

# Union Of India vs Khaitan Holdings (Mauritius) Limited & ... on 28 January, 2019

**Author: Prathiba M. Singh**

**Bench: Prathiba M. Singh**

\$~19

\* IN THE HIGH COURT OF DELHI AT NEW DELHI  
+ 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  
ORDER

% 28.01.2019

1. There are several factual and legal issues that arise in the present case that require determination by this Court. The said issues, inter alia, are: -

(a) Whether a judgment of a Court could be made the basis for invocation of arbitration under a Bilateral Investment Treaty entered into between the Republic of India and a foreign country?

(b) Whether the Bilateral Investment Treaty between the Republic of India and the Republic of Mauritius, is meant to only promote and protect genuine foreign investors and not Indian citizens posing as foreign investors?

(c) Whether the investor in this case, Khaitan Holdings (Mauritius) Limited, is barred from invoking the jurisdiction of the Arbitral Tribunal owing to clauses in the UAS License Agreement, which bind Loop Telecom Ltd, as also Khaitan Holdings (Mauritius) Limited which is the investor in Loop Telecom Ltd?

(d) Whether Loop Telecom Ltd, having invoked the jurisdiction of TDSAT and the said two orders passed having acquired finality, can investors in Loop Telecom Ltd seek compensation under the BIT in the arbitral proceedings?

(e) Whether the Republic of India has acquiesced/ participated in the arbitral proceedings and is hence estopped from invoking jurisdiction of this Court?

(f) Whether Khaitan Holdings (Mauritius) Limited (including its predecessor) is actually a Mauritian investor which can invoke the BIT as the beneficial owners of Khaitan Holdings (Mauritius) Limited and/or the group companies are Indian citizens?

(g) Whether the principle of Kompetenz-Kompetenz applies and thus, parties should be relegated to the Arbitral Tribunal?

(h) Whether under Rule 21 of the UNCITRAL rules of arbitration, the Tribunal should be determine its own jurisdiction?

(i) Whether the issues raised relate only to the jurisdiction of the Arbitral Tribunal or is the existence of the arbitration agreement in question?

(j) Whether the continuation of the arbitral proceedings be contrary to public policy?

2. Parties have addressed detailed submissions on the above issues at the interim stage. The application moved by Defendant No.1 before the Arbitral Tribunal, seeks the following reliefs: -

"For the reasons set out in this 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, and case number 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 injury, 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

(g) such further or alternative relief as the Tribunal may deem appropriate."

3. The submission of the Ld. ASG on behalf of the Plaintiff is that the Indo-Mauritius Bilateral Investment Treaty is meant to protect and promote genuine foreign investment. It is not meant to allow Indian citizens, residing in Delhi, who are the beneficial owners of a Mauritian entity to seek arbitration against the Republic of India under the said Treaty. He submits that the said proceedings are oppressive, vexatious and also constitute abuse of process.

4. Mr. Dayan Krishnan, Ld Sr. Counsel appearing for Defendant no.1, has raised several objections as to the maintainability of the present suit. Opposing the grant of any interim relief, he submits that the arbitration was invoked way back in 2013 and the Plaintiff has also nominated its arbitrator. The Chairman of the Tribunal was appointed in 2018 and the first date of hearing is 28th January 2019, i.e., today. The Plaintiff having participated in the proceedings, ought to be relegated to the Arbitral Tribunal and the Tribunal ought to rule on its own jurisdiction under Rule 21 of the UNCITRAL Rules, governing the arbitration.

5. Submissions have been made by both the Plaintiff and the Defendant no.1. The other defendants have chosen not to appear. On a query from the Court it is submitted that Mr. Ishwari Prasad Khaitan held the shareholding in Khaitan Holdings (Pvt) Ltd until one and half years ago. The exact shareholding of Defendant no.1 currently is not clear to the Court. The issues enumerated above, are factual and legal issues of importance. The Arbitral Tribunal is scheduled to assemble today at 2:30 pm IST. Considering the nature of reliefs sought before the Arbitral Tribunal, it is clear that before this Court can take a view on the above issues, if the application is allowed to be decided by the Arbitral Tribunal, irreparable harm would be caused to the Plaintiff. Considering the voluminous material placed before the court and the issues that are to be determined, even at the prima facie stage, Defendant no.1 Khaitan Holdings (Mauritius) Limited, is directed to seek postponement of the hearing of its application seeking interim relief before the Arbitral Tribunal till tomorrow.

6. List for pronouncement of orders on 29th January, 2019 at 10:30 am.

Dasti.

PRATHIBA M. SINGH, J.

JANUARY 28, 2019 Rekha