*Reportable*

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(s.)17753-17755 OF 2017
(Arising out of SLP(C) No(s). 29747-29749 of 2013)

VENTURE GLOBAL ENGINEERING LLC Appellant(s)

VERSUS

TECH MAHINDRA LTD & ANR ETC. Respondent(s)

WITH

CIVIL APPEAL NO(s.) 17756 OF 2017
(Arising out of SLP(C) No. 8298 of 2014)

O R D E R

In view of the difference of opinion in terms of separate judgments pronounced by us in these appeals today, the Registry is directed to place the papers before Hon'ble the Chief Justice of India for appropriate further course of action.

…....................J.
(J. CHELAMESWAR)

…....................J.
(ABHAY MANOHAR SAPRE)

NEW DELHI
NOVEMBER 1, 2017

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**J U D G M E N T**

**Chelameswar, J.**

1. Leave granted in both the SLPs.

I had the advantage of reading the opinion of my learned brother Justice Sapre. While I agree with the conclusion recorded by him that the High Court erred in its conclusion on the question

whether the proceedings initiated by VENTURE in OP No. 390 of 2008 are barred by the principle of “issue estoppel”, I am unable to persuade myself to agree with his conclusions that the judgment under appeal is required to be reversed on the questions relating to public policy and fraud for the following reasons;

2. The facts of these appeals are narrated in great detail by my learned brother. There is no need to repeat except to mention those which are essential for the purpose of my conclusion.

3. An Arbitral Award dated 3rd April, 2006 (hereinafter the AWARD) came to be passed in an arbitration between VENTURE and SATYAM.

The relevant portion of the AWARD reads as under:

> “A. I order VGE to deliver to Satyam share certificates in form suitable for immediate transfer to Satyam or its designee evidencing all of VGE’s ownership interest legal and/or beneficial in SVES. I further order it to do all that may otherwise be necessary to effect the transfer of such ownership to Satyam or its designee.”

4. The dispute leading to the Arbitration and the AWARD arose out of the Agreement dated 20th October, 1999 (Agreement I) entered into between VENTURE and SATYAM.

5. Article VIII of the said Agreement defined the expression "Events of Default" and stipulated the consequences thereof:

**"ARTICLE VIII EVENTS OF DEFAULT AND REMEDIES**

**Section 8.01 Events of Default**

For the purposes of this Agreement, an "Event of Default" means, with respect to any Shareholder, the occurrence of any of the following:

(a) A Bankruptcy Event occurs with respect to such Shareholder.

(b) Subject to clause (c) and (d) below, such Shareholder breaches this Agreement in any material respect and fails to cure such breach within thirty (30) days after being notified in writing by the other Shareholder of such breach.

(c) A Shareholder Transfers, or attempts to Transfer, any Shares in violation of the transfer restrictions set forth in Article VII of this Agreement.

(d) Such Shareholder is subject to Change in Control

**Section 8.02 Rights Upon Events of Default Generally**

Upon the occurrence of an Event of Default (other than a Bankruptcy Event) with respect to any Shareholder (the Defaulting Shareholder"), the other Shareholder (the "Non-Defaulting Shareholder") shall have the option, within thirty (30) days after becoming aware of the Event of Default to (a) purchase the Defaulting Shareholder's Shares at book value and repay Shareholder's loan, or (b) cause the immediate dissolution and liquidation of the COMPANY in accordance with Article IX. Either of such options must be exercised by the Non-Defaulting Shareholder by written notice to the Defaulting Shareholder within thirty (30) days after becoming aware of the subject Event of Default.

**Section 8.03 Rights Upon Bankruptcy Event**

Upon the occurrence of a Bankruptcy Event with respect to any Shareholder (the "Bankrupt Shareholder"), such shareholder shall give immediate written notice to the other Shareholder (the

**"Solvent Shareholder").** The Solvent Shareholder shall have the option of (a) purchasing the Shares held by the Bankruptcy Shareholder at book value and repay such Shareholder's loans or (b) causing the immediate dissolution of liquidation of the company in accordance with Article IX. Either of such options must be exercised by the Solvent Shareholder by written notice to the Bankrupt Shareholder within one hundred twenty (120) days of receipt of notice of the Bankruptcy Event from the Bankrupt shareholder.

**Section 8.04 Remedies Not Exclusive**

The rights granted in this Article are not exclusive of any other rights or remedies available at law or in equity."

6. The arbitrator *inter alia* opined that an Event of Default on the part of VENTURE occurred and therefore, VENTURE (the defaulting shareholder) is liable to transfer its interest i.e. 50 per cent of the shares in the JVC to SATYAM (non-defaulting shareholder).

7. SATYAM filed a petition in the Eastern District Court of Michigan, US seeking enforcement of the AWARD against VENTURE. Admittedly, the petition was allowed on 31$^{st}$ July, 2006 and the District Court of Michigan by its judgment directed the enforcement of the AWARD. It appears that VENTURE appealed against the said order in the 6$^{th}$ Circuit, US Appellate Court in Michigan.

8. I assume for the purpose of these appeals that the directions of the Eastern District Court of Michigan dated 31st July, 2006 is legally tenable. In the final analysis, enforcement of the AWARD means transfer of the shares (property of VENTURE) in the JVC. Since the JVC is a company registered (incorporated) in India, transfer of shares therein will have to be effected in accordance with the relevant procedure established by law of India i.e. the Companies Act and other related enactments which obligate VENTURE to perform certain acts. If VENTURE declines to perform its obligations, the directions contained in the judgment of the American Court will have to be executed in India in accordance with the procedure prescribed under the Code of Civil Procedure, 1908 for the enforcement of foreign judgments or decrees, as the case may be.

9. Be that as it may, in my opinion, it was really not necessary for SATYAM to have approached the American Court for the enforcement of the AWARD, whether the AWARD is a "foreign award" as defined under Chapters I or II of Part II of the Arbitration and Conciliation Act, 1996 (hereafter "the ACT") or not, in view of

the judgments of this Court in ***Bhatia's case***[1] and ***BALCO's case***[2]**,** Part I of the ACT is applicable to the AWARD since the AWARD is anterior to the date of the judgment of this Court in ***BALCO's* case**[3].

> "Para 197. ... Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter."

Therefore, the AWARD would be enforceable as if it were a decree of a civil court in view of Section 36[4] of the ACT.

10. The only way VENTURE could avoid the enforcement of the AWARD is by having the AWARD set aside either under Section 34 of the ACT or any other procedure applicable under any other applicable law in any other appropriate jurisdiction available to VENTURE under the principles of international law. We are not informed of any such proceeding either subsisting or successfully pursued by VENTURE in any jurisdiction. On the other hand, VENTURE initiated proceedings on 13th April, 2006 before the District Court for the Northern District of Illinois Eastern Division,

[1] ***Bhatia International vs. Bulk Trading S.A. & Anr.,*** (2002) 4 SCC 105

[2] ***Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc.,*** (2012) 9 SCC 552 (CB)

[3] 6th September 2012

[4] Section 36. Enforcement.—(1)Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

USA for a declaration that the AWARD was not enforceable in the United States of America. Subsequently, even that application was dismissed as withdrawn by an Order of that Court dated 25th April, 2006.

11. Thereafter, VENTURE filed OS No. 80 of 2006 on 28th April, 2006 before the Ist Additional Chief Judge, City Civil Court, Secunderabad seeking mainly two reliefs:

i. a declaration that the Award was illegal and without jurisdiction; and

ii. a permanent injunction restraining Satyam from enforcing the Award.

12. This Court had an occasion to examine the maintainability of the said suit in an appeal arising out of certain interlocutory proceedings (detailed in the judgment of my learned brother) in ***Venture Global Engineering*** *v.* ***Satyam Computer Services Ltd. & Another,*** (2008) 4 SCC 190 (hereinafter called VENTURE-I). In substance, this Court held (subject to certain qualifications) that VENTURE is not disentitled to challenge the AWARD in India.

13. Consequent upon the judgment in VENTURE-I, the Ist Additional Chief Judge, City Civil Court, Secunderabad transferred O.S. No. 80 of 2006 to the Court of 2nd Additional Chief Judge City

Civil Court at Hyderabad. The suit was converted into an application under Section 34 of the ACT and was renumbered O.P. No. 390 of 2008. The Suit/O.P. as originally filed was based on certain grounds other than the grounds on which the O.P. eventually came to be allowed.

14. On the 7th of January 2009, Ramalinga Raju, the Chairman and founder of SATYAM made a statement in writing[5] wherein he made certain admissions to the effect that the balance sheets of SATYAM had been manipulated to inflate profits to the tune of Rs. 7080 crores.

15. VENTURE filed an application[6] under Order VIII Rule 9 of the CPC seeking permission to plead additional facts by amending the pleadings in O.P. No. 390 of 2008. VENTURE contended that the facts disclosed by Ramalinga Raju and the subsequent developments "are crucial at the adjudication of the disputes between the parties" and prayed;

> "In the foregoing fats *(sic)* and circumstances it is humbly submitted that the Hon'ble Court may be pleased to pass the following orders;

[5] Letter addressed to the Board of Directors of SATYAM
[6] IA No. 1331 of 2009 dated 12.06.2009 in O.P. No. 390 of 2008

a) That the subsequent developments and events as stated in this petition in para 3 to 21 together with the accompanying documentation be brought on Record.

b) Such other or further orders as may be necessary in the interests of justice."

The Trial Court, by an order dated the 3rd of November, 2009 allowed the application.

16. SATYAM challenged the order dated 3rd November, 2009 in a revision petition before the High Court. By an order dated the 19th of February, 2010, the High Court allowed the revision petition and dismissed Venture's application. The High Court held (in substance) that under Section 34 of the ACT, an application for setting aside of an Award could only be filed within 3 months (extendable only by another 30 days) from the date of the Award permitting attack against the AWARD on a new ground would amount to permitting the AWARD to be challenged after the expiration of limitation.

17. VENTURE appealed to this Court. This Court, by judgment of the 11th of August, 2010[7], allowed the appeal and restored the order of the Trial Court.

> "39. Therefore, this Court is unable to accept the contention of the learned counsel for the respondent that the expression "fraud in the making of the award" has to be narrowly construed. This Court cannot do so primarily because fraud being of "infinite variety" may take many forms, and secondly, the expression `the making of the award' will have to be read in conjunction with whether the award "was induced or affected by fraud".
>
> 40. On such conjoint reading, this Court is unable to accept the contentions of the learned counsel for the respondents that facts which surfaced subsequent to the making of the award, but have a nexus with the facts constituting the award, are not relevant to demonstrate that there has been fraud in the making of the award. Concealment of relevant and material facts, which should have been disclosed before the arbitrator, is an act of fraud. If the argument advanced by the learned counsel for the respondents is accepted, then a party, who has suffered an award against another party who has **concealed facts** and obtained an award, cannot rely on facts which have surfaced subsequently even if those facts have a bearing on the facts constituting the award. Concealed facts in the very nature of things surface subsequently. Such a construction would defeat the principle of due process and would be opposed to the concept of public policy incorporated in the explanation."

18. Thereafter, OP No. 390 of 2008 was heard and allowed by the trial Court by its Order dated 31.01.2012. The AWARD was set aside.

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[7] *Venture Global Engineering v. Satyam Computer Services Limited & Another,* (2010) 8 SCC 660 ("Venture-II")

19. The trial court framed as many as 8 points for consideration, and they read:

> "(1) Whether the proceeding as it stands now before this Court is a suit in the true sense of the term and whether the instant original proceeding can still be construed as a suit as contended by the respondents and, if so, whether the proceeding is liable to be dismissed as not maintainable?
>
> (2) Whether the proceeding, even if construed as an original petition under Section 34 of the Act, is still liable to be dismissed as not maintainable as contended by the respondents?
>
> (3) Whether the instant proceeding is barred by the law of limitation and is liable to be dismissed on that ground?
>
> (4) Whether the Bankruptcy of petitioner's affiliates does not constitute a bankruptcy event as per the terms and conditions agreed to between the parties?
>
> (5) Whether the award in so far as the order of transfer of petitioner's shares to the 1st respondent at the book value is violation of Foreign Exchange Management Act and also a violation of public policy?
>
> (6) Whether the Award is vitiated by any irregularities in the financial statements of 1st respondent as set out in additional pleadings?
>
> (7) Whether the petitioner was under any incapacity on account of the suppression of material facts and the indulgence in fraud by the 1st respondent which were said to have come to light after the passing of the award by the learned Tribunal? And, if so, whether such suppression of material facts and fraud have any causative link, and, if so, whether the award is vitiated by fraud on the part of the 1st respondent in the facts and circumstances urged by the petitioner? And, if so, whether the award is liable to be set aside?
>
> 8. Whether the petitioner had made out valid and sufficient grounds to set aside the impugned award, and if so, the award is liable to be set aside?
>
> 9. To what relief?

