Devas Multimedia Private Limited vs Antrix Corporation Limited on 17 January, 2022

Author: V. Ramasubramanian

Bench: V. Ramasubramanian, Hemant Gupta

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5766 of 2021

DEVAS MULTIMEDIA PRIVATE LTD. ... APPELLANT(S)

Versus

ANTRIX CORPORATION LTD. & ANR. ... RESPONDENT(S)

WITH

CIVIL APPEAL NO.5906 of 2021

JUDGMENT

V. Ramasubramanian, J.

1. Challenging an order of winding up passed by the National Company Law Tribunal under Section 271(c) of the Companies Act, 2013 (for short the 2013 Act), which was confirmed by the National Company Law Appellate Tribunal on appeals, the company in liquidation, namely, Devas Multimedia Private Limited, through its ex-Director has come up with an appeal in Civil Appeal No.5766 of 2021 and one of the shareholders of the company in liquidation, namely, Devas Employees Mauritius Private Limited (hereinafter referred to as DEMPL) has come up with another appeal in CA No.5906 of 2021.

2. We have heard Shri Mukul Rohtagi, learned senior counsel appearing for the company in liquidation, Shri Arvind P. Datar, learned senior counsel appearing for the shareholder-appellant, Shri N. Venkataraman, learned Additional Solicitor General appearing for Respondent No. 1 herein, which is the company which moved the Tribunal for winding up the company in liquidation and Shri

Balbir Singh, learned Additional Solicitor General appearing for the Union of India.

3. Brief Background 3.1 The first respondent in these appeals, namely, Antrix Corporation Limited (hereinafter referred to as Antrix), incorporated on 28.09.1992 under the Companies Act, 1956, is the commercial arm of the Indian Space Research Organisation (ISRO for short) which is wholly owned by the Government of India and coming under the administrative control of the Department of Space. 3.2 On 28.07.2003, Antrix entered into a Memorandum of Understanding with Forge Advisors, LLC, a Virginia Corporation. The intent, as spelt out in the MOU, was to make both parties become "strong and vital partners in evaluating and implementing major new satellite applications across diverse sectors including agriculture, education, media and telecommunications". Apart from other things, the MOU contemplated Forge Advisors to provide a broad array of advisory services that included near-term tactical projects in the areas of sales, marketing, business development, strategic partnership negotiations and other related business areas and long term projects in the areas of corporate strategy, market opportunity assessment, business case development for new services, launch of new application services etc. 3.3 On 22.03.2004, Forge Advisors made a presentation proposing an Indian joint venture, to launch what 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 such as (i) consumer segment, comprising of entertainment and information services to digital multimedia consoles in cars and vehicles; (ii) commercial segment, comprising of high value information services to Commercial Information Devices in commercial transport vehicles; and (iii) social segment, comprising of Developmental Information Services to Rural Information kiosks in underserved areas.

3.4 The presentation dated 22.03.2004 was followed by a proposal dated 15.04.2004. The proposal was to form "a strategic partnership to launch DEVAS, a new service that delivers video, multimedia and information services via satellite to mobile receivers in vehicles and mobile phones across India". The proposal dated 15.04.2004 indicated that 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 satellite to mobile receivers in vehicles and mobile phones across India 1. The proposal contemplated the formation of a joint venture and 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.

3.5 The concept of DEVAS, as indicated in the penultimate paragraph of the Executive Summary of the proposal dated 15.04.2004, was based upon the evolution and performance of 1 Paragraph 1 of the Executive Summary of the Proposal dated 15.04.2004 similar services in other markets such as XM Radio and Sirius Radio in the United States and Mobile Broadcasting Corporation's multimedia services via satellite in Korea and Japan. 3.6 It appears that pursuant to the aforesaid proposal, several meetings were held between the representatives of Forge and ISRO/Antrix and a Committee headed by one Dr. K.N. Shankara, Director of SAC (Space Application Centre) was constituted to examine the proposal.

3.7 On 17.12.2004 Devas Multimedia Private Limited, (hereinafter referred to as 'Devas' or the 'company in liquidation') was incorporated as a private company under the Companies Act, 1956. Immediately thereafter, Antrix entered into an Agreement with the said company on 28.01.2005. The Agreement was titled as "Agreement for the lease of space segment capacity on ISRO/Antrix S□ Band spacecraft by DEVAS". The preamble of the 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 and that Devas had, therefore, requested Antrix, 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.. What was to be leased out by Antrix to Devas was 5 numbers of C X S transponders each of 8.1 MHz capacity and 5 numbers of S X C transponders each of 2.7 MHz capacity on the Primary Satellite 1 (PS1). The leased capacity was agreed to be delivered by Antrix to Devas from a fully operational and ready PS□1 within 30 months of the agreement, with a further grace period of six months.

3.8 Article 7 of the Agreement contained provisions for the termination of the Agreement by either of the parties, with certain consequences to one or the other, depending upon the circumstances under which termination was made. 3.9 It appears that Devas obtained approvals from Foreign Investment Promotion Board (FIPB) during the period May 2006 to September 2009. Pursuant to those approvals, Devas actually brought into India, an investment of about INR 579 crores. 3.10 Devas also obtained an Internet Service Provider (ISP) License from the Department of Telecommunications on 02.05.2008. Devas then 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 ISP license. Devas claims to have conducted experiments on the emerging technologies for satellite and terrestrial system in September 2009.

3.11 However the Agreement dated 28.01.2005 was terminated by Antrix by a Communication dated 25.02.2011, in accordance with Article 7(c) of the Agreement, which provides for termination on the ground of force majeure. It was stated in the said letter that the Government of India had taken a policy decision not to provide orbital slots in S□Band for commercial activities. 3.12 This termination led to Devas initiating a commercial arbitration in India before the ICC Arbitral Tribunal. Independently, the Mauritius investors initiated a BIT arbitration under the India□ Mauritius Bilateral Investment Treaty and the German Company by name Deutsche Telecom, initiated a BIT arbitration under the India□Germany BIT. ICC Arbitral Tribunal passed an Award on 14.09.2015 directing Antrix to pay Devas, a sum of USD 562.5 million with simple interest @ 18% p.a. The Government of India suffered similar awards in the other 2 BIT Arbitral proceedings also. 3.13 In the meantime, the Central Bureau of Investigation (CBI) filed a First Information Report on 16.03.2015, against the company in liquidation namely Devas, as well as the officers of Devas and Antrix, for offences under Section 420 read with Section 120B of IPC and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988. It was followed by a charge□sheet filed on 11.08.2016 and a supplementary charge□sheet on 08.01.2019. Similarly the Enforcement Directorate filed a report in ECIR No.12/BGZO/2015.

3.14 Therefore, Antrix made a request to the Ministry of Corporate Affairs, Government of India, on 14.01.2021 seeking authorization to initiate proceedings under Section 271(c) of the 2013 Act for winding up Devas. Authorisation was given on 18.01.2021, on the basis of which Antrix filed a petition before the National Company Law Tribunal, Bengaluru Bench on 18.01.2021 for the winding up of Devas.

3.15 On 19.01.2021, NCLT passed a reasoned order, after hearing the counsel for Devas, admitting the company petition and appointing the Official Liquidator attached to the High Court of Karnataka at Bangalore, as the provisional liquidator. 3.16 Against the said order of NCLT admitting the company petition, DEMPL filed an appeal, but the same was disposed of by the NCLAT with a direction to DEMPL to seek impleadment before NCLT and raise all objections.

3.17 DEMPL simultaneously filed a writ petition in W.P. No. 6191 of 2021 before the Karnataka High Court challenging the constitutional validity of Section 272(1)(e) of the Companies Act, 2013 and praying for quashing the authorization dated 18.01.2021 granted by the Ministry of Corporate Affairs to Antrix to initiate proceedings for winding up Devas. The High Court dismissed the Writ Petition on 28.04.2021 and also imposed costs of Rs.5,00,000/□on DEMPL on the ground that they were guilty of abuse of process of law.

3.18 By a final order dated 25.05.2021, NCLT directed the winding up of Devas. Aggrieved by the order of winding up, Devas filed one appeal and the shareholder□DEMPL filed another appeal before NCLAT. These appeals having been dismissed by NCLAT by an Order dated 08.09.2021, the ex□Director of the company as well as the shareholder are on appeal before us.

4. Grounds of Attack:

> 4.1 The Company in liquidation, which is the appellant in one appeal, assails the impugned orders of NCLT and NCLAT broadly on the following grounds:□
>
> (i) breach of the mandatory requirement of advertisement before ordering winding up;

(ii) winding up petition barred by limitation;

(iii) Antrix estopped from pleading fraud;

(iv) violation of the principles of natural justice due to the denial of permission for cross examination.

(v) erroneous findings of fact;
(vi) application of incorrect standard of proof on the question of fraud;

(vii) erroneous conclusions regarding the consequences of fraud, assuming that fraud was established;

4.2 DEMPL, which is the appellant in the second appeal before us and which holds 3.48% of the issued equity share capital of the Company in liquidation, assails the impugned orders broadly on the following grounds:☐

(i) The question of locus of a small shareholder to oppose winding up has been decided by both Tribunals contrary to law;

(ii) Findings recorded against shareholders on the question of fraud, have been so recorded without making them a party and without giving them an opportunity of hearing;

(iii) Inapplicability of the theory of useless formality to mandatory requirements such as advertisements before ordering winding up.

5 Defence 5.1 The impugned orders are sought to be defended by Shri N. Venkataraman, learned Additional Solicitor General appearing for Antrix, broadly on the following grounds:☐

(i) Detailed findings recorded by the Tribunal on 8 different types of fraud committed by Devas, both in the formation of the Company and in the manner in which the affairs of the Company were carried out, which cannot be assailed in an appeal under Section 423 of the Companies Act, 2013.

(ii) The Agreement dated 28.01.2005 entered into between Antrix and Devas spoke about three components, namely, DEVAS2 Technology, DEVAS services and DEVAS device, none of which existed either on the date of formation of Devas or on the date of execution of the Agreement or on the date of termination of the Agreement and not even on the date of winding up of the company.

(iii) Violation of SATCOM policy, manipulation of minutes of meetings and the misleading Cabinet Note.

(iv) Shocking nature of the financial fraud.

5.2 Shri Balbir Singh, learned Additional Solicitor General

appearing for the Union of India defended the impugned orders broadly on the following grounds:

> (i) The requirement of an advertisement before winding up is 2 Wherever there is a reference to the company in liquidation, we have used the lowercase of the letters in the word ‘Devas’ and wherever there is a reference to the technology and services offered by Devas, we have used the capital letters in the word ‘DEVAS’ redundant in a petition under Section 271(c).

(ii) The question of fraud has to be addressed from the broad parameters laid down, not only in Section 17 of the Indian Contract Act, 1872, but also in Section 447 read with Section 7 of the Companies Act, 2013 and keeping in mind the distinction between fraud, fraudulent manner, fraudulent purpose and unlawful purpose.

(iii) The attempt of Devas to challenge the constitutional validity of Section 271(c) and its failure.

(iv) The case on hand not falling under the category of cases where cross-examination was necessary.

6. Fraud as a ground for winding up and the difference between 1956 Act and 2013 Act Before we proceed to consider the specific grounds of challenge to the impugned order, it is necessary to see the contours of Section 271 (c) of the Companies Act, 2013, as it is stated by the learned counsel on both sides (i) that this is a new addition to the Companies Act; and (ii) that this is the first case of winding up on the ground of fraud. Therefore, a comparison of the provisions of 2013 Act with those of the 1956 Act may serve us better. 6.1 The Companies Act, 1956 spoke about two categories of winding up, namely, (i) winding up by the Tribunal; and

(ii) voluntary winding up. The circumstances in which a company could be wound up by the Court, were enlisted in Section 433 of the 1956 Act. This Section contained a list of nine circumstances in which a company may be wound up. Fraud (i) either in the formation of the company or (ii) in the conduct of affairs of the company or (iii) on the part of persons concerned in the formation of or the management of its affairs, was not one of the circumstances stipulated in Section 433 of 1956 Act.

