brought into question in the present proceedings. The relevants extracts of Paragraphs No.12 of the said Judgment are reproduced as under:

> *"**12.4** On the basis of the pleadings, the documents produced and the submissions made, NCLT recorded the following findings namely,*

(i) that the incorporation of Devas was with fraudulent intention to grab the prestigious contract in question, in connivance and collusion with the then officials of Antrix;

(ii) that it is not in dispute that at the time of entering into the contract, Devas did not have the technology, infrastructure or experience to perform their obligations under the Agreement;

(iii) that one of the subscribers to the Memorandum of Association of the company in liquidation was an Auditor by name Shri M. Umesh, whose Article Clerk by name Gururaj was the one signed the Agreement;

(iv) that the Executive Director of Antrix who signed the Agreement of behalf of Antrix is one of accused in the criminal cases;

(v) that the incorporation of Devas was with fraudulent motive and unlawful object, to bring money into India and divert it by dubious methods;

(vi) that even after the termination of the Agreement, Devas was not carrying on any business operations;

(vii) that the objective of Devas was hardly to do any business except grabbing Primary Satellite-I (PS-I) and Primary Satellite-II (PS-II), and that therefore the requirements of Section 27l(c) stand satisfied.

12.5 *The order of the Appellate Tribunal is in two parts; the first authored by Member (Judicial), and the second authored by Member (Technical). The Member (Judicial) noted,* ***(i)*** *that the company in liquidation failed to establish either the existence of technology or the ownership of intellectual property rights over the stated technology;* ***(ii)*** *that even according to the affidavit of Shri M. G. Chandrashekar, Devas had*

ample time to develop Devas Technology, meaning thereby that its non-existence at that time was admitted; ***(iii)*** *that the company did not have a single approval, permission or licence to render Devas services utilising Devas technology;* ***(iv)*** *that the approval of the Space Commission for building a satellite for Devas, was secured only after finalisation of commercial terms but without apprising the Space Commission of the same;* ***(v)*** *that even in the cabinet note, prepared by the Department of Space on 17.11.2005 a full picture was not recorded;* ***(vi)*** *that there was a contravention of the SATCOM Policy;* ***(vii)*** *that though the original minutes of the meeting required Devas to secure a spectrum licence from Wireless Planning Committee (WPC), after appearing before the apex committee with requisite technical details, the minutes of the meetings were manipulated later as though the company was exempted from the requirement;* ***(viii)*** *that after objections about the manipulations, the original minutes of the meeting came to be restored, on 20.11.2009, but this happened only after the grant of experimental licence on 07.05.2009;* ***(ix)*** *that in any case the experimental licence was to establish Wireless Telegraph Station in India under the India Telegraph Act, 1885, without which experimental trials could not have been conducted;* ***(x)*** *that Devas obtained IPTV licence as part of ISP licence, which has nothing to do with what was offered as DEVAS services;* ***(xi)*** *that the agreement dated 28.01.2005 made no reference of IPTV;* ***(xii)*** *that undeniably, Devas services cannot be provided with ISP licences;* ***(xiii)*** *that after bringing an amount of Rs 579 crores into India, a major portion was taken out of India;* ***(xiv)*** *that the only business activity carried on by Devas was to provide ISP services in a particular locality in Bangalore for a few residents and that too for a short duration, which made Devas earn a revenue of Rs. 80,000/;* ***(xv)*** *that the diversion of Rs. 489 crores and Rs. 58 crores for non ISP purposes is violative of ISP licence, which comes*

squarely within the ambit of Section 27l(c); ***(xvi)*** *that Devas fraudulently approached FIPB through the ISP route to avoid scrutiny by Department of Space;* ***(xvii)*** *that the investors of Devas actually became shareholders and they also had their nominees on the Board of Devas;* ***(xviii)*** *that therefore these persons were also guilty of the conduct of the affairs of Devas in the manner stated;* ***(xix)*** *that the Share Subscription Agreement dated 06.03.2006 entered into with the investors contains a recital as though appropriate licences have been validly issued or assigned to the company, though in fact the only licence namely ISP licence was obtained much later on 02.05.2008 and* ***(xx)*** *that therefore the formation of the company and the conduct of the affairs of the company were fraudulent and the persons concerned therewith were also guilty of fraud.*

12.6 *In his independent but concurrent opinion the Member (Technical) of NCLAT classified the items of fraud into eight categories. He first found that the company was formed and the Agreement was entered into with the stated object of providing a bouquet of services, which were non-existent. The second category of fraud dealt with by the Member (Technical) related to the misrepresentation in the Agreement. The third category of fraud concerned the violation of SATCOM Policy. The fourth category was actually an extension of the third category which related to SATCOM Policy. The fifth category was about suppression and misrepresentation in obtaining the approval of the cabinet. The sixth category of fraud revolved around the ISP licence dated 02.05.2008 of which IVIV licence was a part, but which had nothing to do with Devas Services. The seventh category related to the fraudulent manner in which experimental licence was obtained and the eighth category related to FIPB approvals and money trail. The Member (Technical) found the formation of company, the conduct of the affairs of the company and those persons concerned in*

the formation and conduct of management of its affairs to be guilty of fraud.

12. 7 *Technically speaking, the appeal before us which is under Section 423 of the Companies Act, 2013, is only on a question of law. When two forums namely NCLT and NCI.AT have recorded concurrent findings on facts, it is not open to this Court to reappreciate evidence. Realising this constraint, the learned Senior Counsel for the Appellant sought to project the case as one of perversity of findings. But we do not find any perversity in the findings recorded by both the Tribunals. These findings are actually borne out by documents, none of which is challenged as fabricated or inadmissible. Though it is sufficient for us to stop at this, let us go a little deeper to find out whether there was any perversity in the findings recorded by the Tribunals and whether such findings could not have been reached by any reasonable standards.*

12.8. *The following undisputed facts emerge from the documents placed before the Tribunal. The authenticity of these documents were never in question or denied:*

(i) An agreement of a huge magnitude, for leasing out five numbers of C X S transponders each of 8.1 MHz capacity and five numbers of S X C transponders each of 2.7 MHz capacity on the Primary Satellite-I (PS-I), was surprisingly and shockingly entered into by Antrix with Devas, without same being preceded by any auction/tender process. It appears from the letter dated 27.09.2004 sent by DEVAS LLC, USA to Shri K.R. Sridhara Murty, Executive Director of Antrix with copies to Dr. G. Madhavan Nair, Chairman, ISRO and others that Shri Ramachandran Viswanathan, met the then Chairman of ISRO and other officials in Bangalore in April-2003 and they met once again in Washington D.C. during the visit of the then

Chairman of ISRO. These meetings, which were not preceded by any invitation to the public for any Expression of Interest, culminated in a Memorandum of Understanding dated 28.07.2003. Though it is not clear where the MoU was signed, there are indications that it was signed overseas;

(ii) It must be noted here that a one man Committee comprising of Dr. B.N. Suresh, former Member of the Space Commission and Director of Indian Institute of Space Science and Technology, was constituted on 8.12.2009, long after the commencement of the commercial relationship, to look comprehensively into all aspects of the contract, both commercial and technical. According to the Report submitted by him in May-2010, it was Forge Advisors, USA which made a presentation in March-2003, on technology aspects of digital multimedia services to Antrix/ISRO, followed by a presentation in May-2003 purportedly to the top management of Antrix/ ISRO. The MoU was signed thereafter;