20. After an elaborate discussion of the said points, the trial court concluded at para 12 of the judgment.

> "Before the last point is taken up, it is necessary to sum up the discussion and findings. Under point number 1, it is held that the present proceeding after conversion from the Suit to the Original Petition cannot be construed to be a suit and hence cannot be rejected on the assumption that the suit is not maintainable. Under point number 2, it is held that the present proceeding which to be construed as an Original Petition under Section 34 of the Act is not liable to be dismissed as not maintainable. Under point number 3 it is held that the instant proceeding i.e. Original Petition is not barred by Law of Limitation. Under point number 4 answered against the Petitioner it is held that bankruptcy of Petitioner's affiliates had constituted a bankruptcy event as per the terms and conditions agreed to between the parties. However, it is to be noted that when this finding was recorded by the Arbitral Tribunal the additional pleas now urged by the Petitioner before this court were not available to the Petitioner and hence the additional pleas were not brought to the notice of the learned Arbitral Tribunal. The said findings of the Arbitral Tribunal can be sustained if only the issue of fraud is not taken into consideration. Thus, in the absence of plea of the suppression of material facts and fraud on the part of the 1st Respondent, the findings of the learned arbitrator that the bankruptcy of Petitioner's affiliates constitutes a bankruptcy event is sustainable. However, after the suppressed material facts and fraud have come to light even that finding of the Arbitral Tribunal cannot be sustained for the reasons already assigned under point numbers 6 and 7. Under point number 5, the award in so far as it ordered transfer of petitioner's share to the 1st Respondent @ book value is in violation to FEMA and Public Policy of India. Under points numbers 6 and 7, it is held that the award which is affected and induced by fraud is vitiated and cannot be enforced being opposed to Public Policy of India and is liable to set aside. In view of the above findings, this Court holds that the Petitioner has made out valid and sufficient grounds to set-aside the impugned award and hence, the award is liable to be set aside. The point is accordingly answered."

21. In substance, the trial court held all the points in favour of VENTURE except Point No.4 and concluded that the AWARD is

required to be set aside on two grounds, (i) the direction in the AWARD to transfer the shares in JVC of VENTURE at book value is in conflict with the requirements of The Foreign Exchange Management Act, 1999 (hereafter referred to as "FEMA") and therefore violation of public policy[8], (ii) The AWARD is unsustainable because of the financial irregularities and the manipulation of the accounts of SATYAM.[9] In the opinion of the trial court, the AWARD "is affected and induced by fraud" and cannot be enforced being opposed to public policy of India.

22. Whether the above conclusions are tenable? was the question before the High Court.

The High Court framed 8 points for consideration in the judgment under appeal.

> "1) Whether the institution of the proceedings by the 1st respondent in the Indian Courts to enforce a foreign award can be

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[8] (f) In view of the discussion coupled with reasons the point is answered in favour of the petitioner and against the Respondents holding that the award in so far as it ordered for transfer of petitioner's shares to the 1st Respondent at book value is a violation of Foreign Exchange Management Act and violation of public policy.

[9] ….In view of the detailed discussions coupled with the reasons, the points 6 and 7 are thus answered in favour of the Petitioner and against the Respondent 1 and 2 holding that the Award is vitiated by irregularities in the financial statements of 1st Respondent as set out in additional pleadings and that the Petitioner was under an incapacity on account of the acts of fraud committed by the 1st Respondent which had come to light after the passing of the award by the learned Tribunal and, therefore, such acts of fraud have causative link, and hence, the award which is affected and inducted by fraud is vitiated and cannot be enforced being opposed to Public Policy of India and is liable to set aside on the grounds of material suppression of facts, fraud, incapacity of the Petitioner and violation of Public Policy of India.

justified in view of the judgment of the Supreme Court in BALCO'S case (4 supra)?

2) Whether the principle of 'issue estoppel' gets attracted in the facts of the case?

3) Whether it is competent for a party to arbitration to invoke Part-I as well as Part-II of the Arbitration Act in relation to a foreign award?

4) Whether the ground of fraud raised by the appellant has been pleaded and proved as required in law, and whether the finding recorded by the trial Court on that aspect can be sustained?

5) Whether the award can be said to be opposed to public policy, on the ground that the transfer of money for its implementation, needs permission, under FEMA?

6) Whether an Indian Court can set aside a foreign award, which has already been enforced in the proceedings with the participation of both the parties to the award?

7) Whether the trial Court followed the correct procedure in deciding the O.P.? and

8) Whether the miscellaneous orders that are challenged in certain appeals and revisions can be sustained in law?"

23. Point Nos.4 and 5 above are relevant in the context of the twin reasons given by the trial court for arriving at the conclusion that the **AWARD** is required to be set-aside.

24. The High Court opined that the findings recorded by the trial court are unsustainable. The relevant portion of the judgment under appeal insofar as it pertains to point No. 4 reads:

"In every alternative sentence, the word 'fraud' has been used and it was proceeded as though fraud was proved. It is important to mention that the trial Court did not record any finding to the effect

that fraud has been proved by the 1st respondent, much less any reference was made to the oral and documentary evidence.

It hardly needs any mention that the OP was required to be tried as a suit, particularly when allegations of far-reaching consequences were made. However, the trial Court was mostly impressed by the contents of the charge-sheet filed against Mr. Ramalinga Raju by the investigating agencies. Even while the cases are pending trial before the respective Courts, it has proceeded as though the allegation as to fraud was proved. For all practical purposes, it has rendered the trial before the concerned Courts, nugatory.

We are, therefore, of the clear view that the finding of the trial Court on the question of fraud does not accord with law."

Coming to point No. 5, the High Court held:

"It is also important to mention that I.A. No. 1331 of 2009 did not contain any plea as to public policy. It was only in relation to alleged fraud. The observation of the trial Court is erroneous and contrary to record.

It is possible to argue that, if the complaint itself is that the award is opposed to public policy, an aggrieved party cannot be expected to raise that plea before the Arbitrator; and if the violation of the public policy is brought about by the award, the complaint cannot be made at any stage, anterior to that. However, when a ground of that nature is raised under Section 34 of the Act, it must be demonstrated as to how the award is opposed to public policy. Even at the cost of repetition, it can be said that, it is only when the award exhorts a party to the proceedings to take steps, that has the effect of contravening law of the land, in which it is to be enforced, that the ground can be invoked. There is not even a semblance of finding by the trial Court in this behalf. It is trite that every step for enforcing the award must be in accordance with the relevant provisions of law. Therefore, we answer this point in favour of the appellant."

25. The net result of the litigation is that while the Trial Court set aside the AWARD, the High Court reversed the trial court judgment and restored the AWARD.

26. Aggrieved by the judgment, the present two appeals are filed one by VENTURE and other by SATYAM now represented by Tech Mahindra.

27. Naturally VENTURE is aggrieved by the judgment. Notwithstanding the fact SATYAM succeeded before the High Court, SATYAM also filed a separate appeal (being SLP(C) No. 8298 of 2014) questioning the correctness of the decision of the High Court insofar as it held that the trial court had the jurisdiction to examine the legality of the AWARD.

28. The crux of the entire litigation is that VENTURE seeks to have the AWARD set aside. It must be remembered that SATYAM has not initiated any proceeding so far in India for the enforcement of the AWARD.

29. As rightly pointed out by my learned brother, though various submissions were made both before the trial court and the High Court, before this Court VENTURE confined its attack on the

AWARD only to two grounds i.e. the AWARD is contrary to the public policy of India because compliance with the AWARD would amount to violation of the provisions of the FEMA ACT., and the AWARD is required to be set aside because of the "fraud" disclosed by the statement dated 7th January 2009 of Ramalinga Raju.

30. Under the scheme of the ACT an award can be set aside in this country only on the grounds enumerated in Section 34[10], if an

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[10] **Section 34. Application for setting aside arbitral award.—**(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if-

a. the party making the application furnishes proof that-

i. a party was under some incapacity, or

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

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

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

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

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

b. the Court finds that-

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

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

application praying for such a relief is filed in accordance with the procedure stipulated therein.

Section 34(2)(b)(ii) stipulates that an award which is in conflict with public policy of India is liable to be set aside.

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

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
(ii) it is in contravention with the fundamental policy of Indian law; or
(iii) it is in conflict with the most basic notions of morality or justice.

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

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

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

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

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

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

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

In the Explanation to Section 34(2) it is declared that "… an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud …"

31. Though the trial Court had set aside the AWARD purportedly on two grounds, in essence the ground is only one, that the AWARD is in conflict with the public policy of India. Because the conclusion of the trial court on Point Nos. 6 & 7 framed by it that "the AWARD is affected and induced by fraud" is also an aspect of the "conflict with the public policy of India."

32. I am of the opinion that the High Court is right in reversing the judgment of the trial court, though the reasons given by the High Court, in my opinion, are not very elegant and logical.

Therefore, I propose to examine the correctness of the conclusions of the trial court on Points No.5, 6 & 7 framed by it.

**PUBLIC POLICY:**

33. The trial court recorded that the AWARD is required to be set aside on the ground that the AWARD is opposed to the public policy of India. In the opinion of the trial court, the AWARD contained directions which are in conflict with the FEMA Act and Regulations

made thereunder. The trial court considered this under Point No.5 framed by it in para no.10 of its judgment. It framed the question as follows:

> "(a) The question under this point is this: 'Whether the award in so far as the order of transfer of petitioner's shares to the 1st Respondent at the book value is a violation of Foreign Exchange Management Act and violation of public policy?'
>
> **The trial court took note of the contention of VENTURE**:
>
> (b) The contentions of the petitioner on this aspect are as under: "It is admitted that the Award directed 1st Respondent to acquire the Petitioner's shares in Respondent No. 2 at book value being less than its fair value. Such a direction was in express violation of the Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000, which require such transfers to take place at fair value..."

34. The submission of VENTURE appears to be:

(i) The AWARD insofar as it directed VENTURE to transfer its shares in the JVC to SATYAM at book value is in violation of the Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000; and

(ii) The book value of the shares of JVC is less than that of their fair value.

35. It must be pointed out here that even according to the trial court SATYAM argued "that the book value of the shares is the price of shares as recorded in the books of accounts of the Company. It may be above or below the market value."

On the above rival submissions, the trial Court concluded;

> "Thus the award to the extent it directed the transfer of Petitioner's shares to the 1st Respondent at the rate of book value is violation of Foreign Exchange Management Act and consequently the public policy.
>
> ***** ***** ***** ***** *****
>
> In view of the discussion coupled with reasons the point is answered in favour of the petitioner and against the Respondents holding that the award in so far as it ordered for transfer of petitioner's shares to the 1st Respondent at book value is a violation of Foreign Exchange Management Act and violation of public policy."

36. In the entire discussion dealing with the submission, neither the text of the regulations nor the scheme of either the FEMA Act or the regulations is subjected to any analysis. The trial court did not even indicate the number of the regulation which mandates (if at all) that the transfer such as the one directed by the AWARD is required to be only at "fair value' of the shares. The trial court simply accepted the submission of VENTURE.

37. Assuming for the sake of argument that there is some stipulation in the abovementioned regulation which forbids the transfer of shares in question except “for a fair value”, there is no discussion in the judgment of the trial court as to;

(i) what is meant by fair value of the shares under FEMA;

(ii) how that fair value is to be determined;

(iii) whether the fair value of shares is the same as market value of shares;

(iv) what exactly is the fair value of the shares in question;

The trial court did not even record a finding that the book value of the shares of the JVC is less than that of their market value or fair value. It must also be pointed out here that the trial court did not even refer to any pleading on the basis of which submission was made before it.

38. The entire exercise undertaken by the trial court only demonstrates the unfortunate trend in the legal system where without settling the facts in issue first and identifying the questions

of law relevant in the context for determining the controversy between the parties, case law is dumped upon and examined by the courts. The result is an exercise like the one undertaken by the trial court. I am of the opinion that the conclusion recorded by the trial court on Point No.5 is without any basis in facts and without even identifying the provision of law with which the AWARD is in conflict with. Hence, in my opinion, the conclusion in this point cannot be sustained.

39. In the process of such uncharted debate, the trial court undertook an examination whether the payment of US$ 622,656 to be made towards the book value of the shares requires permission of the Reserve Bank of India and whether such permission is required to precede the award etc. I failed to identify any categoric conclusion recorded by the trial court on that question. Whether there are any pleadings calling upon the court to examine those questions is also not indicated in the judgment.

**FRAUD:**

40. The next question is - whether fudging of the accounts of SATYAM would in any way provide a ground for VENTURE to seek setting aside of the AWARD?

41. The content of the letter[11] dated 7th January 2009 of Ramalinga Raju, if true undoubtedly would have legal consequences both civil and criminal for SATYAM, Ramalinga Raju and some more persons who are responsible for the fudging of the accounts of SATYAM. Various civil and criminal proceedings were in fact initiated and some consequences followed.

According to the Statement of Ramalinga Raju, the fudging of accounts of SATYAM took place over a number of years.[12]

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[11] Extracted in extenso by my learned brother

[12] The gap in the balance Sheet has arisen purely on account of inflated profits **over a period of last several years** (limited only to Satyam standalone, books of subsidiaries reflecting true performance). What started as a marginal gap between actual operating profit and the one reflected in the books of accounts continued to grow over the years. It has attained unmanageable proportions as the size of company operations grew significantly (annualized revenue run rate of Rs. 11,276 crore in the September quarter, 2008 and official reserves of Rs. 8,392 crore). The differential in the real profits and the one reflected in the books was further accentuated by the fact that the company had to carry additional resources and assets to justify higher lever of operations – thereby significantly increasing the costs.