6.2 Though Section 433 of the 1956 Act did not include fraud as one of the circumstances in which a company may be wound up, there was still an indirect reference to fraud. Section 439(1) of the 1956 Act provided a list of seven persons who were entitled to file an application for the winding up of a company. Under clause (f) of sub-section (1) of Section 439, an application for winding up shall be presented by "any person authorized by the Central Government in their behalf" in a case falling under Section 243. 6.3 Section 243 of the 1956 Act empowered the Central Government to cause a petition for winding up to be presented, in cases covered by sub-clause (i) or sub clause (ii) of Clause (b) of Section 237. Section 243 of the 1956 Act read as follows: "243. Application for winding up of company or an order under section 397 or 398. If any such company or other body corporate is liable to be wound up under this Act and it appears to the Central Government from any such report as aforesaid that it is expedient so to do by reason of any such circumstances as are referred to in sub-clause (i) or (ii) of clause (b) of section 237, the Central Government may, unless the company, or body corporate is already being wound up by the Tribunal, cause to be presented to the Tribunal by any person authorised by the Central Government in this behalf –

(a) a petition for the winding up of the company, or body corporate on the ground that it is just and equitable that it should be wound up ;

(b) an application for an order under section 397 or 398,

(c) both a petition and an application as aforesaid." 6.4 Section 243 forms part of a set of provisions from Sections 235 to 251 in Chapter I of Part VI of the Act. This cluster of provisions from Sections 235 to 251 is grouped under the Heading "Investigation". Section 235(1) empowers the Central Government to order an investigation into the affairs of the company whenever a Report has

been made by the Registrar under Section 234. Indepen□dent of Section 235(1), Central Government is empowered also under Section 237 to order an investigation, if, in its opinion or in the opinion of the Company Law Board (i) the business of the company is being conducted for a fraudulent or unlawful purpose or (ii) the company was formed for any fraudulent or unlawful purpose or (iii) persons concerned in the formation of the company or the management of its affairs have in connec□tion therewith, are guilty of fraud. Section 237 of the 1956 Act reads as follows:□ "237. Investigation of company's affairs in other cases. □Without prejudice to its powers under section 235, the Central Government –

(a) shall appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Central Government may direct, if –

(i) the company, by special resolution ; or

(ii) the Court, by order, declares that the affairs of the company ought to be investigated by an inspector appointed by the Central Government ; and

(b) may do so in its opinion or in the opinion of the Tribunal, there are circumstances suggesting –

(i) that the business of the company is being conducted with intent to defraud its creditors, members or any other persons, or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any of its members, or that the company was formed for any fraudulent or unlawful purpose;

(ii) that persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members ; or

(iii) that the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company." 6.5 Thus a combined reading of Sections 439(1)(f), 243 and 237(b) of the 1956 Act shows that, (i) fraud in the formation of the company; (ii) fraud in the conduct of affairs of the company; and

(iii) fraud on the part of the persons engaged in the formation or conduct of the affairs of the company, though not listed as some of the circumstances under Section 433 of the 1956 Act, were still available for the winding up of the company, even under the 1956 Act. But there were 3 requirements to be satisfied. They are: (i) the perpetration of one or the other types of fraud mentioned above are reflected in a report of investigation; (ii) the petition under these provisions is to be filed only by a person authorised by the Central Government; and (iii) the petition should be premised on the ground that it is just and equitable to wind up the company. 6.6 What is interesting to observe from section 243 (a) is that a petition for winding up in terms of Section 439(1)(f) of the 1956 Act, read with Section 237(b)(i) and (ii), has to be on "just and equitable" ground. Clause (a) of Section 243 of the 1956 Act, enabled the Central Government (if upon receipt of a report about the

existence of the circumstances referred to in Section 237(b)(i) and (ii), it appears to the Central Government that it is expedient to do so), to authorize any person to present a petition for the winding up of a company, not directly on the ground of fraud but actually on the ground that it is just and equitable that the company should be wound up.

6.7 It must be noted that just and equitable clause has several facets. The origin of just and equitable clause in Company law, is traceable to the law of partnership, which developed "the conceptions of probity, good faith and mutual confidence 3". The principle behind just and equitable clause, in the words of the House of Lords is that "equity always does enable the Court to subject the exercise of legal rights to equitable considerations". In other words, equitable considerations get superimposed on statutorily governed legal rights under this clause. 6.8 It is well settled that the words "just and equitable" in the legislation specifying the grounds for winding up by the Court, are not to be read as being ejusdem generis with the preceding words of 3 Ebrahimi vs. Westbourne Galleries Ltd.; (1972) 2 WLR 1289 the enactment. They are not to be cut down by the formation of categories or headings under which cases must be brought if the enactment is to apply4. But apart from cases, (i) where there is something in the history of the company or in the relationship between the shareholders; or (ii) where there is functional deadlock of a paralysing kind; or (iii) where there is justifiable lack of confidence, which may give rise to a petition for winding up on just and equitable clause, there have also been other cases at least before the Courts in England, some of which are listed in paragraph 360 of Volume 16 of the Fifth Edition (2017) of the Halsbury's Laws of England. Two of them are (i) where the company is a bubble company; and (ii) where the company is fraudulent in its inception and carries on at a loss without a capital of its own. 6.9 But traditionally, fraud committed by a company on outsiders or the fact that the company acted dishonestly to outsiders, was not a ground for winding up in English Law. A useful 4 Para 359, Vol. XVI, Fifth Edition (2017) of Halsbury's Laws of England. reference may be made in this regard to Re Medical Battery Co.5, where a question relating to investigation through public examination came up. It was held therein that the relevant provision was not intended to apply to a case where the charges were about the commitment of fraud in the course of business with the outside world and not connected in any way with the promotion or formation of the company.

6.10 But the law has not remained static even in England. The Insolvency Act, 1986 was amended in England through the Companies Act, 1989 to incorporate Section 124□A. Under Section 124□A of the Insolvency Act, 1986, (i) the Secretary of State may seek the winding up of a company if he thinks that it is expedient in the public interest to wind up the company and

(ii) if the court thinks it just and equitable to do so. Such winding up may be based upon, (i) the reports of some investigations under the Companies Act itself; or (ii) a report under the Financial 5 (1894) 1 Ch. 444 Services and Markets Act; or (iii) any information under the Criminal Justice Act, 1987.

6.11 In Re Walter L. Jacob & Co. Ltd.6, the Court of Appeal (Civil Division) was concerned with a case, where the Secretary of State, after examining the books of the company in question, formed an opinion that the company should be wound up in public interest. Therefore, he filed a petition under Section 447 of the Companies Act, 1985 for winding up on just and equitable ground under Section

122(1)(g) of the Insolvency Act, 1986. The High Court dismissed the petition. While reversing the decision and ordering the winding up, the Court of Appeal held that the Court's task in the case of petitions for winding up in public interest, is to carry out a balancing exercise, having regard to all the circumstances as disclosed by the totality of the evidence. One of the arguments raised in that case was that the company sought to be wound up did well and that all clients to whom the company owed money except one, had settled the matter with the company. While rejecting the said 6 (1989) 5 BCC 244 argument, the Court of Appeal emphasised that the Parliament had recognised the need for the general public to be protected against the activities of unscrupulous persons who deal in securities. 6.12 Thus, there was a shift even in the English Law, from the conservative view that fraud committed by the company upon outsiders was not available as a ground for winding up. However, winding up on the ground of public interest was also linked to just and equitable clause in England. This is perhaps why the law even in India, for the winding up of a company on the ground of fraud, was also linked to just and equitable clause under the 1956 Act. 6.13 But the mandate of Section 243 (a) of the Companies Act, 1956 to take recourse, in cases of fraud, to just and equitable ground, was little incongruous. This is due to the reason that under Section 443(2), the court may refuse to make an order of winding up, on just and equitable ground, if some other remedy was available to the persons seeking winding up. Section 443(2) of the 1956 Act reads as follows:□"443. Powers of tribunal on hearing petition xxxxxxxxxxxxxxx (2) Where the petition is presented on the ground that it is just and equitable that the company should be wound up, the Tribunal may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy." Therefore, despite the fact that fraud was available, albeit indirectly, as a circumstance for the winding up of a company, even under the 1956 Act, its link to just and equitable clause was little problematic because of section 443(2). 6.14 Coming to the 2013 Act, provisions similar to sub□clauses

(i) and (ii) of clause (b) of section 237 of the 1956 Act, are to be found in sub□clauses (i) and (ii) of clause (b) of section 213 of the 2013 Act. They employ the same language for the purpose of ordering an investigation into the affairs of a company. But under section 237 of the 1956 Act, the power to order investigation was with the central Government, while it is with the Tribunal under Section 213 of the 2013 Act. Section 224 (2) of the 2013 Act is similar to Section 243 of the 1956 Act as it enables the Central Government to authorize any person to file a petition for winding up, on the basis of the report of any investigation. Here again, the petition for winding up on the basis of the report of such investigation, is to be on just and equitable ground by virtue of clause (a) of sub□section (2) of Section 224, which is similar to clause (a) of Section 243.

6.15 The main departure of the 2013 Act from the statutory regime of the 1956 Act, is the specific inclusion of fraud, directly as one of the circumstances in which a company could be wound up. Section 271 of the 2013 Act lists out the circumstances in which a company may be wound up. What were clauses (a), (g), (h) and (i) of Section 433 of 1956 Act have now become clauses (a), (b), (d) and (e) of Section 271 of the 2013 Act, though not in the same order. In addition, (i) conduct of the affairs of the company in a fraudulent manner; (ii) formation of the company for fraudulent or unlawful purpose; and (iii) persons concerned in the formation or management of its affairs being guilty of fraud, misfeasance or misconduct, have now been included in clause (c) of Section 271, as

some of the circumstances in which a company could be wound up. In other words, fraud has now directly become (under the 2013 regime), one of the circumstances in which a company could be wound up, though it also continues to be a ground indirectly, under section 224(2) read with section 213 [as it was under Section 439(1)

(f) read with sections 243 and 237(b) of the 1956 Act] . 6.16 As a matter of fact, Section 271(1) of the 2013 Act, as it was originally enacted, included the inability of a company to pay its debts as one of the grounds for winding up. Therefore, the deeming provision which was there in Section 434 of the 1956 Act found a place as sub□section (2) of Section 271 of the 2013 Act. But by the Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), "inability to pay debts" has been deleted from Section 271. As a consequence, the deeming provision in sub□section (2) of Section 271 also stands deleted. In fact, section 271 of the 2013 Act (along with sections 270 and 272) got amended even before they were notified under Section 1 (3) of the Act to come into force.

6.17 In other words, Section 271 as it originally stood in the 2013 Act, listed six circumstances in which a company may be wound up. Inability to pay debts was one of those six circumstances. But by Act 31 of 2016, 'inability to pay debts' got deleted from the list of circumstances7. Section 271 of the 2013 Act, as it now stands after 2016, reads as follows:

> "271. Circumstances in which company may be wound up by Tribunal□□A company may, on a petition under sec□tion 272, be wound up by the Tribunal,□□
>
> (a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;
>
> (b) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public or□der, decency or morality;
>
> (c) if on an application made by the Registrar or any other person authorised by the Central Government by noti□fication under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons con□ cerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;

7 Now the inability of a company to pay its debts is a ground for initiation of CIRP. If CIRP fails, winding up can be resorted to.

(d) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or

(e) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up." 6.18 Just as Section 439(1) of the 1956 Act provided a list of persons by whom an application for winding up may be filed, Section 272(1) of the 2013 Act also provides a list of persons by whom a petition for winding up may be filed. What is common to both Section 439(1) of the 1956 Act and Section 272(1) of the 2013 Act, is that a petition for winding up may be filed by: (i) the company; (ii) any contributory; (iii) the Registrar; and (iv) any person authorized by the Central Government in that behalf. 6.19 Both Section 439(1) of the 1956 Act and Section 272(1) of the 2013 Act use two important expressions, in relation to the persons competent to file a petition for winding up and the procedure to be followed. They are, (i) authorization; and (ii) sanction. The circumstances in which an 'authorization' has to be granted and the circumstances in which a sanction has to be granted, are different. Similarly, the grant of sanction should be preceded by an opportunity of hearing, but the issue of authorization does not require any prior opportunity to the company to make a representation. Sub-sections (5) and (6) of section 439 of the 1956 Act and sub-section (3) of section 272 of the 2013 Act are presented in a table for easy reference:

439. Provisions as to applica□	272. Petition for winding up tions for winding up
.....	
(1) ……. (2) ……. (3) ……. (4) ……. (5) Except in the case where he is authorised in pursuance of clause (f) of sub- section (1), the Registrar shall be entitled to pre- sent a petition for winding up a company only on the grounds specified in clauses (b), (c), (d), (e) and (f)] of section 433: Provided that the Registrar shall not present a petition on the ground specified in clause (e) aforesaid, unless it appears to him either from the financial condition of the company as dis- closed in its balance sheet or from the report of a special audi- tor appointed under section 233A or an inspector] appointed under section 235 or 237, that the company is unable to pay its debts: Provided further that the Reg- istrar shall obtain the previous sanction of the Central Gov- ernment to the presentation of the petition on any of the	(1) …….. (2) …….. (3) The Registrar shall be enti- tled to present a petition for winding up under section 271, except on the grounds specified in clause (a) of that section: Provided that the Registrar shall obtain the previous sanction of the Central Government to the presentation of a petition: Provided further that the Central Government shall not accord its sanction unless the company has been given a reasonable opportunity of making representations.

grounds aforesaid.
(6) The Central Government shall not accord its sanction in pursuance of the foregoing proviso, unless the company has first been afforded an opportunity of making its representations, if any.