(iii) But the documents filed by the appellants themselves show that a power point presentation was made by Forge LLC on 22.03.2004, proposing an Indian joint venture to launch what came to be known as DEVAS (which perhaps ultimately turned out to be ASURAS23). It was claimed in the said proposal that DEVAS platform will be capable of delivering multimedia and information services via satellite to mobile devices tailored to the needs of various market segments such as consumer segment, commercial segment and social segment. This presentation dated 22.03.2004 was followed by a proposal dated 15.04.2004, about which we have made a brief mention in paragraph 3.4 above. This proposal obliged ISRO/Antrix to invest in one operational S-band Satellite with a ground space segment to be leased to a joint

venture between Forge and Antrix. What was to be reserved for the joint venture was 97% of the space. The consideration receivable by ISRO/ Antrix upon such a lease, was to be US $ 11 million annually for a period of 15 years. At least at this stage the proposal to invest in an operational S-band satellite and the lease of nearly the entire space of such satellite to a joint venture, should have come to the public domain, to see, (a) if the technology existed; and (b) if the proposal was commercially viable. But it was not done;

(iv) On 14.05.2004, a Committee headed by one Dr. K.N. Shankara, Director, Space Applications Centre was constituted purportedly to examine the technical feasibility, risk management including possibilities of alternate uses of space segment, financial and market aspects and time schedule. According to the Report submitted by this Committee, DEVAS was conceived as a new national service expected to be launched by the end of 2006 that would deliver video, multimedia and information services via high powered satellite to mobile receivers in vehicles and mobile phones across India. The catch here lies in the fact that while it was possible to deliver some of these services via terrestrial mode, it was not possible at that point of time to provide this bouquet of services via satellite. Even today satellite phones are beyond the reach of a common man. Mobile receivers or devices which can simply receive audio and video content are different from mobile phones, which are capable of providing a two way communication. The technology for providing the services through mobile phones was not in existence at that time, which is why the proposal made by Forge Advisors included an expectation that such a service may be launched by the end of 2006. It was with this expectation/promise that an Agreement was entered into on 28.01.2005 but this

so-called new national service was never launched as promised in 2006. The launch of the services was not linked to the provision of a S-band satellite by Antrix, at least at the time when negotiations took place;

(v) Admittedly, FIPB (Foreign Investment Promotion Board) approvals taken by Devas during the period May-2006 to September-2009 were on the basis of the ISP (Internet Service Provider) license secured from the Department of Telecommunications on 02.05.2008 and IPTV (Internet Protocol Television) services license obtained on 31.03.2009;

(vi) Therefore, the finding of the Tribunal, (a) that a public largesse was doled out in favour of Devas, in contravention of the public policy in India; (b) that Devas enticed Antrix/ISRO to enter into an MoU followed by an Agreement by promising to provide something that was not in existence at that time and which did not come into existence even later; (c) that the licenses and approvals were for completely different services; and (d) that the services offered were not within the scope of SATCOM Policy etc. are actually borne out by records;

(vii) There is no denial of the fact that Devas offered a bouquet of services known as (a) Devas Services through a device called (b) Devas device in a hybrid mode of transmission, which is a combination of satellite and terrestrial transmissions, and which is called (c) Devas Technology but none of which existed at the relevant point of time or even thereafter;

(viii) Devas did not even hold necessary intellectual property rights in this regard though they claimed to have applied;

(ix) That the formation of the company, namely, Devas Multimedia Private Limited was for a fraudulent and unlawful purpose is borne out by the fact that the company was incorporated in December-2004, as a result of preliminary meetings held at Bangalore in March-2003 and in USA in May-2003, followed by the signing of the MoU on 28.07.2003, the presentation made on 22.03.2004 and the discussions held thereafter. The ground work was clearly done during the period from March-2003 to December-2004 before the company was formally incorporated. Immediately after incorporation, the Agreement dated 28.01.2005 was signed. Therefore, the first ingredient of Section 271(c) of the Companies Act, 2013, namely, the formation of the company for a fraudulent and unlawful purpose was clearly made out;

(x) The kind of licenses obtained such as ISP and IPTV licenses and the object for which FIPB approvals were taken but showcased as those sufficient for fulfilling the obligations under the Agreement dated 28.01.2005 demonstrated that the affairs of the company were conducted in a fraudulent manner. This is fortified by the fact that a total amount of Rs.579 crores was brought in, but almost 85% of the said amount was siphoned out of India, partly towards establishment of a subsidiary in the US, partly towards business support services and partly towards litigation expenses. We do not know if the amount of Rs.233 crores taken out of India towards litigation services, also became a part of the investment in a more productive venture, namely, arbitration. The manner in which a misleading note was put to the cabinet and the manner in which the minutes of the meeting of TAG sub-committee were manipulated, highlighted by the Tribunal, also shows that the

affairs of the company were conducted in a fraudulent manner. Thus, the second limb of Section 271(c), namely, the conduct of the affairs of the company in a fraudulent manner, also stood established.

(xi) SATCOM Policy perceived telecommunication and broadcasting services to be independent of each other and also mutually exclusive. Therefore, a combination of both was not permitted by law. It is especially so since no deliberation took place with the Ministry of Information and Broadcasting. Moreover, unless ICC allocates space segment, to a private player, the same becomes unlawful. This is why the conduct of the affairs of the company became unlawful;

(xii) That the officials of the Department of Space and Antrix were in collusion and that it was a case of fence eating the crop (and also allowing others to eat the crop), by joining hands with third parties, is borne out by the fact that the Note of the 104th Space Commission did not contain a reference to the Agreement. The Cabinet Note dated 17.11.2005 prepared after ten months of signing of the Agreement, did not make a mention about Devas or the Agreement, but proceeded on the basis as though ISRO received several Expressions of Interest. These materials show the complicity of the officials to allow Devas to have unjust enrichment;

(xiii) It is on record that the minutes of the meeting of the Sub Committee dated 06.01.2009 were manipulated and the experimental licence was granted on 07.05.2009. Only thereafter, the original minutes were restored on 20.11.2009 and that too after protest. (xiv) Admittedly, every one of the investors procured shares of the company in liquidation and each shareholder had a representative in the board of directors. Since the

> *board controlled the company, the directors were guilty of the conduct of the affairs of the company in a fraudulent manner. Since each shareholder had a representative in the board, the shareholders had to take the blame for the misdeeds of the directors; (xv) Additionally, the shareholders were fully aware of the fact that the application for approval dated 02.02.2006 to the FIPB was for ISP services. But they entered into a Share Subscription Agreement on 06.03.2006 for Devas services. The Share Subscription Agreement discloses that they were aware of the false statements contained in the Agreement dated 28.01.2005. Therefore, the shareholders, who now want to reap the fruits of a tree, fraudulently planted and unlawfully nurtured, cannot feign ignorance and escape the allegations of fraud.*
>
> ***12.9*** *An argument was advanced by the learned senior counsel for the appellants, on the basis of a statement contained in the order of NCI.AT that the allegations are prima facie made out, that a company cannot be ordered to be wound up on the basis of prima facie findings. The standard of proof required for winding up of a company cannot be prima facie."*

82. The last aspect of the argument put forth by Mr. Dutt on the binding nature of the Civil Appeal No.5766/2021 pertains to the applicability of Article 144 of the Constitution of India in the present case. Article 144 reads as under:

