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

Decision Dated: 29th January, 2019

\+ **CS (OS) 46/2019, I.As. 1235/2019 & 1238/2019**

UNION OF INDIA ..... Plaintiff

Through: Mr. Sanjay Jain, Senior Advocate with Mr. Piyush Joshi, Ms. Anuradha R. V., Ms. Sumiti Yadava, Ms. Lalia Philip, Mr. Prithvirat Chauhan and Mr. Yuvraj, Advocates. (M:9871881988)

versus

KHAITAN HOLDINGS (MAURITIUS) LIMITED & ORS. ..... Defendants

Through: Mr. Dayan Krishnan, Senior Advocate with Ms. Misha Rohatgi Mohta, Advocate for R-1 (M:9899705974)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

I.As. 1235/2019 (u/Order XXXIX Rule 1 & 2)

1. Arbitration as a means for resolution of disputes is well entrenched in most judicial systems. In the context of commercial arbitration, there are two types - domestic arbitration and international commercial arbitration. In all these disputes, minimum judicial interference in the conduct of arbitral proceedings is the norm. There is yet another species of arbitration which is the subject matter of the present case i.e., Arbitral proceedings under Bilateral Investment Treaties. While traditional arbitrations arise out of commercial contracts entered into between individuals and companies, arbitrations under BITs arise out of agreements signed between two

sovereign nations. Under these agreements, each of the States, signatory to the Agreement agrees to provide Fair and Equitable Treatment to investors from the other State, as also extend protection against arbitrary, discriminatory and unfair practices. The investments made by investors of the State are to be safeguarded against any expropriation and remedies are also provided for adjudication of disputes through international dispute settlement mechanisms. The dispute settlement mechanisms can be triggered both by the aggrieved State as also an aggrieved investor from a State which is party to the Agreement, against the other State. Interference by domestic courts in arbitral proceedings that may be commenced under BITs is permissible but only in *`compelling circumstances'*, in *`rare cases'*. Courts are hesitant to interfere in the arbitral process once the Tribunal is constituted and is seized of the dispute.

2. The Union of India seeks an anti-arbitration injunction against the arbitral proceedings initiated by Defendant No.1 – M/s Khaitan Holdings (Mauritius) Ltd. (*hereinafter, 'Defendant no.1'/Khaitan Holdings*), a Mauritius based company, under the Agreement entered into between the Republic of India and the Republic of Mauritius for the Promotion and Protection of Investments (*hereinafter* '*BIT agreement*'). The suit was initially listed on 25th January 2019 on which date summons and notices were issued. It is submitted by learned counsel for the Plaintiff that all Defendants have been served by email. Defendant No.1 has appeared before the Court yesterday under protest. Defendant Nos.2 to 5 are not before the Court. The Ld. ASG presses for urgent interim relief in view of the hearing fixed by the Arbitral Tribunal constituted under the BIT, which is fixed for 28th January 2019. Submissions were heard on the grant of ad-interim relief,

as pleadings are yet to be completed in the application. However, considering the nature of submissions addressed and the voluminous documents/material placed before the Court, that required consideration, Defendant no.1 was directed to seek postponement of the hearing in its application before the Arbitral Tribunal on 28th January 2019, until pronouncement of orders today.

3. Plaintiff in the present suit is the Union of India / Republic of India (*hereinafter 'Republic of India*') which has entered into an agreement with the Government of Republic of Mauritius for the Promotion and Protection of Investments (*hereinafter* '*BIT agreement*'), which was executed in 1998 with effect from 20th June, 2000. Khaitan Holdings is a company based in Mauritius. Its predecessors in interest are Kaif Investment Limited (*hereinafter 'Kaif Investment'*) and Capital Global Limited (*hereinafter 'CGL'*). Defendant No.2 – Loop Telecom and Trading Limited is an Indian company earlier known as Loop Telecom Limited (*hereinafter 'Loop Telecom'*). Defendant No.3 – Shri Ishwari Prasad Khaitan (*hereinafter, 'Ishwari Prasad Khaitan'*) and Defendant No.4 – Smt. Kiran Khaitan (*hereinafter, 'Kiran Khaitan'*) are Indian citizens, who are alleged to be the beneficial shareholders of Khaitan Holdings. Defendant No.5 – Shri Ravikant Ruia (*hereinafter, 'Ravikant Ruia'*) is a promoter of the ESSAR Group of Companies, including Hutchison ESSAR Limited.

4. The present suit has been filed by Union of India seeking the following reliefs: -

> "*(1) Pass and pronounce a Decree of Declaration in favour of the Plaintiff and against the Defendants, who are liable jointly and severally, to the effect that the*

Defendant No. 1 is disentitled to take recourse to the Arbitration under the Agreement between the Government of the Republic of India and the Government of the Republic of Mauritius for the Promotion and Protection of Investments, and that all steps taken or caused to be taken by the Defendants are non-est and beyond the intent and scope of the said Agreement.

(2) Pass and pronounce a Decree of Declaration in favour of the Plaintiff and against the Defendants, who are liable jointly and severally, to the effect that the Defendant No. 3 has abused the process of law by using his beneficial ownership and control over the Defendant No. 1, to cause the Defendant No. 1 to take recourse to the Agreement between the Government of the Republic of India and the Government of the Republic of Mauritius for the Promotion and Protection of Investments, and taking further steps in pursuance thereof.

(3) Pass and pronounce a Decree of Permanent Injunction in favour of the Plaintiff and against the Defendants, who are liable jointly and severally, restraining them, their agents, attorneys, legal representatives, assigns, directors, principal officers, successors, subsidiaries, affiliates and/ or any other person purporting to act for and on their behalf, from continuing any further with the Arbitration proceedings titled Khaitan Holdings Limited (Mauritius) v. Republic of India (PCA Case No 2018-50), under the Agreement between the Government of the Republic of India and the Government of the Republic of Mauritius for the Promotion and Protection

of Investments and / or taking any further steps in relation to the same.

