

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 733 of 2020

IN THE MATTER OF:

Union of India

....Appellant

Vs

Vijaykumar V. Iyer

....Respondent

Present:

For Appellant: Mr. Amit Mahajan, CGSC with Ms. Pooja Mahajan, Mr. Gitesh Chopra, Mr. Vidur Mohan, Mr. Kanu Agrawal and Ms. Shefali Munde, Advocates.

For Respondent: Mr. Ravi Kadam and Mr. Abhinav Vashisht, Sr. Advocates with Mr. Anoop Rawat, Ms. Charu Bansal, Ms. Ankita Mandal, Mr. Vaijayant Paliwal, Mr. Saurav Panda, Ms. Kriti Kalyani and Ms. Salonee Kulkarni, Advocates for R-1.

Mr. Dhruv Dewan, Ms. Harshita Choubey, Mr. Dhruv Sethi, Ms. Chandni Ghatak and Mr. Rohan Batra, Advocates for R-2.

Mr. Ramji Srinivasan, Sr. Advocate with Mr. Raunak Dhillon, Mr. Aditya Marwah, Mr. Madhav Kanoria, Mr. Shubhankar Jain, Mr. Shivkrit Rai and Ms. Rajshree Chaudhary, Advocates for R-3 (CoC).

With

Company Appeal (AT) (Insolvency) No. 1410 of 2019

IN THE MATTER OF:

Vijay Kumar Iyer

....Appellant

Vs

GTL Infrastructure Ltd.

....Respondent

Present:

For Appellant: Mr. Abhinav Vashisht, Sr. Advocate with Mr. Sumesh Dhawan, Mr. Anoop Rawat, Ms. Charu Bansal, Ms. Ankita Mandal, Mr. Vaijayant Paliwal, Mr. Saurav Panda, Ms. Kriti Kalyani and Ms. Salonee Kulkarni, Advocates.

For Respondent: Mr. Arun Kathpalia, Sr. Advocate Ms. Shyel Trehan, Mr. Rohan Rajadhyaksha, Mr. Prasad Lotlikar and Mr. Raghav Anand, Advocates for R-1. Mr. Raunak Dhillon, Mr. Aditya Marwah and Mr. Shubhankar Jain, Advocates for R-2 (CoC).

With

Company Appeal (AT) (Insolvency) No. 1503 of 2019

IN THE MATTER OF:

Vijay Kumar Iyer

....Appellant

Vs

GTL Infrastructure Ltd.

....Respondent

Present:

For Appellant: Mr. Abhinav Vashisht, Sr. Advocate with Mr. Sumesh Dhawan, Mr. Anoop Rawat, Ms. Charu Bansal, Ms. Ankita Mandal, Mr. Vaijayant Paliwal, Mr. Saurav Panda, Ms. Kriti Kalyani and Ms. Salonee Kulkarni, Advocates.

For Respondent: Mr. Arun Kathpalia, Sr. Advocate Ms. Shyel Trehan, Mr. Rohan Rajadhyaksha, Mr. Prasad Lotlikar and Mr. Raghav Anand, Advocates for R-1. Mr. Raunak Dhillon, Mr. Aditya Marwah and Mr. Shubhankar Jain, Advocates for R-2 (CoC).

With

Company Appeal (AT) (Insolvency) No. 08 of 2020

IN THE MATTER OF:

GTL Infrastructure Ltd.

....Appellant

Vs

Vijay Kumar Iyer

....Respondent

Present:

For Appellant: Mr. Arun Kathpalia, Sr. Advocate, Ms. Shyel Trehan, Mr. Rohan Rajadhyaksha, Mr. Prasad Lotlikar and Mr. Raghav Anand, Advocates.

For Respondent: Mr. Abhinav Vashisht, Sr. Advocate with Mr. Sumesh Dhawan, Mr. Anoop Rawat, Ms. Charu Bansal, Ms. Ankita Mandal, Mr. Vaijayant Paliwal, Mr. Saurav Panda, Ms. Kriti Kalyani and Ms. Salonee Kulkarni, Advocates for R-1.

With

Company Appeal (AT) (Insolvency) No. 26-27 of 2020

IN THE MATTER OF:

State Bank of India

....Appellant

Vs

GTL Infrastructure Ltd.

....Respondent

Present:

For Appellant: Mr. Raunak Dhillon, Mr. Aditya Marwah and Mr. Shubhankar Jain, Advocates.

**For Respondent: Mr. Arun Kathpalia, Sr. Advocate, Ms. Shyel Trehan, Mr. Rohan Rajadhyaksha, Mr. Prasad Lotlikar, Mr. Raghav Anand, Advocates for R-1.
Mr. Abhinav Vashisht, Sr. Advocate with Mr. Sumesh Dhawan, Mr. Anoop Rawat, Ms. Charu Bansal, Ms. Ankita Mandal, Mr. Vaijayant Paliwal, Mr. Saurav Panda, Ms. Kriti Kalyani and Ms. Salonee Kulkarni, Advocates for R-2.**

With

Company Appeal (AT) (Insolvency) No. 685-686 of 2020

IN THE MATTER OF:

Indus Tower Ltd.

....Appellant

Vs

**Vijaykumar Iyer – Resolution Professional
of Aircel Ltd. and Dishnet Wireless Ltd. & Anr.**

....Respondents

Present:

For Appellant: Mr. Ashish Joshi, Advocate.

**For Respondent: Mr. Abhinav Vashisht, Sr. Advocate with Mr. Sumesh Dhawan, Mr. Anoop Rawat, Mr. Vaijayant Paliwal, Mr. Saurav Panda, Ms. Charu Bansal, Ms. Salonee Kulkarni, Ms. Kriti Kalyani and Ms. Ankita Mandal, Advocates for R-1.
Mr. Dhruv Dewan and Ms. Harshita Choubey, Advocates for R-2.**

With

Company Appeal (AT) (Insolvency) No. 734 of 2020

IN THE MATTER OF:

GTL Infrastructure Ltd.

....Appellant

Vs

Vijay Kumar Iyer & Anr.

....Respondents

Present:

For Appellant: Mr. Arun Kathpalia, Sr. Advocate, Ms. Shyel Trehan, Mr. Rohan Rajadhyaksha, Mr. Prasad Lotlikar and Mr. Raghav Anand, Advocates.

For Respondents: Mr. Abhinav Vashisht, Sr. Advocate with Mr. Sumesh Dhawan, Mr. Anoop Rawat, Mr. Vaijayant Paliwal, Mr. Saurav Panda, Ms. Charu Bansal, Ms. Salonee Kulkarni, Ms. Kriti Kalyani and Ms. Ankita Mandal, Advocates for R-1.

Mr. Dhruv Dewan and Ms. Harshita Choubey, Advocates for R-2.

Mr. Raunak Dhillon, Mr. Aditya Marwah and Mr. Shubhankar Jain, Advocates for R-3.

With

Company Appeal (AT) (Insolvency) No. 758 of 2020

IN THE MATTER OF:

Telecom Regulatory Authority of India

....Appellant

Vs

Aircel Ltd. & Anr.

....Respondents

Present:

For Appellant: Ms. Maneesha Dhir, Mr. Abhishek Kumar and Mr. Saransh Gupta, Advocates.