> *"All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court."*

83. Article 144 of the Constitution of India mandates that all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court. The term *aid* mandates all authorities, civil and judicial which means

all Courts to act in aid of the Supreme Court. The scope of Article 144 of the Constitution of India has been succinctly laid down by the Apex Court in Kantaru Rajeevaru (supra) wherein the Apex Court has held as under:

> *"**52.** The position under our constitutional scheme is that the Supreme Court of India is the ultimate repository of interpretation of the Constitution. Once a Constitution Bench of five learned Judges interprets the Constitution and lays down the law, the said interpretation is binding not only as a precedent on all courts and tribunals, but also on the coordinate branches of Government, namely, the legislature and the executive.* ***What follows from this is that once a judgment is pronounced by the Constitution Bench and a decree on facts follows, the said decree must be obeyed by all persons bound by it****. In addition, Article 144 of the Constitution mandates that all persons who exercise powers over the citizenry of India are obliged to aid in enforcing orders and decrees of the Supreme Court. This then is the constitutional scheme by which we are governed — the rule of law, as laid down by the Indian Constitution."*
>
> (*emphasis supplied*)

84. The Supreme Court is the Final Court and once the Supreme Court lays down a law, it is binding on all Courts, Tribunals, on the Legislature and the Executive. Article 144 of the Constitution of India mandates every authority to aid in enforcing the orders and decrees of the Supreme Court. The Apex Court in Civil Appeal No.5766/2021 has, on the basis of the documents before it, held that Respondent No.2 was incorporated for fraudulent purposes and the affairs of the company were being conducted in a fraudulent manner and as stated above, the agreement, from which the present arbitration arises, was a product of fraud. After such a finding has been rendered by the Apex Court, it was not open for the learned Single Judge to come to the conclusion that the award, which has been held to be a

product of fraud and which is in contravention of the fundamental policies of India, which is in conflict with the most basic notions of morality or justice, would still be enforceable in the country. Such a finding by the learned Single Judge would be against the spirit of Article 144 of the Constitution of India.

Analysis of the power of the Court under Section 34(2)(b) of the Arbitration Act to set aside an award without any specific pleadings.

85. It has been argued by the Learned Senior Counsel for the Appellant herein that in a proceeding instituted under Section 34 of the Arbitration Act, the grounds for challenging an arbitral award must be specifically pleaded and the Court cannot *suo motu* discover grounds of fraud and public policy. His contention is that Antrix has sought to introduce the grounds of challenge to the arbitral award relating to fraud and public policy of India by way of two amendment applications, which are barred by limitation and have not been decided by the Ld. Single Judge. He therefore has argued that it is erroneous on the part of the Ld. Single Judge to set aside the ICC Award on the grounds of fraud or the award being in conflict with the public policy of India.

86. *Per contra,* the ld. ASG, arguing for Respondent No. 1, has stated that the two amendment applications are not barred by limitation and the Courts have adequate power to exercise discretion and allow the amendment applications, which bring on record subsequent facts pertaining to the fraudulent conduct of Devas and its shareholders. He states that these facts are material for effective adjudication of the case and do not amount to raising fresh grounds in an ongoing proceedings. He has also argued that under the scheme of Section 34 of the Arbitration Act, it is not necessary for

a party to specifically plead any of the grounds under Section 34(2)(b) or Section 34(2A), provided an application under Section 34 is made. He, therefore, submits that the learned Single Judge has correctly set aside the ICC award under Section 34 of the Arbitration Act on the grounds of fraud and it being in conflict with the public policy of India.

87. Section 34 of the Arbitration Act reads as under:

> *"**Section 34**. Application for setting aside arbitral awards.*
> *(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
> *(2) An arbitral award may be set aside by the Court only if--*
> *(a) the party making the application 1[establishes on the basis of the record of the arbitral tribunal that]--*
> *(i) a party was under some incapacity, or*
> *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
> *(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:*
> *Provided that, if the decisions on matters submitted to arbitration can be separated from*

those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.--For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.--For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.
(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of

> *one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]"*

88. Learned Senior Counsel for the Appellant herein has also argued that in order to set aside an award under Section 34 of the Arbitration Act, it is not sufficient to state that the agreement or the transaction is affected by fraud, it must be proved that the making of the award is induced or affected by fraud. He argues that a causative link must be established between the fraud relied on and the making of the award under challenge. He relies upon the decision of the Singapore Court of Appeal in Bloomberry Resorts and Hotels (supra) to buttress this argument. The relevant extracts of the decision read as under:

> *"**40** The appellants' case was that at any of these three levels there had been fraud on the part of the respondents which allowed the appellants to allege, in the language of s 24(a) of the IAA, that the making of the Award had been "induced or affected by fraud or corruption.*
>
> ***41** In this respect we agree with the appellants' submission that the "fraud" referred to in the section must include procedural fraud, that is, when a party commits perjury, conceals material information and/or suppresses evidence that would have substantial effect on the making of the award: see BVU v BVX [2019] SGHC 69 at [47] ("BVU"). We further note, however, that in the same paragraph, BVU states that there must be a causative link between any concealment aimed at deceiving the arbitral tribunal and the decision in favour of the concealing party. The appellants say that this link relates to the word "induced" in s 24(a) of the IAA and that therefore the word "affected" that follows "induced" must necessarily cover different and likely broader situations such as where an award is "tainted" by fraud (a) either in relation to the*

arbitration; or (b) where there is potentially fraud in the performance of the underlying contract. We comment that these two examples given by the appellants are in fact quite different: the first one is just a rephrasing of the trite proposition that fraud in the conduct of the arbitration is not permitted. The second (fraud in the performance of the underlying contract) makes no sense because if there was an allegation in the arbitration of fraud in the performance of the underlying contract, then of course that would be an issue determined by the arbitral tribunal, properly within its remit. If no allegation of fraud in performance was made by either party, then fraud would play no part in the proceedings at all. The appellants produced no authority for the proposition that an award can be "tainted" by fraud when fraud was neither an issue in the arbitration nor involved in an external manner in the procurement of the award (eg, by bribery of a witness to give false evidence). Nor did they give any example of a situation in which an arbitration award was set aside for fraud even though there was no causative link between the fraud and the ultimate award.

42 *In our judgment, the word "affected" must be understood in a manner similar to "induced" albeit perhaps somewhat more broadly. It would be going too far, however, to give the word "affected" such a wide definition as to allow an award to be set aside if the challenging party can merely show some peripheral fraud in the circumstances relating to a case or the parties notwithstanding that that fraud played no part in the conduct of the arbitration or the making of the award. The party challenging the award on grounds of fraud must show a connection between the alleged fraud and the making of the arbitral award. Absent such a connection, s 24 of the IAA would not be satisfied."*

89. At the outset, it is pertinent to note that the aforesaid decision has been given in the context of Section 24(a) of Singapore's International Arbitration Act, 1994 (*hereinafter referred to as* "**SIAA**"). The said provision reads as under:

> **Court may set aside award**
>
> **24.** Despite Article 34(1) of the Model Law, the General Division of the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —
>
> | | |
> |---|---|
> | (*a*) | the making of the award was induced or affected by fraud or corruption; or |
> | (*b*) | a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced. |

90. From a bare perusal of the said provision, it is apparent that the said provision is drafted in similar terms as Explanation 1(i) of Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996, which is applicable to domestic arbitration between two Indian parties, such as the present case. However, under the Arbitration Act, 1996, this provision has to be read as a part of the ground provided for under Section 34(2)(b)(ii), i.e., an arbitral award being in conflict with the public policy of India. On the other hand, Section 24 of the SIAA, is an additional ground, separate from the ground of "award is in conflict with the public policy of this State" which is provided for under Article 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration. Thus, the two provisions, while couched in similar terms, are different in their meaning, scope and applicability. Therefore, in light of the same, we find that the Appellants

reliance upon the decision in Bloomberry Resorts and Hotels (supra) is misplaced, and the same is not applicable to the facts of the present case.

