Bharti Airtel Limited vs Vijaykumar V. Iyer on 3 January, 2024

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Bench: Dipankar Datta

2024 INSC 15

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 3088-3089 OF 2020

BHARTI AIRTEL LIMITED AND ANOTHER .....

VERSUS

VIJAYKUMAR V. IYER AND OTHERS .....

JUDGMENT

SANJIV KHANNA, J.

The present appeals raise an interesting question on the right to claim set-off in the Corporate Insolvency Resolution Process, when the Resolution Professional proceeds in terms of clause (a) to sub-section (2) of Section 25 of the Insolvency and Bankruptcy Code, 20161 to take custody and control of all the assets of the corporate debtor.

2. In order to decide the issue raised in these appeals, we are required to refer to the facts in brief:

> 2.1 In April 2016, Bharti Airtel Limited and Bharti Hexacom Limited2 1 For short, 'IBC'.

2For short- 'The appellants' or 'Airtel entities'. entered into eight spectrum trading agreements with Aircel Limited and Dishnet Wireless Limited3 for purchase of the right to use the spectrum allocated to the latter in the 2300 MHz band. The agreement was contingent on approval of the Department of Telecommunications4, Government of India. The DoT for grant of approval demanded bank guarantees in relation to certain licence dues and spectrum usage dues from the Aircel entities. Challenging this direction, the Aircel entities approached the Telecom Disputes Settlement and Appellate Tribunal5. By the interim order dated 3rd June 2016, TDSAT directed Aircel entities to submit the bank guarantees. As the Aircel entities did not have the means to procure and submit the bank guarantees for approximately Rs.453.73 crores, they approached the Airtel entities to submit

bank guarantees on their behalf to the DoT.

2.2 In terms of the eight spectrum transfer agreements, the Airtel Entities were to pay Rs.4,022.75 crores to the Aircel entities. The Airtel entities and Aircel entities entered into three Letters of Understanding whereby the Airtel entities agreed to furnish the bank guarantees to the DOT on behalf of the Aircel entities. The Airtel entities were to deduct Rs.586.37 crores from the 3For short- 'Aircel entities'.

4 For short- 'DoT'.

5 For short- 'the TDSAT'.

consideration payable to the Aircel entities under the spectrum transfer agreements. On the Aircel entities replacing the bank guarantees furnished by the Airtel entities and the Airtel entities receiving the bank guarantees from the DOT, Rs.411.22 crores were payable by the Airtel entities to the Aircel entities. 2.3 TDSAT vide order dated 9th January 2018 held that the DOT's demand of Rs.298 crores against the Aircel entities was untenable, and directed the DoT to return the bank guarantees to the Aircel entities. However, the bank guarantees were not returned by the DoT, which preferred Civil Appeal No. 5816 of 2018 before this Court. Cross-appeals were filed by Aircel entities. 2.4 This Court by order dated 28th November 2018 held at the interim stage, that the order of the TDSAT dated 9th January 2018, insofar as bank guarantees are concerned, shall be given effect to. However, the DoT did not return the bank guarantees. 2.5 In view of the aforesaid, the Airtel entities wrote to the bank seeking confirmation of cancellation of the bank guarantees. As the banks were reluctant, the Airtel entities approached this Court, which vide order dated 8th January 2019, directed that the bank guarantees shall be cancelled and shall not be used for any purpose whatsoever.

2.6 Thereupon the Airtel entities made a payment of Rs.341.80 crores due to the Aircel entities on 10th January 2019. The balance amount of Rs.145.20 crores was set-off by the Airtel entities on the ground that this amount was owed by the Aircel entities to the Airtel entities. According to Airtel entities, Rs.145.20 crores was the adjusted or the net amount payable by the Aircel entities towards operational charges, SMS charges and interconnect usage charges6 to the Airtel entities.

2.7 In the meanwhile, Corporate Insolvency Resolution Process was initiated against Aircel entities, namely Aircel Limited and Dishnet Wireless Limited. The Adjudicating Authority7, Mumbai Bench, admitted the petitions against Aircel Limited and Dishnet Wireless Limited vide the orders dated 12th March 2018 and 19th March 2018. 2.8 Claims on account of the interconnect charges were filed by Bharti Airtel Limited, including the claim on behalf of Telenor (India) Communications Private Limited8, in light of Telenor's merger with Bharti Airtel Limited, effective from 14th May 2018. Claim was also filed by Bharti Hexacom Limited. The total claim by the Airtel Entities was Rs.203.46 crores. However, the Airtel entities also 6For short- 'interconnect charges'.

7 Section 5(1) of IBC– "Adjudicating Authority", for the purposes of this Part, means National Company Law Tribunal constituted under Section 408 of the Companies Act, 2013 (18 of 2013). 8

For short- 'Telenor India'.

owed Rs.64.11 crores towards interconnect charges to the Aircel entities.

2.9 The claims submitted by the Airtel entities were admitted by the Resolution Professional to the extent of Rs.112 crores. Claim on account of receivable of about Rs.5.85 crores owed by Aircel entities to Telenor India, which had been merged with Bharti Airtel Limited, was not accepted.