6.20 It may be seen from the above table that the second proviso to sub-section (5) of section 439 of the 1956 Act became the first proviso to sub-section (3) of Section 272 of the 2013 Act and sub-section (6) of Section 439 became the second proviso to sub-section (3) of Section 272. They respectively prescribe, (i) that for presenting a petition for winding up, the Registrar requires previous sanction of the Central Government; and (ii) that before granting sanction, the Central Government should give a reasonable opportunity to the company to make a representation.

6.21 Thus, in effect, the distinction between the procedure to be followed by the Registrar and the procedure to be followed by "any other person authorised by the Central Government", for presenting a petition for winding up, is maintained as such. If the petition is to be filed by the Registrar, it should be preceded by 2 things namely, (i) a sanction; and (ii) an opportunity to the company to object. If the petition is to be filed by "any other person", there is only one requirement namely that of authorization by the Central Government by notification.

6.22 The above discussion would show that in contrast to the 1956 Act, the 2013 Act provides 2 different routes for the winding up of a company on the ground of fraud. They are:

(i) winding up under clause (c) of Section 271 (directly on the ground of fraud) by any person authorised by the Central Government by notification; or

(ii) winding up under clause (e) of Section 271 (on the ground that it is just and equitable to wind up) in terms of Section 224(2)(a) on the basis of a report of investigation under Section 213(b).

6.23 If the second route is taken, then the power of the Tribunal to order winding up, may perhaps stand circumscribed by sub-section (2) of Section 273 which states that where a petition is presented on just and equitable ground, the Tribunal may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy. But

the question whether such a restriction could be applied to cases of fraud, established by reports of investigation, may have to be tested in appropriate cases. 6.24 Having seen the distinguishing features between the 1956 Act and the 2013 Act, with regard to the question of availability of fraud as a ground for the winding up of a company, let us now take up for consideration, the grounds of attack to the impugned orders one after another.

7. Advertisement of the Company Petition Admittedly, the petition for winding up, in this case, was never advertised nor even ordered to be advertised, either upon the admission of the petition or anytime thereafter. It is therefore contended by the appellants that the failure to comply with this requirement which is mandatory, vitiates the whole proceedings. 7.1 Under the 1956 Act regime, the mode of proceedings to be held for winding up of a company, was prescribed by the Companies (Court) Rules, 1959 issued in exercise of the powers conferred by sub-sections (1) and (2) of Section 643 of the 1956 Act. Rule 10 of these 1959 Rules prescribed that all applications under the Act, unless otherwise provided by the Rules or permitted by the Judge, shall be made (i) either by a petition; or (ii) by a Judge's summons. Rule 11(a) contains a list of about 23 types of applications under the Act, which shall be made by way of petition. Rule 11(b) states that all applications other than those covered by Rule 11(a), shall be made by a Judge's summons.

7.2 After making a distinction between (i) applications to be made by way of a petition; and (ii) applications to be made by way of a Judge's summons in Rule 11, the Companies (Court) Rules, 1959 speaks about advertisement in Rules 23 and 24. Rules 23 and 24 of the Companies (Court) Rules, 1959 read as follows:-"23. Summons for direction -(a) Where a petition is presented under paragraphs (1), (3), (4), (22) and (23) of Rule 11, an application shall, in every case, be made by summons to the Judge in Chambers for directions as to the advertisement of the petition, the notices to be served and the proceedings to be taken. Except where, in any particular case, a different form is prescribed by these rules, such summons shall be in Form No. 4. (b) The summons shall be posted for hearing before the Judge in Chambers at the next Chamber sittings, and the Judge may make such orders thereon and may give such directions as may seem to him appropriate. (c) No summons for directions shall be necessary in the case of other petitions, but the petition shall, upon admission, be placed before the Judge in Chambers for fixing the date of hearing and directions as to the advertisement of the petition and the notices to be served, and such other directions as may be necessary.

24. Advertisement of petition -(1) Where any petition is required to be advertised, it shall, unless the Judge otherwise orders, or these rules otherwise provide, be advertised not less than fourteen days before the date fixed for hearing, in one issue of the Official Gazette of the State or the Union Territory concerned, and in one issue each of a daily newspaper in the English language and a daily newspaper in the regional language circulating in the State or the Union Territory concerned, as may be fixed by the Judge. (2) Except in the case of a petition to wind-up a company the Judge may, if he thinks fit, dispense with any advertisement required by these rules." 7.3 As could be seen from Rule 23, the summons for directions as to advertisement of the petition, dealt with by Rule 23, correlates only to 5 out of the 23 items listed in Rule 11(a). These 5 items mentioned in Rule 23, are those found in serial Nos.1, 3, 4, 22 and 23 of Rule 11(a). A petition for winding up falls under item No.15 of Rule 11(a). Therefore, Rule 23 has no application to a petition for winding up.

7.4 Rule 24 deals with advertisement of a petition. But Rule 24(1) begins with the words "where any petition is required to be advertised". Therefore, Rule 24 will also have no application unless there is any provision in the Act or the Rules which require the petition to be advertised.

7.5 Part III of the 1959 Rules contains special provisions relating to proceedings for winding up. This part comprises of Rules 95 to 338. Rule 95 requires a petition for winding up to be in Form No.45, 46 or 47. Rule 96 speaks about admission of petition and directions as to advertisement. It reads as follows:□"96. Admission of petition and directions as to advertisement □Upon the filing of the petition, it shall be posted before the Judge in Chambers for admission of the petition and fixing a date for the hearing thereof and for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served. The Judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition." Rule 99 deals with advertisement and it reads as follows:□"99. Advertisement of petition □Subject to any directions of the Court, the petition shall be advertised within the time and in the manner provided by rule 24 of these rules. The advertisement shall be in Form No. 48." 7.6 It must be remembered that Chapter II of Part VII of the 1956 Act, did not contain a provision in itself, requiring the advertisement of a petition for winding up. But Section 643(1) read with Clause (i) of Sub□section (2) of Section 643 of the 1956 Act delegated to the Rule making power of the Central Government, the power to prescribe the mode of proceedings to be held for the winding up of a company by the Court. Therefore it is the Rules that speak about advertisement.

7.7 Coming to the rules framed under the 2013 Act, Sub□sec□tions (1) and (2) of Section 468 of the 2013 Act empower the Central Government to make Rules providing for all matters relating to winding up of companies. In exercise of the powers so conferred, the Central Government has issued a set of Rules known as the Compa□nies (Winding up) Rules, 2020. Rules 5 and 7 of these Rules speak about advertisement. These Rules read as follows:

> "5. Admission of petitioner and directions as to advertisement.□Upon filing of the petition, it shall be posted before the Tribunal for admission of the petition and fixing a date for the hearing thereof and for appropriate directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served, and where the petition has been filed by a person other than the company, the Tribunal may, if it thinks fit, direct notice to be given to the company and give an opportunity of being heard, before giving directions as to the advertisement of the petition, if any, and the petitioner shall bear all costs of the advertisement.
>
> 7. Advertisement of petition.□Subject to any directions of the Tribunal, notice of the petition shall be advertised not less than fourteen days before the date fixed for hearing in any daily newspaper in English and vernacular language widely circulated in the State or Union territory in which the registered office of the company is situated, and the advertisement shall be in Form WIN 6." 7.8 In view of the language employed in Rule 7 of the 2020 Rules, it is contended by Shri Arvind P. Datar, learned senior counsel appearing for DEMPL, that there is no option available to NCLT but to order the advertisement of the petition. Rule 7 begins with the words

"subject to any directions of the Tribunal, notice of the petition shall be advertised". These words, in the contention of the learned senior counsel for DEMPL, indicate the availability of a limited elbow space to the Tribunal to issue directions about the newspaper in which the advertisement is to be issued and the particular edition (State, Regional or National Edition) in which the advertisement shall be published. In other words, his contention is that ordering the publication of an advertisement is mandatory, but smaller things such as the particular newspaper, particular edition etc., are left to the discretion of the Tribunal to be exercised in the form of directions.

7.9 Before we test the correctness of the above argument, it may be necessary to look at the anatomy of Rule 5 which prescribes the procedure to be followed by the Tribunal, upon the filing of a petition for winding up. The step□by□step procedure prescribed in Rule 5 is as follows:□(1) The petition should first be posted before the Tribunal for admission.

(2) The purpose of posting the petition for admission is three□fold, namely, (i) fixing a date for hearing of the petition;

(ii) issuing appropriate directions as to the advertisement to be published; and (iii) indicating the persons upon whom the copies of the petition are to be served.

(3) On the date when the petition is posted for admission, the Tribunal may direct notice to be given to the company and also provide an opportunity of being heard before giving directions as to the advertisement of the petition. 7.10 The essence of Rule 5 is to provide an opportunity of being heard to the company sought to be wound up, even before directions as to the advertisement of the petition are given. The last limb of Rule 5 speaks about the discretion vested in the Tribunal to direct notice to be given to the company and to give an opportunity of being heard before giving any directions as to the advertisement of the petition. This last limb of Rule 5 provides the clue about the purpose of advertisement.

7.11 One way of looking at the requirement of an advertisement is that it provides an opportunity to all the stakeholders such as

(i) creditors; (ii) workers; (iii) suppliers; (iv) customers; and (v) the general public, either to support or oppose the proceedings for winding up. There is also another way of looking at the object of issuing an advertisement of the petition for winding up. The advertisement serves as a warning/notice or red alert to all those dealing with the company so that they know that there could be an element of risk in dealing with the company.

7.12 After all, the winding up of a company is like the insolvency of an individual. The advertisement of the petition for winding up, not merely serves as an opportunity to support or oppose winding up, but also harms the reputation of the company and sends shock waves in the stock market, if it is a listed company or among the stakeholders who have dealings with the company. This is why an opportunity of being heard is contemplated in Rule 5, before ordering the advertisement of the

petition. This is exactly the reason why this Court held in National Conduits (P) Ltd. vs. S.S. Arora8 as follows: □"xxxxx xxxxx xxxxx The view taken by the High Court that the Court must, as soon as the petition is admitted, advertise the petition is contrary to the plain terms of Rule 96. Such a view, if accepted, would make the Court an instrument, in possible cases, of harassment and even of blackmail, for once a petition is advertised, the business of the Company is bound to suffer serious loss and injury." 7.13 The decision is National Conduits (P) Ltd. (supra) was followed in Cotton Corporation of India Limited vs. United Industrial Bank Ltd. & Ors.9 In fact, the argument of the companies sought to be wound up in Cotton Corporation of India Limited (supra) was that "the presentation of winding up petition coupled with advertisement thereof in newspapers, has certain serious consequences on the status, standing, financial viability and stability and operational efficiency of the company." While dispelling the apprehensions so expressed, this 8 AIR 1968 SC 279 9 (1983) 4 SCC 625 Court relied upon the decision in National Conduits (P) Ltd. (supra) to say that the apprehensions stood removed by taking a view that advertisement is not automatic.

7.14 Therefore, the way in which the requirement of advertisement has been viewed by Courts is that advertisement causes more harm to the company than the benefit that it brings to the company. Hence the argument of the appellant in this case that the failure to advertise the petition was prejudicial to their interest, goes contrary to one of the important purposes of the advertisement and the chilling effect that it is supposed to have on the company. 7.15 It is no doubt true that in National Conduits, this Court was concerned with an appeal arising out of an order of the Delhi High Court, holding that once a petition is admitted to file, the Court is bound forthwith to advertise the petition. Interestingly, such an order was challenged by the Company itself on the ground that advertisement was prejudicial to them. While considering the challenge, in terms of Rule 24(2), this Court held in National Conduits (in paragraph 4) that a petition for winding up cannot be placed for hearing before the Court, unless the petition is advertised. 7.16 In IDBI Bank Ltd. vs. the Official Liquidator10, authored by one of us (VRS, J.) as a Company Judge in the High Court of Judicature at Madras, it was held that Rule 99 of the 1959 Rules makes it mandatory for an advertisement to be issued and that Rule 24(2) does not confer any power even upon the Company Court to dispense with any advertisement, in the proceedings for winding up. It was also pointed out in IDBI Bank Ltd. (supra) that Rule 100(2) which prohibits the withdrawal of a winding up petition before the date fixed in the advertisement for the hearing of the parties, also provided a clue about the mandatory nature of the requirement to advertise. In the aforesaid decision, Rule 101 which provides for the substitution of a creditor or contributory in the place of the original petitioner, upon his failure to advertise, was also taken note of. Rule 101 of the Companies (Court) Rules, 1959 reads as follows:

> 10 2013(6) CTC 40 "Rule 101. Substitution of creditor or contributory for original petitioner. – Where a petitioner. – (1) is not entitled to present a petition, or (2) fails to advertise his petition within the time prescribed by these rules or by order of court or such extended time as the court may allow, or (3) consents to withdraw the petition, or to allow it to be dismissed, or the hearing to be adjourned or fails to appear in support of his petition when it is called on in court on the day originally fixed for the hearing thereof, or any day to which the hearing has been adjourned, or (4) if appearing, does not apply for an order in terms of the prayer of his petition or

> where in the opinion of the court there is other sufficient cause for an order being made under this rule, the court may, upon such terms as it may think just, substitute as pe□titioner any creditor or contributory who, in the opinion of the court, would have a right to present a petition, and who is desirous of prosecuting the petition." 7.17 In the light of the aforesaid Rule 101 also, it was held in IDBI Bank Ltd., that the requirement of advertisement was mandatory. While coming to the said conclusion, the Madras High Court also took note of the difference of opinion in this regard between the High Courts of Allahabad and Gujarat on the one hand and the High Court of Delhi on the other hand, with respect to the power of the Court to dispense with the publication of advertisement in the official Gazette. Paragraphs 53 to 55 of the decision of the Madras High Court in IDBI Bank Ltd. is reproduced for easy reference as follows:□"53. In U.P. Twiga Fiberglass Ltd vs. Parekh Marketing Pvt.