91. Having said that, it would be appropriate to understand how Courts in India, have interpreted the ground of an arbitral award being in conflict with the public policy of India, as provided for under Explanation 1(i) of Section 34(2)(b)(ii) of the Arbitration Act.

92. In Renusagar Power Co. Ltd. v. General Electric Co, **(1994) Supp (1) SCC 644**, the Court, was dealing with the enforcement of an arbitral award under the Foreign Awards (Recognition and Enforcement) Act, 1961. However, in order to interpret the words "public policy", the Court relied upon Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (*hereinafter referred to as* "**the New York Convention**"), which is phrased in a similar manner to Section 34 & 48 of the Arbitration Act. The Court in its decision, interpreted "public policy" in the following terms:

> *"**32**. With regard to enforcement of foreign judgments, the position at common law is that a foreign judgment which is final and conclusive cannot be impeached for any error either of fact or of law and is impeachable on limited grounds, namely, the court of the foreign country did not, in the circumstances of case, have jurisdiction to give that judgment in the view of English law; the judgment is vitiated by fraud on part of the party in whose favour the judgment is given or fraud on the part of the court which pronounced the judgment; the enforcement or recognition of the judgment would be contrary to public policy; the proceedings in which the judgment was obtained were opposed to natural justice. (See : Dicey & Morris, The Conflict of Laws, 11th Edn., Rules 42 to 46, pp. 464 to 476; Cheshire & North, Private International Law, 12th Edn., pp. 368 to 392.)*

33. *Similarly in the matter of enforcement of foreign arbitral awards at common law a foreign award is enforceable if the award is in accordance with the agreement to arbitrate which is valid by its proper law and the award is valid and final according to the arbitration law governing the proceedings. The award would not be recognised or enforced if, under the submission agreement and the law applicable thereto, the arbitrators have no justification to make it, or it was obtained by fraud or its recognition or enforcement would be contrary to public policy or the proceedings in which it was obtained were opposed to natural justice (See : Dicey & Morris, The Conflict of Laws, 11th Edn., Rules 62-64, pp. 558 & 559 and 571 & 572; Cheshire & North, Private International Law, 12th Edn., pp. 446-447). The English courts would not refuse to recognise or enforce a foreign award merely because the arbitrators (in its view) applied the wrong law to the dispute or misapplied the right law. (See : Dicey & Morris, The Conflict of Laws, 11th Edn., Vol. II, p. 565.)*

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45. *We are, therefore, of the view that the words "public policy" used in Section 7(1)(b)(ii) of the Foreign Awards Act refer to the public policy of India and the recognition and enforcement of the award of the Arbitral Tribunal cannot be questioned on the ground that it is contrary to the public policy of the State of New York.*

IV. Meaning of 'public policy' in Section 7(1)(b)(ii) of the Act

46. *While observing that "from the very nature of things, the expressions 'public policy', 'opposed to public policy' or 'contrary to public policy' are incapable of precise definition" this Court has laid down: (SCC p. 217, para 92)*

> *"Public policy ... connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time." (See : Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly [(1986) 3 SCC 156, 217 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103 : (1986) 2 SCR 278, 372] .)*

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***63**. In view of the absence of a workable definition of "international public policy" we find it difficult to construe the expression "public policy" in Article V(2)(b) of the New York Convention to mean international public policy. In our opinion the said expression must be construed to mean the doctrine of public policy as applied by the courts in which the foreign award is sought to be enforced. Consequently, the expression 'public policy' in Section 7(1)(b)(ii) of the Foreign Awards Act means the doctrine of public policy as applied by the courts in India. This raises the question whether the narrower concept of public policy as applicable in the field of public international law should be applied or the wider concept of public policy as applicable in the field of municipal law.*

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***66**. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2)(b) of the New York Convention*

> *and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."*

93. In Associated Builders v. Delhi Development Authority, **(2015) 3 SCC 49,** the Court expounded upon the meaning of "public policy" under Section 34 of the Arbitration Act. The relevant extracts of the decision are reproduced as under:

> *"**17**. It will be seen that none of the grounds contained in sub-section (2)(a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances.*
>
> ***18**. In Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , the Supreme Court*

construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:

> *"7. Conditions for enforcement of foreign awards.—(1) A foreign award may not be enforced under this Act—*
>
> ***
>
> *(b) if the Court dealing with the case is satisfied that—*
>
> ***
>
> *(ii) the enforcement of the award will be contrary to the public policy."*

In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to

> *(i) The fundamental policy of Indian law,*
>
> *(ii) The interest of India,*
>
> *(iii) Justice or morality,*

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene

any fundamental policy of Indian law (see SCC pp. 689 & 693, paras 85 & 95).

***19**. When it came to construing the expression "the public policy of India" contained in Section 34(2)(b)(ii) of the Arbitration Act, 1996, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] held: (SCC pp. 727-28 & 744-45, paras 31 & 74)*

> *"31. Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be—award could be set aside if it is contrary to:*
>
> *(a) fundamental policy of Indian law; or*
>
> *(b) the interest of India; or*
>
> *(c) justice or morality, or*
>
> *(d) in addition, if it is patently illegal.*

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

***

74. In the result, it is held that:

(A)(1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) The court may set aside the award:

(i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act,

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable;

(vii) in certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract."

*****

27. *Coming to each of the heads contained in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.*

*****

29. *It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.*

30. *The audi alteram partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act. These sections read as follows:*

> *"18.Equal treatment of parties.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case.*
>
> ***
>
> *34.Application for setting aside arbitral award.—*
> *(1)****
>
> *(2) An arbitral award may be set aside by the court only if—*

> *(a) the party making the application furnishes proof that—*
>
> ***
>
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;"*

31. *The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:*

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. *A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312] , it was held: (SCC p. 317, para 7)*

> *"7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."*

In Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held: (SCC p. 14, para 10)

"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

***33**. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:"General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong".It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is*

found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

> *"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."*

***34**. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.*

*****

***36**. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court.*

An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".

Morality

***37**. The other ground is of "morality". Just as the expression "public policy" also occurs in Section 23 of the Contract Act, 1872 so does the expression "morality". Two illustrations to the said section are interesting for they explain to us the scope of the expression "morality":*

> *"(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1000 rupees to A. The agreement is void, because it is immoral.*
>
> *(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Penal Code, 1860."*

*****

***39**. This Court has confined morality to sexual morality so far as Section 23 of the Contract Act, 1872 is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific performance of a contract involving prostitution. "Morality" would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. However, interference on*

this ground would also be only if something shocks the court's conscience.

Patent Illegality

***40**. We now come to the fourth head of public policy, namely, patent illegality. It must be remembered that under the Explanation to Section 34(2)(b), an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator. This is explained by Denning, L.J. in R. v. Northumberland Compensation Appeal Tribunal, ex p Shaw [(1952) 1 All ER 122 : (1952) 1 KB 338 (CA)] : (All ER p. 130 D-E : KB p. 351)*

> *"Leaving now the statutory tribunals, I turn to the awards of the arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means (see Statutes 9 and 10 Will. III, C. 15). At one time an award could not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held in Kent v. Elstob [(1802) 3 East 18 : 102 ER 502] , that an award could be set aside for error of law on the face of it. This was regretted by Williams, J., in*

Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] , but is now well established."