2.10 By the letter dated 12th January 2019, the Resolution Professional for Aircel Limited, Dishnet Wireless Limited and Aircel Cellular Limited, wrote to Bharti Airtel Limited, stating that they had suo moto adjusted an amount of Rs.112.87 crores from the amount of Rs.453.73 crores payable by Airtel entities to Aircel entities, consequent to the discharge and cancellation of the bank guarantees. Bharti Airtel Limited was asked to pay Rs.112.87 crores to Aircel entities, which were undergoing Corporate Insolvency Resolution Process, failing which the Resolution Professional would be obligated to take steps for recovery. The Airtel entities objected on several grounds, and also claimed set-off of the amount due to them by the Aircel entities from the amount payable by them to the Aircel entities. Their reply and claim for set- off was rejected by the Resolution Professional. 2.11 The Airtel entities thereupon approached the Adjudicating Authority in Mumbai, who, vide order dated 1st May 2019 held that the Airtel entities had a right to set off Rs.112.87 crores from the payment, which was retained, and due and payable to Aircel entities. 2.12 This order was challenged by the Resolution Professional before the National Company Law Appellate Tribunal9. The NCLAT vide order dated 17th May 2019 allowed the appeal, inter alia, holding that set-off is violative of the basic principles and protection accorded under any insolvency law. Set-off is antithetical to the objective of the IBC. Reference was made to the non-obstante provisions in the form of Section 238 of the IBC. As moratorium under Section 14(4) applies till the date of completion of the Corporate Insolvency Resolution Process, which is till the resolution plan is approved or the liquidation order is passed, to permit set-off will be contrary to law. Further, the set-off being claimed is in respect of two separate and unrelated transactions. Meaning of set-off and types and principles of set-off.

3. Set-off in generic sense recognises the right of a debtor to adjust the smaller claim owed to him against the larger claim payable to his creditor.10 Philip R. Wood11 calls it a form of payment. Palmer12 9 For short- 'NCLAT'.

10 Philip R. Wood, Set-off and Netting, Derivatives, Clearing Systems, (Sweet & Maxwell 2007). 11 Ibid.

12 Kelly R. Palmer, The Law of Set Off in Canada (Canada Law Book 1993). notes a distinction between 'set-off' as in accounting, and 'set-off' as a defence. The former focuses on the practical effect of set-off which results in discharge of reciprocal obligations, while the latter focuses on set-off pleaded as a defence to a claim, albeit not as a 'sword'.

4. Set-off is given legal preference for three reasons. First, in economic terms, set-off is a form of security recognised in law. It is, however, not a security in a strict sense, but a right that enhances

provision of credit and acts as a stimulus to trade and commerce by giving a degree of confidence to parties dealing with each other. Secondly, it helps reduce litigation, promotes economy of time and is an efficient method in resolving debt between parties. Thirdly, natural equity requires that cross-demands should compensate each other by deducting the lesser sum from the greater.

5. At least five different meanings can be ascribed to the term 'set-off', namely, (a) statutory or legal set-off; (b) common law set-off; (c) equitable set-off; (d) contractual set-off; and (e) insolvency set-off.13 It is observed that the streams of common law and equity on the right of set-off have flown together and have so combined as to be 13 Jurong Aromatics Corporation Pte Ltd. and Others v. BP Singapore Pte Ltd. and Another, (2018) SGHC 215. (High Court of Republic of Singapore) in the modern era indistinguishable from one another.14 It is necessary to briefly explain the contours of contractual set-off, statutory/legal set-off, equitable set-off and insolvency set-off.

6. Contractual set-off is a matter of agreement, rather than a separate application of set-off. The parties are free to mutually agree on the outcomes they desire. Being consensual, when expressly stated, the normal rules of set-off regarding mutuality of credits or debts, liquid debts, and connected debts – aspects relevant and noticed below while dealing with statutory/legal set-offs or even insolvency set-off – may not apply. The contract, however, should be within bounds of legality and public policy.15 Further, the normal requirements of the law of contracts, viz. intention to create legal relationship, acceptance, consideration etc. should be established for a valid contractual set-off.16

7. Ascertaining the applicability of contractual set-off requires an assessment of the understanding whether the right is conferred by the agreement, as the court gives effect to the intention of the parties as to how they should deal.17 The right to set-off may be explicit in the words of the agreement, or can be gathered by 14 Federal Commerce and Navigation Co. v. Molena Alpha Inc., (1978) Q.B. 927. (Lord Denning) 15 Palmer, supra note 12, at 263.

16 Palmer, supra note 12, at 263.

17Ministre du Revenu national c. Caisse Populaire du bon Conseil, 2009 SCC 29 (S.C.C.) (Supreme Court of Canada) existence of oral or implied agreement to set-off, reflecting an understanding to the said effect. There are earlier judgments in common law countries that suggest that courts may rely on the equitable foundations of set-off to relax the evidentiary burden required to prove an agreement to set-off.18 It is suggested that courts accept slighter evidence of agreement to set-off than is usually required in order to establish disputed facts,19 but this is too broad a statement. Rather, the courts should consider that netting of cross dues is both legitimate and equitable, and in that context make an assessment of the relevant facts to decide whether or not the set-off rights are conferred.

8. Statutory or legal set-off is created by a statute. For example, Order VIII Rule 6 of the Code of Civil Procedure, 190820 states that where a suit for recovery of money is filed, the defendant can claim set-off against the plaintiff's demand for any ascertained sum of money 18 Jeffs v. Wood, [1723] 2 Eq Ca. Ab. 10.

