

**Devas V. Antrix: A Judicial Crunch for Arbitration in India****Dr. Monika Jain<sup>1,\*</sup>****Abstract**

*A corporation's dissolution is a legal procedure. It is a method via which a company's operations come to an end owing to specific events described in the Companies Act and its assets are managed for the benefit of its shareholders and creditors. However, in the Devas-Antrix case, a firm was wound up for the first time for fraud, which is now a reason for winding up under Section 271 of the 2013 Companies Act. In light of this recent Supreme Court decision, the following paper will assess fraud as a foundation for winding up. This article's goal is to examine the winding-up process in light of both the 1956 Statute and the 2013 Act. It will also make an effort to analyse the long-term effects of the Supreme Court's ruling on corporate fraud and any future precedents it may set.*

**Keywords:** agreement, arbitration, bilateral treaty, corporate, fraud, NCLT, Supreme Court

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**Introduction**

An order for the wrapping up of Devas Multimedia Pvt. Ltd. and Anr (Devas) was recently issued by the National Company Law Tribunal (NCLT) Bengaluru Bench in the case of Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd. and Anr. Devas had been operating fraudulently since the company's existence, according to the National Company Law Tribunal (NCLT), which made this determination while issuing an order under Section 273 of the Companies Act, 2013. In September 2021, the NCLAT upheld this NCLT ruling. In January 2022, the Supreme Court dismissed Devas Multimedia's appeal of the NCLT and NCLAT rulings authorising the winding up of the company.<sup>2</sup> The choice is significant for a variety of reasons. First of all, the ruling

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<sup>2</sup> Devas Multimedia – Devas Multimedia Pvt. Ltd. Vs. Antrix Corporation Ltd. & Anr. – Supreme Court, IBC LAWS, 2022).

represents the first instance of a firm being wound up due to fraud under the current system of Company Law. The second issue is winding up procedures when a firm is concurrently involved in both criminal and arbitral processes. In this article, we take a quick look at the case's facts and the Supreme Court's judgements.<sup>3</sup> According to Sections 271 and 272 of the Companies Act, 2013, the NCLAT ordered the liquidation of Devas in 2021 in response to a petition submitted by Antrix, the commercial and marketing arm of the Indian Space Research Organisation. Devas was accused of fraud.<sup>4</sup> The Supreme Court's ruling is the most recent twist in the ostensibly endless Devas narrative, which began in 2005. It happens at a time when Deva's international investors have successfully attached Indian assets in numerous foreign countries, including Canada and France, in order to recoup the money that India owes them as per two bilateral investment treaty awards.<sup>5</sup> Additionally, following the SC's decision, Devas' foreign investors filed a new BIT claim against India, claiming that the nation is making unjustified efforts to thwart the enforcement of a commercial arbitration award which Devas had won against Antrix in accordance with the International Chamber of Commerce's rules, back in 2015.<sup>6</sup> This brief explains the lessons India can take away from this experience as the Devas case develops. To understand why India opted to withdraw the contract, the first Section of the Article recounts the case's history. The BIT claims were made against India as a result of the termination of the Devas-Antrix contract. The final portion investigates India's omission to bring up Devas' fraud before the BIT arbitration tribunals. The future wraps up by outlining the most important lessons India may take away from the entire incident.<sup>7</sup>

## Background

Devas and Antrix inked a contract in 2005 under which the latter would use satellite spectrum in the S-band that Antrix had leased to offer multimedia services. Three Mauritian investors CC/Devas, who filed the first BIT lawsuit against India were among the numerous

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<sup>3</sup> Devas Multimedia Private Ltd. v. Antrix Corporation & Anr., Civil Appeal No. 5766 of 2021.

<sup>4</sup> The Hindu, 9 Jan 2022

<sup>5</sup> The Hindu 13 Jan 2022

<sup>6</sup> CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India, PCA Case No 2013-09, Award on Jurisdiction and Merits, July 25, 2016 CC/Devas v. India).