Ltd {1986 (59) CC 886}, a Division Bench of the Allahabad High Court considered on appeal, a question, among others, as to whether the non□publication of the advertisement in the Gazette would be violative of Rule 24. In that case, the Company Judge ordered the publication of advertisements in one English Daily and one Vernacular Daily, but not in the Gazette. The Division Bench of the Allahabad High Court held that Rule 24(1) contains a rider "unless the Judge oth□ erwise orders" and that Rule 99 also speaks about "subject to any directions of the Court". A similar view with regard to the power of the Company Court to dispense with the publi□cation of advertisement in the Government Gazette was taken by a Division Bench of the Gujarat High Court in Plas□tisac P. Ltd vs. Gujarat Lease Finance Ltd {2000 (101) CC 334 (Guj.)}. But a Division Bench of the Delhi High Court disagreed with the views expressed by the Allahabad and Gujarat High Courts, with regard to the power of the Com□pany Court to dispense with the publication of advertisement in the Official Gazette. In Lt. Col. R.K.Saxena vs. Imperial Forestry Corporation {2001 (107) CC 401 (Del.)}, a Division Bench of the Delhi High Court, after a careful consideration of Rules 96, 99 and 24 held that "the publication of the ad□vertisement of a petition for winding up is mandatory, even in respect of the Official Gazette". On the scope of the discre□tion conferred by Rule 99, the Delhi High Court held that the discretion is limited only to the extent of deciding at what stage the petition is to be advertised. The contention that the Company Court has inherent powers by virtue of Rule 9 even to dispense with the requirement of Rule 24, was also re□jected by the Delhi High Court on the ground that "if a statute requires a thing to be done in a particular manner, it shall be done in that manner or not at all".

54. Though there was a difference of opinion between the Al□lahabad and Gujarat High Courts on the one hand and the Delhi High Court on the other hand, with regard to the power to dispense with the publication of advertisement in the Official Gazette, all these Courts were unanimous in their opinion at least with regard to the mandatory nature of the requirement of publication of advertisements, in one English Daily and one Vernacular Daily as ordered by the Company Judge. Therefore, it is clear that publication of ad□vertisements is mandatory. Irrespective of whether the Court has any discretion to dispense with the publication in the Gazette or not, the publication of advertisements at least in newspapers is mandatory and the failure of the petitioning creditor to comply with this requirement despite a positive order to that effect, is fatal to his petition.

55. In Falcon Gulf Ceramics Ltd vs. Industrial Designs Bu□reau {1996 (86) CC 207 (Raj.)}, a Division Bench of the Ra□jasthan High Court set aside an order of winding up passed by the Company Court, on the sole ground that the winding up order was not preceded by an advertisement. The Divi□sion Bench of the Rajasthan High Court held in that case that advertisement of a petition was imperative in view of the provisions of Rule 96 read with Rule 99. For holding so, the Division Bench of the Rajasthan High Court relied upon paragraph 1463 of Halsbury's Laws of England (4th Edition), which stated that non□compliance with these provisions is a ground on which the Court shall reject the petition. After cit□ing the relevant passage from the decision of the Supreme Court in National Conduits, the Division Bench held in para 16 of its decision that in the absence of advertisement and admission, the petition for winding up was bound to be re□jected." 7.18 However, when the decision of the Company Judge in IDBI Bank Ltd. was assailed in an intra□court appeal, the Division bench of the Madras High Court held in Pradeep D. Kothari vs. IDBI Bank Ltd.11 as follows:

> "31. Therefore, to our minds, two aspects would arise for consideration given the fact and circumstances obtaining in the instant case. First, if, winding up is not advertised, by the original petitioner as directed, can the Court direct the PL to advertise the petition, having regard to the fact that the proceedings are inter alia for the benefit of creditors at large and not one single creditor ?
>
> 31.1. The answer to this poser, to our minds, has to be in af□firmative as there is no bar in the Rules which prohibits a PL from advertising the Company Petition in such like circum□stances, though, ordinarily, in practice, Company Petitions are advertised by the petitioner who institutes the action. As alluded to above, the Rules do not bar the Company Court from directing the PL to advertise the petition. The reason, why we hold this view is plainly this, that, while, adver□tisement of the petition is compulsory as winding up proceedings are proceedings in rem and therefore should receive the widest of publicity enabling all stakeholders to have notice of the proceedings, there is no such stipu□lation in the Rules that once, the winding up petition is admitted by a Court, it can in no circumstances move forward, unless an advertisement is taken out by the original petitioner or a suitable substituent who fulfills the qualifications provided in Rule 101(4)." 7.19 But the Judgment of the Company Judge of the Madras High Court in IDBI Bank Ltd. and the Judgment of the Division Bench in Pradeep D. Kothari, arose out of proceedings for winding up, in which a specific order directing the publication of the 11 2018 (1) CTC 136 advertisement had been made by the Company Court at the time of admission. However, the said direction was omitted to be complied with, by the petitioning creditor. Therefore, the crucial question that fell for consideration in that case was as to how a company Judge should proceed, in circumstances where the petitioning creditor loses interest in prosecuting the petition further and abandons the proceedings without carrying out the advertisement. This question assumed significance in the light of the fact that the failure of one petitioning creditor cannot result in serious prejudice to a whole body of creditors, in a proceedings in rem.

> 7.20 The above decision of the Division Bench of the Madras High Court in Pradeep D. Kothari was assailed before this Court.

While upholding the decision of the Division Bench, in its decision in IDBI Bank Ltd. vs. the Official Liquidator12, this Court held as follows:

> "14.3. Against this backdrop, the crucial question that arises for our consideration is whether a winding up petition can be dismissed solely on the ground lack of a prosecuting creditor under Rule 101, or whether the Company Court has 12 (2020) 15 SCC 517 the power to direct the publication of an advertisement by the Liquidator of the company, especially in cases where other unsatisfied creditors still remain. For answering this question, it is important to bear in mind that winding proceedings are proceedings in rem and have an impact on the rights of people, in general. Thus, it is mandatory to advertise such proceedings so as to ensure that they receive the widest possible publicity and all relevant stakeholders have adequate notice. This implies that in a situation where the petitioning creditor fails to advertise the petition and no other creditor or contributory comes forward to prosecute it, Rule 101 should not be read in a manner that absolutely bars the continuation of a winding up petition. This is particularly so when there are unsatisfied creditors who should have been given an opportunity to prosecute the petition, but were deprived of the same due to the failure to advertise. Indeed, Rule 101 is only limited to instances where the petitioning creditor fails to advertise the petition. However, there is nothing in the language of Rule 24, 96 or 99 to indicate that only such petitioning creditor can advertise the petition. In our considered opinion, given the absence of a specific provision mandating that the petition can only be advertised by the petitioning creditor, the Company Court has the discretion to direct the publishing of an advertisement to secure the interest of other creditors. In such situations, the winding up proceedings cannot be dismissed, as it would frustrate the very objective of securing the interest of all creditors.
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> 14.4. In the light of this discussion, we find that it would be unjust to dismiss the winding up petition in the instant case solely on the ground that there is no other person willing to substitute the original creditor in terms of Rule 101. Here, due to the lack of advertisement of the winding petitions, it appears that the secured creditors of KOFL were constrained to approach the DRT for recovery of their dues by filling OAs Nos. 139 of 2001, 978 of 2000 and 14 of 2002. Further, upon learning of the decision of the Company Judge dated 04.10.2013, dismissing the winding up petition, one of the secured creditors (SBI) also approached the DRT to secure its interest. Based on this, vide order dated 13.12.2013, the DRT had directed that the amount to be returned to KOFL be attached so that the banks have an opportunity to recover their dues from KOFL.

This clearly goes on to show that the secured creditors of KOFL were relevant stakeholders who were affected by the non-advertising of the winding-up petition. They should have been called upon

to indicate whether they would want to step into the shoes of the petitioning creditors as per Rule

101." 7.21 Thus even in a case where the Court took a view that advertisement is mandatory, not only in view of the prescription contained in the Rules, but also in view of the specific order passed by the Company Court at the time of admission, directing the publication of the advertisement in specified newspapers, this Court did not see the failure to publish an advertisement as something that would lead to the automatic dismissal of the petition for winding up. This is for the reason that the advertisement of a petition for winding up is perceived to be something that worked at cross purposes, sometimes beneficial to several stakeholders as it provides an opportunity of hearing to them and sometimes as a measure of harassment of the company. There are cases where the companies themselves have opposed the advertisement of the petition on the ground that the same would harm their reputation and cripple their commercial activities. There are also cases where the failure to advertise has led to some of the creditors not having any notice of the proceedings and thereby suffering prejudice. This is why another Bench of the Madras High Court held in T. Narayanan vs. the Official Liquidator13, after taking note of the decision in National Conduits, as follows:

> "38. Assuming that the mandatory requirement was not complied with, the question falling for consideration is, can the non□compliance of procedural mandatory requirement would ipso facto vitiate the winding up order and stall fur□ther proceedings?. The next question falling for considera□tion is 'can the non□ compliance of a procedural manda□tory requirement be a ground to set aside the winding up order after three years, especially when the appellant had the opportunity of fighting out the litigation in the earlier round?'
>
> 39. The purpose of advertisement is to give an opportunity to the creditors/debtors/Company to put forth their case be□fore the Court. Assuming that the procedural mandatory requirement was not complied with, in our considered view, it cannot be a ground to set aside the winding up order after three years. As rightly contended by the learned Senior Counsel for the Official Liquidator, to sus□ tain the allegations of violation of principles of natural justice, one must establish prejudice. When fairness is shown and if the facts and circumstances indicate that 13 2012 (1) MLJ 59 the Company/contributory were put on notice and that no prejudice was caused to them, the Company/contrib□utory cannot complain of any procedural irregularity." 7.22 We may also have to take note of one more aspect. The Companies Act, 2013 mandates the constitution of a National Company Law Tribunal and a National Company Law Appellate Tribunal to exercise and discharge such powers and functions as may be conferred upon it by or under the Act. Section 424(1) makes it clear (i) that the Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice; and
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> (ii) that subject to the other provisions of the Act and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own

procedure.

7.23 While Section 468(1) of the 2013 Act empowers the Central Government to make Rules consistent with the Code of Civil Procedure, providing for all matters relating to winding up, Section 469(1) empowers the Central Government generally to make Rules for carrying out the provisions of the Act.

7.24 In exercise of the powers conferred by Sections 468 and 469, the Central Government issued the Companies (Winding Up) Rules 2020. Similarly, the Central Government issued another set of Rules called the National Company Law Tribunal Rules, 2016 (for short "NCLT Rules 2016") in exercise of the powers conferred by Section 469.

7.25 Rule 35 of the National Company Law Tribunal Rules, 2016 deals with advertisement of petitions. It reads as follows:□"35. Advertisement detailing petition.□(1) Where any application, petition or reference is required to be advertised, it shall, unless the Tribunal otherwise orders, or these rules otherwise provide, be advertised in Form NCLT□3A, not less than fourteen days before the date fixed for hearing, at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situate, and at least once in English language in an English newspaper circulating in that district. (2) Every such advertisement shall state;□

(a) the date on which the application, petition or reference was presented;

(b) the name and address of the applicant, petitioner and his authorised representative, if any;

(c) the nature and substance of application, petition or reference;

(d) the date fixed for hearing;

(e) a statement to the effect that any person whose interest is likely to be affected by the proposed petition or who intends either to oppose or support the petition or reference at the hearing shall send a notice of his intention to the concerned Bench and the petitioner or his authorised representative, if any, indicating the nature of interest and grounds of opposition so as to reach him not later than two days previous to the day fixed for hearing.

(3) Where the advertisement is being given by the company, then the same may also be placed on the website of the company, if any.