19 Canadian Encyclopedic Digest, Release 3, “Personal Property” by Gloria Mintah, § 187, CD-ROM (Thomson Reuters Canada Limited, August 2009); See also Palmer, supra note 12, at 263. 20 Order VIII Rule 6. Particulars of set-off to be given in written statement.—(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off. (2) Effect of set-off.—The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set- off, but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

legally recoverable by the defendant from the plaintiff, but not exceeding the pecuniary limits of the jurisdiction of the court. It requires that both the parties should fill the same character as they fill in the plaintiff’s suit. The defendant may, at the first hearing of the suit, and not afterwards, unless permitted by the court, present the written statement containing particulars of debts sought to be set-off.21 For set-off in law, the obligations existing between the two parties must be debts which are for liquidated sums or money demands which can be ascertained with certainty. Both the debts must be mutual cross-obligations, that is, cross-claims between the parties in the same right.22

9. A few judgments of this Court and the High Courts allow the defendant to claim equitable set-off in respect of an unascertained sum of money payable as damages. Equitable set-off can also be claimed in respect of an ascertained sum of money.23 However, the claim for an equitable set-off must have a connection between the plaintiff’s claim for the debt and the defendant’s claim to set-off, which would make it inequitable to drive the defendant to a separate suit.24 It has been accordingly held that the claim for set-off should 21 For the purpose of the present decision, we need not examine the contours and conditions of Order VIII Rule 6 CPC.

22 Citibank Canada v. Confederation of Life Insurance Company, 42 CRB (3)(d) 288. 23 Ramdhari v. Premanand, 19 Cal WN 1183.

24 Maheswari Metals & Metal Refinery, Bangalore v. Madras State Small Industries Corporation, AIR 1974 Mad 39.

arise out of the same transaction, or transactions which can be regarded as one transaction. Equitable set-off is allowed in common law, as distinguished from legal set-off, which is allowed by the court only for an ascertained sum of money and is a statutory right. We shall be subsequently examining the right to equitable set- off while examining the provisions of the IBC.

10. Rory Derham on the law of set-offs observes that insolvency set-

offs should not be equated with equitable set-offs.25 This statement reflects the development of law in the United Kingdom, which has resulted in enactment of special provisions on set-off in case of insolvency. We need not examine in detail the law as applicable to insolvency set-off in the United Kingdom for the present decision, albeit it is relevant to state that they are broader and wider than the provisions of equitable set-off. Insolvency set-off under the law of the United Kingdom is permitted when there are mutual debts, mutual credits and other mutual dealings between the parties at the relevant cut-off time, which is essentially the stage of commencement of the liquidation process. We shall subsequently examine the term "mutual dealings" as applicable to liquidation proceedings in India.

25 Rory Derham, Derham on the Law of Set-Off (Oxford University Press 4th ed. 2010). Analysis of the provisions of IBC relating to the Corporate Insolvency Resolution Process, liquidation proceedings and application to the facts of present case.

11. In the present case we are examining and concerned with the provisions as applicable to the Corporate Insolvency Resolution Process in Chapter II Part II of the IBC, which consists of the compendium of Sections from 6 to 32A of the IBC. In the course of our discussion, we would also be referring to Section 53 of the IBC, which is a part of Chapter III Part II, and relates to the liquidation process.

12. At the outset we should record, that there is a difference between the Corporate Insolvency Resolution Process and the liquidation process of the IBC. The Corporate Insolvency Resolution Process focuses on and fosters rehabilitation, revival and resolution of the corporate debtor, whereas the liquidation process focuses on the constellation of assets of the company in liquidation, and distribution and payment to the creditors from the liquidation estate in terms of the order of preference set out in the insolvency statute.

13. Unlike the provisions of the Companies Act, 1956 or the Companies Act, 2013, IBC in the case of Corporate Insolvency Resolution Process does not give the indebted creditors the right to set-off against the corporate debtor. The earlier enactments – the Companies Act, 1956 vide Section 529, and the Companies Act, 2013 vide Section 325 (now omitted) – did permit set-off per the Provincial Insolvency Act, 1920, which enactment is now repealed. Accordingly, under the Companies Acts, in terms of the provisions of Section 46 of the Provincial Insolvency Act, 1920, indebted creditors' right to set-off against the corporate debtor was statutorily recognised subject to satisfaction of certain conditions. Significantly, in the case of partnerships and individual bankruptcies, Section 17326 of the IBC permits set-off. Regulation 29 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 201627 provides for mutual credits and set- off and reads:

> "29. Mutual credits and set-off.— Where there are mutual dealings between the corporate debtor and another party, the sums due from one party shall be set off against the sums due from the other to arrive at the net amount payable to the corporate debtor or to the other party." The title of the Liquidation Regulations states that they shall apply to the process under Chapter III Part II of the IBC. In other 26 Section 173. Mutual credit and set-off.—(1) Where before the bankruptcy

commencement date, there have been mutual dealings between the bankrupt and any creditor, the bankruptcy trustee shall—

(a) take an account of what is due from each party to the other in respect of the mutual dealings and the sums due from one party shall be set-off against the sums due from the other; and

(b) only the balance shall be provable as a bankruptcy debt or as the amount payable to the bankruptcy trustee as part of the estate of the bankrupt.

(2) Sums due from the bankrupt to another party shall not be included in the account taken by the bankruptcy trustee under sub-section (1), if that other party had notice at the time they became due that an application for bankruptcy relating to the bankrupt was pending. 27 For short- 'the Liquidation Regulations'.

words, the Liquidation Regulations are not applicable to Chapter II Part II of the IBC, which relates to the Corporate Insolvency Resolution Process.