***41**. This, in turn, led to the famous principle laid down in Champsey Bhara Co. v. Jivraj Balloo Spg. and Wvg. Co. Ltd. [AIR 1923 PC 66 : (1922-23) 50 IA 324 : 1923 AC 480 : 1923 All ER Rep 235 (PC)] , where the Privy Council referred to Hodgkinson [(1857) 3 CB (NS) 189 : 140 ER 712] and then laid down: (IA pp. 330-32)*

"The law on the subject has never been more clearly stated than by Williams, J. in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] : [CB(NS) p. 202 : ER p. 717]

'The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final Judge of all questions both of law and of fact. ... The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think firmly established viz. where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established.'

***

Now the regret expressed by Williams, J. in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended.

An error in law on the face of the award means, in Their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned Judges have arrived at finding what the mistake was is by saying: 'Inasmuch as the arbitrators awarded so and so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Rule 52.' But they were entitled to give their own interpretation to Rule 52 or any other article, and the award will stand unless, on the face of it they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, Their Lordships think that the judgment of Pratt, J. was right and the conclusion of the learned Judges of the Court of Appeal [Jivraj Baloo Spg. and Wvg. Co. Ltd. v. Champsey Bhara and Co., ILR (1920) 44 Bom 780. The judgment of Pratt, J. may be referred to at ILR p. 787.] erroneous."

This judgment has been consistently followed in India to test awards under Section 30 of the Arbitration Act, 1940."

94. Subsequent to the decision in Associated Builders (supra), the Arbitration and Conciliation (Amendment) Act, 2015 (*hereinafter referred to as* "**the 2015 Amendment Act**") was enacted which amended Section 34 of the Arbitration Act. The Apex Court in Ssangyong (supra), interpreted Section 34 of the Arbitration Act by tracing the history of the provision and various developments the provision had undergone, by way of judicial decisions, legislative amendments and suggestions by the Law Commission. Analysing the same, the Court then stated the following, apropos Section 34(2)(b)(ii) of the Arbitration Act:

> *"**34**. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .*

35. *It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.*

36. *Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.*

37. *Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous*

application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

***38**. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.*

***39**. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.*

***41**. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.*

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> ***44***. *In Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , this Court dealt with a challenge to a foreign award under Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (the Foreign Awards Act). The Foreign Awards Act has since been repealed by the 1996 Act. However, considering that Section 7 of the Foreign Awards Act contained grounds which were borrowed from Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention), which is almost in the same terms as Sections 34 and 48 of the 1996 Act, the said judgment is of great importance in understanding the parameters of judicial review when it comes to either foreign awards or international commercial arbitrations being held in India, the grounds for challenge/refusal of enforcement under Sections 34 and 48, respectively, being the same."*

95. The above decisions have been recently followed in Delhi Airport Metro Express (P) Ltd. v. Delhi Metro Rail Corporation Limited, **(2022) 1 SCC 131**, wherein the Court observed as under:

> *"**28**. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the*

award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

***29**. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality".*

30. *Section 34(2)(b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression "public policy of India" and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.*

31. *In Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , this Court held that the meaning of the expression "fundamental policy of Indian law" would be in accordance with the understanding of this Court in Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] . In Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , this Court observed that violation of the Foreign Exchange Regulation Act, 1973, a statute enacted for the "national economic interest", and disregarding the superior Courts in India would be antithetical to the fundamental policy of Indian law. Contravention of a statute not linked to public policy or public interest cannot be a ground to set at naught an arbitral award as being discordant with the fundamental policy of Indian law and neither can it be brought within the confines of "patent illegality" as discussed above. In other words, contravention of a statute only if it is linked to public policy or public interest is cause for setting aside the award as being at odds with the fundamental policy of Indian law. If an*

> *arbitral award shocks the conscience of the court, it can be set aside as being in conflict with the most basic notions of justice. The ground of morality in this context has been interpreted by this Court to encompass awards involving elements of sexual morality, such as prostitution, or awards seeking to validate agreements which are not illegal but would not be enforced given the prevailing mores of the day. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213]"*

96. The question of the power of a Court dealing with an application under Section 34 of the Arbitration Act to *suo motu* discover grounds of fraud and introduce additional grounds to a Section 34 application by way of an amendment application, even after the period prescribed in the statute has been answered by the Hon'ble Supreme Court in its decisions in Hindustan Construction Company (supra) and Sal Udyog (supra).

97. In Hindustan Construction Company (supra) the Court was dealing with an amendment application for incorporation of additional grounds in an application under Section 34 or an appeal under Section 37. Similar to the present case, the amendment application had been filed after the period of limitation prescribed under Section 34(3). The Court in its decision has held as under:

> *"**29**. There is no doubt that the application for setting aside an arbitral award under Section 34 of the 1996 Act has to be made within the time prescribed under sub-section (3) i.e. within three months and a further period of thirty days on sufficient cause being shown and not thereafter. Whether incorporation of additional grounds by way of amendment in the application under Section 34 tantamounts to filing a fresh application in all situations and circumstances. If that were to be treated so, it would follow that no amendment in the application for setting aside the*

award howsoever material or relevant it may be for consideration by the court can be added nor existing ground amended after the prescribed period of limitation has expired although the application for setting aside the arbitral award has been made in time. This is not and could not have been the intention of the legislature while enacting Section 34.

***30**. More so, Section 34(2)(b) enables the court to set aside the arbitral award if it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or the arbitral award is in conflict with the public policy of India. The words in clause (b) "the court finds that" do enable the court, where the application under Section 34 has been made within prescribed time, to grant leave to amend such application if the very peculiar circumstances of the case so warrant and it is so required in the interest of justice.*

***31**.L.J. Leach & Co. Ltd. [AIR 1957 SC 357 : 1957 SCR 438] and Pirgonda Hongonda Patil [AIR 1957 SC 363 : 1957 SCR 595] , seem to enshrine clearly that courts would, as a rule, decline to allow amendments, if a fresh claim on the proposed amendments would be barred by limitation on the date of application but that would be a factor for consideration in exercise of the discretion as to whether leave to amend should be granted but that does not affect the power of the court to order it, if that is required in the interest of justice. There is no reason why the same rule should not be applied when the court is called upon to consider the application for amendment of grounds in the application for setting aside the arbitral award or the amendment of the grounds in appeal under Section 37 of the 1996 Act.*

***32**. It is true that, the Division Bench of the Bombay High Court in Vastu Invest & Holdings (P) Ltd. [(2001) 2 Arb LR 315 (Bom)] held that independent*

ground of challenge to the arbitral award cannot be entertained after the period of three months plus the grace period of thirty days as provided in the proviso to sub-section (3) of Section 34, but, in our view, by "an independent ground" the Division Bench meant a ground amounting to a fresh application for setting aside an arbitral award. The dictum in the aforesaid decision was not intended to lay down an absolute rule that in no case an amendment in the application for setting aside the arbitral award can be made after expiry of period of limitation provided therein.