For Respondents: Mr. Sumesh Dhawan, Mr. Anoop Rawat, Ms. Salonee Kulkarni, Mr. Saurav Panda, Mr. Vaijayant Paliwal, Ms. Kriti Kalyani, Ms. Charu Bansal and Ms. Ankita Mandal, Advocates for R-1.

Mr. Dhruv Dewan and Ms. Harshita Choubey, Advocates for R-2.

With

Company Appeal (AT) (Insolvency) No. 762 of 2020

IN THE MATTER OF:

Tatwa Technologies Ltd.

....Appellant

Vs

Vijay Kumar Iyer & Anr.

....Respondents

Present:

For Appellant: Mr. Ninad Deshpande, Ms. Manisha Kanojia and Mr. Shivalok Yashovardhan, Advocates.

For Respondents: Mr. Sumesh Dhawan, Mr. Anoop Rawat, Ms. Salonee Kulkarni, Mr. Saurav Panda, Mr. Vaijayant Paliwal, Ms. Kriti Kalyani, Ms. Charu Bansal and Ms. Ankita Mandal, Advocates for R-1.

With

Company Appeal (AT) (Insolvency) No. 822 of 2020

IN THE MATTER OF:

Telecom Regulatory Authority of India

....Appellant

Vs

Dishnet Wireless Ltd. &Anr.

....Respondents

Present:

For Appellant: Ms. Maneesha Dhir, Mr. Saransh Gupta and Mr. Abhishek Kumar, Advocates.

For Respondents: Mr. Sumesh Dhawan, Mr. Anoop Rawat, Ms. Salonee Kulkarni, Mr. Saurav Panda, Mr. Vaijayant Paliwal, Ms. Charu Bansal, Ms. Kriti Kalyani, Ms. Ankita Mandal, Advocates for R-1. Mr. Dhruv Dewan and Ms. Harshita Choubey, Advocates for R-2.

ORDER

BANSI LAL BHAT, J.

Before embarking upon the exercise of coming to grips with the questions formulated by the Hon'ble Apex Court in the bunch of Civil Appeal Nos. 6328-6399 of 2015- *Union of India vs. Association of Unified Telecom Service Providers of India, etc. etc.* (hereinafter referred to as 'Judgment') with connected matters in terms of judgment rendered on 1st September, 2020 as modified by order dated 25th September, 2020, we deem it appropriate to refer to pendency of a bunch of 10 appeals noted hereinbelow preferred before this Appellate Tribunal against approval of resolution plans in respect of Aircel Ltd., Dishnet Wireless Ltd. and Aircel Cellular Ltd. in terms of common order dated 9th June, 2020 passed by the Adjudicating Authority (National Company Law Tribunal) Mumbai Bench II.

Particulars of 10 appeals pending before this Appellate Tribunal

S.No.	Appeal Nos.	Cause Title
1.	Comp. App. (AT) (Ins) No. 733 of 2020	Union of India Vs. Shri Vijaykumar V. Iyer
2.	Comp. App (AT) (Ins) No. 1410 of 2019	Vijay Kumar Iyer Vs. GTL Infrastructure Ltd.
3.	Comp. App (AT) (Ins) No. 1503 of 2019	Vijay Kumar Iyer Vs. GTL Infrastructure Ltd.

4.	Comp. App (AT) (Ins) No. 08 of 2020	GTL Infrastructure Ltd. Vs. Vijay Kumar Iyer
5.	Comp. App. (AT) (Ins) No. 26-27 of 2020	State Bank of India Vs. GTL Infrastructure Ltd. & Anr.
6.	Comp. App. (AT) (Ins) No. 685 - 686 of 2020	Indus Tower Ltd. Vs. Vijaykumar Iyer – Resolution Professional of Aircel Ltd. and Dishnet Wireless Ltd. & Anr.
7.	Comp. App. (AT) (Ins) No. 734 of 2020	GTL Infrastructure Ltd. Vs. Vijay Kumar Iyer & Anr.
8.	Comp. App. (AT) (Ins) No. 758 of 2020	Telecom Regulatory Authority of India Vs. Aircel Ltd. & Anr
9.	Comp. App. (AT) (Ins) No. 762 of 2020	Tatwa Technologies Ltd. Vs. Vijay Kumar Iyer & Anr.
10.	Comp. App. (AT) (Ins) No. 822 of 2020	Telecom Regulatory Authority of India Vs. Dishnet Wireless Ltd. & Anr.

While six out of the aforesaid ten appeals assail the impugned order in regard to approval of Resolution Plan remaining four appeals have been filed in respect of orders passed on I.A.s, subsequent to the passing of order of approval of Resolution Plan, relating to claims.

2. The Hon'ble Apex Court in Para 23 of the aforetitled judgment directed as under:-

“23. We consider it appropriate that the aforesaid various questions should first be considered by the NCLT. Let the NCLT consider the aforesaid aspects and pass a reasoned order after hearing all the parties. We make it clear that it being a jurisdictional question, it requires to be

gone into at this stage itself. Let the question be decided within the outer limits of two months. We also make it clear that we have not observed on the merits of the case, and we have kept all the questions open to be examined by the NCLT.”

3. The questions are enumerated in Paragraphs 18 to 22 of the said judgment which are reproduced hereinbelow:-

“18. A question has been raised concerning ownership. Whether TSPs can be said to be the owner based on the right to use the spectrum under licence granted to them? Whether a licence is a contractual arrangement? Whether ownership belongs to the Government of India? Whether spectrum being under contract can be subjected to proceedings under Section 18 of the Code? The question also arises whether the spectrum can be said to be in possession, which arises from ownership. What is the distinction between possession and occupation? Whether possession correlates with the ownership right? A question also arises concerning the difference between trading and insolvency proceedings. Whether a licence can be transferred under the insolvency proceedings, particularly

when the trading is subjected to clearance of dues by seller or buyer, as the case may be, as provided in Guideline Nos. 10 and 11; whereas in insolvency proceedings dues are wiped off. Guideline No. 12 is also assumed to be of significance in case spectrum is subjected to insolvency proceedings, which must be considered.

19. It is also required to be examined that when the Government has declined the permission to trade and has not issued NOC for trading on the ground of non-fulfilment of the conditions as stipulated in the licence agreement, the spectrum can be subjected to resolution proceedings which will have the effect of wiping off the dues of the Government, which are more than Rs 40,000 crores. Whereas the dues of the banks are much less. Whether obtaining the DoT's permission and its approval to the resolution plan would be a substitute for Trading Guideline Nos. 10, 11, and 12?

20. A question also arises of bona fide nature of the proceedings under the Code. In the backdrop facts of the cases, question also arises whether spectrum licence is subjected to proceedings under the Code, and it overrides

the provisions contained in the Telegraph Act, 1885, the Wireless Telegraphy Act, 1933, and the Telecom Regulatory Authority of India Act, 1997.

21. In view of the fact that the licence contained an agreement between the licensor, licensee, and the lenders, whether on the basis of that, spectrum can be treated as a security interest and what is the mode of its enforcement.

Whether the banks can enforce it in the proceedings under the Code or by the procedure as per the law of enforcement of security interest under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (the SARFAESI Act) or under any other law.