Ramalinga Raju's statement is not very clear regarding the point of time at which the fudging of the accounts of SATYAM commenced.[13]

42. In my opinion, Points No.6 & 7 framed by the trial court are too vague and imprecise. Section 34(2) of the ACT declares that if making of an award is either "induced or affected by fraud", the same is liable to be set aside. Whether the facts relating to the fudging of the accounts of SATYAM and the non-disclosure of those facts by SATYAM before the arbitrator would amount either **(i)** to 'inducing' the making of the AWARD by fraud; or **(ii)** the AWARD made in ignorance of those facts by virtue of non-disclosure of those facts by SATYAM would be an 'award affected by fraud', - would be the questions relevant for deciding whether the AWARD is required to be set aside.

43. The expression "Fraud" has no definition in law which has universal application. In "*KERR on the Law of Fraud and Mistake*"[14], it is said:

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[13] The trial court at para 11(a) of the judgment recorded a submission that the fudging commenced w.e.f. the year 2002.

[14] McDonnell, Denis Lane & Monroe, John George, *A Treatise on the Law of Fraud and Mistake*, KERR ON THE LAW OF FRAUD AND MISTAKE, 1952 (7th Edn.) *Sweet & Maxwell Limited* (London), page 1.

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

The ACT does not define the expression 'Fraud'. A reference is made to the definition of the expression 'Fraud' in Section 17 of the Contract Act, 1872 in a bid to explain the meaning of the word 'fraud'.[15]

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[15] Section 19 of the Contract Act declares that if the consent to an agreement is caused by **fraud**, such agreement though a contract, is voidable at the option of the party whose consent was so caused.

> **"Section 19 Voidability of agreements without free consent.**—When consent to an **agreement is caused** by coercion, **fraud** or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true."
>
> Section 17 of the Contract Act defines **fraud**.
>
> Section 17. 'Fraud' defined.- 'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—
>
> (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
>
> (2) the active concealment of a fact by one having knowledge or belief of the fact;
>
> (3) a promise made without any intention of performing it;

44. But the fact remains, such a definition is valid only in the context of contracts. In my opinion, the definition under Section 17 of the Contract Act may not be of any great assistance, to understand the meaning and scope of the explanation to Section 34(2) of the ACT. From the language of the explanation to Section 34(2), what renders an AWARD liable to be set aside is that the making of the AWARD must have been induced by fraud or the AWARD is affected by fraud. Neither does the trial court judgment identify the legal parameters for recording a conclusion that the making of the AWARD was induced by or fraud or that the AWARD is affected by fraud, nor does it explain how the non-disclosure of the facts relating to the true financial status of SATYAM actually is an inducement for making of the AWARD. On the other hand, the trial court relied upon the observations made by this Court in VENTURE-II (***Venture Global Engineering v. Satyam Computer Services Limited & Another,*** (2010) 8 SCC 660), that "concealment

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(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

of relevant and material facts which should have been disclosed before the Arbitrator is an act of fraud" to support the conclusion that the AWARD is required to be set aside.

The Trial Court opined that:

> "In the light of this legal position and the pleadings supported by documentary evidence on record, I am of the well considered view that there is adequate pleading on the point of material suppression of facts and fraud and also the required standard of evidence to *prima facie* accept the version of the Petitioner on the application of the test of preponderance of probabilities.
>
> … Therefore, the non-disclosure of material facts and fraud go to the root of the matter and suggest that they do have a causative link affecting the award. In view of the detailed discussions coupled with the reasons, the points 6 and 7 are thus answered in favour of the Petitioner and against the Respondent 1 and 2 holding that the Award is vitiated by irregularities in the financial statements of 1st Respondent as set out in additional pleadings and that the Petitioner was under an incapacity on account of the acts of fraud committed by the 1st Respondent which had come to light after the passing of the award by the learned Tribunal and, therefore, such acts of fraud have causative link, and hence, the award which is affected and induced by fraud is vitiated and cannot be enforced being opposed to Public Policy of India and is liable to set aside on the grounds of material suppression of facts, fraud, incapacity of the Petitioner and violation of Public Policy of India."

45. In my opinion, the conclusion of the trial court that the various facts brought on record by VENTURE borne by the disclosure statement of Ramalinga Raju dated 7th January, 2009 and the subsequent developments thereafter (I shall refer to them collectively as 'CONCEALED FACTS' for the sake of convenience) are

material facts which ought to have been disclosed before the Arbitrator and the failure to make such a disclosure would render the AWARD liable to be set aside is wholly untenable. No reference is made to the pleadings of VENTURE as to how VENTURE believed that the "CONCEALED FACTS" are material for the adjudication of the dispute by the arbitrator. Equally absent is the discussion by the trial court as to how the "CONCEALED FACTS" would become material facts in the context of the arbitration. In the entire discussion on point nos.6 & 7, the trial court does not give any reason justifying the conclusion that the "CONCEALED FACTS" are material facts in the context of the arbitration. Except mechanically repeating the words of this Court that the non-disclosure or concealment of the material facts before the arbitrator is an act of fraud, there is no discussion as to how the CONCEALED FACTS are material facts whose concealment resulted in inducing the making of the AWARD by fraud or affected by fraud.

46. It must be remembered here that this Court in **VENTURE-II** categorically declared:

> “44. This Court also holds that the facts concealed must have a causative link. And if the concealed facts, disclosed after the passing of the award, have a causative link with the facts constituting or inducing the award, such facts are relevant in a setting-aside proceeding and award may be set aside as affected or induced by fraud. The question in this case is therefore one of relevance of the materials which the appellant wants to bring on record by way of amendment in its plea for setting aside the award.
>
> 45. Whether the award will be set aside or not is a different question and that has to be decided by the appropriate court. In this appeal, this Court is concerned only with the question whether by allowing the amendment, as prayed for by the appellant, the Court will allow material facts to be brought on record in the pending setting-aside proceeding. Judging the case from this angle, this Court is of the opinion that in the interest of justice and considering the fairness of procedure, the Court should allow the appellant to bring those materials on record as those materials are not wholly irrelevant or they may have a bearing on the appellant's plea for setting aside the award.
>
> 46. Nothing said in this judgment will be construed as even remotely expressing any opinion on the legality of the award. That question will be decided by the court where the setting-aside proceeding is pending. The proceeding for setting aside the award may be disposed of as early as possible, preferably within 4 months.”

This Court only held that the CONCEALED FACTS of Ramalinga Raju are relevant and, therefore, VENTURE must be permitted to plead those facts. But this Court did not make any declaration that such facts would constitute material facts rendering the AWARD liable to be set aside on the ground that the non-disclosure of those facts before the arbitrator would amount to fraud, inducing the making of the AWARD or that the AWARD is affected by the fraud. At the same time, this Court categorically declared in para 61 that

"nothing said in the judgment will be construed as even remotely expressing any opinion on the legality of the award."

47. The High Court rightly disagreed with the conclusions of the trial court and reversed the judgment of the trial court. High Court ought to have given more cogent reasons for the disagreement.

48. In the circumstances, I am of the opinion that the High Court rightly reversed the judgment of the trial court, not warranting any interference by this Court in exercise of the discretionary jurisdiction under Article 136 of the Constitution of India. I would therefore dismiss the appeals of VENTURE.

**CIVIL APPEAL No. OF 2017**

(ARISING OUT OF SLP (C) No. 8298/2014)

49. If this Court agrees with the conclusion of the High Court that the AWARD is not liable to be set aside, the appeal of SATYAM would become purely academic. Even otherwise, a reading of the Special Leave Petition discloses, all that SATYAM is seeking is to re-agitate the question of the applicability of Part-I of the ACT to an international commercial arbitration. In other words, it is a challenge to the correctness of the decision of a Constitution Bench of this Court in ***BALCO's case***. I am of the opinion that such a

course ought not to be permitted. I would, therefore, dismiss the appeal of SATYAM.

…………………………J.
**(J. CHELAMESWAR)**

New Delhi
November 01, 2017

**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL Nos. 17756 OF 2017**
(ARISING OUT OF SLP (C) Nos. 29747-29749/2013)

Venture Global Engineering LLC .......Appellant(s)

VERSUS

Tech Mahindra Ltd. & Anr. Etc. ......Respondent(s)

**WITH**

**CIVIL APPEAL No. OF 2017**
(ARISING OUT OF SLP (C) No. 8298/2014)

Tech Mahindra Ltd. & Anr. Etc. .......Appellant(s)

VERSUS

Venture Global Engineering LLC. ......Respondent(s)

**J U D G M E N T**

**Abhay Manohar Sapre, J.**

1. Special Leave Petition (Civil) Nos.29747-29749 of 2013 are filed by the Venture Global Engineering

LLC. Special Leave Petition (C) No.8298 of 2014 is filed by Tech Mahindra Ltd. Both of them are Bodies Corporate. They are the plaintiff and the 1st defendant respectively in O.S. No.87 of 2012 on the file of the 1st Additional Chief Judge, City Civil Court, Secunderabad.

2. Leave granted.

3. O.S. No.87 of 2012 was filed praying that an Arbitral Award dated 03.04.2006 (hereinafter referred to as the "Award") be set aside in exercise of the power under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "AAC Act"). O.S. No. 87 of 2012 was transferred to the Court of Chief Judge, City Civil Court, Hyderabad and re-numbered as O.P. No. 390 of 2008.

4. By order dated 31.01.2012, O.P. No.390 of 2008 was allowed setting aside the Award.

5. Aggrieved by the said order, the defendant preferred three appeals to the High Court of Andhra Pradesh. By a common judgment dated 23.08.2013, the High Court allowed the appeals. Hence, the instant appeals.

6. The necessary background facts of these appeals are:

7. For the sake of convenience and brevity, the plaintiff-Venture Global Engineering LLC is hereinafter referred to as "Venture", whereas defendant No.1-Tech Mahindra (formerly known as Satyam Computer Services Private Ltd. is hereinafter referred to as "Satyam" and defendant No.2-Satyam Venture Engineering Services is hereinafter referred to as "JVC".

8. Plaintiff-Venture in O.S. No.87 of 2012 is a Company incorporated under the US laws. It is one of a group of companies.

9. Satyam is an Indian Company registered under the Companies Act, 1956 with its office at Hyderabad engaged in the business of computer software.

10. On 20.10.1999, the Venture and Satyam entered into a Joint Venture and Shareholder Agreement (hereinafter referred to as Agreement-I) for incorporating JVC. The entire shareholding of JVC is to be held between the two collaborating companies equally. The Agreement consists of XI Articles. Each Article consists of several sections.

11. Annexure-A to the Agreement defines several expressions used in the Agreement.

12. The provisions of Agreement-I relevant to the controversy on hand are:

(i) Section 6 (a) to (e) of Article VI which provide that both Venture and Satyam would not compete in any manner in the business of JVC and

also would not compete *inter se* in their respective business directly or indirectly so long as both of them hold shares in JVC and also within two years after they cease to hold the shares in the JVC.

**(ii)** Section 8.01 of Article VIII defines the expression "event of default". It then sets out four events of default in clauses (a) to (d). One such event specified in Clause (a) is – "A bankruptcy event when occurs with respect to a shareholder." It reads as under:

> **"Section 8.01 Events of Default**
>
> **For purposes of this Agreement, an "Event of Default" means, with respect to any Shareholder, the occurrence of any of the following:**
>
> **(a) A Bankruptcy Event occurs with respect to such Shareholder.**
>
> **(b) Subject to clause (c) and (d) below, such Shareholder breaches this Agreement in an material respect and fails to cure such breach within thirty(30) days after being notified in writing the other Shareholder of such breach.**
>
> **(c) A Shareholder Transfers, or attempts to**

**Transfer, any Shares in violation of the transfer restrictions set forth in Article VII of this Agreement.**

**(d) Such Shareholder is subject to a Change in Control."**

**(iii)** Section 8.02 provides the consequences of the occurrence of any "event of default". It reads as under:

> **"Section 8.02 Rights Upon Events of Default Generally**
>
> **Upon the occurrence of an Event of Default (other than a Bankruptcy Event) with respect to any Shareholder (the "Defaulting Shareholder"), the other Shareholder (the "Non-Defaulting Shareholder") shall have the option, within thirty (30) days after becoming aware of the Event of Default to (a) purchase the Defaulting Shareholder's Shares at book value and repay Shareholder's loan, or (b) cause the immediate dissolution and liquidation of the COMPANY in accordance with Article IX. Either of such options must be exercised by the Non-Defaulting Shareholder by written notice to the Defaulting Shareholder within thirty (30) days after becoming aware of the subject Event of Default."**

**(iv)** Sections 8.03 and 8.04 stipulate the rights and obligations flowing from the occurrence

of the "event of default". One of them is that the non-defaulting shareholder shall have an option within 30 days after becoming aware of the occurrence of the "event of default" to either purchase the defaulting shareholder's shares at book value or cause the immediate dissolution and liquidation of the JVC Company following the procedure prescribed in Agreement-I. It read as under:

> **"Section 8.03 Rights Upon Bankruptcy Event**
>
> **Upon the occurrence of a Bankruptcy Event with respect to any Shareholder (the "Bankrupt Shareholder"), such shareholder shall give immediate written notice to the other Shareholder (the "Solvent Shareholder"). The Solvent Shareholder shall have the option of (a) purchasing the Shares held by the Bankruptcy Shareholder at book value and repay such Shareholder's loans or (b) causing the immediate dissolution of liquidation of the company in accordance with Article IX. Either of such options must be exercised by the Solvent Shareholder by written notice to the Bankrupt Shareholder within one hundred Twenty (120) days of receipt of notice of the Bankruptcy Event from the Bankrupt shareholder."**

> **"Section 8.04 Remedies Not Exclusive – The rights granted in this Article are not exclusive of any other rights or remedies available at law or in equity."**

**(v)** Article XI, Section 11.05 (a) prescribes the procedure for the settlement of disputes:

> **" (a) In the event of a dispute between the parties to this Agreement regarding the terms and conditions of this Agreement or any of the transaction documents, the Parties shall negotiate in good faith for a period of 30 days in an effort to resolve the issues causing such dispute. If such negotiations are not successful, the parties shall submit the disagreement to the senior officer VENTURE and the senior officer of SATYAM designees for their review and resolution in such manner as they deem necessary or appropriate. Compliance with this Section 11.5 (a) shall be a condition precedent to the commencement of any judicial or other legal proceeding."**

**(vi)** Section 11.05 (b) stipulates the governing law of the agreement;

> **"(b) This Agreement shall be construed in accordance with and governed by the laws of the State Michigan, United States, without regard to the conflicts of law rules of such jurisdiction. Disputes between the parties that cannot be resolved via negotiations shall be submitted for final, binding arbitration to**

**the London Court of Arbitration."**

It provides that the disputes between the parties, if not settled through negotiations, shall be referred to arbitration to the London Court of International Arbitration (hereinafter referred to as LCIA).