***33**. Insofar as Bijendra Nath Srivastava [(1994) 6 SCC 117] is concerned, this Court did not agree with the view of the High Court that the trial court did not act on any wrong principle while allowing the amendments to the objections for setting aside the award under the 1940 Act. This Court highlighted the distinction between "material facts" and "material particulars" and observed that amendments sought related to material facts which could not have been allowed after expiry of limitation. Having held so, this Court even then went into the merits of objection introduced by way of amendment. In our view, a fine distinction between what is permissible amendment and what may be impermissible, in sound exercise of judicial discretion, must be kept in mind. Every amendment in the application for setting aside an arbitral award cannot be taken as fresh application.*

*****

***35**. The question then arises, whether in the facts and circumstances of the present case, the High Court committed any error in rejecting the appellant's application for addition of new grounds in the memorandum of arbitration appeal.*

***36**. As noticed above, in the application for setting aside the award, the appellant set up only five grounds viz. waiver, acquiescence, delay, laches and res*

> *judicata. The grounds sought to be added in the memorandum of arbitration appeal by way of amendment are absolutely new grounds for which there is no foundation in the application for setting aside the award. Obviously, such new grounds containing new material/facts could not have been introduced for the first time in an appeal when admittedly these grounds were not originally raised in the arbitration petition for setting aside the award. Moreover, no prayer was made by the appellant for amendment in the petition under Section 34 before the court concerned or at the appellate stage.*
>
> ***37**. As a matter of fact, the learned Single Judge in para 6 of the impugned order has observed that the grounds of appeal which are now sought to be advanced were not originally raised in the arbitration petition and that the amendment that is sought to be effected is not even to the grounds contained in the application under Section 34 but to the memo of appeal. In the circumstances, it cannot be said that discretion exercised by the learned Single Judge in refusing to grant leave to the appellant to amend the memorandum of arbitration appeal suffers from any illegality."*

98. In Sal Udyog (supra), the Court was concerned with the question of whether a party waives off its right to plead a specific ground in an appeal under Section 37 of the Arbitration Act if it has not pleaded the same in its application under Section 34. In the facts of that particular case, the ground of patent illegality was pleaded by the Appellant therein in its appeal under Section 37 but not in its Section 34 application. The Court in that case has observed:

> *"**24**. We are afraid, the plea of waiver taken against the appellant State on the ground that it did not raise such an objection in the grounds spelt out in the*

Section 34 petition and is, therefore, estopped from taking the same in the appeal preferred under Section 37 or before this Court, would also not be available to the respondent Company having regard to the language used in Section 34(2-A) of the 1996 Act that empowers the Court to set aside an award if it finds that the same is vitiated by patent illegality appearing on the face of the same. Once the appellant State had taken such a ground in the Section 37 petition and it was duly noted in the impugned judgment, the High Court ought to have interfered by resorting to Section 34(2-A) of the 1996 Act, a provision which would be equally available for application to an appealable order under Section 37 as it is to a petition filed under Section 34 of the 1996 Act. In other words, the respondent Company cannot be heard to state that the grounds available for setting aside an award under sub-section (2-A) of Section 34 of the 1996 Act could not have been invoked by the Court on its own, in exercise of the jurisdiction vested in it under Section 37 of the 1996 Act. Notably, the expression used in the sub-section is "the Court finds that". Therefore, it does not stand to reason that a provision that enables a Court acting on its own in deciding a petition under Section 34 for setting aside an award, would not be available in an appeal preferred under Section 37 of the 1996 Act.

***25**. Reliance placed by the learned counsel for the respondent Company on the ruling in Hindustan Construction Co. Ltd. [State of Maharashtra v. Hindustan Construction Co. Ltd., (2010) 4 SCC 518 : (2010) 2 SCC (Civ) 207] is found to be misplaced. In the aforesaid case, the Court was required to examine whether in an appeal preferred under Section 37 of the 1996 Act against an order refusing to set aside an award, permission could be granted to amend the memo of appeal to raise additional/new grounds. Answering the said question, it was held that though an application for setting aside the arbitral award under*

> *Section 34 of the 1996 Act had to be moved within the time prescribed in the statute, it cannot be held that incorporation of additional grounds by way of amendment in the Section 34 petition would amount to filing a fresh application in all situations and circumstances, thereby barring any amendment, however material or relevant it may be for the consideration of a Court, after expiry of the prescribed period of limitation. In fact, laying emphasis on the very expression "the Court finds that" applied in Section 34(2)(b) of the 1996 Act, it has been held that the said provision empowers the Court to grant leave to amend the Section 34 application if the circumstances of the case so warrant and it is required in the interest of justice. This is what has been observed in the preceding paragraph with reference to Section 34(2-A) of the 1996 Act."*

99. In both the above cases, the Apex Court has looked at the language of the provision under Section 34 of the Arbitration Act and laid emphasis upon the phrase "*the Court finds that*" that occurs in Section 34(2)(b) and 34(2A) of the Arbitration Act. This phrase has been interpreted by the Court, as an enabling provision, allowing the Court while deciding an application under Section 34 of the Arbitration Act to grant leave to amend an application under Section 34 of the Arbitration Act, if the peculiar circumstances of the case so warrant and it is so required in the interest of justice. The Court has held that the phrase enables a Section 34 Court to discover on its own, patent illegality in the award and set it aside under Section 34(2A). It has further held that the provision, which enables a Court to act on its own in deciding an application under Section 34, would also be available in an appeal under Section 37 of the Act.

100. The phrase "*the Court finds that*", which finds mention in both Section 34(2)(b) and Section 34(2A), allows the Court to look into the award

and discover the grounds mentioned under Section 34(2)(b) and Section 34(2A) of the Arbitration Act. Consequentially, the phrase, enables the Court, to discover *suo motu*, whether an award is in conflict with the public policy of India. As a corollary, having regards to Explanation 1(i) of Section 34(2)(b) of the Arbitration Act, it follows that the Court would also have the power to discover on its own whether the making of an award is induced or affected by fraud or corruption or is in violation of Section 75 or 81 of the Arbitration Act. We, therefore, find no merit in the submission of the Appellant herein, that a Section 34 Court does not have the power to *suo motu* discover grounds of public policy or fraud and set aside an arbitral award on this basis.

101. The facts of the present case are nothing short of peculiar. Devas has an arbitral award amounting to USD 562.5 million along with interest and costs, in its favour. While the arbitral award was published on 14.09.2015, there have been two chargesheets filed by the CBI against Devas and other individuals alleging criminal conspiracy, fraud and other corrupt practices on 11.08.2016 and 08.01.2019 and the investigation regarding the same is ongoing. While the proceedings in the underlying Section 34 Petition were pending, the Supreme Court has upheld the decision of the NCLT and NCLAT to wind up Devas on the grounds that it was formed for a fraudulent and unlawful purpose and the affairs of Devas have been conducted in a fraudulent manner. The Hon'ble Supreme Court in its Judgment passed in Civil Appeal No.5766/2021 has confirmed certain finding on facts, which have attained finality and are binding upon the parties and this Court on the basis of these findings, the following observations can be arrived at:

*101.1.*It is well established that Devas was incorporated with fraudulent intentions, so that it could enter into the Devas Agreement with Antrix.

Devas could manage to do so, only by conniving and colluding with the then officials of Antrix, which assisted Devas in entering into the Devas Agreement. The collusion between the officials of DoS and Antrix is borne out from the Note for the 104th Space Commission which did not contain any references to the Devas Agreement. The Cabinet Note dated 17.11.2005, which were prepared ten (10) months after the signing of the Devas Agreement, did not make any mention about Devas or the Agreement, but the cabinet proceeded on the basis that ISRO had received multiple expressions of interest from various entities. Therefore, the Cabinet was kept completely in the dark and material information was suppressed by Devas when Cabinet approval was obtained by Devas. Further, the Cabinet was misled to believe there are several firm expressions of interest before ISRO, even though the agreement was granted only to Devas. Devas has thus not only suppressed, but also misrepresented information in order to pursue its fraudulent activities in India.