22. A question of seminal significance also arises whether the spectrum is a natural resource, the Government is holding the same as cestui que trust. In view of the nature of the resource, it can be subjected to insolvency/liquidation proceedings. Earlier licence was obtained on the payment of fees in advance that was not beneficial to the TSPs, as such a new revenue sharing regime was devised in 1999, and the Central Government has an exclusive right under Section 4 of the Telegraph

Act, 1885 in use of spectrum, it can part with on certain statutory guidelines, its use is not permissible without the payment of requisite fee.

Whether dues under the licence can be said to be operational dues? It is also to be examined whether deferred/default payment instalment(s) of spectrum acquisition cost can be termed to be operational dues besides AGR dues. Whether as per the revenue sharing regime and the provisions of the Telegraph Act, 1885, the dues can be said to be operational dues? Whether natural resource would be available to use without payment of requisite dues, whether such dues can be wiped off by resorting to the proceedings under the Code and comparative dues of the Government, and secured creditors and bona fides of proceedings are also the questions to be considered.”

4. It would be appropriate to refer to the subsequent development. It being brought to the notice of Hon'ble Apex Court that the Resolution Plans of Resolution Applicants have been approved by the NCLT under Section 31 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') and that an appeal has already been filed against the approval order by the

Department of Telecommunications (DOT) before this Appellate Tribunal, the Hon'ble Apex Court modified the directions given in terms of paragraph 23 of its judgment dated 1st September, 2020 by providing as under:-

“23. In view of above, we direct the NCLAT to first consider the various questions framed in paragraphs ‘18’ to ‘22’ of the Judgment, mentioned above, and pass a reasoned order in accordance with paragraph ‘23’ thereof.”

We are thus required to firstly consider the questions formulated by Hon'ble Apex Court in paragraphs 18 to 22 of the Judgment and record our findings with reference to the specific questions formulated by the Hon'ble Apex Court. The appeals pending consideration before this Appellate Tribunal in regard to approval of the Resolution Plans of the above named three Resolution Applicants will have to be taken up for consideration only thereafter.

5. Before we proceed to examine the issues and return findings thereon in the light of undisputed factual matrix and the submissions made by the learned senior counsel representing the parties, we deem it appropriate to have a brief glimpse of the factual aspect to trace the genesis of controversy. The parties are locked in a grim battle in regard to 'spectrum' which has assumed vital significance and is capable of being exploited to the optimum level generating huge revenue and manifesting in turnaround of economy.

6. Vide judgment dated 24th October, 2019, '*Union of India vs. Association of Unified Telecom Service Providers of India*' and other Civil Appeals were decided by the Hon'ble Apex Court which dealt with the definition of 'AGR' and dues to be paid thereunder. MA (D) No. 9887 of 2020 in the abovetitled appeals came to be filed by Union of India seeking extension of time to make the payment as it was pointed out that several Telecom Service Providers (TSPs) were under insolvency proceedings. Order dated 20th July, 2020 came to be passed by the Hon'ble Apex Court wherein the Hon'ble Apex Court observed that under the guise of reassessment and recalculation attempts were being made to wriggle out of the liability in terms of the judgment which was impermissible. The Hon'ble Apex Court observed that no dispute could be raised with respect to dues which have to be paid and a new round of litigation would be prohibited. The Hon'ble Apex Court, noticed that before the initiation of insolvency proceedings, most of the Telecom Service Providers, who were undergoing insolvency proceedings had applied to the DOT to grant permission for trading of license which came to be resisted by the Central Government. The permission was declined. There were huge outstanding arrears concerning the spectrum license, payment whereof was a precondition for grant of such permission. The Hon'ble Apex Court took note of various sharing arrangements made inter se Telecom Service Providers with respect to the spectrum. It also noticed the stand taken by DOT that the spectrum cannot be the subject matter of the I&B Code proceedings in view of provisions of Section

14 and 18. The Hon'ble Apex Court, after noticing the stand taken by Telecom Service Providers that the Corporate Insolvency Resolution Process (CIRP) Proceedings have been triggered bonafide proceeded to examine the limited question in proceedings before it whether the proceedings have been resorted to as a subterfuge to avoid payment of AGR dues and it was for the NCLT to decide whether the license/ spectrum can be transferred and be a part of resolution process initiated under I&B Code. The Hon'ble Apex Court took note of the statutory guidelines issued by DOT in 2015 whereunder spectrum sharing allows the operators to pool their respective spectrum for usage in a specific geographical area. It noticed that the Central Government had framed Spectrum Sharing Guidelines on 24th September, 2015 whereunder the spectrum trading allows the parties to transfer their rights and obligations to another party. In case of Spectrum Sharing, the right to use spectrum remains with the respective Telecom Service Providers whereas in case of Spectrum Trading the right to use gets transferred from the buyer to the seller. It noticed the transactions under the Guidelines for Access Spectrum Trading. While dealing with the aspect of payment of AGR dues by the TSPs it noticed the stand of Union of India which, on the representation of TSPs and Indian Banks Association had decided to provide the facility of making payment in installments within twenty years. The Hon'ble Apex Court raised three questions for its consideration. Para 10 of the judgment, relevant for our purpose, is reproduced as under:-

“10. The following three questions arise for consideration:

- 1. Whether spectrum can be subjected to proceedings under the Code?*
- 2. In the case of sharing, how the payment is to be made by the Telecom Service Provider (for short, ‘TSP’)? and*
- 3. In the case of trading, how the liability of the seller and buyer is to be determined?”*

7. In para 16 of the judgment, while noticing the question for consideration whether spectrum can be subjected to proceedings under I&B Code, the Hon’ble Apex Court observed that it’s a natural resource and under Section 4 of Indian Telegraph Act, 1885 (ITA) the Government has the sovereign right. It took note of the definition of creditor, debt, property, operational creditor and operational debt and thereafter formulated questions for consideration in paras 18 to 22 of the judgment which, in terms of direction passed in para 23 of the judgment as modified by order dated 25th September, 2020, this Appellate Tribunal is required to consider in the first instance and pass a reasoned order.

8. Mr. Amit Mahajan, learned CGSC representing the Appellant – ‘Union of India’ submitted that spectrum is a valuable and scarce natural resource which belongs to the people but the State legally owns it as a trustee on behalf

of people. It is further submitted that Spectrum and its 'right to use' is a national asset and same has been granted by the DOT to the Telecom Companies (TelCos) subject to various terms and conditions which have been imposed for two reasons: (i) to ensure that spectrum, a scarce, finite nature resource is not hoarded or wasted by the TelCos and is optimally utilized by them for the benefit of people; (ii) to ensure that the people who own the source are adequately compensated for it. It is further submitted that the Spectrum and its right to use must be examined in the light of these terms and conditions and the doctrine of public trust so evolved. It is submitted that the public trust doctrine, for the first time articulated in *M C Mehta vs. Kamal Nath (1997) 1 SCC 388* postulates that the State, which is the trustee of the resources has the duty to protect the trust corpus. It emphasizes not only the State's but also of Court's affirmative duty to protect the natural resources and ensure that short term public interest or private interest do not trump long term public interest in such resources. Reliance is placed upon *Fomento Resorts and Hotels Ltd. (2009) 3 SCC 571*, wherein the Hon'ble Apex Court reiterated that public trust doctrine imposes limits and obligations upon Government Agencies, their Administrators on behalf of all the people and especially future generations. It emphasized that the State and Managers of resources owe a duty to ensure that such resources are not impaired, even if private interests are involved. Public trust doctrine is a tool for exerting long established public rights over short term public rights and private gain. Every

