

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Ins) No.530 & 700 of 2019

IN THE MATTER OF:

Vijay Kumar V Iyer

**Resolution Professional for
Aircel Ltd. And Dishnet Wireless Ltd.
Deloitte Touche Tohmatsu India LLP,
Indiabulls Finance Centre,
Tower 3, 27th Floor, Senapati
Bapat Marg, Elphinstone Road (West)
Mumbai, Maharashtra – 400 013**

... **Appellant**

Vs

**1.Bharti Airtel Ltd
Bharti Crescent, 1, Nelsor Mandela Road,
Vasant Kunj, Phase – II,
New Delhi – 100 070**

... **Respondent No. 1**

**2.Bharti Hexacom Ltd
UGF, Plot No..16, Phase, IV,
Udyog Vihar, Gurugram,
Haryana – 122 015**

... **Respondent No.2**

**3.State Bank of India
On behalf of Committee of Creditors
Of Aircel Limited
4th & 5th Floor, Red Fort Capital, Parsavnath Towers,
Bhai Veer Singh Marg,
New Delhi – 110 001**

... **Respondent No.3**

**4.State Bank of India
On behalf of the Committer of Creditors
Of Dishnet Wireless Limited,
4th & 5th Floor, Red Fort Capital
Parsavnath Towers,
Bhai Veer Singh Marg,
New Delhi – 110 001**

... **Respondent No.4**

Present:

Mr. Raju Ramachandran, Sr. Advocate, Mr. Sumesh Dhawan, Mr. Vaijayant Paliwal and Ms. Charu Bansal, Advocates for Appellant.

Mr. Ramji Srinivasan, Sr. Advocate with Mr. Ramakant Rai, Ms. Mehak Suri, Advocate for R1 and R2.

Mr. Raunak Dhillon with Ms. Ananya Dhar Choudhury & Mr. Parikalp Gupta, Advocates for R3 and R4.

J U D G M E N T

(13th JULY, 2020)

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The present Appeal is filed by Resolution Professional of the Corporate Debtors - Dishnet Wireless Limited & Aircel Limited under Section 61 of the Insolvency and Bankruptcy Code, 2016 against the impugned order dated 01.05.2019 in MA 230/2019 in C.P No.302/IBC/NCLT/MB/MAH/2018 & MA No.219 in CP No.298/IBC/NCLT/MB/MAH/2018 passed by National Company Law Tribunal ('for short Adjudicating Authority') Mumbai Bench permitted to set off certain amount to be paid by the Aircel Companies to the Airtel Companies to the tune of approx. Rs.112 Crores. (Set off amount).
2. The Corporate Insolvency Resolution Process of the Corporate Debtor Dishnet Wireless Limited commenced from 19.03.2018 pursuant to admission of the case under Section 10 of the I&B Code, 2016 (C.P 302/I&BP/NCLT/MB/2018). Similarly, Corporate Insolvency Resolution Process commenced in the case of Aircel Limited vide an order dated 12.03.2018 pursuant to admission of the case under Section 10 of the I&B Code, 2016 in CP No.298/IBC/NCLT/MB/MAH/2018.

3. Aircel Limited and Dishnet Wireless Limited (Aircel entities) had entered into Spectrum Trade Agreement with Respondent No.1 & 2 in April, 2016.
4. The Adjudicating Authority vide its order dated 01.05.2019 has allowed the set off while making payment of the amount out of total consideration of Rs. 453 crores settled as per Spectrum Trade Agreement.
5. The Resolution Professional has submitted that the Respondent were obliged to return Rs.453 Crores retained in terms of the Hon'ble Supreme Court order 08.01.2019 in IA No 180450/2018 with Contempt Petition No.271/2018. However, the Respondents in breach of the orders of Hon'ble Supreme Court, paid a sum of approx.. Rs.341 Crores approximately and thereby illegally detained a sum of approx.. Rs.112 Crores. The Appellant has also submitted that the Adjudicating Authority by permitting the present set off has granted the Respondents a preferential payment over other Operational Creditors and it is also against the objective of I&B Code and Article 14 of the Constitution.
6. While the Respondent has submitted that they have released Rs.341.80 Crores to Aircel entities and has applied the balance amount of Rs.112 Crore approx. for set off against the dues owed by Aircel entities to Airtel entities only to the extent of undisputed principal amounts payable by Aircel entities to Airtel entities. After adjusting the amount they notified the same to the Resolution Professional vide their letter dated 10.01.2019 & 11.01.2019. The Resolution Professional has sent a letter on 12.01.2019 to Airtel entities denying their right to set off. The Hon'ble Supreme Court on 12.02.2019 in Civil Appeal No. 5744/2018 in Dishnet Wireless Ltd. & Anr. Vs. Union of India & Ors with IA No.10371/2019 and I.A No.13908/2019 has passed direction to the Adjudicating Authority to decide their Airtel Applications as per the submissions made by the Respondents:

“We have been informed by the learned counsel for the parties that matter relating to set off of Rs.112 Crores is pending before the National Company Law Tribunal, Mumbai. We direct the NCLT, Mumbai, to decide the aforesaid matter within a period of three weeks from today”.