101.2. The Devas Agreement is an agreement of huge magnitude pertaining to the leasing out of transponders by Antrix, to Devas, on the Primary Satellite-I, without the same being preceded by any auction or tender process. It is also established that the minutes of the meeting of the Sub Comittee dated 06.01.2009 were manipulated and an experimental license was granted on 07.05.2009 and the original minutes were restored on 20.11.2009 after protest.

101.3. It is also established that Devas, with a fraudulent motive and unlawful object, used the Devas Agreement to bring in money into India and divert it using dubious methods. This is evidenced by the fact that Devas brought into India an amount of Rs. 579 crores, but took out of India, an

amount of Rs. 489 crores soon after. This diversion of funds has been held to be in violation of the ISP license upon which Devas was operating.

101.4. It is pertinent to note that, at the time of entering into the Devas Agreement, Devas did not have the technology, infrastructure or experience to perform their obligations under the Agreement, and even after termination of the Agreement, Devas was not carrying on any business operations in India.

102. A reading of the aforesaid facts clearly establishes that the fraudulent conduct of Devas begins from the very incorporation of the company and extends to the Devas Agreement, in its entirety, and all other actions pursued by it. The nature of fraud is so serious and complex that it not only resulted in the company being wound up under the Companies Act, 2013, but also led to a criminal investigation against the company and its officers. The Devas Agreement itself has been obtained through the process of fabrication of documents and misrepresentation and constitutes a clear case of fraud. Such is the extent of the fraud that it permeates through every agreement, transaction or award entered into by Devas. The fraud propagated by Devas is not only against Respondent No. 1, but against the State as a whole, inasmuch as it attempts to obtain monetary benefits from the State itself, by attempting to enforce an arbitral award, which itself is arising out of fraud. A fraud of such scale would certainly render the award to be in conflict with the public policy of India.

103. In view of the aforestated judgments, specific amendments to Section 34 of the Arbitration Act, and in view of the categorical findings of the Apex Court in its Judgment passed in Civil Appeal No.5766/2021, nothing prevented the learned Single Judge from relying on those findings and using them for the purpose of setting aside the ICC Award under Section 34 of the

Arbitration Act on the ground that the agreement itself was a product of fraud and, therefore, the making of award is automatically induced by fraud and corruption. The findings by the Apex Court, which is the highest Court of the land, could not have been ignored by the learned Single Judge and those findings would automatically become the findings of the learned Single Judge while considering an application under Section 34 of the Arbitration Act for which there was no necessity of a specific pleading. In any event, applications have been filed, though belatedly, and the Apex court in Hindustan Construction Company (supra) and Sal Udyog (supra) has held that the Courts, while dealing with an application under Section 34 of the Arbitration Act, have the power to discover grounds under Section 34(2)(b) and 34(2A) of the Arbitration Act. The learned Single Judge, in paragraphs No.162 & 163 of the Impugned Judgment, has rejected the contention of the Appellants herein that the application cannot be considered because it is barred by limitation. The learned Single Judge, therefore, has applied his mind to the amendment application also and has taken it into consideration while deciding the application under Section 34 of the Arbitration Act and the issue as to whether the making of award was vitiated by fraud or corruption.

104. We therefore see no perversity in the decision of the Ld. Single Judge to set aside the ICC Award on the grounds of fraud and it being in conflict with the public policy of India. Accordingly, the challenge to the Impugned Judgment by the Appellant, on the ground that the Ld. Single Judge could not consider the grounds of public policy and fraud under Section 34 fails.

105. The last aspect to be considered is the contention of the Learned Senior Counsel for the Appellant herein that the general observations regarding fraud cannot be applied while considering an application under

Section 34 of the Arbitration Act without satisfying the ingredients of Sections 17 & 19 of the Indian Contract Act, 1872. It is his case that a general principle of fraud cannot be applied when there are specific provisions, namely Sections 17 & 19 of the Indian Contract Act, 1872 and Explanation 1(i) to Section 34(2)(b)(ii) of the Arbitration Act, which would prevail over this general principle.

106. At this juncture, it would be apposite to elucidate upon the principle of "*fraud vitiates all solemn acts*" as has been expounded through various judicial decisions. The Hon'ble Supreme Court in S.P. Chengalvaraya Naidu v. Jagannath and Ors**., (1994) 1 SCC 1**, speaking about the aforesaid principle has observed as under:

> *"**1. "Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree — by the first court or by the highest court — has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.***
>
> *XXX*
>
> ***5.** The High Court, 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, 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, who's case is based on falsehood, has no right to approach the court.*** *He can be summarily thrown out at any stage of the litigation."*
>
> (emphasis supplied)

107. Following the decision in S.P. Chengalvaraya Naidu (supra), in Ram Chandra Singh v. Savitri Devi, **(2003) 8 SCC 319**, the Apex Court has held as under:

> *"**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 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.*

xxx

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.

xxx

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.

xxx

37. *It will bear repetition to state that any order obtained by practising fraud on court is also non est in the eye of the law."* *(emphasis supplied)*

108. In Bhaurao Dagdu Paralkar v. State of Maharashtra and Ors., **(2005) 7 SCC 605**, it has been 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. [1963 Supp (2) SCR 585 : AIR 1963 SC 1572] and Indian Bank v. Satyam Fibres (India) (P) Ltd. [(1996) 5 SCC 550]]*

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 [(1994) 1 SCC 1] .)*

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 also 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 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 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 [(2003) 8 SCC 319] .)*

xxx

16. *In Lazarus Estates Ltd. v. Beasley [(1956) 1 QB 702 : (1956) 1 All ER 341 : (1956) 2 WLR 502 (CA)] 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.*** *(p. 722) These aspects were recently highlighted in State of A.P. v. T. Suryachandra Rao [(2005) 6 SCC 149 : (2005) 5 Scale 621] ."* (emphasis supplied)

109. Recently, in Satluj Jal Vidyut Nigam v. Raj Kumar Rajinder Singh and Ors., **(2019) 14 SCC 449**, the Hon'ble Supreme Court has held:

> *"**65.** The question in the instant case is as to whether an incumbent can be permitted to play blatant fraud time and again and court has to be silent spectator under the guise of label of the various legal proceedings at different stages by taking different untenable stands whether compensation can be claimed several times as done in the instant case and its effect. Before the land acquisition had been commenced in 1987, the land more than 1000 bighas had been declared a surplus in ceiling case and compensation collected, which indeed (quaere included) disputed land at Jhakari,* ***it would be a perpetuating fraud in case such a person is permitted to claim compensation for same very land. Fraud vitiates the solemn proceedings; such plea can be set up even in collateral proceedings.*** *The label on the petition is not much material and this Court has already permitted the plea of fraud to be raised. Moreover, the appeal arising out of 72 awards is still pending in the High Court in which Reference Court has declined compensation on the aforesaid ground.*
>
> *xxx*
>
> ***68. Fraud vitiates every solemn proceeding and no right can be claimed by a fraudster on 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 wilful) 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) Unconscionable dealing; esp., in contract law, the unconscientious use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain."* (emphasis supplied)

110. It is now well settled that the principle of "*fraud vitiates all solemn acts*" is applicable not only to the primary proceedings, but also to all collateral proceedings that arise out of the same facts and circumstances. The act of fraud is an anathema to all equitable principles and every transaction tainted with fraud must be viewed with disdain by Courts. Fraud is always viewed seriously by Courts and any act or conspiracy, of fraud or deception, done with a view to deprive the rights of others in relation to a property would render such a transaction *void ab initio*. A party which commits such fraud or deception cannot be permitted to reap its benefits, especially by taking advantage of the judicial process, including in subsequent or collateral proceedings, as doing so would result in the Court enabling the perpetuation of fraud. Such an interpretation would be absurd and would lead to disastrous outcomes.