(4) An affidavit shall be filed to the Tribunal, not less than three days before the date fixed for hearing, stating whether the petition has been advertised in accordance with this rule and whether the notices, if any, have been duly served upon the persons required to be served:

> Provided that the affidavit shall be accompanied with such proof of advertisement or of the service, as may be available.

(5) Where the requirements of this rule or the direction of the Tribunal, as regards the advertisement and service of petition, are not complied with, the Tribunal may either dismiss the petition or give such further directions as it thinks fit.

(6) The Tribunal may, if it thinks fit, and upon an application being made by the party, may dispense with any advertisement required to be published under this rule." 7.26 It may be seen from Sub-rule (1) of Rule 35 that the procedure laid down in Rule 35 is applicable to cases "where any application, petition or reference is required to be advertised." 7.27 The requirement to advertise a petition for winding up does not flow out of the statute, but flows out of the Rules. Since the requirement to advertise a petition for winding up is stipulated in Rules 5 and 7 of the Companies (Winding up) Rules, 2020, what is prescribed in Rule 35 would cover even petitions for winding up.

7.28 If so understood, Sub-rules (5) and (6) of Rule 35 of the NCLT Rules 2016 would throw light upon the controversy on hand. Sub-rule (5) makes it clear that even in cases where the direction of the Tribunal as regards advertisement has not been complied with, the Tribunal has an option (i) either to dismiss the petition; or (ii) to give such further directions as it may think fit. Sub-rule (6) confers power upon the Tribunal even to dispense with any advertisement. 7.29 In other words, what was not specifically available in black and white, under the 1956 statutory regime, namely the power to dispense with any advertisement, is now made available specifically under the statutory regime of 2013. 7.30 In the case on hand, the company in liquidation was incorporated on 17.12.2004, the Memorandum of Association of the Company was subscribed to by two persons by name D. Venugopal and M. Umesh. They subscribed to 9000 equity shares and 1000 equity shares respectively @ Rs.10 per share. Subsequently six individuals by name Ramachandran Vishwanathan, Paresh Shah Natwarlal, James Fox, MG Chandrasekar, Abhishek Jain and L Clarence Irving were issued with equity shares on 31.12.2005. Thereafter, two corporate entities, namely, Columbus Capital Devas (Mauritius) Ltd. and the Telecom Devas Mauritius Ltd., were issued Optionally Convertible Preference Shares and equity shares. Subsequently, two other companies by name Deutsche Telecom Asia Plc. Ltd. and Devas Employees Mauritius Pvt. Ltd. were issued with equity shares. All these shareholders are aware of the winding up proceedings and the proceedings are fought tooth and nail by one shareholder DEMPL through Mr. Ramachandran Vishwanathan who was also a shareholder. Another individual shareholder by name MG Chandrasekar has filed one of the above appeals as the ex-director of the company in liquidation. Admittedly, the company in liquidation does not have any creditors or customers who have dealings with the company. In other words, there are no stakeholders who are prejudiced by the failure of NCLT to order the publication of advertisement of the petition. Though technically the Tribunal may not be correct in invoking "useless formality theory" in cases of this nature, we can certainly apply the test of prejudice, especially in the light of the serious nature of the allegations of fraud, on the basis of which the company is sought to be wound up. This is not a case where the company is sought to be wound up on the ground of inability to pay debts or on just and equitable ground. This is a case of fraud and all stakeholders are fully aware of the proceedings and they have even shown extreme urgency in enforcing an ICC Arbitration award and 2 BIT awards, before the conclusion of the winding up proceedings. Therefore, we are unable to sustain the argument that the failure of the

Tribunal to order the publication of an advertisement rendered the entire proceedings unlawful. 7.31 The Companies (Winding Up) Rules, 2020 contain a list of Forms in which all the proceedings before the Tribunal are to be couched. While FORM WIN 1 prescribes the format of a petition for winding up by a person other than the company and Forms WIN 2, WIN 3 etc., prescribe the formats of certain other things, FORM WIN 11 prescribes the format of a winding up order. The National Company Law Tribunal is obliged under Rule 17(1) of the Companies (Winding Up) Rules 2020, to prepare the order for winding up in FORM WIN 11 with such variations as may be necessary. On the basis of the contents of FORM WIN 11, it was argued by the learned counsel for the appellants that paper publication of the advertisement of the winding up petition is mandatory.

7.32 FORM WIN 11 reads as follows:□FORM WIN 11 [See rule 17(1)] Before The National Company Law Tribunal Bench At..... In The Matter of□□□□□Ltd (Give The Name of The Company) (Company incorporated under Companies Act,.....) Company Petition No...../20.....

.....'Petitioner Before the Hon'ble Mr. □□□□□Dated..... Winding up Order Upon the petition of..... presented on the day of..... .20 , upon hearing Shri .....representative for the petitioner Shri representative for the creditors (or contributors) supporting the petition, Shri..... representative for the creditors (or contributors) opposing the petition, and Shri..... representative for the company, upon reading the said petition, the affidavit of A.B., filed the .....day of..... 20 verifying the said petition, the affidavit of x.y., filed the ..... day of..... 20 ..... the (state or union territory) paper publication of the advertisement of the said petition this Tribunal doth order:

> *(1) That the said company be wound up by this Tribunal under the provisions of the Companies Act, 2013; and (2) That the provisional liquidator or Company Liquidator as the case may be as liquidator of the company aforesaid forthwith take charge of all the property effects actionable claims and books and papers of the said company;

**(3) That the provisional liquidator or Company Liquidator shall cause a sealed copy of this order to be served on the company by pre'paid registered post;

(4) That the petitioner do advertise within fourteen days from this date a notice in the prescribed form of the making of this order in one issue (each) of. .. (here enter the newspaper or newspapers in which the order is to be advertised);

(5) That the said petitioner do serve a certified copy of this order on the Registrar of Companies not later than one month from this date; and (6) That the cost of the said petition shall be paid out of the assets of the said company.

Dated this ..... day ..... 20.

(By the Tribunal) Registrar *Where the company ordered to be wound up is a Banking Company or an Insurance Company add at the end of clause (1) "and the Banking Companies Act, 1949' or 'and

the Insurance Act 1938" as the case may be.

** To be inserted only where the company is not the petitioner.

7.33 The above FORM WIN 11 contains a reference to advertisement, in two places. In the first place, it is found in the preamble portion of the format, beginning with the words “upon the petition.....”. In the second place, a reference to advertisement is found in paragraph 4 of FORM WIN 11. While the advertisement referred to in the preamble of FORM WIN 11, obviously relates to the advertisement of the petition, the advertisement referred to in paragraph 4 of WIN 11 relates to the advertisement of the making of the order of winding up. It is needless to say that the advertisement of the petition for winding up is different from the advertisement of an order of winding up.

7.34 In so far as the advertisement of the order of winding up is concerned, Rules 19 and 20 occupy the field. Rules 19 and 20 of the Companies (Winding Up) Rules, 2020 read as follows:☐“19. Directions on making winding up order. ☐At the time of making the winding up order or at any time thereafter the Tribunal shall give directions to the petitioner as to the advertisement of the order and the persons if any on whom the order shall be served and the persons if any to whom notice shall be given of the further proceedings in the liquidation and such further directions as may be necessary.

20. Advertisement of order. ☐Save as otherwise ordered by the Tribunal the order for the winding up of a company by the Tribunal shall within fourteen days of the date of the order be advertised by the petitioner in a newspaper in the English language and a newspaper in vernacular language widely circulating in the State or the Union territory where the registered office of the company is situated and shall be served by the petitioner upon such person if any and in such manner as the Tribunal may direct and the advertisement shall be in Form WIN 14”.

7.35 Rule 19 mandates the Tribunal, at the time of making of the winding up order or any time thereafter to give directions to the petitioner as to the advertisement of the order. This is why paragraph 4 of FORM WIN 11 forms part of the operative portion of the FORM.

7.36 In so far as the reference to advertisement contained in the preamble of FORM WIN 11 is concerned, it is merely one of the several items that the Tribunal may take into account for passing a winding up order. The items mentioned in the preamble of FORM WIN 11 are, (i) the petition for winding up; (ii) the hearing of the representative for the petitioner; (iii) the hearing of the representative for the creditors or contributories supporting the petition; (iv) the hearing of the representative for the creditors or contributories opposing the petition; (v) the hearing of the representative of the company; (vi) the affidavits; and (vii) the paper publication of the advertisement of the petition. 7.37 Thus the preamble merely contains a list of several matters that may be taken into account by the Tribunal before passing an order of winding up. All those items need not necessarily be present in all cases. For instance, there may be cases where the petition may not be supported by all creditors or contributories. There may also be cases where the petition may not be opposed by all creditors or contributories. However, there is a mention in the preamble about

the hearing of the representatives of creditors supporting or opposing the winding up petition. Therefore, we cannot hold that merely because something is mentioned in the preamble of Form WIN□1, it becomes mandatory.

8. LIMITATION 8.1 The second ground on which the impugned orders are assailed, is that the petition under Section 271(c) was hopelessly barred by limitation. Section 433 of the Companies Act, 2013 makes the provisions of the Limitation Act, 1963 applicable to proceedings or appeals before the Tribunal or the Appellate Tribunal as the case may be. Therefore, it is the contention of the learned senior counsel for the appellants that Article 137 of the Schedule to the Limitation Act, which prescribes a period of limitation of 3 years for any application for which no period is prescribed elsewhere, is applicable to the case on hand. The period of 3 years so prescribed, according to the learned Senior Counsel for the appellants, in cases of fraud, would start running from the date stipulated in Section 17 of the Limitation Act, 1963. Section 17 reads as follows:

> "17. Effect of fraud or mistake.—(1) Where, in the case of any suit or application for which a period of limitation is pre□scribed by this Act,—
>
> (a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or
>
> (b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid;
>
> or
>
> (c) the suit or application is for relief from the conse□quences of a mistake; or
>
> (d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently con□cealed from him, the period of limitation shall not begin to run until plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the appli□cant first had the means of producing the concealed docu□ment or compelling its production:
>
> Provided that nothing in this section shall enable any suit to be instituted or application to be made to recover or enforce any charge against, or set aside any transaction af□fecting, any property which—
>
> (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been com□mitted, or
>
> (ii) in the case of mistake, has been purchased for valu□able consideration subsequently to the transaction in which the mistake was made, by a person who did

not know, or have reason to believe, that the mistake had been made, or

(iii) in the case of a concealed document, has been pur□chased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.

(2) Where a judgment□debtor has, by fraud or force, pre□vented the execution of a decree or order within the period of limitation, the court may, on the application of the judg□ment□creditor made after the expiry of the said period extend the period for execution of the decree or order: Provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be." 8.2 The argument of Shri Mukul Rohatgi, learned Senior Counsel for the appellant is that even assuming that the so called fraud was incapable of being discovered with due diligence, limitation would start running at least from the date of actual discovery of the fraud. The date of actual discovery of fraud cannot be postponed beyond 11.08.2016, which was the date on which a charge sheet was filed in the criminal case, by the CBI before the Special Court. Therefore, it is the contention of the learned senior counsel for the appellants that the petition for winding up ought to have been filed at least on or before 10.08.2019. However, Antrix applied to the Government of India only on 14.01.2021 for the grant of authorisation. The authorisation was issued on 18.01.2021 and the petition for winding up was filed on 18.01.2021 (the same day).

Therefore, placing heavy reliance upon the decision of the three member Bench of this Court in Jignesh Shah and Anr. vs. Union of India and Anr.14, it is contended on behalf of the appellant that the petition for winding up should have been thrown out on the ground of limitation, even if we take the date of filing of the charge□sheet alone as the date of knowledge of the alleged fraud. 14 (2019) 10 SCC 750 8.3 Before we consider the aforesaid contentions independently, it will be useful to take note of the manner in which the National Company Law Appellate Tribunal dealt with the question of limitation and decided the same against the appellants. 8.4 The Member (Technical) of NCLAT, in his separate but concurring opinion, dealt with the question of limitation, from paragraphs 2 to 13. In sum and substance, the Member (T) of NCLAT held (i) that the fraud alleged by Antrix was not a singular act which was transaction□specific; (ii) that the petition for winding up was based upon a series of acts of fraud, unearthed over a long period of time; (iii) that though the CBI filed a first charge□sheet on 11.08.2016, a supplementary charge□sheet was filed on 8.01.2019;

(iv) that a complaint was lodged under the Prevention of Money Laundering Act, 2002 alleging financial frauds, only on 24.12.2018; and (v) that in cases of this nature, the date of discovery of the first act of fraud among a series of acts of fraud, cannot be taken to be the date on which the right to apply accrued in terms of Article 137 of the Schedule to the Limitation Act, 1963.