(vii) Section 11.05(c) stipulates ensuring compliance of provisions of Companies Act and other applicable Acts/Rules, which are in force in India at any time. It reads as under:

> **"(c) Notwithstanding anything to the contrary in this agreement, the Shareholders shall at all times act in accordance with the Company's Act and other applicable Acts/Rules being in force, in India, at any time."**

13. Pursuant to the aforementioned Agreement, Satyam, Venture and JVC entered into another Agreement dated 11.02.2000, Agreement–II called Non-Compete Agreement. Clause 5 of the Agreement provides that the Agreement shall be governed by and construed according to laws of the State of

Michigan (US) without regard to conflicts of law rules of its jurisdiction. It then also provides that the disputes between the parties, if cannot be mutually resolved, shall be referred to arbitration to the LCIA. It also provides that a party to the Agreement may seek injunctive relief in a Court of competent jurisdiction restraining a violation of the Agreement. It reads as under:

> **"Clause 5 – This agreement shall be governed by and construed according to the Laws of the States of Michigan, United States, without regard to conflicts of law rules of such jurisdiction. Disputes between the parties which cannot be resolved via negotiations shall be submitted for final, binding arbitration to the London Court of Arbitration. In addition, a party may seek injunctive relief in a court of competent jurisdiction, restraining a violation of this agreement."**

14. In September 2000, Satyam entered into an Agreement with another American Company called-TRW Automotive to provide information technology to TRW. Satyam also entered into a "sub-contract"

with the JVC to share the benefits of the business with TRW.

15. Between March 2003 to May 2004, 21 members of the Group of Companies of which the Venture is a member filed bankruptcy proceedings in U.S. Courts and were declared bankrupt.

16. Aforementioned two events gave rise to disputes between Venture and Satyam. Eventually Satyam invoked the arbitration clause contained in Section 11.5 (b) of Agreement-I by filing a request with the LCIA for arbitration on 25.07.2005 against Venture.

17. On 10.09.2005 the LCIA appointed Mr. Paul B. Hanon as sole Arbitrator to decide the disputes. Both the parties entered appearance before the Arbitrator and filed their respective claims against each other.

18. The Arbitrator delivered his reasoned Award on 03.04.2006. He rejected the claims of Venture and allowed the claims of Satyam.

19. The Arbitrator held that an "event of default (bankruptcy)" on the part of Venture had occurred entitling Satyam to claim reliefs specified in Section 8.03 of Agreement-I against Venture. The Arbitrator also held that Venture violated Agreement-II by failing to provide business as stipulated in the Agreement.

20. The relevant part of the operative portion of the Award reads as under:

> **"A. I order VGE[1] to deliver to Satyam share certificates in form suitable for immediate transfer to Satyam[2] or its designee evidencing all of VGE's ownership interest (legal and/or beneficial) in SVES[3]. I further order it to do all that may otherwise be necessary to effect the transfer of such ownership to Satyam or its designee.**
>
> **B. Concurrently with the transfer of**

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1 VGE = VENTURE
2 Satyam = SATYAM
3 SVES = JVC

**ownership described in Section 6.1A above, I order Satyam to pay VGE US$622,656, such sum being the net difference between the amount payable by Satyam to VGE for the book value of the share of SVES (plus interest) and the amount payable by VGE to Satyam for the disgorgement of royalties paid to VGE by SVES (plus interest).**

**C. I order VGE to pay Satyam GBP48,777.48, the costs of the Arbitration as determined by the LCIA Court.**

**D. I order VGE to pay to Satyam US$1,488,454.11 Satyam's additional costs as determined in Section 5.12 hereof.**

**E. I order VGE to pay Satyam interest at the 5 per cent per annum compounded annually on the unpaid balance of the sums set forth in Sections 6.1 C and D hereof until such sums are paid.**

**F. I declare that Satyam is released from its obligation under the NCA not to compete with SVES or VGE with respect to engineering services to the automotive industry."**

21. Aggrieved by the Award, Venture filed a complaint against Satyam on 13.04.2006 before the United States District Court for the Northern District of Illinois, Eastern Division (USA) seeking a declaration that the Award was not enforceable in

US. By an Order dated 25.04.2006, the said complaint was dismissed as withdrawn.

22. On 14.04.2006, Satyam filed a petition against Venture in Eastern District Court of Michigan (US) seeking to enforce the Award against the Venture. On 28.04.2006, Venture filed its response and cross-petition in Satyam's petition. By Order dated 31.07.2006, Satyam's petition was allowed directing enforcement of the Award.

23. Aggrieved by order dated 31.07.2006, Venture filed an appeal on 08.09.2006 in 6th circuit US appeal Court in Michigan.

24. On 28.04.2006, Venture filed a civil suit (O.S. No.80/2006) before the 1st Additional Chief Judge City Civil Court Secunderabad seeking (i) a declaration that the Award is illegal and without jurisdiction, (ii) a decree for grant of permanent injunction restraining Satyam from enforcing the

Award which, *inter alia,* directed Venture to sell their 50% shares of JVC to Satyam at book value.

25. In the said suit, on 15.06.2006, an *ex parte* injunction order was passed restraining Satyam from enforcing the Award insofar as it directed transfer of shares by Venture to Satyam.

26. Aggrieved by the order dated 15.06.2006, Satyam filed Misc. Appeal No.519/2006 in the High Court of Andhra Pradesh. By its order dated 13.09.2006, the High Court allowed the said appeal, remitted the matter to the Trial Court for fresh adjudication on merits.

27. On remand, Satyam filed an application (IA No.2042/2006) under Order VII Rule 11 of the Code of Civil Procedure, 1908 (in short "the Code") praying for rejection of the plaint and dismissal of suit.

28. By order dated 28.12.2006, the Trial Judge

allowed the application. The plaint was rejected.

29. Challenging the said order, Venture filed appeal before the High Court. The High Court dismissed the appeal on 27.02.2007.

30. Aggrieved by the said order, Venture moved this Court. This Court allowed the appeal by a reported judgment in **Venture Global Engineering** vs. **Satyam Computer Services Ltd. & Anr.**, (2008) 4 SCC 190 (hereinafter referred to as "Venture-I"). This Court, *inter alia,* held that:

(i) Venture was entitled to challenge the Award in Indian Courts as the provisions of Part I of AAC Act will apply to the Award in the light of law laid down in **Bhatia International** vs. **Bulk Trading S.A. & Anr.,** (2002) 4 SCC 105 (**See Paras 33/35**);

(ii) That Award violates the provisions of FEMA and the Companies Act (**Para 34**);

(iii) That parties will have a right to challenge

the Award including its enforceability in Indian Courts by virtue of Section 11.05(c) of Agreement-I which has an overriding effect on all clauses of the Agreement including Section 11.05(b) - (**Para 39**);

(iv) That Satyam violated the terms of Agreement-I when they sought transfer of shares of Indian company in US Courts (**Paras 40/44**);

(v) That the appropriate remedy for a person, aggrieved by the Award, lies in filing application under Section 34 of the AAC Act in Indian Courts rather than filing a civil suit;

(vi) Conversion of the suit into proceedings under Section 34 of the AAC Act is permissible in law and such proceedings can be transferred to the Court of competent jurisdiction, if necessary (**Para 41**);

(vii) That Satyam should not have continued with the proceedings filed in US Courts against

Venture on the strength of the Award in the light of injunction orders passed by the Courts in India against Satyam and (**Para 42**),

(viii) That in the light of law laid down in **Bhatia International's case** (supra), even though the Award in question is a foreign Award, yet it will be governed by Part I of the Act (**Para 47**).

31. This Court observed "we have not expressed anything on merits of the claim of both the parties." This Court further observed that the Trial Court was at liberty to transfer the case to the competent Court to decide the case (if found necessary) on merits and directed parties to maintain status quo with respect to transfer of shares.

32. On 17.01.2008, the Eastern District of Michigan Southern Division, US Court passed an order observing therein that Venture violated the order of US Courts which directed the enforcement

of the Award and called upon the parties to move to this Court. Venture filed an appeal to US Court of Appeal. In the appeal, Venture attempted to provide some new evidence to show fraud played by Satyam. It was, however, dismissed on 09.04.2009

33. In the meanwhile, both Venture and Satyam filed review petitions against the order dated 10.01.2008 passed in Venture I by this Court. By order dated 29.04.2008, this Court dismissed both the review petitions.

34. Pursuant to the order of this Court in Venture I, the Ist Addl. Chief Judge, City Civil Court, Secunderabad transferred O.S. No.80 of 2006 to the Court of 2nd Additional Chief Judge, City Civil Court of Hyderabad. The suit was then converted into an application under Section 34 of the Act and was renumbered as O.P. No. 390/2008.

35. On 07.01.2009, B. Ramalinga Raju-Chairman

and founder of the Satyam made a disclosure and confessed in writing that the balance sheets of Satyam had been manipulated inflating the profits to the tune of Rs.7080 crores. M/s Price Waterhouse Cooper (PWC), the auditors of Satyam was compelled to declare that the financial statements of Satyam could no longer be considered accurate or/and reliable.

36. Venture filed an application (IA No. 1331 of 2009 dated 12.06.2009) under Order VIII Rule 9 of the Code in O.P. No.390/2008 seeking permission to bring additional facts on record by amending the pleadings to question the legality of the Award. It was contended that the disclosure of facts made by Ramlainga Raju *prima facie* constituted a fraud and misrepresentation committed by Satyam on all the stakeholders including Venture and, therefore, the Award is liable to be set aside on this ground in

addition to those already taken. The Trial Court, by order dated 03.11.2009, allowed the application.

37. Challenging the order, Satyam filed a revision before the High Court. By order dated 19.02.2010, the revision was allowed. The application (IA No.1331/2009) filed by Venture stood dismissed. The High Court held that under Section 34 of the AAC Act, an application for setting aside of an Award could be filed only within 3 months (extendable by 30 days) from the date of the Award and a new ground of attack to the Award cannot be permitted after the expiry of the period of limitation.

38. Venture carried the matter to this Court. This Court, by judgment dated 11.08.2010, in **Venture Global Engineering vs. Satyam Computer Services Limited & Anr.** (2010) 8 SCC 660 (hereinafter referred to as Venture II) allowed the appeal and restored the order of the Trial Court.

This Court held that the facts, which are sought to be brought on record by the Venture, are relevant for deciding the rights of the parties to O.P. No. 390 of 2008. It was also held that those facts have causative link with the facts, which constituted the *lis* of the Award or induced the making of the Award and, therefore, relevant and material for deciding the legality of the Award.

39. In substance, this Court permitted Venture to challenge the Award on the ground that it was obtained by playing fraud/misrepresentation/ suppression of material facts.

40. It is apposite to quote Paras 44 to 46 of this Court's judgment, which dealt with this issue:

> **"44. This Court also holds that the facts concealed must have a causative link. And if the concealed facts, disclosed after the passing of the award, have a causative link with the facts constituting or inducing the award, such facts are relevant in a setting-aside proceeding and award may be set aside as affected or induced by fraud. The question in this case is therefore one of relevance of**

**the materials which the appellant wants to bring on record by way of amendment in its plea for setting aside the award.**

**45. Whether the award will be set aside or not is a different question and that has to be decided by the appropriate court. In this appeal, this Court is concerned only with the question whether by allowing the amendment, as prayed for by the appellant, the Court will allow material facts to be brought on record in the pending setting-aside proceeding. Judging the case from this angle, this Court is of the opinion that in the interest of justice and considering the fairness of procedure, the Court should allow the appellant to bring those materials on record as those materials are not wholly irrelevant or they may have a bearing on the appellant's plea for setting aside the award.**

**46. Nothing said in this judgment will be construed as even remotely expressing any opinion on the legality of the award. That question will be decided by the court where the setting-aside proceeding is pending. The proceeding for setting aside the award may be disposed of as early as possible, preferably within 4 months."**

41. On 28.12.2010, Venture filed a complaint (suit) in U.S. District Court of Easter District of Michigan against Satyam alleging, *inter alia,* that the Award is vitiated by the fraudulent conduct of

the former Chairman of Satyam, who suppressed the material facts in the arbitral proceedings. In the complaint (suit), Venture alleged that Ramalinga Raju played fraud and misrepresentation on all stakeholders of Satyam including Venture and also on judicial process. It, therefore, prayed that the Award in question be set aside on this ground.