111. We see no merit in the submission that the principle of "*fraud vitiates all solemn acts*" is a general principle and a special provision will prevail over the same. Even in instances where the subsequent proceedings or a collateral proceeding pertains to the application of a special provision on fraud, the factum of fraud having been established in a previous proceeding will affect all the transactions and proceedings which have been tainted with fraud. In the instant case, the Supreme Court in the Civil Appeal No.5766/2021, has held that the commercial relationship between Devas and Antrix is a product of fraud, and as a consequence, the Devas Agreement, the ICC Award, and all other disputes arising out of the transaction would be tainted by fraud. Permitting Devas and its shareholders to reap the benefits of the ICC Award would amount to this Court perpetuating the fraud. Such a view would be against all principles of justice, equity and good conscience.

112. At the cost of repetition, paragraphs 13.5 and 13.6 of the Civil Appeal No.5766/2021 are binding upon the Ld. Single Judge and this Court. Thus, the observations made therein, which are based upon the principle of "*fraud vitiates all solemn acts*", are not only correct in law, but also binding upon the Ld. Single Judge and this Court. We, therefore, see no infirmity in the Impugned Judgment, wherein the Ld. Single Judge has relied upon paragraphs No.13.5 and 13.6 of the Judgment of the Apex Court passed in Civil Appeal No.5766/2021 to set aside the ICC Award.

113. It would be against the principles of justice, equity and good conscience to permit Devas to reap the benefits of the ICC Award, and permitting Devas to do so would amount to this Court perpetuating the fraud.

CONCLUSION:

114. To summarize:

a) The findings of the Apex Court in its Judgment in Civil Appeal No.5766/2021 while upholding the findings of the NCLT and NCLAT, noted that Devas was incorporated for a fraudulent purpose and that its affairs were being conducted in a fraudulent manner. The Apex Court has given these findings after being aware of the fact that an arbitral award has been passed in favour of Devas and the same is under challenge in a petition under Section 34 of the Arbitration Act. The Apex Court has repelled the contention of Devas that the application for winding up was filed only to circumvent the enforcement of the arbitral award. Without the findings rendered by the Apex Court regarding fraud, the Apex Court could not have come to the conclusion that Devas had been incorporated for fraudulent purposes and that its affairs were being conducted in a fraudulent manner and, therefore, the order of winding up Devas under Section 271(c) of the Companies Act, 2013 was correct. These findings, therefore, become the ratio and not the obiter of the case and therefore, were binding on the learned Single Judge under Article 141 of the Constitution of India. It is settled law that even obiter of a judgment of the Hon'ble Supreme Court is binding on all Courts subordinate to it. The Apex Court in Peerless (supra) has reiterated that though the focus of the Apex Court may not be directly on a partiuclar point, yet, a pronouncement by the Apex Court, even if it cannot be called the *ratio decidendi* of the judgment, will still be binding on the High Courts.

b) The proceedings before the Apex Court in Civil Appeal No.5766/2021 are formal proceedings between the same parties i.e., Antrix, Devas and DEMPL, arising out of the same factual matrix,

and the issue of the effect of fraudulent actions of Devas was directly and substantially in issue before the Hon'ble Supreme Court. The issue of fraud was raised and agitated before the Apex Court in Civil Appeal No.5766/2021 and has been heard and finally decided by the Apex Court which was competent to render the findings on the issue before it. As a consequence, the findings of the Apex Court in its Judgment in Civil Appeal No.5766/2021, particularly Paragraphs No. 12 and 13, would be binding between the parties on the basis of the principle of *res judicata.*

c) Article 144 of the Constitution of India mandates every authority to aid in enforcing the orders and decrees of the Supreme Court. The Apex Court in Civil Appeal No.5766/2021 has held that Devas was incorporated for fraudulent purposes and the affairs of the company were being conducted in a fraudulent manner, and therefore, the agreement, from which the present arbitration arises, was a product of fraud. After such a finding has been rendered by the Apex Court, it was not open for the learned Single Judge to come to the conclusion that the award, which has been held to be a product of fraud, would still be enforceable in the country. Such a finding by the learned Single Judge would be against the spirit of Article 144 of the Constitution of India.

d) The phrase "*the Court finds that*", which finds mention in Section 34(2)(b) of the Arbitration Act, enables the Court to look into attendant circumstances to form its own opinion as to whether the award is in conflict with public policy of India or not. As a corollary, it follows that the Court would also have the power to discover on its own, whether the making of an award is induced or affected by fraud

or corruption or is in violation of Section 75 or 81 of the Arbitration Act. This phrase has been interpreted by the Court, as an enabling provision, allowing the Court while deciding an application under Section 34 of the Arbitration Act to grant leave to amend an application under Section 34 of the Arbitration Act, if the peculiar circumstances of the case so warrant and it is so required in the interest of justice.

e) In view of the various Judgments of the Hon'ble Supreme Court interpreting Section 34 of the Arbitration Act, the amendments to Section 34 of the Arbitration Act and in view of the categorical findings of the Apex Court in its Judgment passed in Civil Appeal No.5766/2021, nothing prevented the learned Single Judge from relying on those findings and using them for the purpose of setting aside the ICC Award under Section 34 of the Arbitration Act on the ground that the agreement itself was a product of fraud and, therefore, the making of award is automatically induced by fraud and corruption. The findings by the Apex Court, which is the highest Court of the land, could not have been ignored by the learned Single Judge and those findings would automatically become the findings of the learned Single Judge while considering an application under Section 34 of the Arbitration Act for which there was no necessity of a specific pleading. From a comprehensive reading of the Impugned Judgment, it is evident that the learned Single Judge has applied his mind to the amendment applications and has taken it into consideration while deciding the petition under Section 34 of the Arbitration Act and the issue as to whether the making of award was vitiated by fraud or corruption.

f) The principle of "*fraud vitiates all solemn acts*" is applicable not only to the primary proceedings, but also to all collateral proceedings that arise out of the same facts and circumstances. The act of fraud is an anathema to all equitable principles and every transaction tainted with fraud must be viewed with disdain by Courts. In the instant case, the Supreme Court in the Civil Appeal No.5766/2021 has held that the commercial relationship between Devas and Antrix is a product of fraud, and as a consequence, the Devas Agreement, the ICC Award, and all other disputes arising out of the transaction would be tainted by fraud. Permitting Devas and its shareholders to reap the benefits of the ICC Award would amount to this Court perpetuating the fraud. Such a view would be against all principles of justice, equity and good conscience.

g) The learned Single Judge has not made an error in setting aside the ICC Award on the grounds of fraud and it being in conflict with the public policy of India. Accordingly, the challenge to the Impugned Judgment by the Appellant, on the ground that the Ld. Single Judge could not consider the grounds of public policy and fraud under Section 34 fails.

115. With the aforesaid observations, the appeal is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

MARCH 17, 2023
Rahul/Arsh