<sup>7</sup> The Indian Express, 4 Feb 2022

international investors supporting the Devas-Antrix project.<sup>8</sup> One of the top telecommunications firms in the world, Deutsche Telekom, filed the second BIT lawsuit against India in the cases CC/Devas v. India and DT v. India.<sup>9</sup> The Devas-Antrix agreement was determined by controversy soon after it was signed, with accusations of corruption and irregularities being levelled against the deal that the S-band spectrum was offered at throwaway prices, that Devas, a company founded by former ISRO officials in 2004 (just one year before the contract was signed) had secret knowledge about the commercialization of the S-band spectrum, and that ISRO's current officials colluded with Devas to facilitate the deal.<sup>10</sup>

The United Progressive Alliance administration terminated the agreement with Devas on February 17, 2011. Internally, the decision had already been decided much earlier: on June 30, 2010, the Indian Space Commission accepted the Department of Space's recommendation to void the Devas-Antrix deal.<sup>11</sup> Devas were not informed of the decision, which was instead made known to the general public in February 2011. Of course, there was no mention of suspicions of fraud or other wrongdoing in the sale in the formal justification for the annulment.<sup>12</sup> The deal was instead cancelled, according to the Cabinet Committee on Security of the UPA government, because of increased demand for allocation of spectrum in the interest of national needs, including the needs of railways, defence, paramilitary forces, and other public utility services, including societal needs. As a result, Antrix informed Devas that the contract was cancelled due to a major force.<sup>13</sup>

## Brief Facts

Antrix Corporation Ltd. (Antrix), which was established on September 28, 1992, in accordance with the Companies Act, 1956 is a fully owned subsidiary of the Indian government that reports

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<sup>8</sup> Express News Service, Devas' investors issue new arbitration notice to GoI over failed 2005 Antrix satellite deal, The Indian Express, February 4, 2022,

<sup>9</sup> CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India, PCA Case No 2013-09

<sup>10</sup> Surendra Singh / TNN / Oct 30, 2020, "ISRO: Devas Wins 9-year-old Legal Battle against Antrix as US Court Awards It \$1.2 Billion Compensation: India News - Times of India," The Times of India, accessed September 24, 2021.

<sup>11</sup> DT v. India, para 82

<sup>12</sup> CC/Devas v. India, para 468.

<sup>13</sup> Ibid

to the Department of Space. The Indian Space Research Organisation (ISRO), which offers a variety of goods and services, has a commercial division called Antrix.<sup>14</sup> Under the 1956 Act, Devas was officially established as a private corporation on December 17th, 2004 with the stated goal of providing digital multimedia services. On January 28, 2005, Antrix and Devas signed a written contract known as the Agreement.<sup>15</sup> Devas was creating a platform that could offer multimedia and information services to mobile receivers using satellite and terrestrial systems, according to the Preamble of the Agreement. Antrix had undertaken to construct, maintain, and launch two satellites in accordance with the Agreement, and to lease spectrum capacity on those satellites to Devas.<sup>16</sup> Devas pledged to provide multimedia broadband services across India using such satellites and frequency. Antrix terminated the Agreement on February 25, 2011, in compliance with the force majeure provision, as a result of some conflicts and altered Central Government policy decisions.<sup>17</sup> Devas utilised the arbitration provision of the Agreement after becoming irate over the termination. Finally, on September 14, 2015, the International Chamber of Commerce (ICC) awarded Devas, USD 562.5 million plus interest for the losses brought on by Antrix's improper repudiation of the Agreement.<sup>18</sup> Devas came under suspicion for a number of fraud schemes in the meantime. The Enforcement Directorate (ED) and the Central Bureau of Investigation (CBI) subsequently looked into the situation.<sup>19</sup> For violations of Sections 420 read in conjunction with Section 120B of the IPC and Sections 13(1)(d) read in conjunction with Section 13(2) of the Prevention of Corruption Act, 1988, the CBI filed a First Information Report (FIR) against Devas and its personnel on March 16, 2015.<sup>20</sup> The ED also submitted a report in ECIR No.12/BGZO/2015. Devas was found to be engaged in a number of criminal activities. As a result, Antrix requested permission from the Ministry of Corporate Affairs, Government of India, to begin the process of winding up Devas. The approval was granted on January 18, 2021.<sup>21</sup> Antrix appeared before the National Company Law Tribunal, Bengaluru Bench (NCLT) and asked for Devas to be wound up due to committing fraud in accordance with Section 271(e) of the Companies Act, 2013 (2013 Act) while investigations into the types of frauds committed

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<sup>14</sup> Company Act, 1956

<sup>15</sup> Company Act, 1956

<sup>16</sup> DT v. India, para 92

<sup>17</sup> CC/Devas v. India, para 470.