42. Satyam entered appearance in the aforesaid complaint/suit filed by Venture and opposed the complaint on several grounds. By order dated 30.03.2012, U.S. District Court dismissed the Venture's complaint/suit. On 10.04.2012, Venture filed an application in the complaint seeking permission to amend the complaint/suit. The U.S. Court, by order dated 23.08.2012, dismissed the application. On 21.09.2012, Venture filed an appeal to U.S. Court of appeal against the order dated 30.03.2012 rejecting their complaint/suit.

Venture also filed an appeal on 12.12.2012 to U.S. Court of appeal against the order dated 23.03.2012 by which their amended application was rejected.

43. On 13.09.2012, U.S. Court of appeal for the sixth Circuit allowed the appeal filed by Venture and set aside the order of the District Court dismissing the suit/complaint filed by Venture. The suit/complaint is now remanded to the District Court. It is pending.

44. Coming back to the litigation pending in Indian Courts, consequent upon the judgment of this Court in Venture-II, Satyam joined issues with Venture on the additional pleadings and contended that the facts pleaded have no causative links with Award. Satyam also objected to admissibility of the documents filed by Venture. The Trial Court heard the application filed by Venture under Section 34 of the AAC Act and by its final order dated 31.01.2012

allowed the application and set aside the Award. The Trial Court held:

(i) civil suit filed by Venture could be converted to be an application under Section 34 of the AAC Act and, accordingly, converted;

(ii) the application filed by Venture under Section 34 of the AAC Act is within the period of limitation;

(iii) the Court to which the civil suit was transferred has jurisdiction to try and decide the application under Section 34 of the AAC Act;

(iv) bankruptcy of the Venture's affiliates constitutes an event of default as defined under Agreement-I;

(v) the Award insofar as it directs the Venture to transfer their 50% shares of JVC to Satyam for book value violates the provisions of FEMA and is against public policy;

(vi) the facts revealed by the statement made by Ramalinga Raju (Chairman of Satyam) constitute

fraud and mis-representation played by Satyam on various stakeholders in Satyam including Venture;

(vii) it has causative link with the facts which formed the basis of the Award.

45. It is, therefore, held that the Award is not sustainable in law. Sustaining such Award would be against public policy and the grounds mentioned above would cumulatively constitute ground for setting aside the Award under Section 34 of the AAC Act.

46. Aggrieved by the said order, Satyam carried the matter in appeal to the High Court in CMA No.832/2012.

47. After the aforesaid judgment, Venture filed another civil suit being O.S.No.87/2012 in the Court of Ist Additional Chief Judge, Secunderabad against Satyam seeking restitution of all their rights in JVC as a consequence of setting aside of the

Award. During the pendency of the suit, Venture also applied for grant of *ex parte* interim relief (IA No.1143/2012) in relation to transfer of shares of JVC and by another application being IA No. 1360/2012 sought order restraining Satyam and JVC not to take any major decision in the affairs of JVC.

48. By orders dated 27.04.2012 and 04.06.2012, both the applications were disposed of by the 1st Additional Chief Judge directing the parties to maintain *status quo* in relation to the subject matter of both the I.As.

49. Satyam preferred two appeals against the said two orders – CMAs 834 and 844 of 2012. The three appeals were clubbed together.

50. By interim order dated 22.08.2012, the High Court directed all the parties to appeals to maintain *status quo* in relation to the affairs of JVC and also

in relation to the rights of the shareholders of the said company and of Venture.

51. By final order dated 23.08.2013, the High Court allowed the appeals filed by Satyam. The High Court, *inter alia,* held that:

(i) the civil suit/application filed by Venture under Section 34 of the Act is maintainable and not hit by the decision of **Bharat Aluminium Company** vs. **Kaiser Aluminium Technical Services Inc. (in short "Balco"),** (2012) 9 SCC 552 for the reason that the agreements in question were executed between the parties prior to **BALCO** regime whereas the decision rendered in **BALCO** has a prospective effect;

(ii) proceedings in question are governed by part I of the AAC Act;

(iii) Civil suits/application under Section 34 of the

AAC Act filed by Venture in Indian Courts are hit by the principle of "issue estoppel" and are thus not maintainable in law;

(iv) Venture had no right to invoke both Part I and Part II, i.e., Sections 34 and 48 because it is against the Scheme of the AAC Act;

(v) a case of fraud and misrepresentation set up by Venture in additional pleadings is not in accordance with law inasmuch as these allegations neither satisfies the requirements of law and nor were proved by oral or documentary evidence;

(vi) the Award in question is not against the public policy;

(vii) since the issues arising between the parties have attained finality in US Courts and hence now they cannot be reopened in Indian Courts by taking recourse to the provisions of the AAC

Act; and

(viii) since both the parties to the suit/application did not agree to treat the documents filed by them as proved and no evidence was adduced to prove them in accordance with law although the application under Section 34 of the AAC Act is required to be decided like a suit, the Trial Court did not follow the stipulated procedure while deciding the application.

52. Aggrieved by the said judgment, both Venture and Satyam filed instant appeals by way of special leave petitions before this Court.

53. Venture, in substance, seeks restoration of the order of the Trial Court, which had allowed their application under Section 34 of the AAC Act and had set aside the Award.

54. Satyam's challenge is confined only to the finding of the High Court that the Trial Court has

jurisdiction to entertain and decide the application filed under Section 34 of the AAC Act.

55. Heard Mr. K. K. Venugopal, learned senior counsel for Venture Global Engineering LLC-appellant in SLP(C) Nos.29747-49 of 2013 and respondent in S.L.P.(C) No.8298 of 2014, Mr. K.V. Vishwanathan, learned senior counsel for Tech Mahindra Ltd.-respondent No.1 in SLP(C) Nos.29747-49 of 2013 and appellant No.1 in S.L.P.(C) No.8298 of 2014 and Mr. Iqbal Chagla, learned senior counsel for Satyam Venture Engineering Services-respondent No.2 in SLP(C) Nos.29747-49 of 2013 and appellant No.2 in S.L.P.(C) No.8298 of 2014 and also perused the written submissions filed by the parties.

56. Mr. K. K. Venugopal, learned senior counsel, appearing for the Venture while assailing the legality and correctness of the impugned judgment

urged many-fold submissions as detailed hereinbelow and submitted that the impugned judgment is legally unsustainable inasmuch as it is based on wrong application of law which governs the issues whereas the order of the Trial Court which rightly allowed the application filed by the appellant under Section 34 of the AAC Act and set aside the award deserves to be restored.

57. While elaborating his arguments, learned senior counsel submitted that firstly, the Award impugned in Section 34 proceedings out of which these appeals arise is vitiated on account of fraud, misrepresentation and suppression of material facts played by Mr. Raju in the affairs of Satyam. According to learned counsel, a ground of fraud which stands made out in this case squarely falls under Section 34 of the AAC Act and, therefore, the Award in question deserves to be set aside.

58. In the second place, learned senior counsel submitted that it is not in dispute that Mr. Raju, in no uncertain terms, admitted in his letter dated 07.01.2009 that he not only indulged in several fraudulent and illegal acts in the affairs of Satyam but also indulged in manipulating and fabricating the accounts and the balance-sheet of Satyam with a sole intention to secure illegal monetary gains.

59. Learned senior counsel, therefore, submitted that such fraudulent and illegal acts of Mr. Raju once surfaced in the public domain had a direct bearing over the issues involved in the arbitral proceedings because these acts relate to the period prior to commencement of arbitral proceedings and continued during the pendency of arbitral proceedings but without any knowledge to Venture and learned Arbitrator and hence the entire arbitral proceedings, which eventually culminated in

passing of the impugned award in ignorance of these material major events connected with Venture, Satyam and their affiliates, stood vitiated on account of Mr. Raju's activities.

60. In other words, the submission was that, if the factum of the fraud, misrepresentation, suppression etc. had been disclosed or/and had come to the notice of the Arbitrator or/and Venture, it being the most relevant and material ground, the same could be made basis for seeking setting aside of the arbitral proceedings including the Award in question. In any event, according to learned counsel, the arbitral proceedings would not have then resulted in passing of the Award in question in favour of Satyam, had these facts been taken into consideration?

61. In the third place, learned senior counsel submitted that if the fraud/manipulation/

misrepresentation/suppression of material facts had been disclosed to all the stakeholders including Venture when actually committed and, in all fairness, it ought to have been disclosed by Mr. Raju then it would have enabled Venture to terminate Agreement-I forthwith and claim appropriate reliefs against Satyam in terms of Agreement-I at that time itself.

62. In the fourth place, learned senior counsel submitted that firstly, the fraud/misrepresentation /suppression played by Mr. Raju in the affairs of Satyam was prior in point of time as compared to the "event of default" by the Venture and secondly, the acts of Mr. Raju also constituted an "event of default" under Section 8.01(b) read with Section 11.05 (c) for termination of Agreement-I and for claiming reliefs against Satyam as per Agreement-I.

63. In the fifth place, learned senior counsel

submitted that the confessional statement of Mr. Raju was a "notorious fact" and known to the whole world and especially known to those in market and, therefore, judicial notice of such fact could be taken by the Court for relying upon the letter including its contents against Satyam without any further evidence to prove it.

64. In the sixth place, learned senior counsel submitted that it is a fundamental principle of law that any award/order/judgment passed in judicial proceedings once found to have been obtained by a party against his adversary by taking recourse to illegal means such as fraud, manipulation, misrepresentation, suppression of material facts etc. then the entire judicial proceedings including award/order/judgment passed therein is rendered void *ab initio*. The reason is that fraud/manipulation/misrepresentation/suppression

of material facts etc., if resorted to while prosecuting the judicial proceedings for obtaining the order/judgment/award, the same would result in vitiating such judicial proceedings.

65. This legal principle, according to learned senior counsel, applies to the facts of this case with full force and, therefore, the fraud played, manipulation done and suppression of material facts made by Mr. Raju as its creator was rightly held proved by the Trial Court and was, therefore, rightly made basis to quash the Award in question on the ground of it being against the public policy of India.

66. In the seventh place, learned senior counsel submitted that the acts of Mr. Raju attracted the rigor of Section 8.01(b) read with Section 11.05 (c) and since Section 11.05(c) has an overriding effect on all sections, as held by this Court in Venture-I, if

these acts had been disclosed, it would have enabled the Venture to seek termination of Agreement-I under Sections 8.02 and 8.03 against Satyam.

67. In other words, according to learned senior counsel, there was a causative link between the acts of Mr. Raju, which he did in the affairs of Satyam and the issues which were subject matter of arbitral proceedings. It is for this reason, learned counsel urged that the acts of Mr. Raju constituted an "event of default" under Section 8.01 read with Sections 8.01(b) and 11.05(c). Venture, according to him, was, therefore, deprived of exercising their right against Satyam to claim reliefs in terms of Agreement-I due to suppression of the acts by Mr. Raju from all stakeholders.

68. In the eighth place, learned senior counsel submitted that Satyam committed another breach

of Section 4.01 when it appointed Mr. Raju as one of the nominee Directors on the Board of JVC. It was also an "event of default" under Section 8.01 read with Section 4.01, which entitled the Venture to terminate the Agreement-I and seek appropriate reliefs against Satyam.

69. According to learned senior counsel, a person who indulged in such acts was not eligible for being nominated in the Board of JVC.

70. In the ninth place, learned senior counsel submitted that the scope and width of Sections 8.01(b) and 11.05 (c) is wide enough to include the acts of Mr. Raju which he did in affairs of Satyam and his acts were sufficient for terminating the Agreement-I and seek appropriate relief as provided in the Agreement-I.

71. In the tenth place, learned senior counsel, placing reliance on the doctrine of "alter ego of the

Company", contended that this doctrine applies to the facts of this case and, therefore, if the issues arising in the case are examined in the light of this doctrine, the Award impugned is liable to be set aside on this ground also.

72. In the eleventh place, learned senior counsel contended that in order to decide the questions involved, it is not necessary to appreciate any evidence and the issues have to be decided only on the basis of material on record, which is not in dispute. Learned counsel, therefore, urged that keeping in view these submissions, the Award is against the public policy of India as explained and clarified in Section 34(2)(b)(ii) Explanation I(i)(ii) and (iii) read with Explanation 2 of the AAC Act and hence it deserves to be set aside on this ground also.

73. It is essentially these submissions and some

more which are dealt with *infra* were elaborated by the learned counsel with the aid of relevant sections of Agreement-I and II together with decisions of this Court described as Venture I and Venture II rendered in the earlier round of litigation in this very case, relevant provisions of the AAC Act and decided cases cited at the Bar.

74. In reply, learned counsel for the respondents supported the impugned order and contended that the appellant has failed to make out any case for interference by this Court in the impugned order inasmuch as none of the submissions urged by learned counsel for the appellant has any merit and deserve rejection for want of any factual foundation.