person enjoying the natural resources has the obligation to secure for the rest of people the right to use that resource or property for the long term and enjoyment by future generations. Reference is also made to *Center for Public Interest Litigation vs. Union of India (2012) 3 SCC 1*, which applied the public trust doctrine to spectrum. The Hon'ble Apex Court held that the natural resources constitute public property/ national asset and State is bound to ensure that no action is taken which may be detrimental to public interest. It further held that spectrum has been internationally accepted as a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient utilization. It has a high economic value in the light of demand for it on account of the tremendous growth in the telecom sector. Although it does not belong to a particular State, right of use has been granted to States as per international norms. It is submitted that it is the duty of the Government to provide complete protection to the natural resources as a trustee of the people at large. Such natural resources must be used only for the interests of the country and not private interests. Reference has been made to *Association of Unified Telecom Services Providers & Ors. vs. Union of India & Ors. (2014) 6 SCC 110*, wherein the Hon'ble Apex Court stressed the worth of spectrum and held that the State is also bound to protect the same for the enjoyment of general public rather than permit their use for purely commercial purposes. It held that the public trust doctrine puts an implicit embargo on the right of State to transfer public resources to private property if such transfer affects general

public and mandates affirmative State action for effective management of the natural resources. It further held that the State, or the licensee as the case may be hold it on behalf of the people and are accountable to the people. It is further submitted that the Licence Agreement between the DOT and the Corporate Debtor is also a facet of public trust and cannot be said to exist outside the said trust. It is submitted that the Licence Agreement and terms and conditions of the notice inviting auction for spectrum (NIA) and the Spectrum Trading Guidelines, 2015 merely represents the means by which the State is ensuring the effective use of spectrum for benefit of people. Therefore, spectrum or right to use spectrum is not a property of the licensee or the Corporate Debtor. It is submitted that these are airwaves which are not owned by any entity but can only be used, that too when authorized to do so and strictly in accordance with the terms of right to use. However, auction of spectrum and grant of licence creating a right to use does not make such right absolute or vested in the licensee without complying with the terms of grant/licence, continued compliance of such terms of use is essential for continued right of use by the licensee. The licensee cannot be permitted to appropriate the right to use spectrum unilaterally. It is submitted that the Licence Agreement between the TelCos and DOT, the tripartite agreement between TelCos, DOT and the Lenders and the terms of NIAs regulate the terms on which the right to use spectrum has been given to TelCos. It is submitted that the Telecom Sector owned, controlled and operated by the Government came to

be liberalized in 90's. In 1994, Government allowed private participation in basic services by granting licences to TelCos who were required to pay a fixed licence fee for initial three years and subsequently based on numbers of subscribers subject to some minimum commitments. Since the TelCos were unable to arrange finances for their projects, new Telecom Policy came to be adopted in 1999 which allowed the migration of licensees from a fixed licence fee regime to a revenue share arrangement scheme whereunder the licence fee was collected as part of TelCos revenue (Adjusted Gross Revenue – 'AGR'). National Telecom Policy, 2012 introduced unified licensing regime under which the service operators could provide converged services and allocation of spectrum was delinked from the licence. It is further submitted that under the Licence Agreement eligibility criteria is laid down for grant of licence to ensure that only persons capable of operating telecom services are given the licence, which can only be transferred with the consent of DOT provided all dues of DOT prior to transfer are fully paid and the transferee undertakes to pay all future dues. While the license has been granted for twenty years, the same can be revoked under Clause 10 for non-compliance with the terms and conditions including failure to timely pay the fee and other charges. It is submitted that the licence is not a simple transfer of right to operate telecom services for twenty years but is subject to compliance with various provisions of the agreement including continuous and uninterrupted telecom services by the Licensees and payment of fee, including AGR to maintain/ preserve the licence.

The twin requirements of payment of dues and maintenance of services are the imprimatur of the licence agreement as the same would protect the public interest. It is further submitted that various NIAs for assignment of right for use of spectrum stipulated the conditions for only the right to use spectrum at specified radio spectrum frequencies by payment of spectrum auction price and also percentage of AGR. Reference in this regard is made to NIAs floated in the year 2014, 2015 and 2016. It is submitted that the Telecom Licence Agreement and NIA neither grant an exclusive right to use spectrum nor an exclusive possession of the licence to the TelCos. It is admitted that trading of spectrum is allowed under the Spectrum Trading Guidelines, 2015 but such trading is only permitted amongst valid licence holders who have not violated the terms of licence. This is also subject to the proviso that the seller has cleared all dues to DOT prior to the trade. Trading is permitted only after interests of the Licensor viz. DOT have been secured.

9. Mr. Amit Mahajan, learned CGSC would further submit that the overriding right of the DOT emerges from the Tripartite Agreement entered into between the lenders of TelCos, DOT and TelCos. An event of default has been defined as a default in payment of fee to the DOT as well as material default of the loan agreements. In the event of default in respect of loan agreement, the lenders agent is required to inform DOT in one month's time and could seek transfer of licence to a person selected by the Lenders provided the selectee meets the eligibility criteria and satisfies the DOT that it is capable of operating the

licence and would have to assume the liabilities of the licence towards the DOT. Decision of DOT in this regard is final. It is the Licensor itself which can decide to transfer the licence to another entity. If the selectee is not found, the Licence Agreement would stand terminated and the Licensor would have the prior right to recover its dues in case of disposal. The Licensor is also entitled to terminate the contract if the Lenders are not able to cure the events of breach. The rights of Licensor shall remain protected and unaffected. He further submits that while the Tripartite Agreement was entered to facilitate the financing of the project by Lenders and enabled Lenders to procure assignment or transfer of licence, the interest of DOT was never intended to be inferior to the interests of Lenders. The waterfall mechanism provided under the Tripartite Agreement in case of an event of default gave the first right to payment from assets/infrastructure to DOT and thereafter to Lenders and finally, if any balance was left, to the Licensee. It is therefore, clear that the Tripartite Agreement further reinforces the public trust doctrine that in all circumstances the people will get the first right over the assets/infrastructure/proceeds of the defaulting Licensee. It is submitted that since the right to spectrum itself was given in trust to the TelCos subject to payment of fee including AGR, all assets/ infrastructure that was created by TelCos without paying the fee or sharing the revenue with DOT are also impressed with the character of a trust. Thus, on disposal of assets, DOT will have the first charge for recovery of its dues.

10. Learned CGSC would further submit that the CoC or RP cannot, in the face of Tripartite Agreement, now take a stand that the bargain struck between the parties should be ignored and CoC should be given priority over DOT since the CD is undergoing insolvency resolution. Replacement of Licensee with their own Selectee could have been undertaken by the Lenders in agreement with the terms of Tripartite Agreement and the License Agreement which postulated that the Selectee must meet the eligibility criteria, approval of DOT was taken for replacement and the Selectee pays all pending dues of DOT. It is further submitted that in the instant case, replacement is sought to be done by the CoC in favour of UVARCL, an asset reconstruction company and the provisions of Tripartite Agreement are not being complied in as-much-as UVARCL is neither a Telecom Company nor meets the eligibility criteria to a Telecom Company and is not paying full dues of the DOT. Moreover, DOT has not given any approval to UVARCL for replacement.