(4) Pass any such other and further orders as deemed fit, in favour of the Plaintiff and against the Defendants, including that of the costs."

5. The background of the dispute is that Loop Telecom, an Indian company had applied for 21 Unified Access Services (*hereinafter, "UAS"*) Licences with the Department of Telecommunications, Government of India. Letters of Intent were issued to Loop Telecom on 25th January, 2008. Various allegations were raised against the then Government in the award of licences and the Central Bureau of Investigation (CBI) and other investigative agencies were directed to investigate into the said award of licences. The Supreme Court in ***Centre for Public Interest Litigation v. Union of India (2012) 3 SCC 1*** *(hereinafter, 'CPIL')* on 2nd February, 2012, *inter alia*, cancelled all 21 UAS licenses granted to Loop Telecom.

6. Loop Telecom chose not to participate in the subsequent bidding process and sought refund of the license fee paid by it from the Republic of India. It, thereafter, approached the TDSAT seeking refund of the License Fee. The said petition was dismissed by the TDSAT on 16th September, 2015. A Special Leave Petition against the said order was withdrawn on 13th May, 2016 with liberty.

7. The shareholding of Loop Telecom underwent changes from time to time. Kaif Investment, which held a substantial interest in Loop Telecom merged with Khaitan Holdings. Upon the cancellation of licences by the Supreme Court, CGL & Kaif Investment issued notice dated 16th April 2012 under Article 8.1 of the BIT agreement, seeking settlement of disputes under Article 8.1 of the BIT Agreement. Kaif Investment then merged with

Khaitan Holdings. On 30th September, 2013, notice of arbitration under Article 8.2 of the BIT Agreement was issued by Khaitan Holdings on the ground that it held 26.95% in Loop Telecom and being a company based in Mauritius, it is entitled to claim compensation. In the said notice, Khaitan Holdings sought the following monetary and other claims: -

> "*D. The Relief or Remedy Sought*
>
> *27. KHML seeks restitution in full against the harm it has suffered as a consequence of the UoI's violation of the Treaty.*
>
> *28. Such restitution may include:*
>
> *(a) The return of the (approximately) US$140,000,000 invested by KHML in Loop to date (and compensation for the loss of use of the same), along with interest calculated at 12% p.a, from the date of receipt of the investment till date of realization;*
>
> *(b) KHML's share of the lost shareholder revenue (estimated in excess of US$1 billion) which would have been generated over time by Loop's successful operation of the licences and/or;*
>
> *(c) Loss of the market values of the licences, recently demonstrated by the UoI's re-auction of the relevant spectrum at a substantially increased value, which is in excess of US$ 300 million.*
>
> *(d) Such other losses and harm as KHML identifies in its Statement of Claim/Memorial.*"

8. However, since no positive response was received, disputes arose between the parties and both parties nominated their respective arbitrators in

2013. In the meantime on 21st December, 2017, the CBI - Special Judge acquitted Loop Telecom, Shri Ishwari Prasad Khaitan, Smt. Kiran Khaitan and Shri Ravikant Ruia of all the charges. It is submitted that the UOI has sought leave to appeal against the judgment which is pending consideration.

9. Subsequent to the judgment of the CBI – Special Judge being delivered, Khaitan Holdings sought appointment of the Presiding Arbitrator by the Permanent Court of Arbitration – the appointing authority under the UNCITRAL Rules. On 29th May, 2018, the Presiding Arbitrator was appointed. In the meantime, Loop Telecom again approached the TDSAT seeking refund of licence fee paid, post the acquittal by the CBI Judge. The said petition was dismissed on 16th September, 2018. On 6th December, 2018, the Arbitral Tribunal confirmed the first date of hearing in the arbitration as 28th January, 2019. This was termed as the 'in person First Procedural Meeting'. The Court is informed that the Claim petition is yet to be filed in the arbitration and is due in July 2019. The hearing date in the arbitration has been tentatively scheduled for 14-18th December 2020.

10. The UOI, on 7th December, 2018, called upon Defendant Nos.1 to 4 to desist from proceeding with the arbitration and exercise control over Khaitan Holdings, on the ground that Khaitan Holdings is not a genuine and bonafide investor and is controlled by Shri. Ishwari Prasad Khaitan and Smt. Kiran Khaitan – both of whom are Indian citizens.

11. In response thereto, Shri. Ishwari Prasad Khaitan - Defendant No.3 and Defendant No.4 - Smt. Kiran Khaitan replied taking the stand that the letters ought to be addressed to the respective parties namely; Loop Telecom and Khaitan Holdings. Vide letter dated 17th January, 2019, Khaitan Holdings, brought the said letters dated 7th December, 2018 to the

knowledge of the Arbitral Tribunal. On 24th January, 2019, the Government of India addressed a communication informing the Arbitral Tribunal that it would be approaching the Delhi High Court in view of various facts that have come to its knowledge being: -

(a) Khaitan Holdings though incorporated in Mauritius is not a Mauritius investor, but, in fact, the beneficial owner of the said company is based out of India;

(b) In view of this, Khaitan Holdings or its predecessors could not have initiated a valid dispute under the BIT Agreement;

(c) That the arbitral proceedings were an abuse of process;

(d) That the investments were not in accordance with the laws of India.