<sup>18</sup> CC/Devas v. India 468

<sup>19</sup> CC/Devas v. India 471

<sup>20</sup> CC/Devas v. India 288

<sup>21</sup> CC/Devas v. India 286

by Devas and other litigation were ongoing. After hearing from the parties, the NCLT issued a ruling on January 19, 2021, allowing the petition and naming an official liquidator affiliated with the Bangalore High Court as the provisional liquidator.<sup>22</sup>

After several court cases, the NCLT issued a final ruling on May 25, 2021, ordering Devas to be wound up. Devas appealed to the NCLAT after being upset by the winding-up decision. The NCLAT denied the appeal in a ruling on September 8, 2021. A former director of Devas and a shareholder appealed the NCLAT decision to the Supreme Court of the United Kingdom.<sup>23</sup> Devas challenged the NCLT and NCLAT's contested order, among other things, mostly on the following grounds:

- violation of the law requiring advertising prior to placing an order for winding up.
- The limitation barred the winding up petition.
- The prohibition against Antrix claiming fraud.
- False conclusions about how fraud will affect society.<sup>24</sup>

### **Arguments of Antrix**

- i. The NCLT's thorough findings, which are not subject to challenge in an appeal under Section 423 of the Companies Act, on the eight different types of fraud committed by Devas during the company's formation and administration.
- ii. The Agreement between Antrix and Devas, dated January 28, 2005, mentioned three elements: Devas Technology, Devas Services, and Devas Device, none of which existed at the time Devas was founded, the Agreement was signed, or the company was wound up.
- iii. The scandalous extent of the financial scams at issue.<sup>25</sup>

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<sup>22</sup> CC/Devas v. India 390

<sup>23</sup> Devas Multimedia Private Limited v. Antrix Corporation Limited, Judgment of the United States District Court for the Western District of Washington at Seattle, November 4, 2020

<sup>24</sup> Devas Multimedia Private Limited v. Antrix Corporation Limited, ICC Case No. 18051/ CYK, September 14, 2015.

<sup>25</sup> Devas Multimedia Private Limited v. Antrix Corporation Limited & Another, MANU/SCOR/07312/2022

## Supreme Court

The Hon'ble Supreme Court noted that the Apex Court did not view the inability to publish an advertisement as something that would automatically result in the dismissal of the petition for winding up in response to the Devas' argument regarding the requirement of publicity.<sup>26</sup> The NCLT Rules, 2016 (Rules), according to the Apex Court, give the NCLT the authority to waive the necessity to post an advertisement. According to the evidence, the Supreme Court determined that the NCLT's refusal to mandate the publishing of the petition's advertisement did not adversely affect any parties involved in the current dispute.<sup>27</sup> Although the NCLT may not technically be correct in citing the useless formality theory, the Apex Court determined that the standard of prejudice could be applied in particular light of the relevant claims of fraud. As a result, the Hon'ble Supreme Court was unable to uphold the claim that it was illegal for the NCLT to fail to order the publication of advertising.<sup>28</sup> The Apex Court concurred with the NCLAT's ruling and concluded that the claim that the matter was forever prohibited by limitation was tenable. When addressing the issue of limitation, the NCLAT determined that the fraud alleged by Antrix was not a single, transaction-specific act.<sup>29</sup> Additionally, the NCLAT had stated that the winding up was founded on numerous frauds that were discovered over a protracted period of time. The Apex Court stated that limitation was not necessarily comparable to a lighted matchstick to a train of cannon powder, further elaborating on NCLAT.<sup>30</sup> The date the limitation period starts need not be constant; it may change over time in response to the actions and inactions of the party that is the target of the lawsuit. If a company's business operations are being conducted fraudulently on an ongoing basis.<sup>31</sup> The Hon'ble Supreme Court then turned to the second issue, where Devas claimed that Antrix was barred from accusing Devas of fraud and requesting its dissolution. Regarding estoppel, Devas stated that the Agreement's termination notice was issued on the basis of force majeure rather than fraud.<sup>32</sup> Furthermore, there were never any claims of fraud made during the arbitral procedures. Last but not least, a claim that Antrix was not the victim of fraud was made in the Auditor's report for all

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<sup>26</sup> The NCLT Rules, 2016 (Rules)