8.5 The above view taken by NCLAT is a plausible view and does not suffer from any perversity. The above view cannot be said to be completely contrary to law. However, we will independently deal

with this issue, so that the myth of limitation is demystified. 8.6 The various provisions of the Companies Act, 2013, unfortunately came into force on various dates, in view of the leverage granted under Section 1(3) to the Central Government to appoint different dates for different provisions to come into force. Section 270 providing for the winding up by the Tribunal, Section 271 prescribing the circumstances in which a company may be wound up by the Tribunal and Section 272 stipulating the requirements of a petition for winding up, as they were originally enacted in the Companies Act, 2013, never came into force, since no notification under Section 1(3) of the Act was issued in respect of these three provisions.

8.7 However, the Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016) received the assent of the President on 28.05.2016. Section 255 of this Code declared that the Companies Act, 2013 shall stand amended in the manner specified in the 11 th Schedule to the Code. The existing provisions of Sections 270 to 272 of the Companies Act, 2013 were replaced by the 11 th Schedule read with Section 255 of IBC. Section 255 of IBC came into force on 15.11.2016 vide S.O 3453(E) dated 15.11.2016. Consequently the 11th Schedule containing amendments to the Companies Act, 2013 also came into force on 15.11.2016. Sections 270, 271 and 272 as they stand today, resultantly came into force on 15.11.2016. 8.8 In contrast, the provisions of Sections 4 to 32 of IBC came into force on 1.12.2016 vide S.O 3594(E) dated 30.11.2016. The provisions relating to Corporate Insolvency Resolution Process are found in Sections 6 to 32 of IBC 2016. Sections 7, 9 and 10 of IBC 2016 provide for the initiation of Corporate Insolvency Resolution Process, respectively by the financial creditor, the operational creditor and the corporate applicant.

8.9 Section 434 of the Companies Act, 2013, as it was originally enacted, provided for transfer of certain proceedings pending before various forums on the date of coming into force of the Act. Clause (c) of Sub□section (1) of Section 434 provided for the transfer of the winding up proceedings to the Tribunal, with a mandate to the Tribunal to proceed to deal with those proceedings from the stage before their transfer. IBC 2016, through the 11 th Schedule, substituted a new provision in Section 434. Though the newly incorporated Section 434 also provided under Clause (c) of Sub□ section (1) for the transfer of winding up proceedings from the High Court to the Tribunal, such transfer was made subject to certain restrictions. One of those restrictions was that only those proceedings relating to winding up which are at a stage as may be prescribed by the Central Government, which may be transferred to the Tribunal. This restriction is found in the first proviso to Section 434(1).

8.10 Therefore, the Central Government issued a set of Rules known as the Companies (Transfer of Pending Proceedings) Rules, 2016. These Rules (except Rule 4 which relates to voluntary winding up) came into force with effect from 15.12.2016. Rule 5 of these Rules prescribes the stage at which alone, a petition for winding up under Section 433(e) of the 1956 Act could be transferred to NCLT. Similarly Rule 6 prescribes the stage at which the petitions for winding up filed under Clauses (a) and (f) of Section 433 of the 1956 Act could be transferred.

8.11 What is important to note from the above discussion is

(i) that while Sections 270 to 272 of the Companies Act, 2013 came into force on 15.11.2016, Sections 7, 9 and 10 of IBC came into force on 1.12.2016 and the Rules relating to transfer proceedings came into force on 15.12.2016; and

(ii) what is provided for under the Companies (Transfer of Pending Proceedings) Rules, 2016 read with Section 434 of the Companies Act, 2013 and Section 239 of the IBC 2016 is the transfer of only three categories of petitions for winding up, namely, those that fall under clauses (a), (e) and (f) of Section 433 of the 1956 Act.

8.12 Keeping in mind the above statutory scheme, let us now see what happened in Jignesh Shah (supra), on which heavy reliance is placed. In Jignesh Shah, a suit for specific performance of an agreement with an alternative claim for damages, was filed by IL&FS, on 19.06.2013, on the ground that the cause of action, namely, the refusal to honour the commitment under the agreement arose on 16.08.2012. After more than two years of the date of the institution of the suit and after more than three years of the date mentioned in the plaint as the date of arising of the cause of action, the plaintiff in the suit issued a statutory notice under Sections 433 and 434 of the 1956 Act, on 3.11.2015. After receipt of the reply from the defendant, a petition for winding up was filed by the plaintiff in the suit, against the defendant, on 21.10.2016 before the Bombay High Court under Section 433(e) of the 1956 Act. This petition for winding up was transferred by the High Court of Bombay to the NCLT, by an order dated 1.02.2017, in terms of Section 434 of the Companies Act, 2013 read with Rule 5 of the Companies (Transfer of Pending proceedings) Rules, 2016. NCLT treated the petition for winding up as a petition for corporate insolvency resolution under Section 7 of IBC by a financial creditor and ordered the admission of the petition. The order of admission was unsuccessfully challenged before the NCLAT, whereafter, the matter landed up before this Court. The view taken by NCLAT was that since Section 7 of IBC 2016 came into force on 1.12.2016, the winding up petition was within the period of limitation. It was this view of NCLAT which was put to test before this Court in Jignesh Shah.

8.13 In essence, Jignesh Shah was one under Section 433(e) of the 1956 Act which related to inability of a company to pay its debts. Therefore, unless the debt was a legally recoverable debt, on the date on which a petition for winding up was filed, no petition for winding up was maintainable. If a suit for recovery of such a debt was already time barred, it is incongruous to say that a petition for winding up was maintainable in respect of such a debt. Therefore, the test applied in Jignesh Shah was not new but what was so obvious. In fact, on the date on which a petition for winding up was filed on the file of the Bombay High Court in Jignesh Shah, the civil suit for enforcement of the contract with an alternative claim for damages was pending. If the plaintiff had waited for a decree in the suit and thereafter moved a petition for winding up on the basis of the decree, Section 434(1)(b) of the Companies Act, 1956 would have come into play and the winding up petition could not have been held in Jignesh Shah to have been time barred. Since the plaintiff in the suit moved an application for winding up even during the pendency of the suit, limitation had to be naturally counted on the basis of the original cause of action mentioned in the civil suit, with reference to Section 434(1)(a).

8.14 As we have seen earlier, Section 434 of the 2013 Act read with the Companies (Transfer of Pending Proceedings) Rules, 2016 apply only in respect of three types of proceedings for winding up, namely, (i) proceedings on the ground of inability to pay the debts, covered by Clause (e) of Section 433 of the 1956 Act; (ii) proceedings initiated by the company itself by a special resolution covered by Clause (a) of Section 433; and (iii) proceedings on just and equitable ground covered by clause (f) of Section 433.

8.15 As we have seen in Chapter 6 above, fraud was not included in Section 433 of the 1956 Act as one of the nine circumstances in which a company may be wound up. Under the 1956 statutory regime, a petition for winding up, even if triggered on the basis of an investigation report under section 237(b) read with section 243 and Section 439(1)(f), was required to be only on just and equitable ground under Section 433(f). Therefore, on the date on which IBC came into force, if a petition for winding up was pending under section 433 (e) or (f), it was liable to be transferred to NCLT by virtue of Section 434 of the 2013 Act read with the Companies (Transfer of Pending Proceedings) Rules, 2016. 8.16 But under the Companies Act, 2013, three different types of fraud are included in Section 271(c), as the circumstances for winding up a company. Such a winding up is independent of just and equitable ground. Therefore, the parameters applicable to winding up on the ground of inability to pay debts or on just and equitable ground may not be applied blind fold to a case of fraud. 8.17 Antrix, which initiated the proceedings for winding up, is neither a financial creditor nor an operational creditor nor a corporate applicant. This is why Antrix have not and could not have gone for insolvency resolution process, under the IBC, but taken recourse to Section 271(c) of the Companies Act, 2013. Hence the ratio in Jignesh Shah, as applicable to debts, whose recovery in any case should not have been time barred on the date of initiation of the proceedings for winding up/insolvency resolution process, cannot have any application to the case on hand. 8.18 It is fundamental to the law of limitation that limitation extinguishes the remedy and not the right. If the remedy of filing a civil suit for the recovery of a debt stands extinguished by the Law of Limitation, the creditor cannot make use of Section 433(e) of the Companies Act, 1956. This is the premise on which this Court decided Jignesh Shah.

8.19 After Jignesh Shah, this court was concerned with the application of sections 14 and 18 of the Limitation Act, 1963 in different cases. In Sesh Nath Singh v. Baidyabati Sheoraphuli Co□operative Bank Ltd15 , this Court held that Sections 14 and 18 will apply to cases filed under section 7 or 9 of IBC. Again in Laxmi Pat Surana vs Union Bank of India16, this Court held :“Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), 15 (2021) 7 SCC 313 16 (2021) 8 SCC 481 as the case may be, acknowledge their liability to pay the debt. Such acknowledgement, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgement of the debt, from time to time, for institution of the proceedings under Section 7 of the Code.” 8.20 Thereafter, the question whether the entries made in the balance sheets of a corporate debtor would amount to acknowledgement of a liability under section 18 of the Limitation Act came up for consideration in Asset Reconstruction company vs Bishal Jaiswal17. After referring to the judgment of the Calcutta High Court in Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff 18, this Court held in Bishal Jaiswal (i) that “though the filing of a balance sheet is by compulsion of law, the acknowledgement of a debt is not necessarily so; and (ii) that the entries made in the

balance sheets would amount to acknowledgement of liability depending upon whether such an entry qua any 17 (2021) 6 SCC 366 18 AIR 1962 Cal 115 particular creditor is unequivocal or has been entered into with caveats in the form of notes that are annexed to or forming part of such financial statements" 8.21 The above decisions show that limitation is not always akin to a lighted matchstick to a train of gun powder. The date of commencement of the period need not necessarily be static. The date of commencement may keep changing depending upon the acts of omission and commission on the part of the party against whom the action is initiated. These acts of omission and commission constitute the bundle of facts, which determine the question whether an action is barred by limitation or not. 8.22 As we have pointed out elsewhere, the contours of fraud as delineated in Section 271(c) of the Companies Act, 2013 cover three aspects namely, (i) the affairs of the company being conducted in a fraudulent manner; (ii) the company was formed for fraudulent and unlawful purpose; and (iii) the persons concerned in the formation and management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith. As rightly pointed out by the Tribunal, a singular act of omission or commission may constitute fraud and even a series of acts may constitute fraud. A fraudulent act may be different from the fraudulent manner in which an act is performed. The words "the conduct of the affairs of a company in a fraudulent manner" indicate that the process was a continuing one. If the conduct of the affairs of the company in a fraudulent manner is a continuing process, the right to apply becomes recurring.

8.23 We must keep in mind the fact that apart from the persons in charge of the management of the affairs of the company in liquidation, the officials of Antrix as well as the officials of the Department of Space are now facing prosecution not only for offences under Section 420 read with Section 120B of the Indian Penal Code, but also for offences under the Prevention of Corruption Act, 1988 and the Prevention of Money Laundering Act. The termination of the Contract on 25.02.2011, was not triggered by an allegation of fraud and corruption. Fraud and corruption were discovered only later and by the time the discovery was made, the attempts to reap the fruits of fraud had reached the pinnacle. These attempts continue even till date and this falls squarely within Section 271(c). Therefore, the contention that the petition was barred by limitation was rightly rejected by the Tribunal and we have no reason to take a different view.

9. ESTOPPEL 9.1 The next ground of attack to the impugned orders is that Antrix is estopped from pleading fraud and seeking winding up of Devas, in view of the fact, (i) that the letter of termination dated 25.02.2011, of the Agreement dated 28.01.2005 was not on the ground of fraud but by invoking the force majeure clause; (ii) that in the proceedings before the arbitral Tribunals, no allegation of fraud was ever raised; and (iii) that the Auditor's reports of Antrix for all these years, contained a statement that no fraud was committed on Antrix.

9.2 The contention of the appellants is that under Section 19 of the Indian Contract Act, 1872, an agreement vitiated by fraud is not void but only voidable at the option of the party who is a victim and that therefore the failure of Antrix, (i) to terminate the contract on the ground of fraud and/or (ii) to set up fraud as a defence to the arbitral proceedings operated as estoppel. In addition, the Auditor's statements in the Annual Reports, that no fraud was committed on Antrix, would give rise to a valid plea of estoppel. 9.3 Factually, the appellants are right in pointing out that the Agreement dated 28.01.2005 was terminated by a letter dated 25.02.2011 only by invoking the force majeure

clause and that fraud was not set up as a defence in the arbitral proceedings. The appellants are also factually correct in pointing out from the Auditor's reports of Antrix dated 15.09.2012, 19.07.2016, 24.07.2017, 19.06.2020 etc., that there was a certification by the auditors to the effect that no fraud on or by the company has been noticed or reported during the course of the audit. In the Annexure to the Auditor's report dated 15.09.2012, the Auditors have stated:□"According to the information and explanations given to us in the course of our audit, we report that no fraud on or by the Company has been noticed or reported during the course of our audit." 9.4 Similarly, in the Annual Report dated 19.07.2016, for 2015□16, it was reported by the Auditors as follows:□"To the best of our knowledge and belief and according to the information and explanations given to us, we report that no case of fraud has been committed on or by the Company or by its officers or employees during the year." 9.5 A statement similar to the one extracted above, also finds a place in the Auditor's report dated 24.07.2017, forming part of the Annual Report 2016□17.