11. As regards, the issue whether the spectrum or right to use spectrum can be made part of a Resolution Plan, it is submitted that spectrum being an airwave cannot be held by anyone and it is only its right to use which is given to TelCos in trust for the public and subject to continued compliance with the terms of the licence. It is submitted that the right to use spectrum cannot be treated as an asset of the Corporate Debtor (CD) since the same has been given in trust and in exchange of continued monetary payments and compliance. It is submitted that the CD has been in noncompliance for years which entitles

DOT to withdraw or revoke the licence. It is further submitted that it is an admitted fact (AGR Judgment of Hon'ble Apex Court) that the TelCos have been using spectrum without paying for it, therefore, they had no right to use the spectrum in the earlier years and no right accrues now which can be protected.

12. As regards the issue whether a license, quota, concession by the Government is covered as an asset of the CD, it is submitted that Section 14 of the I&B Code only covers what is not permitted during moratorium and does not provide for what is or what is not an asset of CD. Moreover, in AGR Judgment the Hon'ble Apex Court recognized that the TelCos have been using spectrum illegally without paying for it and the AGR dues are needed to be paid to rectify the same. It is submitted that till such payment is made and noncompliance is rectified, there cannot be an existing legal right to use. Thus, Section 14 would have no application and it cannot be relied upon for creation of right to use which did not exist in the first place. It is further submitted that the explanation to Section 14 refers to non-termination on grounds of initiation of insolvency provided current dues are being paid. DOT did not seek termination on account of initiation of insolvency alone. All dues of DOT including pending AGR dues which are required for continuation of the right to use spectrum form part of current dues and need to be paid. It is further submitted that though an asset that has vested cannot be withdrawn but right to use under the License Agreement and NIAs refers to conditions under which the licence can be revoked/ cancelled even prior to twenty year period. Such

conditions include nonpayment of fee etc. There was no vesting of right, there being only a permission to operate the business and use spectrum subject to payment of fee and compliance with terms and conditions. It is submitted that the DOT's right to revoke the licence was curtailed by NCLT by passing order under Section 14 on wrong premise that the CD was a going concern which admittedly had stopped operating prior to initiation of CIRP.

13. It is further submitted that while intangible asset is included within Section 18, it needs to be an asset over which the CD has ownership rights. IRP can take into custody only such assets over which the CD has ownership rights but not assets owned by a third party in possession of the Corporate Debtor. Merely because spectrum or right to use spectrum may be classified as an intangible asset or is reflected in balance sheet of the TelCos does not imply that the TelCos have ownership rights over the same and the CD has unfettered right to further transfer such asset, moreso when consideration for such right to use has not been paid and terms of licence have not been complied. Reference is made to Section 36(4) of the I&B Code to emphasize that even in liquidation estate of CD assets held in trust for any third party as well as assets held under contractual arrangements not involving transfer of title but only use of assets cannot be included.

14. It is further submitted that I&B Code does not provide for appropriation of assets belonging to third parties for purpose of satisfying the creditors of the

CD. It is submitted that only a limited right to use is granted under the spectrum assignment for specific period and with specific terms and conditions and subject to payment of specific fee and charges. The spectrum assignment does not confer on the Corporate Debtor any nature of rights so as to be categorized as a property which could be dealt under a Resolution Plan. It is submitted that the proceedings under the I&B Code cannot be used as a panacea for wiping off all breaches of the terms of use including nonpayment for use of spectrum and grant the benefits of right to use in favour of the Resolution Applicant even where the same will be in breach of law and against public interest. Reference is made to *Municipal Corporation of Greater Mumbai vs. Abhilash Lal & Ors, 2019 SCC Online SC 1479*, wherein it was held that NCLT could not have approved the plan which implicated the assets of MCGM especially when the Corporate Debtor had not fulfilled its obligations under the contract. It further held that the I&B Code could not have precluded the control that MCGM undoubtedly have under law, to deal with its properties and the land in question, which undeniably were public properties. The present case is covered by this ruling of the Hon'ble Apex Court. It is submitted that the Resolution Plan of UVARCL is ex-facie illegal and in contravention of existing laws and doctrine of public trust. Though I&B Code has an overriding effect, the plan cannot be used as a mechanism or route to undertake actions contrary to law including the doctrine of public trust.

15. As regards nature of dues of DOT, it is submitted on behalf of Appellant that National Telecom Policy, 1999 regime was made on the representation of TelCos who had consistently defaulted in making payments. Under the regime an option was given to migrate to revenue share model which was a liberalized mode of payment. Under it the Government became a partner or sharer of gross revenue. Under this regime, it was stipulated that the conditions are to be accepted in entirety and no dispute concerning the License Agreement shall be raised at a future date. Though, the revenue sharing package was beneficial to the TelCos, they soon started raising disputes on calculation of AGR on one or the other pretext. TelCos continued to use spectrum without paying. It is submitted that the right to use spectrum ceased when TelCos started defaulting on terms of the Licence. The CD was in default in payment of licence fee and AGR and had admittedly suspended operations at the time of entering CIRP. The accumulated fee for right to use which remains in default is more than Rs.10,000 crores in the present case. The amount would be staggering if other TelCos undergoing CIRP is considered. It is submitted that the Resolution Applicant (not being a TelCo), without payment of fee cannot be permitted to trade in spectrum without complying with the terms and conditions of the licence and right to use. The TelCos were holding the spectrum, a national resource in trust for the people and they cannot be permitted to trade therein without payment of consideration. Banking upon the judgment of Hon'ble Apex Court in '*Swiss Ribbons vs. Union of India*' (2019)

4 SCC 17, it is submitted that the intent of the legislature could not have been to treat the dues to DOT as operational or secondary to the dues of the Financial Creditors dehors the agreed terms of contract between the stakeholders. It is further submitted that the dues payable to the DOT are not in respect of any goods or services but consideration for the licence fee and right to use a scarce natural resource which was given in trust to the TelCos. Such consideration is money collected in trust by the DOT for the people. It is submitted that goods which are sold or services that are provided under executed contracts (whereby title to goods passes) are clearly distinguishable from executory contracts of licence or right to use that are given in trust subject to specific terms and conditions to protect the right of the people. In the instant case, the payable to the State arises under licence or a grant given in trust in circumstances where the CD proposes to continue the said license and grant for the benefit of its other creditors and not for the benefit of people. The grant has not been given by the State by way of a contract in trust. The CD has no power to assume the licence in one part (the grant itself) and reject in the other (payment for continuing the grant). The consideration payable to DOT cannot be equated with dues arising under any statute like tax dues under a statute which fall within the definition of 'operational debt'. It is further submitted that dues owed to the Government as consideration for grant under the license Agreement and the NIA cannot be treated as operational debt especially where the CD continues to use or proposes to continue to use the

benefit conferred under the contract. This would allow the CD to unilaterally vary the terms of the contract without consent of DOT and to the detriment of beneficiaries viz. people. Such variation would be contrary to provisions of I&B Code and public interest. It is further submitted that the relationship between the TelCos and the DOT is not in the nature of relationship between a Creditor and a Debtor, this is a relationship between the owner of the asset (State on behalf of the people) and the Grantee. The life of the grant is dependent on the terms of the grant and the state stands in position of a trustee to ensure that the terms and conditions of grant are complied and not in capacity of a creditor seeking to recover the dues.