14. Section 36(4) in Chapter III Part II of the IBC28 deals with the exclusion of assets that do not form part of the liquidation estate. Section 36(4) permits the Insolvency and Bankruptcy Board of India29 to specify assets which could be subject to set-off on account of mutual dealings between the corporate debtor and the creditor. When an asset is excluded from the liquidation estate, it is not available for distribution in the liquidation process. It follows that if a creditor exercises and is allowed set-off, then in terms of Section 36(4) of the IBC this creditor is given a preferred status over others, including the secured creditors, to the extent of the set-off value. 28 Section 36 (4). The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation—

(a) assets owned by a third party which are in possession of the corporate debtor, including—

(i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set- off in multilateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set off on account of mutual dealings between the corporate debtor and any creditor. 29 For short- 'the Board'.

15. The Liquidation Regulations have been framed in exercise of powers conferred on the Board by Sections 5, 33, 34, 35, 37, 38, 39, 40, 41, 43, 45, 49, 50, 51, 52, 54, 196 and 208 read with Section 240 of the IBC. Notwithstanding the omission in the Liquidation Regulations to refer to Section 36(4) of the IBC, set-off on account of mutual dealings is permitted in terms of Regulation 29 of the Liquidation Regulations. The sums due mutually can be set off to arrive at the net amount payable to the corporate debtor or the other party. The exclusion will result in reduction of the liquidation estate and therefore has consequences as noticed above. In the present case, we are not concerned with what is to be included and is a part, or not a part of the liquidation estate.

16. The expression 'mutual dealings' is the condition to be satisfied for insolvency set-off under Regulation 29. We will examine what is meant by the expression 'mutual dealings', and how insolvency set- off is different from contractual, statutory and equitable set-off.

17. Insolvency set-off under the United Kingdom insolvency law was examined in Re.: Bank of Credit and Commerce International SA (No. 8) 30, to imply that the set-off must relate to dealings prior to bankruptcy. It states in explicit terms that the requirement of 30 [1996] Ch. 245. (Appeal Committee of the House of Lords) mutuality is central to bankruptcy set-off and must be rigorously enforced. It is held that it is not the function of an insolvency set-off to confer a benefit to a debtor who has not been a part of mutual dealings, or to give preference to a creditor who has secondary or no liability. The insolvency set-off regime in the United Kingdom is wider than statutory/legal set-off or equitable set-off. However, there is a requirement that the debt should have been provable in the insolvency process.

17.1 An earlier decision in Stein v. Blake31 had held that the bankruptcy set-off applies to all claims from mutual credits or dealings prior to bankruptcy, including claims, which at the time of bankruptcy were due but not payable, unascertained or contingent. This is supplemented by the United Kingdom insolvency set-off regime permitting the estimation of liabilities and calculation of trends. The parties are not required at any particular time to meet and calculate the extent of each other's liabilities. Further, the account is a deemed account by which the claim and counterclaim are automatically reduced to a net balance. The original choses in action, that is, the claim and the counterclaim, are in effect replaced by a claim to a net balance. We must also note that the

provisions 31 [1996] A.C. 243. (House of Lords) of Section 323 of the Insolvency Act, 1986, as applicable in the United Kingdom uses the expressions "mutual credits, mutual debts, or other mutual dealings between the bankrupt and any creditor of the bankrupt, proving or claiming to prove for a bankruptcy debt." Further, Rule 2.85 of the Insolvency Rules, 1986, applicable to the administration, which is similar to the Corporate Insolvency Resolution Process, states that at the time of distribution, only the balance (if any) of the account held by the creditor is provable in the administration. Alternatively, the balance (if any) owed to the company is payable to the administrator as a part of the assets, subject to the exceptions as provided. 17.2 There are also decisions as in the case of National Westminster Bank Ltd. v. Halesowen Presswork & Assemblies Ltd.32, which highlight the mandatory nature of insolvency set-off in the United Kingdom. The Insolvency Rules, 1986 imply that the right to set-off co-exists with the moratorium during administration, because of the time at which the dues owed to each party are calculated.33 The set-off does not occur automatically once the company enters into the administration process. It applies once the intention to distribute the assets is announced by the administrator. Also, the doctrine of set- 32 1972 AC 785.

33 Derham, supra note 25, ¶6.124.

off does not apply in case of company voluntary arrangement under Part I of the Insolvency Act, 1986. Rory Derham observes that the insolvency set-off section not being expressly applicable to a company voluntary arrangement, any set-off, in the absence of contractual right of set-off, does not apply. He observes that the right to set-off in the absence of contractual right to set-off depends on the statute of set-off and equitable set-off. Further, a claim against the corporate debtor incurred after initiation of the administration cannot be set-off against the debtor's cross-claim for lack of mutuality. A claim against the debtor after initiation of administration is not against the corporate debtor itself.

18. The High Court of Australia in Gye v. McIntyre34 states that the word 'mutual' conveys the notion of reciprocity rather than that of correspondence. Mutuality means that the demands must be between the same parties and they must be held in the same capacity, or right or interest. Mutuality is concerned with the status of the parties and their relationship with each other, and not with the nature of the claims themselves. There must be identity between the persons beneficially interested in the claims and the person against whom the claim existed. Therefore, an obligation arising out of an instrument may be set-off against a simple contract 34 (1991) 171 CLR 609.

debt, and a secured debt may be set-off against an unsecured creditor. The court, however, expressed that the requirement of same parties means that A's right to sue B cannot be set-off against A's debt to C or that a joint demand cannot be set-off against a separate demand.

19. The Court of Appeal of Republic of Singapore in BP Singapore Pte Ltd v. Jurong Aromatics Corp Pte Ltd and Others35 observes that the requirement of mutuality will fail in respect of prior claims against the debtor company, where the receiver (read – Resolution Professional) carries on business of the debtor company under a specific agreement to which the creditor and the corporate debtor are also parties.

