

Govt moves to speed up appeal as 2G-linked firm seeks damages

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The Supreme Court had in 2012 cancelled spectrum and licences granted to eight companies, finding that the whole process was “illegal”.(Mint File)

The Prime Minister’s Office (PMO) wants the appeal process in the 2G spectrum case to be accelerated, as telecom companies begin to seek international arbitration that could potentially result in awards for compensation worth billions of dollars, at least three officials aware of the PMO’s intervention said. Over the past three months, the PMO held a series of meetings with the attorney general (AG), the cabinet secretary and CBI to express its concern over the slow pace at which the appeal process is moving, the officials said on condition of anonymity.

It asked that the process be speeded up and a strategy devised to avoid compensation payments sought under Bilateral Investment Treaties (BIT).

The PMO and the office of the AG declined to comment on the matter. CBI did not respond to emails requesting comment.

Following PMO's directive, attorney general KK Venugopal held a meeting on March 1 with the cabinet secretary, the solicitor general and officials from the Department of Telecommunications, CBI and Enforcement Directorate, where he said the government needed "to act with great sense of urgency", and ensure "a dedicated team of lawyers adept in criminal proceedings are engaged" so that the appeal by CBI and ED reaches a conclusion as swiftly as possible, according to the documents detailing the sequence of events of the meeting accessed by HT.

"The attorney general has said that we should pursue the criminal appeal strongly and take it fast forward so that government doesn't have a situation where arbitration tribunal decision arrives before the criminal appeal [at Delhi high court] and it will have to pay huge compensation," a CBI officer, one of the officials cited in the first instance, said.

The PMO stepped in after Khaitan Holdings (Mauritius) Ltd, a company named by CBI and ED in the 2G case, invoked arbitration proceedings at the International Arbitral Tribunal (IAT) in The Hague against the government. A decision on the appeal is likely by December 2020, when the next date for hearing in the matter is scheduled at the IAT, officials from the DoT, CBI and ED, who were cited above, said. Officials say that other telecom companies may follow suit. Officials at DoT estimate that the government may have to pay over \$2 billion, including interest, as compensation to Khaitan Holdings, which had a stake in Loop Telecom, for the cancellation of its 2G licence if its challenge is upheld.

IP Khaitan, chairman of Khaitan Holdings, and Kiran Khaitan (his wife and director of the company), who were named as suspects in the 2G case, have been acquitted by an Indian court as there had been "no criminality" in the way it had acquired 2G spectrum and license, the firm has argued.

Nalin Khaitan, vice-chairman of Khaitan Holdings, said, “We have asked for compensation on the basis of investment made by KHML in India, including the interest and losses, and we hope to get it.”

Khaitan Holdings Mauritius Ltd is a Mauritius-based company that invested in Loop Telecom, which had applied for 2G licences. Since Khaitan Holdings is a foreign investor, it has invoked a BIT with Mauritius and went into arbitration. A BIT is a reciprocal engagement, promotion and protection of investments in each other’s territories by companies based in either country.

A special CBI court in December 2017 acquitted all 21 accused by the CBI in the 2G case including former telecom minister and Dravida Munnetra Kazhagam (DMK) leader A Raja, DMK’s Kanimozhi, corporate leaders, government officials and telecom companies, saying investigative agencies had “miserably failed” to prove charges of corruption in the 2008 allotment of second generation spectrum and licences.

The Supreme Court had in 2012 cancelled spectrum and licences granted to eight companies, finding that the whole process was “illegal”. Loop Telecom, Videocon, Etisalat DB and Unitech were among the companies that had their licences revoked.

The scandal dogged the then Congress-led United Progressive Alliance government for much of its second term in office and was one of the contributors to its massive defeat in the 2014 general election. In 2010, a Comptroller and Auditor General of India (CAG) report found a notional loss of ₹1.76 lakh crore of revenue to the exchequer because precious spectrum had been given away.

The CBI and ED challenged the acquittals in the Delhi high court in March last year.

The DoT has flagged that there have been eight hearings in the high court since then but “nothing substantive” has taken place.

“At the current pace, unless emergent efforts are undertaken, it is likely that award from the Tribunal may be announced before the Delhi high court takes a view on the

appeal in the 2G case,” DoT recently wrote to the solicitor general, Tushar Mehta, according to the documents accessed by HT and cited above.

“Any adverse decision against Republic of India in the arbitration matter may lead to filing of further cases by other claimants too,” the DoT added.

After Khaitan Holdings began arbitration proceedings, the government may face four more similar proceedings at the IAT invoked by the companies whose licences were cancelled, according to government officials aware of the matter.

The PMO, the cabinet secretary, the attorney general and the solicitor general all agree that “this needs to be pursued with the utmost urgency”, said two officials in the CBI and the DoT. The DoT and the CBI are already in touch with the solicitor general to expedite the appeal in the HC, the CBI official cited above, said.

The government has argued that since IP Khaitan, the company’s chairman, is an Indian citizen, he could not take advantage of the BIT between India and Mauritius, which 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. To this, Nalin Khaitan said, “KHML is fully compliant with the BIT agreement. IP Khaitan has been an NRI (non-resident Indian) since 1992 and as long as an investor has fulfilled the legal requirements of Mauritius, then he/she is entitled for protection under the treaty.”

Vyapak Desai, an international arbitration expert and head of the dispute resolution and investigation practice at legal firm Nishith Desai Associates, said: “As part of bilateral investment treaty (BIT), which India has signed with 75 countries, it is government’s obligation to protect the investment of foreign investors. So, if the government fails in its obligation, then the investor from a particular country we have a treaty with can invoke the arbitration because of government’s action or inaction. In the 2G case, since the licenses were cancelled on account of arbitrary and illegal allotment of licenses by the government itself, it has become the basis of the claim by the foreign entity holding such license before international arbitration tribunal.”