12. On the same day, the solicitors of Khaitan Holdings sought a pro-tem injunction from the Arbitral Tribunal, against the Republic of India in the following terms: -

> "*The Claimant will make a formal application for relief from the Tribunal, in the form of an order preventing the Respondent from making or pursuing any such application in the Indian Courts. The Claimant asks that a briefing schedule for the Claimant's application be established at Monday's hearing.*
>
> *In the interim, the Claimant respectfully requests that the Tribunal immediately issue a pro tem injunction to protect its own jurisdiction, restraining the Government of India from taking any action in the Indian Courts to restrain or prevent this arbitration, until such time as the Claimant's application can be properly argued and adjudicated by the Tribunal.*"

13. The present suit came to be filed on 25th January, 2019 and was listed

on urgent mentioning before this Court. Notice was issued to the Defendants and the matter was called today. Before commencement of the hearing, learned ASG, Mr. Sanjay Jain, placed on record emails dated 25th January, 2019 by which the Arbitral Tribunal was notified of the order passed by this Court on 25th January, 2019. In response thereto, the secretariat under instructions from the presiding Arbitrator directed as under:

> *"Dear Mesdames,*
> *Dear Sirs,*
> *I write under the instructions of the presiding arbitrator in the above referenced matter.*
> *The Parties are informed that, if either Party has any application that it wishes to make to the Tribunal at its First Session in relation to the judicial proceedings in Delhi, it shall formulate it as a written application notified to the Tribunal and the other Party by 14.00 hours CET on Sunday 27 January 2019. In such event, the Tribunal will hear counsel for both Parties on such application under item 4 of the Agenda.*
> *Kind regards,*
> *Helen Brown*
> *Legal Counsel*
> *PCA"*

14. Khaitan Holdings, thereafter, moved an application on 27th January, 2019 seeking interim reliefs from the Tribunal in the following manner:

> *"Relief sought:*
> *For the reasons set out in the Application, the Claimant respectfully requests the Tribunal to order:*
>
> *(a) the Respondent to withdraw the proceedings commenced in the Delhi High Court under case name Union of India v. Khaitan Holdings (Mauritius) Limited and Others, ad case no CS (OS) 46/2019.*

(b) the Respondent to refrain from making, or pursuing, any application or action to any court other than the court of the seat for relief where the aim or result of which is to prevent the Claimant from pursuing this arbitration;

(c) the Respondent to refrain from making, or pursuing, any application or action to any court other than the court of the seat for relief the aim or result of which is to hinder, directly or indirectly, any individual or entity from taking actions in connection with, or otherwise progressing, this arbitration;

(d) the Respondent to procure that no ministry, department, agency, instrumentality or other entity under the control of the UOI take any action contrary to sub-paragraphs (b) or (c) above;

(e) the Respondent to refrain from taking any action, or causing any action to be taken, which could lead to further inquiry, aggravation or extension of the dispute between the Parties;

(f) the Respondent to pay the Claimant's costs of this application and of defending the proceedings in the Delhi High Court (case number CS(OS) 46/2019); and such further of alternative relief as the Tribunal may deem appropriate."

15. In this background, the UOI seeks ad-interim relief restraining the arbitral proceedings. On behalf of both parties i.e. the Plaintiff and Khaitan Holdings, detailed submissions have been addressed. Mr. Sanjay Jain, Ld. ASG has made his submissions on the following aspects:-

(a) That Khaitan Holdings could not have invoked arbitration as the disputes are outside the scope of the BIT agreement under Article 2;

(b) That Loop Telecom being an Indian company in whom investment is alleged to have been made by Khaitan Holdings

(Mauritius) Limited, was subject to the laws of India and had accepted the jurisdiction of TDSAT.

(c) That the actual investor and beneficiary of Khaitan Holdings being an Indian citizen i.e. Shri Ishwari Prasad Khaitan he could not take advantage of the BIT agreement as the same is meant for adjudication of disputes between a genuine Mauritius investor and Republic of India and not an Indian citizen and the Republic of India;

(d) The application moved by Khaitan Holdings seeking interim relief before the Arbitral Tribunal, in effect, seeks an order from the Arbitral Tribunal directing the Republic of India to withdraw proceedings from the Delhi High Court;

(e) That the master circular dated 29th July, 2007 issued at the time when Loop Telecom applied for its licences permitted 49% FDI under the automatic route which made it mandatory that the investment would be subject to Indian laws. Since Loop Telecom had approached a specialised Tribunal namely TDSAT to adjudicate the disputes, arbitration under BIT could not be invoked. Reliance is placed by the Plaintiff on the judgment of this Court in ***Union of India v. Vodafone Group [CS(OS) 383/2017 decision dated 7th May, 2018]*** *(hereinafter, 'Vodafone Judgment')*.

(f) That the certificate of incumbency issued by the Mauritian authorities showed that the immediate shareholder of Kaif Investment Limited was Defendant No.1, Khaitan Holdings (Mauritius) Limited. The beneficial owner of this company was

Shri Ishwari Prasad Khaitan, Defendant No.3. All the group companies showed Defendant No.3 and 4 as the ultimate beneficial owners.

16. On the other hand, on behalf of Khaitan Holdings, Mr. Dayan Krishnan, learned senior counsel has submitted as under: -

(a) That Defendant no.1 appears under protest and is not submitting to the jurisdiction of this Court;

(b) That the UOI has approached this Court with considerable delay. That the UOI has acquiesced to the constitution of the Arbitral Tribunal and has participated in the arbitral proceedings without demur or protest.

(c) Except in the rarest of rare cases an anti-arbitration injunction cannot be granted injuncting an arbitration under a BIT Agreement.

(d) The question as to whether Khaitan Holdings is an `investor' under the BIT Agreement is to be interpreted, by the Arbitral Tribunal and not by this Court.

(e) Claims relating to expropriation were not before the TDSAT and hence the fact that Loop Telecom had availed its remedies does not bar the arbitral proceedings under the BIT Agreement.

(f) The acquittal by the CBI Court shows that there was no criminality in the allotment of licenses.

(g) On a specific query from the Court, it is admitted that Shri Ishwari Prasad Khaitan had shareholding in Khaitan Holdings, till one and a half years ago.

Analysis and Findings

17. The genesis of the dispute, which has been encapsulated in the notice invoking arbitration is the judgement of the Supreme Court in ***CPIL*** *(supra)* of the Supreme Court by which the Supreme Court cancelled the licences granted to various companies including Loop Telecom. The judgment of the Supreme Court resulted in fresh recommendations being made by the Telecom Regulatory Authority of India, and thereafter an auction being conducted for allocation of the spectrum and award of licenses.