16. It is further submitted that if the dues of DOT are considered operational, then the plan is not in compliance with Section 30(2) of the Code. Mr. Amit Mahajan would further submit that the Resolution Plan of UVARCL proceeds on the assumption that CD would be able to trade on spectrum and use the proceeds to pay off its financial creditors. However, the liquidation estate of TelCos does not include right to use spectrum. If the TelCos were ordered to be liquidated, the right to use spectrum could not have been sold as part of distribution of their liquidation estate and no benefit could have accrued to any of the creditors. It is further submitted that DOT is a Secured Creditor as the Tripartite Agreement clearly provides that the DOT shall have first priority from any sale of assets/infrastructure of the CD in case of a default. The arrangement between the DOT, CD and the Lenders under the

Tripartite Agreement is such that secures payment to DOT in priority to the dues of Financial Creditors. As regards the factum of DOT having filed its claim as Operational Creditor, it is submitted that same was done under an understanding but the nature of Claim Form filed or any particular understanding of any officer of the Department is of no consequence for the purpose of deciding the legal issues involved. The finding has to be returned by this Appellate Tribunal as per the directions of the Hon'ble Apex Court which is irrespective of any Form filed or objection taken.

17. It is further submitted that in the event of it being found that right to use spectrum is an asset of CD, DOT will be a Financial Creditor. It is submitted that the right to use the spectrum itself is granted on the basis of deferred payments going to the root of exercise of the right of the CD, the said deferred payments can be treated as liability in the nature of Financial Debt under Section 5(8) of I&B Code. Reliance is placed on clause (d) thereof, under which the amount of any liability of CD in respect of any lease or hire purchase contract which is deemed as a finance or capital lease is considered financial debt, even though there is no disbursement of money by the Financier to the CD. It is submitted that the delayed amounts to be paid by the CD can be covered within the definition of Financial Debt as provided for under the I&B Code. The delayed amounts to be paid by the CD would have the trappings of commercial borrowing and in that sense would amount to a creation of a financial debt within the meaning of I&B Code.

18. Mr. Mahajan would further submit that the Resolution Plan approved for the Aircel Companies has the effect of a non-telecom company taking over the Corporate Debtor, monetizing the assets of CD, trade spectrum sometime in future, recover monies from such trading and distribute the same to FCs alone leaving the Licensor – DOT with the prospect of being paid a measly amount against its dues of more than Rs.10,000 crores. It is submitted that the intention behind initiation of CIRP and approval of Resolution Plan in the instant case is to usurp the spectrum without putting it to any use, to evade liability of the DOT and to make contingent payments only to the FCs from the sale of spectrum. It is submitted that the Resolution Plan submitted by UVARCL is a liquidation plan in disguise to enable actions being taken which the CD could not have taken in liquidation. It is submitted that under Section 5(26) of the I&B Code ‘Resolution Plan’ is defined as a plan proposed by the Resolution Applicant for insolvency resolution of the CD as a going concern. It is settled that a Resolution Plan is not a sale or auction or recovery or liquidation but a plan for insolvency resolution of CD as a going concern. Taking over a CD with intent to sell it is against the basic object of I&B Code. It is further submitted that the Aircel Companies stopped operations before going into insolvency and for about three years now spectrum is being wasted to ostensibly preserve the value of the CD. It is further submitted that in the instant case, the Resolution Plan is not intending to revive the operations of the Aircel Companies and put them back on their feet. The plan entails significant

scaling down of the operations of the Aircel Companies and monetization of assets claimed by it. The proceeds of such monetization are proposed to be used for meeting the payment obligations of the Resolution Applicant under the plan primarily towards the Banks. With uncertainty writ large as to when the spectrum will be sold and for how much, the resolution process stands converted into recovery process for Lenders. Thus, the approved Resolution Plan rests largely upon monetizing most of the assets of CD, a fact noted by the NCLT in the impugned order. The approval of the Resolution Plan patently is contrary to the object of I&B Code and also against public interest. It is further submitted that despite observing that the plan does not appear a Resolution Plan but appears to be a winding up liquidation plan, the NCLT failed to examine the bonafide of the Aircel Companies in voluntarily initiating CIRP under Section 10 of I&B Code, such applications being filed fraudulently and with malicious intent to evade payment of huge arrears owed to DOT. The NCLT ignored the mandate of law that it had to ensure that the scheme in terms of the Resolution Plan was not a guise or ruse to sell the assets. It is submitted that the CD cannot be resolved as approved by NCLT as the Resolution Plan approved by it does not seek revival of the Company as a going concern and admittedly the CD has stopped its commercial operations.

19. Per contra Shri Ravi Kadam, Senior Advocate representing Respondent No. 1 (Resolution Professional) in Company Appeal (AT) (Insolvency) No. 733 of 2020 submitted that the Aircel Entities are the holders of Telecom Licences

granted by the DOT for various circles across India which have been granted in the year 2006 under Unified Access Service Licence Agreements (UASL/ Licence Agreements) entered into with DOT and same are valid for a period of twenty years ending 2026. Right to use spectrum has been acquired by the Aircel Entities on exclusive basis for various bands after participating in auctions conducted by DOT. Till date an amount of around Rs.7300 Crores has been paid by the Corporate Debtors towards purchase of right to use spectrum.

20. It is further submitted that under I&B Code an IRP and RP are required to take custody and control of all the assets of the Corporate Debtor including those which are reflected as assets in the balance sheet of the Corporate Debtors, which include both tangible and intangible property. The expression 'property' has been defined in a wider manner to mean every description of property and every description of interest. The term 'transfer of property' is defined to mean transfer of property including any interest in the property. General Clauses Act, 1897 defines 'movable property' as property of every description except immovable property. Under Sale of Goods Act, 1930, the expression 'goods' has been defined to mean every kind of movable property. Thus, the definition of 'property' and 'goods' under various statutes is broad and includes tangible and intangible properties. It is submitted that an asset forming part of the balance sheet of Corporate Debtor and falling within the

definition of property under the applicable law would be regarded as assets of a Corporate Debtor.

21. As regards the meaning of the term 'asset', it is submitted by Mr. Kadam that in Blacks Law Dictionary it is defined as 'an item that is owned and has value'. The term 'intangible assets' is defined in the same dictionary as 'any non-physical asset or resource that can be amortized or converted to cash such as patents, goodwill and computer programs or a right to something such as services paid for in advance'.

22. It is next submitted that the right to use spectrum and telecom licences are valuable intangible assets of the Aircel Entities, which are duly reflected as intangible assets of Aircel Entities in the financial statements of AL and DWL. These have been acquired and disposed of in the past like any other asset and cost of borrowing has also been capitalized for such assets. The Lenders have provided funds to the Corporate Debtors on the understanding that licence and right to spectrum are assets of the Corporate Debtors. If assets are excluded from the ambit of I&B Code only because of their intangible nature, it would adversely affect various companies undergoing insolvency proceedings that have been granted grants and licences by statutory bodies.