<sup>27</sup> CC/Devas v. India, para 354

<sup>28</sup> DT v. India, para 288

<sup>29</sup> DT v. India, para 290

<sup>30</sup> DT v. India, para 292

<sup>31</sup> DT v. India, para 296

<sup>32</sup> DT v. India, para 390

years. The Supreme Court noted that Devas's arguments above would be fruitless.<sup>33</sup> It was noted that Antrix and government representatives were both named as suspects in the FIR for violations of the 1988 Prevention of Corruption Act. The Apex Court stated that the arbitration process began in 2013 and ended with the adoption of the verdict in September 2015.<sup>34</sup> Antrix could not have anticipated claiming fraud in the arbitration even before the fraud was discovered, according to the Hon'ble Supreme Court's opinion. Therefore, the Hon'ble Supreme Court came to the conclusion that the NCLT had correctly rejected the argument that Antrix was precluded from alleging fraud.<sup>35</sup> The Honourable Supreme Court similarly rejected all of Devas' other claims. Finally, it was argued that Antrix's real goal in wanting to wind up Devas was to deny Devas's access to the benefits of two earlier BIT verdicts as well as a unanimous decision made by the ICC arbitral panel, which was presided over by a former Chief Justice of India.<sup>36</sup> Devas stated that such efforts on the part of a corporation owned entirely by the Indian government would send incorrect signals to foreign investors. According to the Apex Court, the argument about the arbitral proceedings was without merit.<sup>37</sup> It was noted that if the seeds of a business partnership between Antrix and Devas were obtained by Devas's deception, then the Agreement and the arbitral awards, among other parts of the plant that sprouted from those seeds, are tainted with the poison of deception.<sup>38</sup> According to the Honourable Supreme Court, permitting Devas and its stockholders to profit from their fraudulent behaviour would send another bad message to the rest of the world. These conclusions led the Apex Court to conclude that no grounds for challenging the NCLT and NCLAT's orders could be sustained. As a result, the appeals were rejected without incurring any fees.<sup>39</sup>

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<sup>33</sup> DT v. India, para 363

<sup>34</sup> Conciliation and Arbitration Act, 1996

<sup>35</sup> CC/Devas v India, Procedural Order No. 7, December 21, 2016

<sup>36</sup> Judgement of Swiss Federal Court, December 11, 2018 [https://www.italaw.com/sites/default/files/case-documents/italaw10304\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw10304_0.pdf). See also Pushkar Anand, 15 Endnotes Antrix-Devas, BIT Arbitrations, and India's Quixotic Approach, The Wire, May 31, 2021,

<sup>37</sup> United States Department of State, Office of the Assistant Legal Adviser for International Claims and Investment Disputes

<sup>38</sup> DT v. India, para 115

<sup>39</sup> DT v. India, para 119

## Challenge the legal Proceedings in Multiple Foreign Jurisdictions

The next question is whether India can use this judgement to oppose the legal actions being taken to seize its assets in several foreign countries. This argument may or may not be accepted by foreign courts, and each court's strategy will differ depending on its jurisdiction.<sup>40</sup> Courts like to refrain from delving into the merits of the case and typically limit their consideration of the decision to solely procedural issues, especially in nations that are thought to be pro-arbitration.<sup>41</sup> However, courts in several jurisdictions have recently relaxed their stance of giving arbitral awards a great deal of reverence. Courts frequently annul arbitral verdicts in France, for instance, when there is evidence of dishonest cooperation between the investor and public authorities of the host state in winning the underlying contract.<sup>42</sup> The Paris Court of Appeal invalidated two awards made in favour of a French investor against the State of Libya in the case of *Sorelec v. Libya* in 2020 because the underlying transaction was tainted by corruption and thus went against the rules of international public policy.<sup>43</sup>

In dealing with the developments in the Devas case, India will find these precedents to be extremely helpful. Devas filed a new BIT claim against India in January 2022, citing the India-Mauritius BIT.<sup>44</sup> Devas claimed that India's attempt to ignore the ICC commercial arbitration award issued in its favour and against Antrix was demonstrated by the order to wind up the firm.<sup>45</sup> The new BIT claim is similar to the famous case *White Industries v. India*, which was filed against India for the excessive judicial hold-ups in Indian courts in determining the enforceability of a commercial arbitral ruling in *White Industries'* favour.<sup>46</sup> Although the facts of the Devas case are different from those of *White Industries*, India can use the accusation of fraud to refute Devas's new BIT claim.<sup>47</sup>

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<sup>40</sup> DT v. India, para 13

<sup>41</sup> New York Convention, 1958

<sup>42</sup> Conciliation and Arbitration Act, 1996

<sup>43</sup> *Sorelec v. Libya*, Paris Court of Appeal Decision on Application to Set Aside Final Award, November 17, 2020.