7. The Respondent No.1 & 2 has submitted that the right of a party to apply set off is a well-known concept in Accounting and have also submitted that such right has been recognised for more than a century in the context of Insolvency /liquidation under Companies Act, Presidency Insolvency Act, and Provincial Insolvency Act, 1920 and have also submitted that this has been done based on mutual debits and credits and mutual dealings between the parties.
8. However, the Respondent No.4 i.e. State Bank of India on behalf of Committee of Creditors has also vehemently opposed set off permitted by Adjudicating Authority. They have submitted that there is no provisions under the IBC or the CIRP Regulations that permit a set off and set off can only exists if it is permitted under the relevant statute like Order 8 Rule 6 of the Civil Procedure Code. Carrying out of a set off is violative of the basic principles and protection accorded under any insolvency law. It will be anti-ethical to the objective of the IBC on the Resolution framework. The objectives of the which is to preserve & maximise the value of the Corporate Debtor. Further submitted that this is also in violation of Moratorium imposed under IBC. The present set off is being claimed is in respect of two separate and unrelated transactions. They have also submitted that it is prejudicial to the interest of secured creditor (which includes State Bank of India) who have a first charge over

the spectrum assets and beneficial interest in the proceeds from any sale of the Spectrum Assets.

9. The Appellant and the Respondents have submitted multiple case laws to supplement their cases/stands taken by them. We have gone through the various submission made including the various citations made by them and observed that whether during the period of Corporate Insolvency Resolution Process when Section 14 (Moratorium) of the I&B Code, 2016 is in operation & whether any dues can be set off as per Accounting Conventions when Moratorium is in force.
10. We have gone through the judgment of this Appellate Tribunal in *Company Appeal (AT) (Ins) No. 267 of 2017 in Indian Overseas Bank Vs. Mr. Dinkar T.Venkatsubramaniam Resolution Professional for Amtek Auto Ltd decided on 27.04.2018* wherein it has been held at para 5 as follows:

“Para 5. Having heard learned counsel for the Appellant, we do not accept the submissions made on behalf of the Appellant in view of the fact that after admission of an application under Section 7 of the I&B Code, once moratorium has been declared it is not open to any person including ‘Financial Creditor’ and the Appellant bank to recover any amount from the account of the ‘Corporate Debtor’, nor it can appropriate any amount towards its own dues”.

11. We have also gone through the judgment of this Appellate Tribunal in *Company Appeal (AT) (Ins) No.519 of 2018 in MSTC Ltd. Vs. Adhunik Metaliks Ltd & Ors. and Company Appeal (AT) (Ins) No.53 & 54 of 2019 Liberty House Group Pvt. Ltd Vs. State Bank of India & Anr. decided on 15.03.2019* wherein at para 24 it has been observed as follows:

“Para 24. Having heard learned counsel for the parties, we find that the Adjudicating Authority rightly held that Section 14 of the ‘I&B Code’ will override any other provisions contrary to the same. Any amount due to the ‘Operational Creditor’ prior to the date of ‘Corporate Insolvency Resolution Process’ (Admission) cannot be appropriated during the moratorium period.”

12. The provisions of the I&B Code, 2016, particularly, Section 238 of the IBC, 2016 reads as follows:

“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”.

13. Section 14 - Moratorium - (4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process.

Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

14. We have also observed that Accounting Conventions cannot supersede any express provisions of the laid down provisions of the specific law on the subject. The I&B Code, 2016 provides the mechanism of **Moratorium** during the CIRP till the Resolution Plan is approved or Liquidation order is passed. The I&B Code has a provision to override other

laws as enunciated above. Hence, even if there are some such provisions in any other law, the I&B Code 2016 will prevail over that.

15. Accordingly, we allow the present appeal and set aside the order dated 01.05.2019 passed by NCLT, Mumbai Bench and direct the Respondent No.1 & 2 to pay the amount whatever has been set off by them to the Aircel Entities.
16. The Appeal is allowed with the above directions and, if any, interim orders were issued stands vacated.
17. No order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member(Technical)

RK

New Delhi