9.6 Even in Annexure□B Report dated 19.06.2020, the Auditors have given a statement as follows:□ "Fraud by company or its officers and employees According to the information and explanation given to us, there are no frauds reported by the company or any fraud has been noticed or reported during the year. Accordingly, the provisions of clause 3(x) of the said order are not applicable." 9.7 Under Clause (xxi) of paragraph 4 of the Companies (Auditor's Report) Order, 2003, issued in exercise of the powers conferred by Section 227 (4A) of the Companies Act, 1956, there is a prescription that the Auditor's Report should contain a statement as to whether any fraud on or by the company has been noticed or reported during the year and if so, the nature and the amount involved.

9.8 But the question is as to whether all the above would lead to an inference of estoppel against Antrix. The fact that the Agreement dated 28.01.2005 was not terminated on the ground of fraud, through the letter dated 25.02.2011, cannot take the appellants anywhere. The earliest First Information Report for the offences under Section 420 read with Section 120B of the IPC was filed by the CBI only on 16.03.2015. The officers of Antrix as well as officials of the Government were also implicated in the FIR for offences under the Prevention of Corruption act, 1988. Therefore, the appellants cannot set up a plea of estoppel on the ground that the termination of the Agreement in the year 2011 was not on the ground of fraud, when the discovery of fraud itself was many years later.

9.9 For the very same reason, the failure of Antrix to plead fraud in the ICC arbitration proceedings, cannot also operate as estoppel. The arbitral proceedings commenced in the year 2013 and the award itself was passed on 14.09.2015. Antrix cannot be expected to plead fraud in the arbitral proceedings, even before the discovery of fraud.

9.10 The Chartered Accountants/Auditors are not experts either in Criminal Law or in the technology that formed the subject matter of the Agreement between Antrix and Devas. The statement of Chartered Accountants are always qualified with certain riders such as "according to the information and explanations given to us in the course of our audit" or "to the best of our knowledge and belief and according to the information and explanations given to us". 9.11 In fact, the Companies (Auditor's Report) Order, 2015 which was superseded by another order in 2016 was

issued by the Central Government in exercise of the power conferred by Section 143(11) of the Companies Act, 2013. Section 143(12) obliges the Auditor to report to the Central Government, if he has reason to believe that an offence of fraud of a particular dimension was being committed in the company by its officers or employees. Sub-section (13) of Section 143 also provides immunity to the Auditors for furnishing a report to the Central Government, if it is done in good faith. Sub-section (12) & (13) of Section 143 read as follows:-"143. Powers and duties of auditors and auditing standards. -xxxx xxxx xxxx (12) Notwithstanding anything contained in this section, if an auditor of a company in the course of the performance of his duties as auditor, has reason to believe that an offence of fraud involving such amount or amounts as may be prescribed, is being or has been committed in the company by its officers or employees, the auditor shall report the matter to the Central Government within such time and in such manner as may be prescribed:

> Provided that in case of a fraud involving lesser than the specified amount, the auditor shall report the matter to the audit committee constituted under section 177 or to the Board in other cases within such time and in such man-ner as may be prescribed:
>
> Provided further that the companies, whose auditors have reported frauds under this sub-section to the audit committee or the Board but not reported to the Central Gov- ernment, shall disclose the details about such frauds in the Board's report in such manner as may be prescribed. (13) No duty to which an auditor of a company may be subject to shall be regarded as having been contravened by reason of his reporting the matter referred to in sub-section (12) if it is done in good faith." 9.12 If the auditors of a company fail to make a report in terms of Section 143(12), despite having knowledge about the fraud, they may become liable for penal consequences under Section 448 read with Section 447 of the Companies Act, 2013. But the failure of the auditors to make a report as required by Section 143(12) or as required by the order issued under Section 143(11), cannot operate as estoppel against the company. The auditor's report can neither be taken as gospel truth nor act as estoppel against the company. The statement in the auditor's report, is as per the information given to them or as per the information culled out to the best of their ability.

9.13 The reliance placed upon Section 19 of the Indian Contract Act, 1872 to raise the plea of estoppel may not wholly be correct. Section 19 of the Indian Contract Act, deals with only one type of fraud namely, a fraud perpetrated on a party to secure his consent to an agreement. Section 19 begins with the words "when consent to an agreement is caused by coercion, fraud.....". Frauds other than those used to induce the consent of a party to an agreement, are not covered by Section 19. In fact, the definition of fraud under Section 17 is also confined only to certain acts committed by a party to a contract. There are cases where a party may perpetrate a fraud either upon non-contracting parties or upon the Government or even upon the courts. The principle that fraud vitiates all solemn acts, will itself be rendered nugatory, if the understanding of fraud is confined only to the realm of contract. 9.14 In the case on hand, the fraud alleged by Antrix is not solely on the ground that their consent to the Agreement dated 28.01.2005 was vitiated by fraud. What is alleged in the petition for winding up are, (i) formation of the company for fraudulent or unlawful

purpose; (ii) fraud in the conduct of the affairs of the company; and (iii) fraud on the part of the persons who were involved in the formation and/or in the management of affairs of the company. The fraud relatable to the agreement, is only one facet of the whole scheme of things. Therefore, we have to go beyond section 19 of the Contract Act.

9.15 In fact, the Explanation (i) under Section 447 of the companies Act, 2013 also defines fraud, but for the purposes of Section 447. What is covered by Section 271(c) of the Companies Act, 2013 is a fraud that goes beyond what lies in the realm of contract or in the realm of the penal provisions of the Companies Act, 2013. Hence the contention that Antrix was estopped from pleading fraud, was rightly rejected by the Tribunal and we see no reason to taken a different view.

10. Refusal to permit cross□examination 10.1 Another ground of attack by the appellants to the impugned orders is that the foundation for the allegation of fraud was the averment that Devas offered to provide goods and services which were non□existent both on the date of execution of the agreement and on the date of its termination and that Devas was also incapable and did not have the necessary permission/approvals to provide such device/services. Contending that the question of existence/availability of the technology has become a contentious issue with both parties filing several affidavits, Devas filed an application before NCLT seeking permission to cross□examine the officials of Antrix. This application was taken up along with the main company petition. While ordering winding up, by a final Order dated 25.05.2021, NCLT justified its action by holding that the case did not require any oral evidence. Therefore, in the memorandum of grounds of appeal before NCLAT, the appellants raised a specific ground that the omission on the part of the Tribunal to afford an opportunity of cross□examination, vitiated the final outcome. But NCLAT upheld the view taken by NCLT.

10.2 Therefore, it is contended on behalf of the appellants that

(i) allegations of fraud, as a rule, warrant a full□fledged trial and proof; (ii) that in the light of the specific bar of jurisdiction of Civil Courts under Section 430 of the Companies Act, 2013, NCLT was obliged to scan the allegations of fraud very carefully, by allowing parties to lead evidence and cross□examine the witnesses; (iii) that the Tribunal is conferred with the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, in respect of the summoning and enforcing of the attendance of any person and examining him on oath, under Section 424(2) of the Companies Act, 2013; (iv) that Rules 52 and 135 of the National Company Law Tribunal Rules, 2016 make it clear that the Tribunal has the power to summon the appearance of any witness, cross□examine him on oath and even issue commission for the examination of witnesses; and (v) that the Tribunals committed a gross error of law in recording findings on serious allegation of frauds, solely on the basis of affidavits and documents. Reliance is placed in this regard by the learned senior counsel for the appellants, on the decisions of this Court in Standard Chartered Bank vs. Andhra Bank Financial Services Ltd. and Ors.19; Svenska Handelsbanken vs. Indian 19 (2006) 6 SCC 94 Charge Chrome and Ors.20 and V. Ravi Kumar vs. State, Rep. by Inspector of Police, District Crime Branch, Salem & Ors.21 10.3 At the outset we should point out that the decision in Svenska Handelsbanken (supra) arose out of an interim order of injunction granted in a civil suit. The principle of law laid down in the said decision that mere pleadings cannot make out a case of fraud, is an off□shoot of the time

tested principle that pleadings cannot take the place of proof. Insofar as the decision in Standard Chartered Bank (supra) is concerned, the same arose out of proceedings before the special Court. One of those proceedings was under Section 111 of the Companies Act, 1956 which was "somewhat summary in nature". Therefore it was in that context that this Court held that when a seriously disputed question of title arises, the Company Court should relegate the parties to a civil suit. But having admitted that under Section 430 of the Companies Act, the jurisdiction of the Civil Court is barred, it is not open to the 20 (1994) 1 SCC 502 21 (2019) 14 SCC 568 appellants to rely upon this decision to say that the parties could be relegated to a civil court.

10.4 Similarly the decision in V. Ravi Kumar (supra), arose out of criminal proceedings under Section 482 Cr.P.C for quashing the second complaint, after the withdrawal of the first complaint. The High Court quashed the criminal complaint and while setting aside the order of the High Court, this Court held that the allegations of fraud and cheating, which prima facie constitute offences under Section 420 IPC, have to be established through evidence at the time of trial.

10.5 Thus the decisions relied upon by the appellants to drive home the point that the Tribunal must have permitted cross-examination, have no relevance to the case on hand. However, dehors those decisions relied upon by the appellants, let us see whether the omission of NCLT to permit cross-examination was fatal.

10.6 The Tribunal classified the allegations made by Antrix into eight categories. In sum and substance, they revolve around, (i) the offer of a non-existent technology; (ii) misrepresentation about the possession of intellectual property rights over a device; (iii) violation of SATCOM policy; (iv) securing of an experimental licence fraudulently; (v) manipulation of the minutes; and (vi) the trail of money brought in through FIPB approvals.

10.7 All the averments forming the foundation of the allegations of fraud, from the point of view of the Indian Evidence Act, would fall under only two categories, namely, (i) positive assertions requiring persons making those assertions to prove them; and (ii) negative assertions.

10.8 A party alleging the non-existence of something, cannot be called upon to prove the non-existence. It is the party who asserts the existence or who challenges the assertion of non existence, who is liable to prove the existence of the same.

10.9 In the case on hand, Antrix asserted that Devas offered services which were non-existent, through a device which was not available and that even the so-called intellectual property rights over the device were not available. Therefore, obviously Antrix cannot lead evidence to show the non-existence or non-availability of those things, either by oral evidence or by subjecting their officials to cross-examination by Devas. Devas never produced before the Tribunals any device nor did they demonstrate the availability to Devas services. All that Devas wanted was, the cross-examination of the officials of Antrix. Any amount of cross-examination of the officials of Antrix could not have established the existence of something that was disputed by Antrix.

10.10 It is also interesting to note that the application for cross-examination was moved by Devas on 5.5.2021, after arguments in the main petition itself had commenced on 30.04.2021 and concluded on 3.05.2021 on the side of Antrix. The list of dates filed by Shri N. Venkataraman, Additional Solicitor General shows that on 19.01.2021, NCLT ordered the admission of the company petition and appointed a provisional liquidator. In fact this order was passed after hearing objections of the company. As against the order of admission, DEMPL filed an appeal before NCLAT. But the same was dismissed by NCLAT on 11.02.2021, with liberty to the DEMPL to file an application for impleadment. DEMPL filed an application for impleadment on 2.03.3021. They also filed a writ petition before the High Court of Karnataka challenging the authorisation given by Central Government to Antrix, as well as the constitutional validity of Section 272(1)(e) read with Section 272(3) of the Companies Act, 2013. After hearing extensive arguments over several dates, the High Court of Karnataka dismissed the writ petition by an Order dated 28.04.2021 with costs of Rs.5,00,000/- for abuse of process of law. It was only thereafter that the company petition was taken up by NCLT and arguments on behalf of Antrix was heard and concluded on 30.04.2021 and 3.05.2021.

10.11 When the company petition was adjourned to 5.05.2021 for arguments on behalf of Devas, a two-pronged strategy was adopted by Devas. The first was to make DEMPL file a writ appeal before the Division Bench of the High Court of Karnataka against the order of the learned Single Judge upholding the constitutional validity of the aforesaid provisions. Simultaneously, Devas filed an application on 5.05.2021 to cross-examine the Managing Director and Finance Director of Antrix. However, Devas also continued their arguments in the main company petition and concluded the same on 10.05.2021. On 10.05.2021, NCLT reserved the judgment. 10.12 Incidentally, it must be pointed out that the writ appeal filed by the DEMPL came up for hearing before the Division Bench of the High Court of Karnataka on 12.05.2021. The Division Bench directed the matter to be listed on 19.05.2021 with a condition that the costs as awarded by the learned Single Judge should be paid on or before the said date.