<sup>44</sup> Antrix-Devas, BIT Arbitrations, and India's Quixotic Approach, THE WIRE

<sup>45</sup> *White Industries Australia Limited v Republic of India*, Award, November 30, 2011.

<sup>46</sup> United States Department of State, Office of the Assistant Legal Adviser for International Claims and Investment Disputes.

<sup>47</sup> A bilateral investment treaty (BIT) is a treaty signed by two countries with the twin objectives of promoting and protecting foreign investment in each other's territory.



## Conclusion

The NCLT's decision, if confirmed on appeal, could, among other things, affect how the BIT arbitration decisions in the CC/Devas and Deutsche Telekom cases are implemented, according to the NCLAT and the Apex Court.<sup>48</sup> In order to have BIT arbitration rulings recognised and put into effect, CC/Devas and Deutsche Telekom are both presently involved in legal cases in the United States.<sup>49</sup> Given that Devas's dissolution has been mandated by the NCLT, the BJP administration may protest to the order's execution on the grounds that the Antrix-Devas agreement was illegal from the beginning due to fraud and corruption.<sup>50</sup> According to Article V(2)(b)24 of the 1958 New York Convention, India may argue that accepting and carrying out the ruling would be against US national policy and should be refused. Despite overwhelming agreement among lawyers, the Supreme Court has ruled that the public interest defence against foreign award enforcement must be applied narrowly in the United States.<sup>51</sup> If this is done, public policy can be defended against corruption. The NCLT has merely found that the company's operations are misleading, and not for any other reason, thus the US court is likely to reject this allegation.<sup>52</sup> The National Labour Relations Commission (NLCT) claimed in its decision that the Antrix-Devas agreement was fraudulent, but it lacked the authority to look into and confirm the pact's validity. However, no concrete evidence of the agreement's legitimacy has yet been offered.<sup>53</sup> The Supreme Court mandated that the case be sent to the Delhi High Court in November 2020. The International Chamber of Commerce arbitral judgement is currently the subject of a petition for reversal, and the ICC award has been suspended until the outcome of the appeal.<sup>54</sup> The Delhi High Court will look into the legitimacy of the Antrix-Devas business arrangement in light of allegations of corruption and fraud made against Antrix and Devas. The Indian government was expected to call for a temporary halt to enforcement operations in the US until the matter is resolved.<sup>55</sup> The Indian government appears to have a single objective in mind: to prevent the International Court of Justice ruling and the BIT arbitration decisions that have not

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<sup>48</sup> Deutsche Telekom v. India, PCA Case No. 2014-10.

<sup>49</sup> Ibid

<sup>50</sup> S. 243(a) of the Companies Act of 1956

<sup>51</sup> Article V(2)(b)24 of the 1958 New York Convention,

<sup>52</sup> Jetivia SA & Anr v. Bilta (UK) Ltd (In Liquidation) & Ors., MANU/UKSC/0024/2015

<sup>53</sup> Alan Redfern, 'The Practical Distinction Between the Burden of Proof and the Taking of Evidence – An English Perspective' in Alan Redfern and others (eds.),

<sup>54</sup> Gary Born, International Commercial Arbitration (2nd edn., Kluwer Law International 2014) §15.09B.

<sup>55</sup> The Insolvency and Bankruptcy Code, No. 31 of 2016,

yet been upheld by US courts from taking effect.<sup>56</sup> The Indian government has paid a high price for its inability to address the corruption problem in a timely manner. The only practical solution at this time is to expedite criminal proceedings and show beyond a reasonable doubt that those involved were corrupt and bought off.<sup>57</sup>

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<sup>56</sup> Andreas Reiner, 'Burden and General Standards of Proof' in Alan Redfern et al., *Arbitration International*, 1994, 320.

<sup>57</sup> Official Liquidator, Manasuba and Co. (Private) Ltd. vs. Commissioner of Police and Ors., MANU/TN/0327/1967.