75. Learned counsel further contended that firstly, the appellant's submissions are based on sheer hypothesis with no factual foundation and hence cannot be made basis to set aside the arbitral

proceedings and Award. It was urged that otherwise also they are totally irrelevant and have no causative link in any manner with the arbitral proceedings and nor they have any kind of impact on the arbitral proceedings much less adverse and lastly, the acts of Mr. Raju were in relation to affairs of Satyam and hence had no significance while examining the legality and correctness of arbitral proceedings and Award under Section 34 of AAC Act. It was also urged that there is no evidence to prove the alleged acts of Mr. Raju as being illegal in any manner. Learned counsel elaborated these submissions by placing reliance on relevant sections of Agreement -I and the decided case law.

76. Having heard learned counsel for the parties and on perusal of the record of the case and the written submissions, I find force in the submissions urged by Mr. K.K. Venugopal, learned senior

counsel for the appellant (Venture).

77. In substance, the questions, which arise for consideration in these appeals, are essentially three. In other words, the fate of these appeals largely depends upon the answers to the following questions as, in my view, these questions are interlinked together.

78. First, whether the acts of Mr. Raju in the affairs of Satyam, as admitted by him in his letter dated 07.01.2009, amounts to misrepresentation/ suppression of material facts and, if so, whether they could be made basis to seek quashing of an Award dated 03.04.2006 of the sole Arbitrator on the ground of it being against the public policy of India under Section 34(2)(b)(ii) read with Explanation (1)(i)(ii) and (iii) of the AAC Act; second, whether the acts of Mr. Raju, in the affairs of Satyam, has any causative link to the arbitral

proceedings or/and to JVC affairs and, if so, whether such acts constitute an “event of default” under Section 8.01(b) read with Section 11.05(c) thereby entitling the Venture to terminate the Agreement I and claim relief as contemplated in Sections 8.03 and 8.04 against Satyam; and third, if the aforesaid questions are answered in affirmative then whether they constitute a ground to enable the Court to set aside the Award under Section 34 of AAC Act.

79. Before I examine the facts of this case to answer the aforementioned questions, it is necessary to take note of the law, which applies to the case on hand. Indeed, if I may say so, it is fairly well settled by the several decisions of this Court.

80. The expression "*fraud*" occurring in Section 34 is not defined in the AAC Act but is defined in Section 17 of the Indian Contract Act,1872. It reads

as under:

> **“17. ‘Fraud’ defined.—‘Fraud’ means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:— —**
> (1) **the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;**
>
> (2) **the active concealment of a fact by one having knowledge or belief of the fact;**
>
> (3) **a promise made without any intention of performing it;**
>
> (4) **any other act fitted to deceive;**
>
> (5) **any such act or omission as the law specially declares to be fraudulent.**
>
> **Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence, is, in itself, equivalent to speech.”**

81. The expression "*public policy of India*" and what it includes is explained and clarified for avoiding any doubt in the Explanation I(i), (ii) and (iii) and Explanation 2 of Section 34(2)(b)(ii) of the

AAC Act. It reads as under:

> **Section 34. Application for setting aside arbitral award-**
> **(1)................................................................**
>
> **(2) An arbitral award may be set aside by the Court only if-**
>
> **(a)................................................................**
>
> **(b) the Court finds that-**
>
> **(i)............................................................**
>
> **(ii) the arbitral award is in conflict with the public policy of India.**
>
> **Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—**
>
> **(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or**
>
> **(ii) it is in contravention with the fundamental policy of Indian law; or**
>
> **(iii) it is in conflict with the most basic notions of morality or justice.**
>
> **Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.”**

82. The expression "*fraud*", what it means and once proved to have been committed by the party to the *Lis* against his adversary then its effect on the judicial proceedings was succinctly explained by this Court in **Ram Chandra Singh** vs. **Savitri Devi & Ors.**, (2003) 8 SCC 319 in the following words:

> **"Fraud as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by word or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud**

> **cannot be perpetuated or saved by the application of any equitable doctrine including res judicata.**"

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

84. While dealing with the question as to what constitutes fraud, the learned author said, "What amounts to fraud has been settled by the decision of House of Lords in **Derry vs. Peek (f)** where lord Herscheel said "fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth or (3) recklessly, careless whether it be true or false." (See **Kerr on Fraud and Mistake- Seventh Edition.**

**Page 10/11**).

85. The author has said that, Courts of Equity have from a very early period had jurisdiction to set aside Awards on the ground of fraud, except where it is excluded by Statute. So also, if the Award was obtained by fraud or concealment of material circumstances on the part of one of the parties so as to mislead the Arbitrator or if either party be guilty of fraudulent concealment of matters which he ought to have declared, or if he willfully mislead or deceive the Arbitrator, such Award may be set aside. **(See - Kerr on Fraud and Mistake - Seventh Edition - pages 424, 425**)

86. The author said that, if a man makes a representation in point of fact, whether by suppressing the truth or suggesting what is false, however innocent his motive may have been, he is equally responsible in a civil proceeding as if he had

while committing these acts done so with a view to injure others or to benefit himself. It matters not that there was no intention to cheat or injure the person to whom the statement was made. (***See* - Kerr on Fraud and Mistake – Seventh Edition, page 7)**

87. This rule of law is applicable not only between the two individuals entering into any contract but is also applicable between an individual and a company and also between the two companies. (**See- Kerr on Fraud and Mistake – Seventh Edition, page 99**).

88. The author said that this principle is also not limited to cases where an express and distinct representation by words has been made, but it applies equally to cases where a man by his silence causes another to believe in the existence of a certain state of things, or so conducts himself as to

induce a reasonable man to take the representation to be true, and to believe that it was meant that he should act upon it, and the other accordingly acts upon it and so alters his previous position. (**See - Kerr on Fraud and Mistake – Seventh Edition, page 110**).

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

90. So far as expression "*public policy of India*" in the context of arbitration cases is concerned, this Court examined the meaning, scope and ambit of

this expression for the first time in the case of **Renusagar Power Co. Ltd.** vs. **General Electric Co.,** 1994 Suppl(1) SCC 644 in the context of Foreign Awards (Recognition & Enforcement) Act, 1961. It was then examined in the case of **Oil & Natural Gas Corporation Ltd.** vs. **Saw Pipes Ltd.,** (2003) 5 SCC 705[ONGC(I)] and then again in another case of **Oil & Natural Gas Corporation Ltd.** vs. **Western Geco International Ltd.,** (2014) 9 SCC 263[ONGC(II)]. It was recently examined in **Associate Builders** vs. **Delhi Development Authority,** (2015) 3 SCC 49 in the context of Section 34 of the Arbitration and Conciliation Act, 1996.

91. In between this period, this Court had also examined the expression in some cases. However, in **Associate Builders's case** (supra), this Court examined the expression in detail in the light of all

previous decisions referred above on the subject. R.F. Nariman, J. speaking for the Bench held that the law laid down in the cases **ONGC (I)** and **ONGC (II)** has been consistently followed by this Court till date. His Lordship further clarified the meaning of expression–"public policy of India" and what it includes therein and held that violation of the provisions of Foreign Exchange Act, disregarding orders of superior Courts in India and their binding effect, if disregarded, would be violative of the Fundamental Policy of Indian Laws. It was, however, held that juristic principle of "judicial approach" demands that a decision be fair, reasonable and objective. In other words, a decision which is wholly arbitrary and whimsical would not be termed as fair, reasonable or an objective determination of the questions involved in the case. It was also held that observance of *audi*

*alteram partem* principle is also a part of juristic principle which needs to be followed. It was held that if the Award is against justice or morality, it is against public policy. It was held that if there is a patent illegality noticed in the Award, it is also against public policy.

92. Keeping in view the aforementioned broad principle of law in mind, I examine the questions in the light of undisputed facts of the case on hand and in the context of the submissions urged.

93. It is apposite to take note of some more relevant sections of Agreement-I in addition to those quoted above. In my view, these sections also have material bearing over the controversy involved as they show the true nature of Joint Venture Agreement. Instead of quoting these sections in verbatim, its reference alone may suffice.

94. These relevant sections are, (1) Recitals in the

Agreement, (2) Clause C of Recitals, (3) Section 1.01(c) and (d), (4) Section 3.02-Place of business, (5) Section 4.01-Authority of Board; Election of Chairman, (6) Section 4.03-Board Meetings and related matters, (7) Section 4.06-Financial, Accounting and Tax Matters, (8) Section 5.06-Capital, (9) Section 5.07-Relationship between the Shareholders and the Company, (10) Section 5.08-Power of Board of Directors, (11) Section 6.03-Ownership of Proprietary Information; Public Disclosures; Non-use of Proprietary and Confidential information, (12) Section 6.07-Representation and Warranties, (13) Definitions of expressions – (a) Affiliate, (b) Company's Act, and (c) Shareholder or Shareholders.

95. Reading of Agreement-I as a whole and, in particular, in the context of the afore-noted sections of the Agreement would go to show (1) the nature of

the Joint Venture Agreement, (2) who are parties to the agreement and what are their *inter se* rights and obligations, and (3) how and in what manner the JVC was to do business in India.

96. Following features emerge from reading the Agreements:

(i) First, the Joint Venture Agreement was between the "Satyam and its affiliates" on the one part and "Venture and its affiliates" on the other part. In other words, Agreement I and Agreement II were between the "Satyam" and "Venture" as also it included along with them their respective "affiliates" (See-Recitals in Agreement I-which read -"*hereinafter together with all its affiliates, referred to as "Satyam" and "Venture"*).

(ii) Second, Satyam and Venture were the only two shareholders of JVC each holding 50% equity share capital of JVC.

(iii) Third, since JVC was formed to do its new business in India, it was made obligatory upon "Satyam and its affiliates", "Venture and its affiliates" and "JVC" to ensure compliance of all the Indian Laws in force. In other words, all the stakeholders, who formed the "JVC", were under legal obligation to ensure strict compliance of all the Indian Laws (Acts/Rules/Regulations) not only in relation to business activities of "JVC" alone but also to ensure compliance of all the Indian laws in their respective business activities jointly and severally, namely, Satyam, Satyam's affiliates, Venture and Venture's affiliates.

(iv) Fourth, Satyam to begin with was to provide all infrastructural facilities to JVC to enable it to start its new business in India.

(v) Fifth, the Chairman of JVC was to be nominated by Satyam, who would have a right to

preside over all Board of Directors' meetings of JVC.

(vi) Sixth, it was obligatory on JVC to maintain "true and correct" accounts of JVC by ensuring strict compliance of all Indian laws governing accounting and finances and to disclose to their major stakeholders the true picture of the JVC's financial status.

97. It is not in dispute that the Agreements were entered into in the year 1999 whereas the business operations of JVC began in 2000. It is also not in dispute that in terms of Section 5.06(a) and (b), Satyam was to give loan in cash and provide all infrastructural facilities, Human Resources, Accounting, Networking facilities and legal advice to JVC. It is also not in dispute that Satyam and Venture, on 20.10.1999, had prepared a financial plan pursuant thereto each one had contributed $US 300.000 and $US 60.000 per month to cover

short falls in Bank loan of JVC. (page 176 of SLP paper book). It is also not in dispute that in terms of the Agreements (Section 4.01/5.03), Mr. Raju was nominated as Chairman of JVC and he presided over all the Board of Directors meetings of JVC from 2000 onwards in addition to presiding over of the Board meetings of Satyam being its Chairman.

98. At this stage, it is apposite to reproduce in verbatim the most crucial document namely, a "*confessional statement of Mr. Raju in the form of a letter dated 7th January, 2009 addressed to Satyam's Board of Directors*". It is this confessional statement, which turned the entire complexion of the case on hand.

99. As mentioned above, this Court, in earlier round of litigation in two decisions, namely, Venture I and II, permitted the Venture to raise the additional plea in Section 34 proceedings to

challenge the arbitral proceedings including the Award on the basis of Mr. Raju's confessional statement made on 07.01.2009. It was held by this Court that such being a material fact which came into existence as a subsequent event had a direct bearing over the issues arising in the case, the legality and correctness of arbitral proceedings including the Award could, therefore, be tested in the light of this material subsequent event. It was also held that since the case on hand relates to the period prior to **Balco's regime** (supra), it would be governed by **Bhatia** (supra) regime and, in consequence, fall in Part I of the AAC Act. It was held that, as a result, the legality of the Award, though foreign in nature, could still be decided under Section 34 of the AAC Act by the Indian Courts. These findings attained finality being rendered *inter se* parties in this very case, are

binding on the parties. This is the reason, why the issues arising in this case are being decided in these proceedings.

