



भारतीय दिवाला और शोधन अक्षमता बोर्ड
Insolvency and Bankruptcy Board of India

7th Floor, Mayur Bhawan, Connaught Place, New Delhi – 110 001

08th January, 2024

Subject: Judgment¹ dated 3rd January, 2024 of Hon'ble Supreme Court of India, in the matter of Bharti Airtel Limited & Anr. Vs. Vijaykumar V. Iyer & Others. [Civil Appeal Nos. 3088-3089 OF 2020].

Whether the right to claim set-off is available in the CIRP, when the RP has proceeded in terms of clause (a) to sub-section (2) of Section 25 of the Insolvency and Bankruptcy Code, 2016?

Brief background-

1. In April 2016, Bharti Airtel Limited & Bharti Hexacom Limited (Airtel entities) entered in to certain agreements with Airtel Limited & Dishnet Wireless Limited (Airtel entities) for purchase of right to use spectrum allocated to Airtel entities for consideration of Rs. 4,022.75 Cr. The said transaction was contingent upon approval from Department of Telecommunication, Government of India. (DoT)
2. DoT asked for bank guarantee from Airtel entities in relation certain licence dues and spectrum usage dues. Such demand was challenged before Telecom Disputes Settlement and Appellate Tribunal (TDSAT) by Airtel entities. TDSAT as interim order, on 03.07.2016 directed Airtel entities to submit the bank guarantees.
3. To procure and submit the bank guarantees to the tune of Rs. 453.73 Cr., Airtel entities approached the Airtel entities. Pursuant to which, they entered in to three letters of understanding whereby the Airtel entities agreed to furnish the bank guarantees to the DOT on behalf of the Airtel entities. According to arrangement between the parties, Airtel entities were entitled to deduct Rs. 586.37 Cr. from the consideration payable to the Airtel entities under the spectrum transfer agreements. On the Airtel entities replacing the bank guarantees furnished by the Airtel entities and the Airtel entities receiving the bank guarantees from the DoT, Rs.411.22 Cr. would be payable by the Airtel entities to the Airtel entities.
4. However, in the meanwhile, *vide* order dated 09.01.2018, TDSAT held that demand of Rs. 298 Cr. against Airtel entities was untenable and directed DoT to return the bank guarantees to the Airtel entities. Further, on failure on part of DoT to return the amount, an appeal was filed by Airtel entities, which resulted in cross- appeals before the Court. This court issued direction to DoT *vide* order dated 28.11.2018, to give effect to order of court and return such amount.
5. Meanwhile, CIRP was admitted against Airtel entities i.e. Airtel Limited & Dishnet Wireless Limited *vide* order dated 12.03.2018 & 19.03.2018 of AA, respectively.

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6. Total claim on behalf of Airtel entities (including Telenor's share, in pursuant to merger dated 14.05.2018) stood at Rs. 203.46 Cr. On the other hand, Airtel entities owed Rs. 64.11 Cr. to Aircel entities towards interconnect charges. Claim of Rs. 112 Cr. was admitted by RP for Airtel entities (including Rs. 5.85 Cr. of Telenor India).
7. Now, RP vide letter dated 12.01.2019 had written to Bharti Airtel Limited, asking it to pay Rs. 112.87 Cr. to Aircel entities, which was *suo moto* adjusted by Airtel entities from the amount of Rs. 453.73 Cr. payable to Aircel entities.
8. Airtel entities approached the AA, whereby AA *vide* order dated 01.05.2019, held that the Airtel entities has a right to set-off Rs. 112.87 Cr. Appeal was preferred by RP, NCLAT while allowing the appeal held that that set-off is violative of the basic principles and protection accorded under any insolvency law. Thereafter, Bharti Airtel Limited filed appeal against said order of NCLAT.

Findings & Observations of Hon'ble Supreme Court:

Hon'ble Supreme Court (SC) while dismissing the appeal made detailed analysis of meaning, importance and types of set off and made following observations: -

- "Set-off" in accounting Vs. "Set-off" as 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'.
 - "Set-off" in world of law- Serves as a form of security recognised in law, helps reduce litigation, promotes economy of time and is an efficient method in resolving debt between the parties. It is based on natural equity which requires that cross-demands should compensate each other by deducting the lesser sum from the greater.
 - Set-off vis-à-vis CIRP and liquidation proceedings.
 1. Although earlier enactments – the Companies Act, 1956 vide section 529, and the Companies Act, 2013 vide section 325 (now omitted) – permits set-off per the Provincial Insolvency Act, 1920, which is now repealed, the Code in CIRP does not given right to set-off against the debts of CD.
 2. Regulation 29 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Liquidation Regulations) provides for mutual credits and set- off. It further clarified that *"The title of the Liquidation Regulations states that they shall apply to the process under Chapter III Part II of the IBC. In other words, the Liquidation Regulations are not applicable to Chapter II Part II of the IBC, which relates to the Corporate Insolvency Resolution Process."* Rationale behind the same is that if a creditor exercises and is allowed set-off, in terms of section 36(4) of the Code, it would enjoy preferred status over others, including the secured creditors, to the extent of the set-off value.
 3. SC critically analysed the position of law regarding set- off of claim and insolvency proceedings with respect to United Kingdom, Singapore and Australia.
- Mutuality-
- According to law laid down United Kingdom, it 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."* Although the precepts provides the mandatory nature of insolvency set-off, still the statute clarifies that such right

to set-off co-exists with the moratorium during administration but does not occur once the administrator has announced the distribution of assets.

- ‘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.

4. Principle of Pari-passu and Anti- Deprivation

- The pari-passu principle aims at ensuring that all creditors get their proportional dues by preventing any one creditor from getting more than their deserved share. On the other hand, anti-deprivation principle aims at conservation of the insolvent estate for the benefit of the creditors.
 - The principle of pari passu though not explicitly mentioned in the IBC, but is apparent as the edifice of section 53 read with section 52 of the Code, 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.
5. Hon’ble Supreme Court observes that section 238 of the Code states that the provisions of the Code would override other laws. The provisions of the Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Further, section 243 deals with the repeal of certain enactments and also incorporates the savings clause/provisions of statutory set-off in terms of Order VIII Rule 6 of CPC or insolvency set-off as permitted by regulation 29 of the Liquidation Regulations cannot be applied to the CIRP where a party is entitled to contractual set-off, on the date which is effective before or on the date the CIRP is put into motion or commences. The reason to preclude the contractual set-off is that beside the moratorium effect, the terms of the contract remain binding and are not altered or modified.
6. It observed that *“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.”* SC held that with respect of the Code, set-off is not automatic and self-executing.
7. During the CIRP stage the main objective is rehabilitation and revival of the CD. The provisions relating to Chapter II of Part II are explicit and do not require purpose interpretation.
8. Thus, set-off of due and payable by the CD entities under the operational services agreement, the SMSs services agreement, and the interconnect usage agreements could be allowed as the same were of contractual set-off that occurred prior to the commencement date. However, SC held that the transaction for purchase of the right to use the spectrum is an entirely different and unconnected transaction. The bank guarantees paid by Airtel entities on behalf of CD, 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 CIRP and thus, set-off is not allowed.