20. The Court of Appeal of Republic of Singapore in BP Singapore Pte Ltd. (supra) had also examined whether the claim of set-off in the said case was available under the head 'equitable set-off'. The court observed that it is not necessary that the claim and cross- claim should arise on the same contract, albeit it should be a close and inseparable relationship or connection between the dealings and the transactions which give rise to the respective claims, such that it would offend one's sense of fairness or justice to allow one's 35 (2020) SGCA 09.

claim to be enforced without regard to the other. The law relating to equitable set-off in India is explained in paragraph 9 supra. Claim for equitable set-off should arise out of the same transaction, or transactions that can be regarded as one transaction. There should be a connection between the plaintiff's claim for the debt and the defendant's claim for set-off, which would make it inequitable to drive the defendant to a separate suit.

21. On the question of mutual dealings, Airtel entities have referred to the judgment of the High Court of Kerala in Gokul Chit Funds and Trades Private Ltd. v. Thoundasseri Kochu Ouseph Vareed and Others36, which we believe allows set-off in terms of the Kerala Insolvency Act, 1955. In the context of mutual dealings, it observes that mutuality can exist when there are even several distinct and independent transactions, albeit between the same parties functioning in the same right or capacity. It is not necessary that the same should arise out of a single transaction. When the transactions between the parties, which are connected, give rise to reciprocal claims and demands on account of the parties acting on the same right or capacity, principle of mutuality will be satisfied. Thus, the contention that each kuri is a distinct and separate transaction was not accepted so as to defeat the mandatory right 36 AIR 1977 Ker 68.

to set-off observing that rights and liabilities arising out of the different chit fund transactions should be allowed to be adjusted against each other.

22. In light of the aforesaid discussion, the expression 'mutual dealings' for the purpose of Regulation 29 of the Liquidation Regulations, is wider than the statutory set-off postulated under Order VIII Rule 6 of CPC, as well as, equitable set-off under the common law as applicable in India. Insolvency set-off applies when demands are between the same parties. There must be commonality of identity between the person who has made the claim and the person against whom the claim exists. Even when there are several distinct and independent transactions, mutuality can exist between the same parties functioning in the same right or capacity. Mutual dealings are not so much concerned with the nature of the claims, but with the relationship and apposite identity of the parties giving rise to the respective claims, such that it would offend one's sense of fairness or justice to allow one to be enforced without regard to the other.

23. The relationship and the nature of identity of the Corporate Debtor undergo a change on the commencement of the Corporate Insolvency Resolution Process. Set-off of the dues payable by the Corporate Debtor for a period prior to the commencement of the Corporate Insolvency Resolution Process cannot be made and is not permitted in law from the dues payable to the Corporate Debtor post the commencement of the Corporate Insolvency Resolution Process.37 Further, a debtor cannot, after notice of assignment of his debt by the creditor, improve his position as regards set-off

by acquiring debts incurred by the assignor creditor which are payable to a third party. This will not meet the mandate of mutual dealing. This will be contrary to equity and would amount to misuse of the provision for insolvency set-off.38 One must also be on guard against misuse of insolvency set-off in case of voluntary winding up.

24. Insolvency set-off as a proposition mitigates against the doctrine of pari passu. Insolvency set-off gives primacy and an overriding effect to the creditor who is entitled to set-off mutual credits. When cross demands are set-off, the assets available for distribution amongst the general body of creditors, would be depleted in favour of a single creditor with a set-off entitlement. This consequently 37 The position may be different where the dues are payable by the debtor to the Corporate Debtor, in which case the liquidator may seek adjustment as a form of payment by the debtor. The reason is that the liquidator is under a statutory obligation to recover the dues from the debtor. Adjustment in such cases is statutory or legal set-off under the IBC/Companies Act. Insolvency set-off in Regulation 29 will not apply for want of mutuality.

38 This will not satisfy the requirements of legal/statutory set-off and equitable set-off under the Code of Civil Procedure, 1908.

results in reduction of the dividend payable. In other words, it puts and grants priority to the creditor, even an operational creditor, to the extent of the set-off. Some jurists have doubted the efficacy of the justification that right to set-off acts as a stimulus to trade and commerce on the ground that rarely any party would treat the possibility of set-off as a form of security. The principle of pari passu though not explicitly mentioned in the IBC, is apparent as the edifice of Section 53 read with Section 52 of the IBC, as these provisions create a liquidation hierarchy with the stipulation that each class of creditors shall rank equally among each other. The same class of creditors should be given equal treatment. As set-offs can mitigate against the pari passu principle, they should be allowed when mandated, or can be justified by law.

25. Apart from the pari passu principle which refers to treating creditors of the same class in the same manner, the United Kingdom insolvency law also relies on the common law principle of anti-deprivation. The principle encapsulates that a person cannot contract to obtain a more beneficial position in the event of bankruptcy, than what the law otherwise provides. A contract which states that a man's property shall remain his until his bankruptcy, and in that event shall go to someone else, is not a valid contract. Both, the pari passu principle and the anti-deprivation principle sprout from the common ground that parties cannot contract out of an insolvency legislation. Their distinction lies in their impacts. The pari passu principle is aimed at ensuring that all creditors get their proportional dues by preventing any one creditor from getting more than their deserved share.39 The anti-deprivation principle on the other hand aims at conservation of the insolvent estate for the benefit of the creditors.40

26. Having examined the different concepts of set-off including insolvency set-off, we would now like to examine the contentions raised by the parties with reference to the provisions of the Corporate Insolvency Resolution Process under the IBC.