100. The letter dated 07.01.2009 reads as under:

> **"To the Board of Directors**
> **Satyam Computer Services Ltd.**
>
> **From B. Ramalinga Raju**
> **Chairman, Satyam Computer Services Ltd.**
>
> **January 7, 2009**
>
> **Dear Board Members,**
>
> **It is with deep regret, and tremendous burden that I am carrying on my conscience, that I would like to bring the following facts to your notice:**
>
> **1. The Balance Sheet carries as of September 30, 2008.**
>
> **a. Inflated (non-existent)cash and bank balances of Rs.5,040 crore (as against Rs.5361 crore reflected in the books)**
>
> **b. An accrued interest of Rs.376 crore which is non-existent.**
>
> **c. An understated liability of Rs.1,230 crore on account of funds arranged by me.**
>
> **d. An over stated debtors position of Rs.490 crore (as against Rs.2651 reflected in the books)**

**2.** **For the September quarter (Q2) we reported a revenue of Rs.2,700 crore and an operating margin of Rs.649 crore (24% of revenues) as against the actual revenues of Rs.2,112 crore and an actual operating margin of Rs.61 crore (3% of revenues). This has resulted in artificial cash and bank balances going up by Rs.583 crore in Q2 alone.**

**The gap in the balance Sheet has arisen purely on account of inflated profits over a period of last several years (limited only to Satyam stand alone, books of subsidiaries reflecting true performance). What started as a marginal gap between actual operating profit and the one reflected in the books of accounts continued to grow over the years. It has attained unmanageable proportions as the size of company operations grew significantly (annualized revenue run rate of Rs.11,276 crore in the September quarter, 2008 and official reserves of Rs.8,392 crore). The differential in the real profits and the one reflected in the books was further accentuated by the fact that the company had to carry additional resources and assets to justify higher level of operations – thereby significantly increasing the costs.**

**Every attempt made to eliminate the gap failed. As the promoters held a small percentage of equity, the concern was that poor performance would result in a take-over, thereby exposing the gap. It was like riding a tiger, not knowing how to get off without being eaten.**

**The aborted Maytas acquisition deal was the last attempt to fill the fictitious assets with real ones. Maytas' investors were convinced that this is a good divestment opportunity**

**and a strategic fit. Once Satyam's problem was solved, it was hoped that Maytas' payments can be delayed. But that was not to be. What followed in the last several days is common knowledge.**

**I would like the Board to know:**

1. **That neither myself, nor the Managing Director (including our spouses) sold any shares in the last eight years – excepting for a small proportion declared and sold for philanthropic purposes.**

2. **That in the last two years a net amount of Rs.1,230 crore was arranged to Satyam (not reflected in the books of Satyam) to keep the operations going by resorting to pledging all the promoter shares and raising funds from known sources by giving all kinds of assurances (Statement enclosed, only to the members of the board). Significant dividend payments, acquisitions, capital expenditure to provide for growth did not help matters. Every attempt was made to keep the wheel moving and to ensure prompt payment of salaries to the associates. The last straw was the selling of most of the pledged share by the lenders on account of margin triggers.**

3. **That neither me, nor the Managing Director took even one rupee/dollar from the company and have not benefited in financial terms on account of the inflated results.**

4. **None of the board members, past or present, had any knowledge of the situation in which the company is placed. Even business leaders and senior executives in the company, such as, Ram Mynampati, Subu D, T.R. Anand,**

**Keshab Panda, Virender Agarwal, A.S. Murthy, Hari T, SV Krishnan, Vijay Prasad, Manish Mehta, Murali V, Sriram Papani, Kiran Kavale, Joe Lagioia, Ravindra Penumetsa, Jayaraman and Prabhakar Gupta are unaware of the real situation as against the books of accounts. None of my or Managing Director's immediate or extended family members has any idea about these issues.**

**Having put these facts before you, I leave it to the wisdom of the board to take the matters forward. However, I am also taking the liberty to recommend the following steps:**

1. **A Task Force has been formed in the last few days to address the situation arising out of the failed Maytas acquisition attempt. This consists of some of the most accomplished leaders of Satyam: Subu D, T.R. Anand, Keshab Panda and Virender Agarwal, representing business functions, and A.S. Murthy, Hari T and Murali V representing support functions. I suggest that Ram Mynampati be made the Chairman of this Task Force to immediately address some of the operational matters on hand. Ram can also act as an interim CEO reporting to the board.**

2. **Merrill Lynch can be entrusted with the task of quickly exploring some Merger opportunities.**

3. **You may have a 'restatement of accounts' prepared by the auditors in light of the facts that I have placed before you.**

**I have promoted and have been associated with Satyam for well over twenty years now. I**

**have seen it grow from few people to 53,000 people, with 185 Fortune 500 companies as customers and operations in 66 countries. Satyam has established an excellent leadership and competency base at all levels. I sincerely apologize to all Satyamites and stakeholders, who have made Satyam a special organization, for the current situation. I am confident they will stand by the company in this hour of crisis.**

**In light of the above, I fervently appeal to the board to hold together to take some important steps. Mr. T.R. Prasad is well placed to mobilize support from the government at this crucial time. With the hope that members of the Task Force and the financial advisor, Merrill Lynch (now Bank of America) will stand by the company at this crucial hour, I am marking copies of this statement to them as well.**

**Under the circumstances, I am tendering my resignation as the chairman of Satyam and shall continue in this position only till such time the current board is expanded. My continuance is just to ensure enhancement of the board over the next several days or as early as possible.**

**I am now prepared to subject myself to the laws of the land and face consequences thereof.**

**(B.Ramalinga Raju)**

**Copies marked to:**

**1.Chairman SEBI**

**2. Stock Exchanges"** **(Emphasis supplied)"**

101. It may here be mentioned that the aforesaid letter, its contents and signature of the author of the letter - Mr. Raju, were never in dispute and nor at any point of time anyone questioned it. In other words, the existence of letter, its contents and signature of Mr. Raju on the letter were never doubted and nor its author (Mr. Raju) at any point of time retracted from his confessional statement made therein or denied having written such letter.

102. In my opinion, therefore, the letter in question was rightly received in evidence without requiring any further formal proof to corroborate its existence and contents. That apart, it being a "notorious fact" being in the knowledge of the whole World and especially those in the trade, the Courts could take judicial notice of such evidence as held by this Court in the case of **Onkar Nath & Ors. Vs. Delhi Administration,** (1977) 2 SCC 611. It is

appropriate to quote the words of the leaned Judge-Justice Y.V.Chandrachud (as His Lordship then was), who speaking for the Bench held as under:

> **"6. One of the points urged before us is whether the courts below were justified in taking judicial notice of the fact that on the date when the appellants delivered their speeches a railway strike was imminent and that such a strike was in fact launched on May 8, 1974. Section 56 of the Evidence Act provides that no fact of which the Court will take judicial notice need be proved. Section 57 enumerates facts of which the Court "shall" take judicial notice and states that on all matters of public history, literature, science or art the Court may resort for its aid to appropriate books or documents of reference. The list of facts mentioned in Section 57 of which the Court can take judicial notice is not exhaustive and indeed the purpose of the section is to provide that the Court *shall* take judicial notice of certain facts rather than exhaust the category of facts of which the Court may in appropriate cases take judicial notice. Recognition of facts without formal proof is a matter of expediency and no one has ever questioned the need and wisdom of accepting the existence of matters which are unquestionably within public knowledge. (See Taylor, 11th Edn., pp. 3-12; Wigmore, Section 2571, footnote; Stephen's Digest, notes to Article 58; *Whitley Stokes' Anglo-Indian Codes*, Vol. II, p. 887.) Shutting the judicial eye to the existence of such facts and matters is in a sense an insult to commonsense and would tend to reduce the**

> **judicial process to a meaningless and wasteful ritual. No court therefore insists on formal proof, by evidence, of notorious facts of history, past or present. The date of poll, the passing away of a man of eminence and events that have rocked the nation need no proof and are judicially noticed. Judicial notice, in such matters, takes the place of proof and is of equal force. In fact, as a means of establishing notorious and widely known facts it is superior to formal means of proof. Accordingly, the courts below were justified in assuming, without formal evidence, that the Railway strike was imminent on May 5, 1974 and that a strike paralysing the civic life of the Nation was undertaken by a section of workers on May 8, 1974."**

103. I apply the aforementioned principle of law to the facts of this case and hold that letter dated 07.01.2006 of Mr. Raju did not require any more formal proof.

104. On reading its contents, I am of the view that the acts of Mr. Raju, in the affairs of Satyam, were essentially in the nature of manipulating and fabricating the accounts books/balance-sheets of Satyam. These acts were done by Mr. Raju without knowledge to all the stakeholders of Satyam

including Venture. These acts were detrimental to the interest of all the stakeholders who were/are directly and indirectly dealing and involved in the affairs of Satyam and its affiliates at all material times.

105. In my opinion, it is a clear case where Mr. Raju suppressed the real facts relating to the affairs of Satyam from its stakeholders and, on the other hand, went on indulging in manipulating and fabricating the accounts books/balance-sheets of Satyam.

106. Satyam, being a limited Company registered under the Indian Companies Act, 1956, was under legal obligation to ensure strict compliance of the Companies Act.

107. Section 209 of the Companies Act deals with Books of Account of the Company. Sub-section (3) thereof casts an obligation on the Company to keep

"*proper books of account*" as are necessary to give a "*true and fair view of the state of affairs of the Company*" or its Branch office and explain its transactions.

108. Similarly, Section 211 of the Act deals with "form and contents of balance-sheet and profit and loss account of the Company". This Section again casts an obligation on every Company that it shall give "*true and fair view of the state of affairs of the company*" at the end of the financial year. Sub-section(3B) provides that if the Company does not comply with the accounting standard prescribed then they have to disclose the reasons for not being able to do so. Non-compliance of these provisions renders the Company to suffer penalty prescribed under Section 628 and other Sections of the Act.

109. Keeping in view the requirements of Sections 209 and 211, I am of the considered opinion that

the acts of Mr. Raju, in the affairs of Satyam, were *prima facie* in breach of Sections 209 and 211 of 1956 Act and other Acts. It had adverse impact on the affairs of Satyam, its affiliates and on those who were dealing with Satyam at the relevant time.

110. These acts also constituted the acts of misrepresentation and suppression of material facts on the part of Mr. Raju which he himself candidly confessed to have done it by expressing his regrets only in his letter dated 07.01.2009. In my view, the principle of law quoted from "Kerr" above squarely applies to the facts of this case. I, accordingly, hold so against Satyam.

111. This takes me to examine the next question as to whether the acts of Mr. Raju, in the affairs of Satyam, amount to "event of default" under Sections 8.01 and 11.05(c) of Agreement-I and, if so, its effect on the rights of the parties to the Agreement.

112. In my opinion, the acts of Mr. Raju amount to “event of default" under Section 8.01(b) and Section 11.05(c) of Agreement-I for the following reasons:

113. First, the acts satisfy the requirements of Section 8.01(b) read with Section 11.05 (c) of Agreement-I.

114. Second, Section 11.05(c) which gives overriding effect on all Sections of Agreement I casts an obligation on “Shareholders” to ensure compliance of all laws of India. The expressions “Shareholder” and “Shareholders” include “Venture”, “Satyam”, their affiliates and assigns.

115. A *fortorari*, non-compliance of any provision(s) of any Act/Rules by any shareholder would, therefore, amount to "event of default" under Sections 8.01(b) and 11.05(c) of Agreement-I.

116. Third, having regard to the nature of the Agreement, it is clear that Section 11.05(c) applies

to the affairs of JVC so also it applies to the shareholders of JVC, viz., Satyam, Venture and their respective affiliates in the affairs of their respective business activities. In my view, to confine the applicability of Section 11.05(c) only to the affairs of JVC would defeat the very purpose of Joint Venture Agreement. It would also not be the true interpretation of Section 11.05(c) and nor was it intended by the parties.

117. In this view of the matter, in my view, breach on the part of Satyam, who was 50% shareholder of JVC, was clearly made out under Agreement-I thereby entitling Venture to take recourse to the remedies provided in Sections 8.03 and 8.04 against Satyam on happening of such events.

118. Fourth, the acts of Mr. Raju, in the affairs of Satyam, were not isolated but spread over in several years in past as is clear from his own statement

(**see -Para 2 of the letter)** and were prior in point of time as compared to the breach committed by Venture.

119. Fifth, the affairs of Satyam had a direct bearing over the rights of the parties to the Agreement and also on the affairs of JVC because Satyam and Venture were the only 2 shareholders of JVC each having 50% stakes therein; second, Satyam and its affiliates were also party to the Agreements with Venture and their affiliates; third, the entire capital including providing of the loan facilities to JVC were to be funded by Satyam and Venture as per Agreement dated 20.10.1999 whereas operative infrastructure was to be provided by Satyam; fourth, Mr. Raju was the Chairman of Satyam and JVC and, as such being in dual capacity, was in a position to control the affairs of both the Companies, i.e., Satyam and JVC; fifth and

the most pertinently, the affairs of Satyam, Venture, JVC and their respective affiliates were so intrinsically connected with each other that any major event occurring in one Company would have had direct and indirect impact on the working of other group companies. Agreement-I, in my view, has to be construed accordingly while deciding the rights of all parties to the Agreement.

120. It could not be, therefore, contended that there was no causative link of any kind between these Companies *inter se*. On the other hand, taking into consideration these admitted facts including the findings of this Court rendered earlier in Venture-I and II, I am clearly of the view that there existed causative link *inter se* these companies. To hold otherwise would be nullifying the findings of this Court recorded earlier in Venture-I and II.

121. In the light of aforesaid reasons, any major event occurring in the affairs of Satyam could be made basis for determining the rights of the parties arising out Agreement I.