18. It can be seen that in the era of BIT agreements, even judgements of Courts could trigger investment disputes under the BITs resulting in enormous claims being raised against the Government. This is so because under public international law which primarily governs BIT agreements, the Articles of State Responsibility specifically provide that the conduct of any organ of the State can be called to question. Article 4 of the Responsibility of States for Internationally Wrongful Acts, 2001 reads as under:

> *"Article 4: Conduct of Organs of a State*
> 1. *The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of that State.*
> 2. *An organ includes any person or entity which has that status in accordance with the internal law of the State."*

19. The issue arises as to whether in the Indian context, where the judiciary is independent of the other organs of the State, its conduct can be called to question in an arbitral proceeding and the Government of India can be made liable for a judgement passed by the Court. Theoretically speaking,

the answer is in the affirmative, though it depends on the facts and circumstances of each case. In the present case, though, at first blush, the judgment of the Supreme Court appears to be the trigger for invocation of arbitration under the BIT Agreement, a closer examination reveals that this may not be so. The findings of the Supreme Court in ***CPIL (supra)*** were that the policy of first-come-first-served by the then Government was completely flawed and had inherently dangerous implications. The Supreme Court also held that the procedure adopted by the Government was not transparent and fair. It held that the actions of the Government were arbitrary and capricious. Thus, the Supreme Court's judgement called to question the executive action of the Government in arbitrary allocations of license and thereafter cancelled the same.

20. The question as to whether Defendant no.1, an investor in Loop Telecom has a cause of action to invoke arbitration under the BIT and whether the cancellation constitutes expropriation is not for this Court decide. The adjudication of this issue is in the domain of the arbitral tribunal seized of the dispute.

UASL regime

21. The Unified Access Service Licences were cancelled by the Supreme Court in ***CPIL (supra)***. A perusal of the UAS License Agreement executed between the Department of Telecommunications and Loop Telecom shows that the said licence is subject to Indian laws. The relevant portions are extracted herein below:

> *"1. Ownership of the LICENSEE Company.*
> *1.1 The LICENSEE shall ensure that the total foreign equity in the paid up capital of the LICENSEE Company does not, at any time during the entire*

Licence period, exceed 74% of the total equity subject to the following FDI norms:
(i) Both direct and indirect foreign investment in the licensee company shall be counted for the purpose of FDI ceiling. Foreign Investment shall include investment by Foreign Institutional Investors (FIIs), Non-resident Indians (NRIs), Foreign Currency Convertible Bonds (FCCBs), American Depository Receipts (ADRs), Global Depository Receipts (GDRs) and convertible preference shares held by foreign entity. Indirect foreign Investment shall mean foreign investment in the company/companies holding shares of the licensee company and their holding company/companies or legal entity (such as mutual funds, trusts) on proportionate basis. Shares of the licensee company held by Indian public sector banks and Indian public sector financial institutions will be treated as 'Indian holding'. In any case, the 'Indian' shareholding will not be less than 26 percent.
(ii) FDI up to 49 percent will continue to be on the automatic route. FDI in the licensee company/Indian promoters/investment companies including their holding companies shall require approval of the Foreign Investment Promotion Board (FIPB) if it has a bearing on the overall ceiling of 74 percent. While approving the investment proposals, FIPB shall take note that investment is not coming from countries of concern and/or unfriendly entities.
(iii) FDI shall be subject to laws of India and not the laws of the foreign country/countries.

16.1 The LICENSEE shall be bound by the terms and conditions of this Licence Agreement as well as by such orders/directions/regulations of TRAI as per provisions of the TRAI Act, 1997 as amended from time to time and instructions as are issued by the Licensor/TRAI.
16.2 All disputes relating to this Licence will be

subject to jurisdiction of Telecom Disputes Settlement and Appellate Tribunal (TDSAT) as per provisions of TRAI Act, 1997 including any amendment or modification thereof."

22. The definition of licensee in this agreement includes the *"licensee, its successors in businesses, administrators, liquidators and assignees or legal representatives"*. The investment by Khaitan Holdings and/or its predecessors was under the automatic route as per clause 1.1 of the General conditions. The said investment was subject to the laws of India. All disputes relating to this licence were to be subject to the jurisdiction of the TDSAT. The question that arises is as to whether Loop Telecom having invoked the jurisdiction of TDSAT, would bar the remedies of the investor in Loop Telecom from invoking arbitration under the BIT Agreement.

Bilateral Investment Treaty - Analysis

23. The remedy under a BIT Agreement is a remedy which is provided to investors from foreign countries. Presuming an investor to be a genuine investor, if the investor's investment in India has been prejudiced, the investor can invoke remedies available under the BIT. The availability of such remedies promotes the investor friendly ecosystem of any country. Under the BIT the State holds out an assurance to protect the investments of investors from the Contracting State. An assurance given under any BIT signed by the Republic of India constitutes a solemn promise by the country for being a destination for safe foreign investment. The BIT provides for obligations and remedies which are not dependent on any other statutes or laws. The BIT is self-contained and is primarily governed by principles of public international law. It would not be wrong to say that BITs are *sui*

generis in nature and do not depend on the applicability, interpretation and adjudication under domestic laws. Interference with the BIT dispute resolution mechanism in the case of a genuine investor dispute could lead to erosion of investor confidence and also dislodge the fundamental precincts on which BITs are based.

24. The question is whether the investment by Defendant no.1 in Loop Telecom is genuine and bonafide foreign investment and whether the BIT arbitral process ought to be interfered with.