10.13 On 25.05.2021, the NCLT passed final orders, after which DEMPL withdrew the writ appeal on 27.05.2021.

10.14 It is clear from the above time-line of events that the application for cross-examination was moved by Devas after conclusion of the arguments on the side of Antrix in the main petition itself, and that too after the unsuccessful attempt made by one of its shareholders to assail the constitutional validity of the statutory provisions. Therefore, the Tribunal was right in rejecting the request for cross-examination.

11. LOCUS STANDI OF THE SHAREHOLDERS 11.1 The next ground of attack to the impugned orders is that despite the petition for winding up containing specific allegations of fraud as against the shareholders of Devas, NCLT did not give any opportunity to the shareholders. Even the application for impleadment filed by DEMPL which is one of the shareholders, pursuant to the leave granted by NCLAT, was taken up along with the main company petition and eventually rejected along with the main company petition. Therefore, DEMPL filed an independent appeal before NCLAT. Unfortunately, the Member (Judicial) of NCLAT dismissed the appeal, as not maintainable,

on the ground

(i) that the rights of the shareholders are confined to the election of Directors, voting in the meetings of the company, distribution of dividends and the distribution of surplus upon liquidation; and

(ii) that the company in liquidation itself, through its ex□Director, has independently filed an appeal as an aggrieved person. 11.2 Therefore, relying upon the decision of this Court in National Textile Workers' Union vs. P.R. Ramakrishnan & Ors.22, it is contended that it would be contrary to every recognised principle of fair judicial procedure and violative of the rule of audi alteram partem which constitutes one of the basic principles of natural justice, to deny to the shareholders, the right to be heard before an order prejudicially affecting their interest was passed. 11.3 It is true that the petition for winding up was filed under Section 271(c) alleging (i) that the affairs of the company have been conducted in a fraudulent manner; (ii) that the company was formed for fraudulent and unlawful purpose; and (iii) that the persons concerned in the formation or management of its affairs have been 22 (1983) 1 SCC 228 guilty of fraud. But there is no scope either in the Act or in the Rules for the impleadment of any shareholder as a respondent to the petition for winding up. Rule 3(1) of Companies (Winding Up) Rules 2020 requires a petition for winding up to be in Form WIN 1 or Form WIN 2. A look at these forms would indicate that there is no provision for making any one, as the respondent in the petition. Therefore, the question of impleading any shareholder at the time when the petition for winding up was filed, did not arise. 11.4 Interestingly, Antrix sought the authorisation under Section 272(1)(e) on 14.01.2021 and the Central Government granted authorisation on 18.01.2021. On the very same day, the petition for winding up was filed. When the petition was taken up by NCLT on 19.01.2021 for the first time, Devas Multimedia Private Limited, which is the company in liquidation appeared through counsel and opposed the petition and also sought sufficient time to file reply. Therefore, NCLT did not have to go through the formality of ordering notice before admission, as a battery of counsel appeared for Devas, raised preliminary objections and also sought time to file response. The Tribunal passed a detailed order dated 19.01.2021 admitting the company petition and appointing a provisional liquidator even while granting time to the company to file its reply. In paragraph 5 of the detailed order dated 19.01.2021, the preliminary submissions made by the company in liquidation against the admission of the company petition, are recorded. 11.5 The order dated 19.01.2021 admitting the company petition became the subject matter of an appeal before NCLAT at the instance of the company in liquidation. Therefore, on 8.02.2021 when the company petition came up for hearing, it was adjourned to 16.02.2021 and, thereafter, to 2.03.2021. On 2.03.2021, DEMPL which is a shareholder filed a petition for impleadment. It is true that this application was not independently dealt with and disposed of at that stage. However, the objections of DEMPL to the main company petition were just the same as the objections of the company in liquidation. Despite the fact that a provisional liquidator has been appointed on 19.02.2021 itself, the ex□Director of the company in liquidation was permitted to file objections to the main company petition and also argue the same fully. 11.6 After the conclusion of the arguments on the part of Antrix to the main company petition, DEMPL even moved a writ petition challenging the constitutional validity of Section 272(1)(e) and the authorisation issued to Antrix. The writ petition was dismissed with costs and the writ appeal was withdrawn. 11.7 It will be clear from the above sequence of events that (i) despite NCLT not disposing of the impleadment petition before passing final orders; and (ii) despite NCLT dismissing

the impleadment petition along with the main company petition, their objections to the main company petition have been dealt, along with the objections of the ex-Director of the company in liquidation. In other words, the objecting shareholder had an effective hearing before NCLT. Though their appeal was rejected by NCLAT on the ground of maintainability, their arguments for opposing the winding up, which were just the same as that of the company, have been considered. Therefore, the objection that an opportunity was not given to the shareholders, is just theoretical, when in fact they were heard.

11.8 It is true that in National Textile Workers' Union (supra), this Court took the law relating to locus standi by a leap forward. But as seen from the facts of the said case, the petition for winding up was triggered by one group of shareholders, both on the ground that company was unable to pay its debts and on the ground that it is just and equitable to wind up the company. The company Judge before whom the winding up petition came up, granted an ex-parte injunction restraining company from borrowing any moneys and from alienating and/or creating any charge or encumbrance over any of the assets of the company. As a consequence, the Employees' Cooperative Stores, stopped issuing any provisions or supplies to the workmen. The workmen were also prevented from enjoying the benefits under the ESI scheme. The wages payable for the following month itself became doubtful. Faced with the sudden threat to their livelihood, the workers' Unions sought to implead themselves as party to the winding up proceeding. Therefore, the decision rendered in National Textile Workers' Union's case has to be understood in the context in which it was rendered. 11.9 It is true that the dismissal of the appeal filed by DEMPL, by NCLAT on the ground of maintainability may not be correct. Section 421(1) of the Companies Act, 2013 enables "any person aggrieved by an order of the Tribunal", to file an appeal. To say that DEMPL cannot be taken to be a person aggrieved, may be far-fetched. But on that sole ground, the impugned order cannot be set aside.

11.10 We have seen from the memorandum of grounds of appeal filed by DEMPL before NCLAT and the memorandum of grounds of appeal filed by DEMPL before this Court that their objections to the petition for winding up are just the same as those of the ex-Director of the company in liquidation. In fact, before us, the ex-Director of the company in liquidation was represented by Shri Mukul Rohtagi, learned senior counsel and DEMPL was represented by Shri Arvind P. Datar, learned senior counsel. While the learned senior counsel for the company in liquidation occupied the crease only for limited number of overs, the learned senior counsel appearing for DEMPL took the entire responsibility on his shoulders and played a very long innings. Therefore, it is not possible for us to set aside the order of winding up, on the sole ground that the shareholders application for impleadment as well as the appeal were rejected wrongly. 11.11 Before leaving the discussion on this ground of attack, we must also take note of one submission made by Shri N. Venkataraman, learned Additional Solicitor General. According to him, all the shareholders of Devas are arrayed as accused by the CBI in the criminal cases. But the CBI has not even been able to serve summons on them. Therefore, persons who are ducking/ avoiding summons in the criminal prosecution, cannot be heard to contend that they must have been heard in the petition for winding up. Taking advantage of their citizenship/residence abroad, these shareholders are prosecuting proceedings for the enforcement of (i) ICC Arbitral Tribunal Award in India; and (ii) BIT Awards overseas, even while making it impossible for CBI to serve summons on them for the past five years. It is not open to such persons to raise the bogey of failure to afford an opportunity.

12. FINDINGS ERRONEOUS AND PERVERSE AND THE STANDARD OF PROOF APPLIED INCORRECT 12.1 The next ground of attack to the impugned orders is that the findings recorded by the NCLT which were approved by NCLAT were completely perverse and erroneous and that the Tribunals applied a completely incorrect standard of proof. In any case, the findings were recorded to be only prima facie, which is not sufficient to order the winding up of the company.

12.2 In order to test the correctness of the above contention, it is necessary to take note of the averments on which Antrix built their case for winding up, the response of Devas to the averments, the findings recorded by NCLT and the findings recorded by NCLAT. 12.3 Briefly stated, the averments made by Antrix in their petition for winding up were, (i) that Devas was incorporated as a private limited company, on 17.12.2004, with an authorised share capital of Rs.1,00,000/- divided into 10,000 equity shares of Rs.10/- each; (ii) that within a few weeks of incorporation, an Agreement dated 28.01.2005 was entered into between the company and Antrix, as a result of a fraudulent and criminal conspiracy between the persons in management of the affairs of the company and the officials of Antrix/Government of India, to award a lease of scarce and valuable S- band spectrum, without obtaining necessary approvals and without following applicable norms and procedures;

(iii) that the persons in-charge of the formation as well as the management of the affairs of Devas did not possess the necessary technical know-how or the intellectual property rights for the provision of what was claimed as “Devas Services”, either at the time of signing of the agreement or even till date; (iv) that despite not being in possession of either the technology or the device, the company was pushing Antrix and the Government of India to launch the satellite; (v) that as part of the conspiracy, the Agreement dated 28.01.2005 was terminated by Antrix by a letter dated 25.02.2011 by invoking the force majeure clause; (vi) that it made things easy for Devas to initiate an arbitration before the ICC Arbitral Tribunal, apart from the initiation of the two BIT Arbitrations by the shareholders of Devas, (vii) that when the criminal conspiracy, fraud and corrupt practices came to light, an FIR was lodged by the CBI on 16.03.2015; (viii) that a charge-sheet was filed by CBI on 11.08.2016, both against the persons responsible for the formation and management of the affairs of the company in liquidation, as well as the officials of Antrix and Government of India; (ix) that a supplementary charge-sheet was filed on 08.01.2019; (x) that a complaint was also registered under the Prevention of Money Laundering Act, 2002 on 24.12.2018; (xi) that the company which was formed with an authorized share capital Rs. 1,00,000/- in December, 2004, managed to secure a contract for a stated consideration of an “up-front capacity reservation fee” in the region of US, $ 20 million per satellite, apart from annual license fee of around US $ 9 million per satellite; (xii) that the execution of such a contract and the award of a public largesse of such a huge magnitude was not through any public auction but by private negotiations held by the officials of Antrix with Forge Advisors of USA, (xiii) that after securing the contract, the company was able to sell its equity shares as well as OCP shares at a huge premium to foreign investors; (xiv) that equity shares of a face value of Rs. 10/- were sold at the rate of Rs. 1.26 lakhs per share; (xv) that interestingly, DT Germany which invested Rs. 430 crores through DT Asia obtained only 19% share holding, while four Mauritius investors obtained 37% share holding by investing Rs. 150 crores; (xvi) that experimental licences were obtained by Devas by manipulating the minutes of the meetings; (xvii) that FIPB approvals were secured for the stated purpose of providing Internet services, though the agreement

was for rendering a hybrid service known as Satellite based Digital Multimedia Broadcasting Services (SDMB Services, for short); (xviii) that the fact that such a hybrid technology was not in existence at that time was suppressed from FIPB as well as other authorities; (xix) that after showcasing the inflow into India, of investment to the tune of Rs. 579 crores, the company siphoned out of India, a sum of Rs. 75 crores for creating a wholly owned subsidiary in USA, a sum of Rs. 180 crores towards payment for business support services and sum of Rs. 233 crores toward litigation services; (xx) that a sum of Rs. 92 crores alone was kept in India out of which Rs. 21 crores was by way of Fixed Deposits and a sum of Rs. 59 crores was paid to Antrix towards up□front capacity fee; (xxi) that some of the then officials of Antrix and the Government of India were parties to the fraudulent and unlawful purpose for which Devas was created and the fraudulent manner in which the affairs of the company had been conducted; (xxii) that the persons including investors and the share□holders concerned in the formation and the management of its affairs have been guilty of fraud, corrupt practices and money laundering and that therefore the company was liable to be wound up.

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 271(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 271(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 IPTV 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 NCLAT have recorded concurrent findings on facts, it is not open to this Court to re-appreciate 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-1 (PS-1), 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 23 According to Hindu Mythology, Devas are demigods and Asuras are demons 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 NCLAT 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.

12.10 But we do not think that the appellants can take advantage of the use of an inappropriate expression by NCLAT. The detailed findings recorded by the Tribunal show that they are final and not prima facie. Merely because NCLAT used an erroneous expression those findings cannot become prima facie.

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 unacceptable, 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.

14. Conclusion Therefore, in fine, we find all the grounds of attack to the concurrent orders of the NCLT and NCLAT to be unsustainable. Therefore, the appeals are dismissed. However, without any order as to costs.

.....J. (Hemant Gupta) .....J. (V. Ramasubramanian) NEW DELHI JANUARY 17, 2022