27. The IBC is an Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of stakeholders, etc. The IBC codifies the law of insolvency and bankruptcy. The IBC is a complete code in itself, except where it refers and permits application of the provisions of other 39 Belmont Park Investments v. BNY Corporate Trustee Services Ltd. [2012] 1 AC 383. 40 In the present decision, we are not examining the extent of, and the manner in which the anti-deprivation principle is applicable in India.

enactments, as has been consistently held by this Court in Indian Overseas Bank v. RCM Infrastructure Ltd. and Another41, Innoventive Industries Limited v. ICICI Bank and Another42, Embassy Property Developments Private Limited. v. State of Karnataka and Others43, and V. Nagarajan v. SKS Ispat and Power Limited and Others44.

28. Section 23845 of the IBC states that the provisions of the Code would override other laws. The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

29. Section 243 deals with the repeal of certain enactments and also incorporates the savings clause. Sub-section (1) states that Provincial Insolvency Act, 1920 is hereby repealed. Sub-section (2) does not apply in the present case. Provincial Insolvency Act, 1920 did not apply to the Corporate Insolvency Resolution Process stage.

30. Given the aforesaid legal position, we do not think that the provisions of statutory set-off in terms of Order VIII Rule 6 of CPC 41 (2022) 8 SCC 516.

42 (2018) 1 SCC 407.

43 (2020) 13 SCC 308.

44 (2022) 2 SCC 244.

45 Section 238. Provisions of this Code to override other laws.—The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. or insolvency set-off as permitted by Regulation 29 of the Liquidation Regulations can be applied to the Corporate Insolvency Resolution Process. The aforesaid rule would be, however, subject to two exceptions or situations. The first, if at all it can be called an exception, is where a party is entitled to contractual set-off, on the date which is effective before or on the date the Corporate Insolvency Resolution Process is put into motion or commences. The reason is simple. The Corporate Insolvency Resolution Process does not preclude application of contractual set-off. During the moratorium period with initiation of the Corporate Insolvency Resolution Process, recovery, legal proceedings etc. cannot be initiated, enforced or remain in abeyance. Besides the moratorium effect, the terms of the contract remain binding and are not altered or modified.

31. The foundation of contractual set-off is based on the same ground as in the case of equitable set-off, which is impeachment of title, albeit contractual set-off is a result of mutual agreement that permits set-off and adjustment. Therefore, if a debtor's title to sue is impeached before the Corporate Insolvency Resolution Process is set into motion, so should the title of the Resolution Professional, who in terms of Section 25 of the IBC has the duty to preserve and protect assets of the corporate debtor, including continuing the business operations of the corporate debtor. The Resolution Professional takes the debtor's property subject to all clogs and fetters affecting it in the hands of the debtor.

32. The second exception will be in the case of 'equitable set-off' when the claim and counter claim in the form of set-off are linked and connected on account of one or more transactions that can be treated as one. The set-off should be genuine and clearly established on facts and in law, so as to make it inequitable and unfair that the debtor be asked to pay money, without adjustment sought that is fully justified and legal. The amount to be adjusted should be a quantifiable and unquestionable monetary claim, as the Corporate Insolvency Resolution Process is a time-bound summary procedure. It is not a civil suit where disputed questions of law and facts are adjudicated after recording evidence. Set-off of this nature does not require legal proceedings. Further, set-off of money is to be given against money alone. It will not apply to assets. Lastly, being an equitable right, it can be denied when grant of relief will defeat equity and justice.

33. We would in fact borrow the term 'transactional set-off'46 instead of equitable set-off, when we describe the second exception. The 46See Derham, supra note 25 and Gerard McCormack, Set-off under the European Insolvency Regulation (and English Law), 29 IIR 100, 100-117 (2020). reason is that the second exception refers to an ascertained amount, which is a requirement for legal set-off under Order VIII Rule 6 of CPC and at the same time relies on equitable right when the statute is silent and there is no reason to deny set-off under the common law. It is an equitable right because the transactions are close and connected, harbingering the claim and the counterclaim. It would be manifestly unjust to bifurcate the connected transactions to accept and enforce the claim of one party without adjusting the amount due to the second party. This, in our opinion, does not contradict the eclipse by way of moratorium, because the transactions are treated as singular and one. When transactions are closely connected, a claim for transactional set-off during the moratorium period on a claim by the Resolution Professional, is by way of a defence to protect the legitimate expectation and respect legal certainty.

34. Thus, while accepting contractual and transactional set-off on the conditions specified, we have struck a balance with the doctrines of pari passu and anti-deprivation, which we believe is just and fair. Insolvency set-off in terms of Regulation 29 of the Liquidation Regulations is statutory.

35. In the context of the present case, the aforesaid legal position takes care of the argument raised on behalf of the appellant Airtel entities that the Resolution Professional had allowed set-off of about Rs. 64 crores which was due and payable by the corporate debtor Aircel entities under the operational services agreement, the SMSs services agreement, and the interconnect usage agreements prior to commencement of the Corporate Insolvency Resolution Process from the dues payable by the corporate debtor (Aircel entities) to the Airtel entities. The contractual set-off had

occurred prior to the commencement date. This aspect has been further elucidated in paragraph 50 below.