25. The BIT mechanism was triggered on 16th April, 2012 when the first notice was issued by CGL and Kaif Investment requesting resolution of the disputes. The said notice was under Article 8.1 of the BIT. Thereafter, Kaif Investment was merged with Khaitan Holdings. On 30th September, 2013, notice of arbitration under Article 8.2 was issued. In this notice, Khaitan Holdings sought restitution of its investment in Loop Telecom and the sums expended by Loop Telecom in purchasing the cancelled licenses. The proposal for settlement/conciliation sought payment of US$ 166.89 million towards loss of direct investment of Rs.2457.53 crores towards lost telecom license fee paid by Loop Telecom as also withdrawal of penalties, notices for liquidated damages, which were issued by the Government of India. A perusal of this notice shows that while Khaitan Holdings sought restitution of its direct investment, it also, in addition sought various amounts which had already been sought by Loop Telcom before the TDSAT. Thus, to an extent the claims were overlapping. In the final notice of arbitration which was issued, however, the amounts were merged and the remedies sought were as under:

> "*D. The Relief or Remedy Sought*

27. KHML seeks restitution in full against the harm it has suffered as a consequence of the UoI's violation of the Treaty.

28. Such restitution may include:

(a) The return of the (approximately) US$140,000,000 invested by KHML in Loop to date (and compensation for the loss of use of the same), along with interest calculated at 12% p.a, from the date of receipt of the investment till date of realization;

(b) KHML's share of the lost shareholder revenue (estimated in excess of US$1 billion) which would have been generated over time by Loop's successful operation of the licences and/or;

(c) Loss of the market values of the licences, recently demonstrated by the UoI's re-auction of the relevant spectrum at a substantially increased value, which is in excess of US$ 300 million.

(d) Such other losses and harm as KHML identifies in its Statement of Claim/Memorial."

26. Pursuant to this notice issued by Khaitan Holdings, Arbitrators were nominated by both parties. However, until 6th April, 2018, Khaitan Holdings did not activate the arbitral proceedings. The judgment of the Special CBI Court was delivered on 21st December, 2017. It was only thereafter that Khaitan Holdings sought appointment of the presiding Arbitrator. The presiding Arbitrator was appointed in May, 2018. The first date of hearing was fixed as 28th January, 2019.

27. On 7th December, 2018, on the basis of the documentary evidence

which the Plaintiff claims to have got hold of during the criminal proceedings, it called upon Defendants No. 2, 3 and 4 to impress upon Khaitan Holdings not to pursue the arbitration under the BIT Agreement. This communication was based on the premise that Khaitan Holdings was wholly controlled by Defendants No. 2, 3 and 4. However, the said Defendants did not accede to the request of the Republic of India which led to issuance of communications to the Arbitral Tribunal by the Republic of India and thereafter, filing of the present suit. Though going simply by the notice invoking arbitration, sufficient time appears to have elapsed, the arbitration itself, has been activated only a few months ago. Under these circumstances, it cannot be held that the Republic of India has acquiesced to the BIT arbitration.

28. The questions raised by the UOI in the present suit, especially the connection between Defendants No.1, 2, 3 and 4 are not such as those that can be termed as either being *malafide* or an abuse of process. The Republic of India is well within its rights to invoke the jurisdiction of domestic Courts, especially when the cause of action has a real nexus to the territory of India.

29. In ***Vodafone Judgment (supra)***, a Learned Single Judge of this Court has clearly observed that arbitration proceedings under BITs are not governed by the Arbitration and Conciliation Act, 1996 as they are not commercial arbitrations. Thus, the jurisdiction of this Court would be determined under the Code of Civil Procedure, 1908. The observations of the Court in the ***Vodafone Judgment (supra)*** are as under:

> *"66. Section 20 CPC is the residuary clause which deals with the 'place of suing'. The said Section*

reads as under:-

"20. Other suits to be instituted where defendants reside or cause of action arises.— Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises." (emphasis supplied)

72…. In fact, from the aforesaid statements, this Court is of the view that the cause of action for the present suit partly arose within the jurisdiction of this Court and Defendants had purposefully availed of Indian jurisdiction, inter alia, by making an investment in India, holding economic interests in India and carrying on business in India and from a reasonable and holistic perspective, Defendants have to be considered as working for gain within the jurisdiction of this Court.

…

75. Consequently, this Court has jurisdiction over the Defendants in personam and over the subject matter of the dispute

…"

30. Shri Ishwari Prasad Khaitan and Smt. Kiran Khaitan, who are the *prima facie* owners of Khaitan Holdings, are also residents of Delhi. Loop Telecom is a company incorporated in Delhi. As per the arbitration notice, it is disputes arising out of investments made in Loop Telecom that are the subject matter of the arbitration. Any prayer for injunction can therefore in law be adjudicated by this Court. Thus, the Plaint iff is not estopped from the invocation of jurisdiction of this Court either by acquiescence or by virtue of lack of jurisdiction.

Shareholding pattern in Loop Telecom and Khaitan Holdings (Mauritius) Ltd

31. The investor in Loop Telecom, an Indian company was Capital Global Limited in 2008. In March, 2009, Capital Global Limited transferred its investment to Kaif Investment, another Mauritian entity. Kaif Investment invested 92 million USD, between March, 2009 to March, 2012. With effect from 31st March, 2012, Kaif Investment merged with Khaitan Holdings. The beneficial owners of all these companies are Shri Ishwari Prasad Khaitan and Smt Kiran Khaitan – both of whom are admittedly Indian citizens. This is clear from a perusal of the certificate of incumbency issued by the Mauritian authorities, which shows that the immediate shareholder of Kaif Investment is Khaitan Holdings. The group companies listed in the certificate are as under:

"7. Details of Group companies:

Company Name	***Country of Incorporation***	***Immediate Shareholder***	***Ultimate Beneficial owner***
Capital Global Ltd.	*Mauritius*	*Loop Mobile Holdings India*	*Mrs. Kiran Khaitan*