122. A *fortiori*, the acts of Mr. Raju, in the affairs of Satyam, had also direct bearing over the claim filed by Satyam against Venture in arbitration proceedings in London Court of Arbitration in 2005 because Satyam's claim also arose out of Agreement I/II. Had Mr. Raju brought his acts of Satyam to the notice of shareholders/Board of Directors of JVC in any Board meeting of JVC, Venture too would have been able to get first right to terminate Agreement-I under Section 8.01(b) read with Section 11.05(c) and claim appropriate reliefs against Satyam because, as held above, Satyam breach was prior in point of time.

123. In my opinion, Venture was, therefore,

deprived of their legal and contractual rights to exercise against Satyam but for no fault of theirs. Venture also lost their right to defend Satyam's claim before the Arbitrator on these grounds, which were deliberately suppressed by Satyam from Venture.

124. Sixth, it is a well settled principle of law that commission of fraud, misrepresentation, suppression of material facts from the adversary in the judicial proceedings and the Court/Arbitrator result in vitiating the entire judicial/arbitral proceedings including judgment/order/award passed thereon once come to the knowledge of the party concerned. On proving existence of commission of fraud, misrepresentation, suppression of material facts by the party concern, the judicial/arbitral proceedings are rendered illegal and *void ab initio*. This principle applies to arbitral

proceedings in question and to Award dated 03.04.2006 and thus renders both *void ab initio*. I accordingly hold so.

125. Seventh, the Award dated 03.04.2006 is also against the public policy of India in the light of law laid down by this Court in the case of ***Associate builder's*** case quoted supra, It is, therefore, liable to be set aside for the reasons that it is proved that the Award was obtained by Satyam against Venture by misrepresentation and suppression of material facts having bearing over the proceedings; second, the acts of Mr. Raju, in the affairs of Satyam, as its Chairman violated several sections of IPC, Companies Act and FEMA; and third, the arbitral proceedings in question due to this reason, which came to knowledge to all stakeholders of Satyam including Venture subsequent to passing of the Award could not be said to have been held fairly or

reasonably but were concluded to the detriment of the interest of Venture causing them prejudice while defending their interest before the learned Arbitrator. It also deprived Venture from exercising their contractual right for want of knowledge of these acts of Mr. Raju against Satyam at appropriate stage in court of law in terms of agreement. All this occurred obviously due to Satyam concealing these major events at all relevant time from Venture.

126. As taken note of above, once the fraud, misrepresentation or suppression of fact, if found to have been done by the party in any judicial proceedings is later discovered or disclosed then it would relate back to the date of its actual commission and would necessarily result in vitiating such judicial proceedings. Such is the case here.

127. The Award of an arbitral Tribunal can be set

aside only on the grounds specified in Section 34 of the AAC Act and on no other ground. The Court cannot act as an Appellate Court to examine the legality of Award nor it can examine the merits of claim by entering in factual arena like an Appellate Court. It has to confine its enquiry only to the limited issue as to whether any ground specified in Section 34 of AAC Act is made out or not. Once the ground under Section 34 of the AAC Act is made out, the Award then has to be set aside. In the case on hand, in my view, a ground under Section 34(2)(b)(ii) read with Explanation I (i)(ii) and (iii) is made out. *I* accordingly hold so.

128. In the light of foregoing discussion, I am of the opinion that the arbitral proceedings including the Award in question was passed in violation of public policy of India under Section 34(2)(b)(ii) read with Explanation 1(i), (ii) and (iii) of the AAC Act and

thus not legally sustainable. I accordingly hold so.

129. This takes me to examine the next argument of learned senior counsel for the appellant that the High Court was not right in dismissing the appellant's application by applying the principle of "issue-estoppel". I find force in the appellant's submission.

130. This Court in the case of **Masud Khan** vs. **State of Uttar Pradesh,** (1974) 3 SCC 469 had the occasion to consider the question of applicability of principle of "issue-estoppel" to judicial proceedings. Their Lordships speaking through A. Alagiriswami, J. examined the facts of that case in the light of law laid down in several English and Indian cases and held that principle of "issue-estoppel" applies to criminal proceedings only and not to any other proceedings. This is what His Lordship held in para 4 and in concluding para:

**"4. But that apart, this matter could be decided on another point. The question of issue-estoppel has been considered by this Court in *Pritam Singh* v. *State of Punjab*, AIR 1956 SC 415, *Manipur Administration* v. *Thokchom Bira Singh, AIR 1965 SC 87* and *Piara Singh* v. *Staff of Punjab,(1969) 1 SCC 379*. Issue-estoppel arises only if the earlier as well as the subsequent proceedings were criminal prosecutions. In the present case while the earlier one was a criminal prosecution the present is merely an action taken under the Foreigners (Internment) Order for the purpose of deporting the petitioner out of India. It is not a criminal prosecution. The principle of issue-estoppel is simply this: that where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law. *Pritam Singh case* was based on the decision of the Privy Council is *Sambasivam* v. *Public Prosecutor, Federation of Malaya, (1950) AC 458*. In that case Lord MacDermott speaking for the Board said:**

> **"The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same**

> **offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication."**

**It should be kept clearly in mind that the proceeding referred to herein is a criminal prosecution. The plea of issue-estoppel is not the same as the plea of double jeopardy or *autrefois acquit*. In *King* v. *Wilkes, 77 CLR 511,* Dixon, J., referring to the question of issue-estoppel said:**

> **"...it appears to me that there is nothing wrong in the view that there is an issue-estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner ... There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of issue-estoppel should not apply.... Issue-estoppel is concerned with the judicial establishment of a proposition of law or fact between**

**parties. It depends upon well-known doctrines which control the relitigation of issues which are settled by prior litigation."**

**The emphasis here again would be seen to be on the determination of criminal liability. In *Marz* v. *Queen, 96 CLR 62,* the High Court of Australia said:**

**"The Crown is as much precluded by an estoppel by judgment in criminal proceedings as is a subject in civil proceedings... The law which gives effect to issue-estoppel is not concerned with the correctness or incorrectness of the finding which amounts to an estoppel, still less with the process of reasoning by which the finding was reached in fact ... It is enough that an issue or issues have been distinctly raised or found. Once that is done, then, so long as the finding stands, if there be any subsequent litigation between the same parties, no allegations legally inconsistent with the finding, may be made by one of them against the other."**

**Here again it is to be remembered that the principle applies to two criminal proceedings and the proceeding with which we are now concerned is not a criminal proceeding. We therefore hold that there is no substance in this contention.**

**5. The petition is dismissed."**

131. Applying the aforesaid principle of law to the facts of the case, I find that the arbitral proceedings out of which these appeals arise are essentially in the nature of the civil proceedings and, therefore, in the light of law laid down in the case of **Masud Khan**(supra), the High Court was not right in applying the principle of "issue-estoppel" for dismissing the application filed by the appellant under Section 34 of the AAC Act.

132. In other words, the application filed by the appellant under Section 34 of the AAC Act could not be dismissed by applying the principle of "issue-estoppel", which in the light of law laid down in the case of **Masud Khan** (supra) had no application to the civil proceedings.

133. Mr. Chagla and Mr. Vishwanathan, learned senior counsel for the respondents, apart from supporting the impugned judgment of the High

Court made various submissions on the merits of the case as taken note of supra. However, in the light of the detailed reasoning given supra, the submissions of learned counsel for the respondents do not survive. They need not be, therefore, dealt with separately again in detail.

134. Yet, another submission of Mr. Vishwanathan in Satyam's appeal that Satyam still has a right to raise the issues on merits in Section 34 proceedings in Trial Court has no substance in the light of what I have held above.

135. In my view, the issues arising in the case must be given quietus in third round of litigation in this Court and which I hereby give to the case. Moreover, when the grounds urged by the appellant (Venture) to attack the Award are made out on merits in these proceedings and which were also dealt with by the two Courts below then I do not

find any justification to again send the case back to the Trial Court to decide the case on merits on some other ground. It is more so when such prayer was not made in the Courts below.

136. That apart, there is enough material on record on which decision could be rendered on the merits of the case. Indeed, it was so rendered by the Trial Court and the High Court though of reversal. In the light of facts emerging from the record, it is not considered necessary to have another round of litigation for filing any additional material or to adduce any more evidence again before the Trial Court.

137. Learned counsel for the appellant attacked the legality of the Award on other grounds also. In the light of foregoing discussion, I do not consider it necessary to deal with any other grounds.

138. Learned counsel for the appellant cited several

decisions in support of his submission. These decisions are: 2008(4) SCC 190, 2010(8) SCC 660, 2015(10) SCC 213, 2016(2) Scale 60, 2003(5) SCC 705, 1997(3) SCC 540, 1993(2) SCC 507,1996(4) SCC 622, 1972 Appeal Cases 153, 2015(4) SCC 609, 1995(2) SCC 513, 2010(8) SCC 665, 1994(1) SCC 1, 2000(3) SCC 581, 1964(4) SCR 19, 1974(1) SCC 242, 2003(8) SCC 673, 1955(2) SCR 271, 1969(1) SCR 1006, 1977(2) SCC 611, 2010(8) SCC 660, 1995(1) SCC 478, 2005(4) SCC 605, 2005(4) SCC 530, 2015(4) SCC 609, 2010(8) SCC 44, 2011(1) SCC 74, 2009(10) SCC 259, 2016(4) SCC 126 and 1955(1) SCR 206.

139. Learned Counsel for the respondents cited several decisions in support of his submissions. These decisions are: 1966(3) SCC 527, 2010(4) SCC 491, 1972 (2) SCR 646, 1968(3) SCR 1, 2012(8) SCC 148, AIR 1971 SC 1949, 1972(4) SCC 562, 2013(10)

SCC 758, 1966(3) SCR 283, 1996(4) SCC 622, 2010(7) SCC 1, 1977(2) SCC 611, 1977(8) SCC 683, 2003(11) SCC 405, 1996(6) SCC 665, 2005(4) SCC 530, 2006(6) SCC 94, 2009(17) SCC 796, 1951 SCR 548, 1998(4) SCC 577 and 1996(5) SCC 550.

140. I have carefully gone through these decisions cited at the bar by both the learned counsel appearing for the parties. In my view, there can be no quarrel to the legal principles laid down in these cases as they are laid down in the light of facts involved in them. However, in the light of what I have held supra, it is not necessary to deal with each of these decisions in detail separately.

141. I, however, consider it apposite to mention that I have considered the issue arising in arbitral proceedings in the context of AAC Act only and, have not expressed any opinion on any of the case relating to this case which are pending in various

Courts in India including in foreign Courts against Satyam and its officials and *vice versa.* All such pending cases will, accordingly, be decided in accordance with law.

142. In view of foregoing discussion, the questions posed above are answered in affirmative and in favour of the appellant (Venture) and against the respondent(Satyam). The appeals filed by Venture Global Engineering LLC thus succeed and are, accordingly, allowed with cost of Rs.5 lacs payable by Satyam to the appellant (Venture). Impugned judgment of the High Court is accordingly set aside and that of the judgment/order passed by the Trial Court is hereby restored.

143. As a consequence, the application filed by the Venture (appellant herein) under Section 34 of the AAC Act, out of which these appeals arise, is allowed. As a result thereof, the entire arbitral

proceedings including the Award dated 03.04.2006 passed by the sole Arbitrator is set aside as being against the public policy of India under Section 34(b)(ii) read with Explanation I(i)(ii) and (iii) of the AAC Act.

144. As a Consequence, the appeal filed by Tech Mahindra is dismissed.

……………………………………J.
[ABHAY MANOHAR SAPRE]

New Delhi;
November 01, 2017

ITEM NO.1501 COURT NO.2 SECTION XII-A

(For judgment)

**S U P R E M E C O U R T O F I N D I A**

**RECORD OF PROCEEDINGS**

Petition(s) for Special Leave to Appeal (C) No(s).29747-29749/2013

VENTURE GLOBAL ENGINEERING LLC Petitioner(s)

VERSUS

TECH MAHINDRA LTD & ANR ETC. Respondent(s)

WITH SLP(C) No. 8298/2014 (XII-A)

Date : 01-11-2017 These petitions were called on for pronouncement of judgment today.

For Petitioner(s)/ Respondent(s)
Mr. K.V. Vishwanathan,Sr.Adv,
Mr. Abhijit Sinha,Adv.
Ms. Shally Bhasin,Adv.
Mr. Siddhant Boxy,Adv.
Mr. E. C. Agrawala, AOR

Mr. Dhruv Mehta,Sr.Adv.
Mr. V.K. Misra,Adv.
Mr. Rajat Taimni,Adv.
Mr. Naval Sharma,Adv.
Mr. Saket Satapathy,Adv.

**Mrs. Shriye Luke,Adv.**

**Mr. Devendra Singh, AOR**

**Mr. Abhijit Sinha,Adv.**

**Mr. Abhinav Mukerji, AOR**

**Hon'ble Mr. Justice J. Chelameswar and Hon'ble Mr. Justice Abhay Manohar Sapre pronounced separate and dissenting judgments of the Bench comprising His Lordship and Hon'ble Mr. Justice Abhay Manohar Sapre, in these petitions.**

**Leave granted in the SLPs. In terms of common signed reportable order, the Registry is directed to place the papers before Hon'ble the Chief Justice of India for appropriate further course of action.**

**Pending application(s), if any, stand disposed of.**

**(OM PARKASH SHARMA) (MADHU NARULA)**

**AR CUM PS BRANCH OFFICER**

**(Two signed reportable judgments and the common order are placed on the file)**