36. The decision of the House of Lords in British Eagle International Airlines Ltd v. Compagnie Nationale Air France47 demonstrates the interaction between the contractual set-off mechanism and the set-off rules as applicable to insolvency in the United Kingdom. In this case, the company under liquidation was a member of International Airport Transport Association which had a clearing house system for ticket sales by member airlines. All payments were channelised through the clearing house and at the end of the accounting period, all debits and credits due to transactions were 47 1975 1 WLR 758.

totalled to arrive at a figure for a net debit or credit. In the said case, British Eagle went into liquidation and were net debtors to the clearing house. They had a claim against Air France. The House of Lords held that Air France was bound to pay the liquidator the money owed to British Eagles.48 The majority judgment also observed that the clearing house medium was possibly analogous to that of secured creditors, albeit without creation and registration of security interests. Therefore, preference to the clearing house agent would be contrary to public policy. 49

37. Our finding that the IBC is a complete code relying upon the opening part of the enactment and Sections 238 and 243 takes care and nullifies the argument raised by the appellant Airtel entities that they are entitled to statutory set-off or insolvency set-off, in the Corporate Insolvency Resolution Proceedings under Chapter II Part II of the IBC. Regulation 29 of the Liquidation Regulations does not apply to Part II of the IBC. The legislation or even the legislative intent permits neither statutory set-off, nor insolvency set-off. In support of our conclusion, we would like to refer to the statutory 48 McCormack, supra note 46.

49 The contractual and consequently the legal position has undergone a change as the IATA clearing house rules have since been amended. Therefore, this judgment should be read and understood with caution.

provisions, and meet the arguments to the contrary raised by the appellants.

38. This brings us to the argument raised by the Airtel entities who have placed reliance on Section 30(2)(b)(ii) and Section 53 of the IBC. The relevant provisions of the said Sections read as under:

> “30. Submission of resolution plan. – xx xx xx (2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan-
>
> (b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than— xx xx xx
>
> (ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of Section 53, xx xx xx

> 53. Distribution of assets.— (1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely—
>
> (a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following—

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in Section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:—

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be. (2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.—For the purpose of this section—

(i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and

(ii) the term “workmen's dues” shall have the same meaning as assigned to it in Section 326 of the Companies Act, 2013 (18 of 2013).”

39. The Airtel entities have contested the conclusion by urging that Section 30 of the IBC seeks to ensure that the assets and liabilities of the corporate debtor, as recorded in the resolution plan, correspond to the liquidation estate of the corporate debtor in the event of liquidation. The provision is to ensure smooth transition between reorganisation under the Corporate Insolvency Resolution Process and the liquidation process. In case a contrary view is taken, anomalies will arise. In the event the corporate debtor undergoes liquidation, Section 36(4)(e) and Regulation 29 would apply. However, if the Resolution Professional proceeds in terms of Section 25 and secures the assets from the creditors, the creditors would not be entitled to claim set-off during the course of the Corporate Insolvency Resolution Process, which is earlier in the point of time.

40. The arguments are fallacious and should not be accepted. Sub-

section (2)(b)(ii) to Section 30 does not support the contention of the Airtel entities. Sub-section (2) to Section 30 deals with the resolution plan and the quantum of payment required to be made when considering a resolution plan under Chapter II Part II of the IBC. The provision requires that the Resolution Professional shall examine each resolution plan received by him to confirm that each plan provides for payment of debts of the operational creditor in the manner as may be specified by the Board. The Board has not specified the manner in which payment of debts to the operational creditor shall be made. However, the stipulation that the payment of debts to the operational creditor shall not be less than the amount that the operational creditors are entitled to in terms of the order of priority in sub-section (1) to Section 53 of the IBC is mandatory.

41. There are several reasons why in our opinion clause (ii) to sub-

section (2)(b) of Section 30 does not support the plea of insolvency set-off. The section does not make Chapter III Part II, that is, Section 36(4)(e) or Regulation 29, applicable to the Corporate Insolvency Resolution Process under Chapter II Part II of the IBC. Secondly, clause (ii) to Section 30(2)(b) deals with the amounts to be paid to the creditors and not the amount payable by the creditors to the corporate debtor. Thirdly, clause (ii) to Section 30(2)(b) has appliance when the resolution plan is being considered for approval. Fourthly, and for the reasons elaborated earlier, and in view of the specific legislative mandate as incorporated and reflected in Chapter II Part II of the IBC, we should hold that the provisions of the IBC relating to Corporate Insolvency Resolution Process do not recognise the principle of insolvency set-off. We would not extend it by implication, when the legislature has not accepted applicability of mutual set-off at the initial stage, that is, the Corporate Insolvency Resolution Process stage.

42. The judgment of this Court in Ebix Singapore Private Limited v.

Committee of Creditors of Educomp Solutions Limited and Another.50, that one of the objects of the IBC is to provide for a comprehensive and a time-bound framework with smooth transition in between organisation and liquidation, has no application and relevance to the context and issue in question. The observations were made in the context of the time bound framework specified in the IBC and the need to adhere to the timelines. Reorganisation or resolution process should not get prolonged or continued indefinitely.

43. Similarly, the decision in Swiss Ribbons Private Limited and Another v. Union of India and Others51, which refers to a claim for set-off being considered by the Resolution Professional during

50 (2022) 2 SCC 401.