		Limited	*(89.11%). Mr. Ishwari Prasad Khaitan (10.89%)*
Khaitan Holdings (Mauritius) Limited	*Mauritius*	*Mr. Ishwari Prasad Khaitan*	*Mr. Ishwari Prasad Khaitan*
Palab Investment Limited	*Mauritius*	*Khaitan Holdings (Mauritius) Limited*	*Mr. Ishwari Prasad Khaitan*
Black Lion Limited	*Mauritius*	*Palab Investment Limited*	*Mr. Ishwari Prasad Khaitan*
Deccan Asian Infrastruture (Mauritius), Inc	*Mauritius*	*Palab Investment Limited*	*Mr. Ishwari Prasad Khaitan*
Aidtel Holdings (Mauritius), Inc	*Mauritius*	*Palab Investment Limited*	*Mr. Ishwari Prasad Khaitan*
Inditel Holdings	*Mauritius*	*Palab Investment Limited*	*Mr. Ishwari Prasad Khaitan*

32. The beneficial owner of Kaif Investment was shown as under:

> *"(b) Beneficial Owner : Ishwari Prasad Khaitan*
> *P. O. Box 24369*
> *Flat 313 (E&W. SI)*
> *B Meter, 630 / Silicon Oasis,*
> *Dubai, UAE."*

33. On a query put to learned counsel for Khaitan Holdings, it is confirmed that until one and a half years ago Shri Ishwari Prasad Khaitan

continued to hold shareholding in Khaitan Holdings. Reply by Defendant No.1 is yet to be filed to confirm its shareholding pattern. The submission of the Ld. ASG is that the beneficial owners of Kaif Investment, Khaitan Holdings and Capital Global, being Shri Ishwari Prasad Khaitan and Smt. Kiran Khaitan, being Indian citizens, the present dispute cannot be termed as a case of a foreign investor invoking the BIT Agreement between India and Mauritius, which is meant to protect foreign investors.

34. Admittedly, 26.95% in Loop Telecom was held by Khaitan Holdings as on date of invoking the arbitration. The remaining shareholding is held by domestic Indian investors. Thus, if Khaitan Holdings is also for the beneficial interest of Indian citizens, Loop Telecom would be nothing but a pure Indian entity. The facts relating to the shareholding of Shri Ishwari Prasad Khaitan and Smt Kiran Khaitan in Loop Telecom, as per the learned ASG, were revealed only in the criminal proceedings, which were commenced pursuant to the judgment of the Supreme Court. The other allegation is that Defendant Nos.3 and 4 i.e. Shri Ishwari Prasad Khaitan and Smt Kiran Khaitan were fronts for Defendant No.5 – Shri Ruia. As per the judgment of the CBI Court, this fact is not established by the prosecution.

35. Under Article 21 of the UNCITRAL Model Rules, the Arbitral Tribunal can rule on its own jurisdiction, including on the existence of the arbitration agreement. The Arbitration and Conciliation Act, 1996 does not have application in the present case as the same relates to commercial arbitrations.

36. The present case is one emanating from a Bilateral Investment Treaty and not from a simple commercial contract. The Treaty has been executed between two sovereign nations. The object of the treaty is as under:

"*Desiring to create favourable conditions for greater flow of investments made by investors of either Contracting Party in the territory of the other Contracting Party; and*
Recognising that the Promotion and Protection of such investment will lend greater stimulation to the development of business initiatives and will increase prosperity in the territories of both Contracting Parties:"

37. The scope of the agreement under Article 2 reads as under:

"*Article 2*
Scope of the Agreement
This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, accepted as such in accordance with its laws and regulations, whether made before or after the coming into force of this Agreement."

38. Thus, the investment made by a Mauritian investor has to be in accordance with the laws and regulations in India for it to fall within the BIT Agreement. The treaty requires, under Article 4, that the investors of the two countries shall be accorded *"fair and equitable treatment in each other's territories"*. It also requires that there shall be no impairment by unreasonable and discriminatory measures and the terms of investment shall not be less favourable, than those afforded to the citizens of India. Thus, fair and equitable treatment is to be accorded to a Mauritius investor.

39. Article 5 and Article 6 relating to compensation for losses and expropriation read as under.

"*ARTICLE 5*
Compensation for Losses
(1) Investors of either Contracting Party whose

investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be afforded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, not less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State.

(2) subject to paragraph (1) of this Article, investors of either Contracting Party who, in any of the situation referred to in that paragraph, suffer losses in the territory of the other Contracting Party resulting from:

(a) requisitioning of their property by the force or authorities of the latter Contracting Party, acting under and within the scope of the legal provisions relating to their competences, duties and command structures: or

(b) destruction of their property by the forces or authorities of the latter Contracting Party, which was not caused in combat action or was not required by the necessity of the situation or observance of any legal requirement;

shall be afforded treatment as regards restitution or adequate compensation, not less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third state.

ARTICLE 6

Expropriation

(1) Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalised, expropriated or subjected to measures having

effects equivalent to nationalisation or expropriation except for public purposes under due process of law, on a non-discriminatory basis and against fair and equitable condensation. Such condensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a fair and equitable rate until the date of payment, shall be made without unreasonable delay and shall be effectively realizable and be freely transferable,

(2) The investor affected by the expropriation shall have right, under the law of the Contracting Party making the expropriation, to review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

(3) Where a Contracting Party expropriates, nationalises or takes measures having effect equivalent to nationalisation or expropriation against the assets of a company which is incorporated or constituted under the laws in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to ensure fair and equitable compensation as specified therein to such investors of the other Contracting Party who are owners of those shares."

40. A perusal of the above shows that losses caused due to war, armed conflict, revolution, national emergency, revolt, riots etc. would be liable to

be restituted and indemnified. Requisition of property by forces or authorities or destruction of property would also be liable to be compensated. The investments cannot be nationalized or expropriated or subjected to measures equivalent to expropriation. The exception to expropriation, however, is *"public purposes following due process of law"*. Thus, if any investment is expropriated for a public purpose after following due process of law, no compensation would be payable.