23. Mr. Kadam would further submit that while spectrum is admittedly a natural resource which belongs to the people of India, by parting with the substantial consideration and by participating and emerging as the highest

bidder in the auction conducted by the DOT under NIAs, the relevant Corporate Debtors have acquired an exclusive right to use the spectrum in the respective bands for the fixed period. The telecom licences and right to use spectrum form the substratum of business and most valuable asset of the Corporate Debtors.

24. It is next submitted that the entire outstanding amount of deferred spectrum payments, minus the amount paid upfront, has been treated as a liability at the time of acquisition of the right to use spectrum. Such amount is capitalized under the books of accounts of the Corporate Debtors maintained under Income Tax Act, 1961. Even deduction is claimed on account of depreciation while calculating income tax liability and such amounts are amortized over a period of time. This is clearly indicative of ownership rights of the Aircel Entities over such asset.

25. It is further submitted that the treatment of right to use spectrum and licences as intangible assets of Corporate Debtor is further corroborated by the consultation paper dated 7th March, 2012 issued by TRAI on auction of spectrum, Guidelines for the Reporting System on Accounting Separation Regulations, 2016, the Indian Accounting Standards – 38 and the conceptual framework for financial reporting published by International Accounting Standards Board. The telecom licences and right to use spectrum were the

assets of Aircel Entities controlled by it and the future economic benefits were expected to flow to it out of such assets.

26. Mr. Kadam would further submit that the right to use spectrum is an intangible asset of the Corporate Debtors and being the asset of Telecom Service Providers they are the owners of the right to use spectrum under licence granted to them. It is submitted that while under Indian Telegraph Act it is the exclusive privilege of Government to maintain and deal with telegraphs but the statute has enabled parting with the privilege by licensing it out for a specified period in lieu of consideration (subject to conditions) whereupon the Licensee becomes the owner of right to use of specific band of spectrum and unless there is breach of contractual terms, the DOT cannot cause interference in exercise of rights of the Corporate Debtors.

27. It is further submitted on behalf of Respondent No. 1 that the relationship between DOT and the TelCos are governed by the terms and conditions of NIA and UASL Agreements executed inter-se the Licensor and Licensee and having been acquired for a substantial consideration through auction, are permitted to be used upon payment of licence fee. This is a contractual arrangement between DOT and TelCos and judicially recognized as such by the Hon'ble Apex Court in *Union of India vs. Association of Unified Telecom Providers of India (2011) 10 SCC 543*.

28. As regards the question whether spectrum is a natural resource and the Government is holding the same as *cestui que trust*, it is submitted that while spectrum is a natural resource that is held by the Government in public trust, the right to use of spectrum is granted by the DOT to the Telecom Service Provider through licence upon payment of consideration which assumes a character of a contract and such right is vested with the Licensee for the licence period. It is further submitted that such right is the asset of the Telecom Service Providers. While all natural resources are vested with the Government who holds the same as *cestui que trust*, however, once the Government has parted with the right to use or utilize or mine such asset, such right vests in the Licensee as its asset.

29. It is further submitted that ownership is a collection of rights to use and enjoy property including right to transmit it to others. Reference in this regard is made to law laid down by the Hon'ble Apex Court in *B. Gangadhar vs. B. G. Rajalingam, 1995 SCC (5) 238*. It is submitted that the ownership includes the right to maintain or recover possession of a thing as against all others, right to its enjoyment, right to access, other beneficial enjoyment incidental thereto and the remedy to have any obstruction removed. Referring to the judgment of Hon'ble Apex Court in *Rajender K. Bhutta vs. Maharashtra Housing and Area Development Authority and Anr. (Civil Appeal No. 12248 of 2018)*, it is submitted that occupation includes possession as its primary element and also includes enjoyment. Mere physical possession would not satisfy the requirement of

occupation. It is submitted that *animus possidendi* (intention to possess) is the key ingredient of possession which is an intent to appropriate to oneself the exclusive use of the thing possessed. It is submitted that the test for determining whether a man is in possession of anything is whether he is in general control of it. It is submitted that the Aircel Entities have a *de jure* right (ownership) as well as *de facto* right (possession) to telecom licence and right to use spectrum. The intention to possess the aforesaid assets by the Aircel Entities is evidenced from the treatment of such assets in their financial statements as their own assets.

30. It is further submitted that the UASL Agreement recognizes the right of the Licensee to transfer the telecom licences with the consent of DOT. The Spectrum Trading Guidelines permit transfer of right to use spectrum with the approval of DOT, and in this regard DOT has the right to recover the dues for the period prior to the effective date of trade. Various conditions and modalities for transfer are prescribed. Thus, the companies holding right to use spectrum are eligible to trade right to use spectrum subject to fulfillment of the conditions set out under the Spectrum Trading Guidelines. It is further submitted that sale of assets of a Corporate Debtor as a part of the Resolution Plan is permissible under Regulation 37 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations). The right to use of spectrum and licences being assets of the Corporate Debtors are permitted to be transferred under the approved Resolution Plans in addition to

such transfer of right to use spectrum being allowed as per the guidelines. It is submitted that merely because full consideration had been not paid by the Corporate Debtor for certain rights to use spectrum, such rights do not cease to be assets of the Corporate Debtors or become non-transferable to a third party.

31. It is submitted that the Resolution Plans envisage inter-alia monetization of right to use of spectrum for the purpose of generation of funds for resolution of debt of their creditors. It is specifically provided that the transfer of right to use spectrum and telecom licences shall take place only upon obtaining due approval from the DOT, thereby also meeting the DOT Guidelines.

32. As regards the question whether spectrum can be subjected to proceedings under I&B Code, it is submitted by Mr. Ravi Kadam, learned senior counsel that the telecom licences and right to use spectrum being assets of Corporate Debtors are covered under moratorium in terms of Section 14 of the I&B Code. It is submitted that the explanation to Section 14(1) and sub-section 2A were introduced to provide adequate clarity that the licences and concessions issued by Government Authorities could not be terminated or suspended during CIRP so long as the dues arising during the CIRP were being paid to ensure that the substratum of the business is maintained during the CIRP. It is submitted that the Insolvency Law Committee Report of February, 2020 clearly reflects the legislative intent i.e. to ensure protection to such

grants and licences during CIRP that form the substratum of the business of the Corporate Debtor and ensure going concern. With reference to judgment of Hon'ble Apex Court rendered in *M/s Embassy Property Developments Pvt. Ltd. vs. State of Karnataka &Ors. (Civil Appeal No. 9170 of 2019)*, it is submitted that the same had been rendered prior to amendment introduced in Section 14. The assets of Corporate Debtor (grants, licences and permits) should continue to be protected and be available to the Corporate Debtor during the CIRP and Corporate Debtor should not be deprived of its primary assets until a Resolution Applicant takes over.