51 (2019) 4 SCC 17.

the resolution process, is an obiter dicta and not a ratio decidendi to the issue in question. The judgment states that a set-off between the corporate debtor and a financial creditor is a rarity. It also observes that it is not the case that legitimate set-offs may not be considered at all, and that they can be considered at the stage of filing proof of claims. These observations were made to differentiate between financial and operational creditors, and how the process of filing an application for initiating the resolution process is distinct viz. the financial creditors and operational creditors under the IBC. Whether the set-off should be considered at the stage of filing of proof of claims during the resolution process was not an issue before the court in Swiss Ribbons (supra). These observations are not ratio decidendi when we apply the inversion test and other tests for the issue in question.52

44. The judgment of this Court in The Official Liquidator of High Court of Karnataka v. Smt. V. Lakshmikutty53 had applied Section 46 of the Provincial Insolvency Act, 1920 and had accordingly permitted insolvency set-off on interpretation and application of Sections 529 and 530 of the Companies Act, 1956. In that context, it is observed that the English courts, on 52 Career Institute Educational Society v. Om Shree Thakurji Educational Society, 2023 SCC OnLine SC 586.

53 (1981) 3 SCC 32.

interpretation of corresponding provisions of the English Companies Act, had taken a similar view. In the present matter, we are dealing with the provisions of the IBC. Secondly, the corporate debtor is not an insolvent company undergoing liquidation process, but is undergoing the Corporate Insolvency Resolution Process.

45. Similarly, the reliance placed by Airtel entities on Section 60(5)54 of the IBC, which confers jurisdiction on the Adjudicatory Authority to entertain and dispose of any application or proceeding by or against a corporate debtor, including claims against any of the subsidiaries or any question of priority or question of law and facts, arising out of or in relation to insolvency resolution or liquidation proceeds of the corporate debtor, does not come to the aid of the Airtel entities. These

are enabling provisions which entitle the Adjudicating Authority to go into several aspects to aid and assist the Corporate Insolvency Resolution Process. They cannot be read as allowing a creditor/debtor to claim set-off in the Corporate Insolvency Resolution Process.

54 Section 60 Adjudicating authority for corporate persons.— (5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

46. Relying upon several decisions under the United Kingdom Insolvency Act and Rules, it has been argued that insolvency set- off is self-executing. Reliance is placed on Innoventive Industries Ltd. (supra), wherein it is observed that the English Insolvency Act has served as a model for the IBC. We do not agree that insolvency set-off under the IBC is automatic and self-executing. We do not find any provision in the IBC which states so. In the context of the IBC, insolvency set-off is neither automatic, nor self-executing.

47. Airtel entities have also argued that the definitions of 'claim' and 'debt' in sub-sections (6) and (11) of Section 3 of the IBC buttress the argument that set-off under the IBC is self-executing.55 The argument is self-serving and evasive because neither clause uses the expression 'set-off', nor is it implied. We would not extend on and remodel the definitions on the basis of predisposed and self-serving suppositions.

48. Therefore, we would reject the argument that insolvency set-off is automatic and self-executing. Self-execution may be acceptable in cases of contractual set-off, as held above.

55 Section 3 Definitions. — (6) "claim" means—(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.

(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

49. Reference is also made to the UNCITRAL Legislative Guide on Insolvency Law56 which states that right to set-off is essential to avoid misuse of insolvency proceedings by a corporate debtor. The said guide states that insolvency law of set-off of mutual obligations arising out of pre-commencement transactions or activities of the debtor leads to commercial predictability and availability of credit. It checks strategic misuse of the insolvency proceedings. In the context of Chapter II Part II of the IBC, we are not concerned with the liquidation estate or the liquidation process. At this stage, we are examining the question of rehabilitation and revival of the corporate debtor. The focus and objective is entirely different. Therefore, in our opinion, the said guide is of no avail or instructive to us. Further, the provisions relating to Chapter II Part II being explicit and not ambiguous, do not require purposive interpretation. We should, however, take on record that the UNCITRAL guide does distinguish between the set-off obligations maturing prior to the commencement of the insolvency proceedings and set-off obligations after the commencement of the insolvency proceedings.57 Only the former should be permitted in insolvency 56 UNCITRAL Legislative Guide on Insolvency Law, Chapter G. p.155-156 (2005). 57 Ibid.

proceedings, while the latter should be disallowed or allowed to a limited extent.

50. On the aspect of mutual dealings and also equity, it is to be noted that adjustment of the inter-connect charges are under a separate and distinct agreement. The telephone service providers use each other's facilities as the caller or the receiver may be using a different service provider. Accordingly, adjustments of set-off are made on the basis of contractual set-off. These are also justified on the ground of equitable set-off. The set-off to this extent has been permitted and allowed by the Resolution Professional. The transaction for purchase of the right to use the spectrum is an entirely different and unconnected transaction. The agreement to purchase the spectrum encountered obstacles because the DoT had required bank guarantees to be furnished. Accordingly, Airtel entities, on the request of Aircel entities had furnished bank guarantees on their behalf. The bank guarantees were returned and accordingly Airtel entities became liable to pay the balance amount in terms of the letters of understanding. The amounts have become payable post the commencement of the Corporate Insolvency Resolution Process. For the same reason, we will also reject the argument that by not allowing set-off, new rights are being created and, therefore, Section 14 of the IBC will not be operative and applicable. Moratorium under Section 14 is to grant protection and prevent a scramble and dissipation of the assets of the corporate debtor. The contention that the "amount" to be set-off is not part of the corporate debtor's assets in the present facts is misconceived and must be rejected.

Conclusion

51. Having considered the contentions raised by the appellant Airtel entities in detail, and in light of the provisions of the IBC relating to the Corporate Insolvency Resolution Process, we do not find any merit in the present appeals and the same are dismissed. There will be no order as to costs.

.....J. (SANJIV KHANNA) .....J. (S.V.N. BHATTI) NEW DELHI;

JANUARY 03, 2024.