41. The cancellation of licences by the Supreme Court in the decision dated 2nd February, 2012 in ***CPIL (supra)***, was a judgment pronounced by the Supreme Court in public interest. The same was rendered after hearing all the parties concerned including Loop Telecom, which was the investment vehicle of Khaitan Holdings. Loop Telecom has availed of its judicial remedies under the Indian law by approaching the TDSAT. Under the judgment of the Supreme Court, Loop Telecom also had an option of participating in the auction directed as per the recommendations of the TRAI. However, it chose not to do so. Thus, the same could be argued as being an exception to Article 6 of the BIT. However, the investor i.e., the Mauritian entities have not availed of any judicial remedies under Indian law and have chosen to invoke the BIT. Insofar as the settlement of disputes under the BIT Agreement is concerned, the same is governed under Article 8, which reads as under:

> "*ARTICLE 8*
> *Settlement of Disputes Between an Investor and a Contracting Party*
> *(1) Any dispute between an Investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible,*

be settled amicably through negotiations between the parties to the dispute.

(2) If such dispute cannot be settled according to the provisions of paragraph (1) of this Article within six months from the date of request for settlement, the investor may submit the dispute to:

(a) arbitration in accordance to the law of the Contracting Party; or

(b) if the Contracting Party of the investor and the other Contracting Party are both parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other states, of March 18, 1965 and the investor consents in writing to submit the dispute to the International centre for the settlement of Investment Disputes, such a dispute shall be referred to the centre; or

(c) to international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law; or

(d) to an ad hoc arbitral tribunal set up in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976, subject to the following modifications:

(i) The appointing authority under Article 7 of the Arbitration Rules shall be the President, the Vice-President or the next senior judge of International Court of Justice, who is not a national of either Contracting Party. The third arbitrator shall not be a national of either Contracting Party.

(ii) The parties shall appoint their respective arbitrators within two months.

(iii) The arbitral award shall be made in accordance with the provisions of this Agreement and shall be binding on the parties to the dispute.
(iv) The arbitral tribunal shall state the basis of its decision and give reasons upon the request of either party.

(3) Where a dispute has been submitted for resolution under paragraph 2(a), 2(b), 2(c) or 2(d) above, the choice so exercised shall not be changed except with the consent of the Contracting Party which is party to the dispute.

(4) Notwithstanding anything contained in paragraph (2) above, the Contracting Party which is a party to the dispute shall have the option to submit the dispute for resolution to international arbitration in accordance with procedure set out in paragraph 2(d) above."

42. Thus, under Article 8 of the BIT Agreement, the investor has the following options –

a) Invoking arbitration under Indian law;

b) If the countries are parties to the Convention on the Settlement of Investment Disputes, the disputes can be referred to ICSID;

c) To seek conciliation of the disputes under the UNCITRAL Conciliation Rules;

d) To seek adjudication of the disputes by an *ad-hoc* Tribunal in accordance with the UNCITRAL arbitration rules.

43. India is not a party to the ICSID convention, though the ICSID mechanism is sometimes invoked by parties. Thus, in terms of arbitration the investor could have invoked arbitration in accordance with the Arbitration and Conciliation Act, 1996 or sought constitution of an *ad-hoc*

Arbitral Tribunal under the UNCITRAL Rules. In the present case, the investor has opted the latter.

44. Article 21 of the UNCITRAL Rules of Arbitration reads as under:

> *"1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.*
> *2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*
> *3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counterclaim.*
> *4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award."*

45. The BIT Agreement in the present case is governed by the UNCITRAL Rules. The Tribunal constituted under these Rules has the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement. The objection to jurisdiction is to be raised not later than the filing of the statement of defence. The Arbitral

Tribunal is expected to, in general, rule on its jurisdiction as a preliminary issue.

46. A perusal of Article 21 shows that the Tribunal is governed by the principle of *kompetenz-kompetenz*, which, in effect, means that the Tribunal can rule on its own jurisdiction. On this aspect, the judgment in ***Vodafone Judgment (supra)*** observes as under:

> *"134. The principle of kompetenz-kompetenz, is recognised in Article 21 of the UNCITRAL Arbitration Rules, 1976 and the same is explicitly engrafted in the India-United Kingdom BIPA. It is generally accepted that an arbitral tribunal has the power to investigate its own jurisdiction.*
> *135. The principle that arbitrators have the jurisdiction to consider and decide the existence and extent of their own jurisdiction is variously referred to as the kompetenz-kompetenz principle or the 'who decides' question.*
> *136. Under the doctrine of kompetenz-kompetenz, the arbitrators are competent to determine their jurisdiction although the effective exercise of that jurisdiction remains subject to the inherent competence of the seat-court (i.e. the place of arbitration as stipulated in the agreement or as fixed by the arbitrators/parties) to decide, in relation to an injunction to restrain international arbitration, whether a particular dispute falls within the scope of the arbitration agreement.*
> *137. Whether the arbitrators under the India-United Kingdom BIPA choose to stay the arbitral proceedings properly brought before them, whilst related arbitration proceedings are pending is entirely a matter for them under the doctrine of kompetenz-kompetenz and the circumstance that arbitrators may do so cannot form an appropriate basis for the National Court to restrain the*

arbitration.

...

139. This Court is of the opinion that it should apply the principle of kompetenz-kompetenz with full rigour as India-United Kingdom BIPA arbitral tribunal would be better placed to assess the scope of the two BIPA arbitration proceedings and the likelihood of parallel proceedings and abuse of process."

47. The continuation of the arbitral proceedings under the BIT, at this stage, may *per se* not be contrary to public policy. It is a principle of public policy that the Government has to honour its commitments including bilateral ones. The representations made by any state under either a bilateral or multilateral treaty is what holds the community of nations together. The adherence to treaties is therefore not just a contractual stipulation but a solemn commitment by a sovereign nation. Thus, the continuation of arbitral proceedings is the rule and not the exception.

