



Pilgrims keep warm around a fire next to a satellite dish in Tent City during the Kumbh Mela at night in Prayagraj, Uttar Pradesh, India. (Photographer: Prashanth Vishwanathan/Bloomberg)

## Antrix-Devas: Government's 'Winding-Up' Move A Masterstroke Or Desperate Attempt?

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Rarely do tribunals move as swiftly as the Bengaluru bench has in the Antrix-Devas matter. Just a day after the central government directed Antrix Corporation Ltd. to file a winding up petition against Devas Multimedia Pvt. Ltd., the bench appointed a provisional liquidator.

This even as the enforcement hearing for the \$1.2 billion arbitral award is due to start at the Delhi High Court. Devas is seeking to enforce the 2016 arbitral award that it won against Antrix, the commercial arm of the state-run Indian Space and Research Organisation.

Experts BloombergQuint spoke with opined that the government's objective could be two-fold: one, get a finding of fraud from the National Company Law Tribunal and use it as a ground to challenge enforcement of the award; and two, take over the management of Devas via a liquidator to negate the company's claim against Antrix.

It is possible that the move adopted by the central government to prefer the application before NCLT is motivated with mala fides in order to pre-empt the arbitration proceedings going forward, Tushar Cooper, senior counsel at the Bombay High Court, said.

If the company is in the hands of the liquidator, the government could have a major say in how the affairs of Devas are conducted- they may even seek to withdraw the award's enforcement proceedings.

### **Tushar Cooper, Senior Counsel, Bombay High Court**

#### **Antrix-Devas Saga So Far**

Two international tribunals—the Permanent Court of Arbitration at The Hague and International Chamber of Commerce – had concluded that Antrix's repudiation of its contract with Devas was unlawful. In 2016, the PCA had found India in breach of the India-Mauritius Bilateral Investment Protection Agreement citing violation of fair and equitable treatment clause and expropriation of the investors' foreign investment.

The arbitration proceedings pertained to the 2005 agreement to license a particular frequency of satellite spectrum to Devas by Antrix for providing high-speed internet services. In return, Devas had agreed to pay reservation and leasing fees for which it raised funding from investors. In 2011, this contract was cancelled by the Indian government.

By 2019, two sets of Devas' foreign investors had also won awards under Mauritius and Germany-India BIT. Devas then filed execution proceedings in various jurisdictions. In October last year, a U.S. federal court [confirmed](#) the ICC award and directed Antrix to pay up.

But within a week of this judgement, the Supreme Court of India put the arbitral award in abeyance and directed the Delhi High Court to determine if there's a case for it to be set aside. The government argued before the apex court that it has discovered a serious fraud in the entire series of transactions leading up to the disputes, including the arbitration agreement.

And this week, the central government authorised Antrix to initiate winding up proceedings against Devas under Companies Act, 2013.

While admitting the petition, the NCLT noted that while various proceedings are pending to enforce the arbitral award, there's no bar in initiating winding up proceedings.

**"We are of the prima facie opinion that incorporation of Devas and obtaining a contract in a fraudulent manner that too within a short time, without having requisite experience, would not justify its continuance on the rolls of Registrar of Companies, Bangalore." - NCLT Order**

### **Antrix-Devas: The Road Ahead**

The NCLT has allowed the provisional liquidator to –

- Take control of Devas' management.
- Custody or control of all the property, effects and actionable claims to which the company is or appears to be entitled to.
- Take necessary measures to protect and preserve the company's properties and avoid their misuse.

Appearing for Devas, senior counsels Sajan Poovayya and Rajiv Nair have asked the court for time to file a response.

One of the arguments against the NCLT order would be that there is no fit case made out for fraud and the whole exercise is motivated to prevent the enforcement of the award, Cooper pointed out.

If this is appealed, the court may apply the test laid down by the apex court in [63 Moons case](#) as to whether this was a fit exercise of power by the government. For that, the government will need to prove that a fraud has been played on it and if it fails to discharge that burden, the ground for winding up would fail, he added.

What the government appears to want is an adjudication on fraud by the NCLT rather than the court. Obviously, a court will carry out a far more stringent evaluation by saying you have to lead evidence, give the right to cross examine etc. This may be circumvented in NCLT which may proceed on the basis of affidavits.

**Tushar Cooper, Senior Counsel, Bombay High Court**

The entire exercise could be construed as an indirect way of sidestepping the arbitral award proceedings, Cooper added.

It'll be difficult to persuade the high court or the Supreme Court to set aside two arbitral awards by alleging fraud at this stage, Vyapak Desai, head of dispute resolution at Nishith Desai Associates pointed out.

The strategy would be how to bring in the element of fraud before the high court to set aside the award. The answer now is NCLT's prima facie order on fraud.

#### **Vyapak Desai, Head - Dispute Resolution, Nishith Desai Associates**

The government has also ensured that it doesn't have to pay any upfront amount to Devas.

In its November order, the apex court had said that Devas would be 'entitled to seek a deposit of the sum awarded or a part thereof before the Delhi High Court. The same day, the central government promulgated an [Ordinance](#) amending the arbitration law. It said that an unconditional stay must be granted where a prima facie case of fraud is made out in the making of the award or the agreement.

Through this Ordinance, the government may now not go out of pocket today, Desai said. And the NCLT order would become the basis of arguments to set aside the award on grounds of fraud, he added. 'The grounds to set aside an arbitral award are very narrow but now, the high court may find it hard to ignore NCLT's findings.'