48. In ***Board of Trustees of the Port of Kolkata Vs. Louis Dreyfus Armatures SAS [G.A. 1997 of 2014 decision dated 29th September, 2014]*** the Calcutta High Court held that the question of whether an entity is to be treated as an investor under the BIT Agreement is to be determined by the Arbitral Tribunal. The observation of the Court is as under:

"The bilateral treaty is between the two sovereign nations. An investor under the treaty has been given certain special rights and privileges which is enforceable under the treaty. Whether the notification of claim falls within such parameters and the Defendant No.1 could be treated as an investor is a matter to be decided by the Arbitral Tribunal duly constituted under the relevant rules. In the event, the preliminary objections are overruled and the Arbitral Tribunal is of the opinion that the matter can proceed

and continuation of such proceeding would not be a recipe for confusion and injustice.
The Union of India would be required to contest the matter on merits"

49. The BIT Agreement in the present case defines `investor' as under:

> "*"investor" means in respect to either Contracting Party:*
> i. *the "national", that is a natural person deriving his or her status as a national of that Contracting Party from the relevant laws of that Contracting Party; and*
> ii. *the "company that is a legal person, such as a corporation, firm or association, incorporated or constituted in accordance with the law of the Contracting Party;"*

50. There are no exceptions to the definition of 'investor' as are contained in several BIT agreements which exclude entities indirectly owned or controlled by citizens of a contracting State. The BIT Agreement has to have specific provisions, if such exclusions are to be read into the definition of *`investor'*. The BIT between India and Mauritius subject matter of the present case was executed in 1998 with effect from 20th June 2000.

51. It is seen that due to issues that have arisen in various disputes like the present case, recently, in 2016, the Union of India has introduced a `Model Text for the Indian Bilateral Investment Treaty', the provisions of which are different from the BIT Agreement which is the subject matter of the present dispute.

52. The arbitral proceedings, at the moment, are however, governed by the BIT that is currently in force between the parties. The proceedings in the present case commenced way back in 2013 when the notice invoking

arbitration was issued. The Tribunal has been constituted in May 2018. Thereafter the first hearing of the Tribunal was scheduled for 28th January 2019. Prior to the first hearing of the Tribunal, the Republic of India has challenged the jurisdiction of the arbitral tribunal to proceed with the arbitration. While holding that the jurisdiction of this Court is not ousted from hearing the present suit and that there is no acquiescence by the Republic of India to the jurisdiction of the Arbitral Tribunal, which estops it from approaching this Court, it is held that the question as to whether Khaitan Holdings is a genuine `investor', based out of Mauritius, which can invoke the jurisdiction of the Arbitral Tribunal is a question to be determined by the Arbitral Tribunal constituted under the BIT Agreement. It is nigh possible that the foreign investor is not a real investor but Defendant no.3 Sh. Ishwari Prasad Khaitan, posing as one. The Arbitral Tribunal would, as part of its enquiry, look into this issue as to whether Khaitan Holdings is a *bona fide* investor and whether the invocation of the arbitration clause by Khaitan Holdings is an attempt to take unfair advantage as held in the case of ***Phoenix Action Ltd Vs. The Czech Republic (ICSID Case No. ARB/06/5).***

53. The grounds on which the Republic of India seeks an anti-arbitration injunction are inter alia as under:

- That Khaitan Holdings is not a genuine investor due to the clear link and control by Sh. Ishwari Prasad Khaitan and Smt.Kiran Khaitan of both Khaitan Holdings (Mauritius) and Loop Telecom;
- That the BIT cannot be invoked by an entity, though incorporated in Mauritius, but is actually controlled by Indian citizens;
- That there has been no expropriation as due process has been

followed and the decision to cancel the licences was rendered by the Supreme Court of India in public interest;

- That the entire foreign investment, being through the automatic route, was subject to Indian laws under the UASL;
- That Loop Telecom has already availed of its remedies against the cancellation of its licences under Indian law and hence rights under the BIT stand waived;
- Overlapping nature of the claims raised by Loop Telecom before TDSAT and Defendant no.1 in the arbitral proceedings;

54. All the above grounds, are those that can be that with and decided by the Arbitral Tribunal. The arbitration having been invoked in 2013 and the Tribunal having been constituted and being seized of the dispute, it is not for this Court to adjudicate on these issues. The above issues ought to be raised by the Republic of India before the Arbitral Tribunal, which under Article 21, would rule upon the same. The proceedings which are already underway cannot be termed as being oppressive, vexatious or an abuse of process at this stage. The prayer for ad-interim relief seeking stay of the arbitral proceedings commenced by Khaitan Holdings under the BIT, is accordingly rejected, at this stage.

55. The observations made above are merely *prima facie* in nature and are not to be construed as an opinion on the merits of the matter.

56. Defendants to file their replies within two weeks and Rejoinder within two weeks. List on 5th March, 2019

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57. Let the plaint be registered as a suit.

58. Since Defendants 2 to 5 are yet to enter appearance and formal notices

and summons by the Court are yet to be served, it is directed that the summons and notices be served on all Defendants by all modes. *Dasti* in addition.

59. The summons to the Defendants shall indicate that a written statement to the plaint shall be positively filed within 30 days from date of receipt of summons. Defendant No.1 has put in appearance through counsel. Let a written statement be filed by Defendant No.1 within 30 days as well. Along with the written statement, the Defendants shall also file an affidavit of admission/denial of the documents of the Plaintiff, without which the written statement shall not be taken on record.

60. Liberty is given to the Plaintiff to file a replication within 15 days of the receipt of the written statement. Along with the replication, if any, filed by the Plaintiff, an affidavit of admission/denial of documents of the Defendants, be filed by the Plaintiff, without which the replication shall not be taken on record. If any of the parties wish to seek inspection of any documents, the same shall be sought and given within the timelines prescribed under the Delhi High Court (Original Side) Rules, 2018.

61. List before the Joint Registrar for marking of exhibits on 18th April, 2019. It is made clear that any party unjustifiably denying documents would be liable to be burdened with costs.

62. List before Court on 5th March, 2019.

63. A copy of this order be given *dasti* under signature of the Court Master.

PRATHIBA M. SINGH
JUDGE

JANUARY 29, 2019
Rekha/Rahul/dk