33. As regard the question whether spectrum can be subjected to proceedings under Section 18 of I&B Code, it is submitted that the right to use spectrum being an intangible asset of the Aircel Entities is expressly covered within the assets as set out under Section 18(f) enjoining upon the IRP to take control and custody of any asset of the Corporate Debtor. Explanation (a) to Section 18 only refers to asset of a third party in possession of a Corporate Debtor. The telecom licences and the right to use spectrum being assets of the TelCos do not fall under the said explanation. Under Section 25(2)(a) of I&B Code, the Resolution Professional is under a duty to take immediate custody and control of all assets of the Corporate Debtor and to protect and preserve the same. The telecom licence and the right to use spectrum being the intangible assets of the Corporate Debtors are the assets which the Resolution Professional is required to take into custody and control. Even

Section 36(4)(iv) provides that liquidation estate assets do not include other contractual arrangements which do not stipulate transfer of title but only use of the assets. Right to use spectrum being an asset of the Corporate Debtors and not being a third party's asset does not fall within the purview of explanation (a) to Section 18. It is further submitted that under Explanation 1 of Section 14(1) all concessions, permits and licences given by the Government Authorities are protected under Section 14 of the I&B code during the CIRP. These provisions, read together with Section 238 of I&B Code make the position clear that the right to use spectrum and the telecom licences shall be subject to proceedings under Section 18 and 25 notwithstanding anything to the contrary contained in the Licence Agreement or other DOT Guidelines.

34. As regards the question whether the dues under the licence can be said to be the operational dues and whether the deferred/default payment, installments of spectrum acquisition cost can be termed to be operational dues besides AGR dues and the allied questions, it is submitted that dues of DOT constitute operational debt. It is submitted that in Black's Law Dictionary 'debt' has been defined to include liability on a claim whereas under I&B Code an 'operational debt' under Section 5(21) has to be either a claim in respect of provision of goods or services or a debt in respect of payment of dues arising under any law and payable to statutory authorities. It is further submitted that the second amendment replacing the term 'repayment' with 'payment' was to clarify that the dues were not limited to merely an obligation to refund by the

Corporate Debtor but also as a performance obligation. Referring to clarification sought by MCA in regard to nature of dues owed by the Aircel Entities, it is submitted that the MCA had issued an Office Memorandum clarifying that the dues arising under the Indian Telegraph Act, 1885 or by way of services in terms of the licence agreement would be in the nature of operational debts. It is submitted that all dues arising pertaining to licence and right to use of spectrum arise under applicable laws and are regulated by the DOT under powers granted under the Indian Telegraph Act and thus satisfies the requirement to be classified as an Operational Debt being dues arising under law for the time being in force and payable to Government. It is further submitted that right to use spectrum/ licence are goods being intangible assets of the TelCos and dues arising on account of provision of such goods by way of the periodic charges such as AGR linked spectrum usage charges/ licence fees or the deferred spectrum consideration fall within the ambit of Section 5(21) and thus meet the requirement of being an operational debt. Such spectrum liabilities having accrued prior to insolvency commencement date though payable subsequently, would be considered as pre-CIRP dues and would be dealt alongwith any other CIRP dues. It is further submitted that CBEC in their circulars, have acknowledged that an activity undertaken by the Government against a consideration including by way of grant of privileges, licences, natural resources such as spectrum, etc. would be 'service' and be subject to GST/ Service Tax. The telecom licences and right to

use spectrum are parted with by the DOT in lieu of consideration and are governed by terms of licence and NIA. Any dues arising during CIRP period under these contracts are in the nature of a service, therefore, coming within the purview of 'operational debt'. Thus, the dues payable by the Corporate Debtors should have to be claimed and admitted as an operational debt. It is submitted that the DOT itself submitted its claim in Form B as an Operational Creditor, participated in the entire CIRP of the Corporate Debtors as an Operational Creditor attending the meetings of CoC and engaging in exercise involving discussions on Resolution Plans. It is now raising the issue on the nature of its dues with the sole intent to somehow steal a march over the other creditors of the Corporate Debtors. It is submitted that merely because credit period has been allowed for payment of certain dues such as the deferred spectrum consideration, it would not bring the debt within the concept of 'debt disbursed for time value of money' and therefore cannot be termed as a financial debt.

35. In regard to treatment of deferred spectrum consideration as debt it is submitted by Mr. Ravi Kadam, learned senior counsel that obligations on account of deferred spectrum installments arose prior to insolvency commencement date during the time the right to spectrum had been acquired by the TelCos whose payment has been deferred and as such are to be treated as pre-CIRP operational debts. DOT itself has filed claims, towards the entire

deferred spectrum installments as an operational creditor, which have been admitted and are being dealt with under the Resolution Plans.

36. On the aspect of availability of natural resource for use without payment of requisite dues, it is submitted that when a company undergoes insolvency proceedings, all pre-CIRP dues (including statutory dues) are required to be dealt with under a Resolution Plan. Hence, non-payment of full consideration shall not impact the rights of Aircel Entities to continue to retain the telecom licence and the right to use spectrum as its assets in the insolvency proceedings even if part of the dues have not been paid before commencement of CIRP. It is further submitted that all admitted claims of Operational Creditors are required to be settled as part of approved Resolution Plans. Dues of DOT are included in dues payable to Government and the interests of Operational Creditors are statutorily protected in the Resolution Plans by providing for mandatory payment which in any case shall not be less than the amount to be paid to such creditors in the event of liquidation of Corporate Debtor under Section 53 of I&B Code or distributed in accordance with order of priority whichever is higher. It is submitted that once the payments envisaged under the Resolution Plans are made, the outstanding dues as on the insolvency commencement date shall stand settled in terms of Resolution Plan.

37. As regards the question whether spectrum licence can be subjected to proceedings under I&B Code, it is submitted that Section 238 of I&B Code

contains a non-obstinate clause which provides that the Code shall have an overriding effect notwithstanding anything inconsistent contained in any other law. It is pointed out that in *Ashwini Kumar Ghosh & Anr. vs. Arabinda Bose*, AIR 1952 SC 369, the Hon'ble Apex Court held that where two statutes cannot be read harmoniously, a later law abrogates earlier laws clearly inconsistent with it. Therefore, I&B Code being comprehensive on the subject of insolvency would have an overriding effect. It is further submitted that the DOT being a statutory authority should be treated in the similar manner as other statutory authorities under the I&B Code as creditors of same class and no preferential treatment can be given to it.

38. On the aspect of a licence being transferred under the insolvency proceedings particularly when trading is subjected to clearance of dues under the Spectrum Trading Guidelines, it is submitted that the Spectrum Trading Guidelines intended to enable optimal utilization of spectrum through appropriate regulatory framework to facilitate greater competition, ease of doing business and optimization of business. On the other hand I&B Code was intended to provide for reorganization and insolvency resolution of corporate persons and seek maximization of value of assets, promote entrepreneurship and make credit available while balancing interests of all stakeholders simultaneously. It is submitted that the question of seeking approval of DOT for trading of right to use spectrum shall only arise prior to actual transaction of trade/ transfer of the allotted spectrum in terms of the Resolution Plan. It is

submitted that the Resolution Plans do provide for seeking such approval as a condition precedent for transfer of right to use spectrum. It is pointed out that under Section 31(4) of I&B Code, the Resolution Applicant is provided time of one year from the date of approval of Resolution Plan to obtain approvals required under the applicable laws. It is further submitted that under UASL and NIA no specific restrictions or requirement of DOT's approval for change in shareholding of companies have been stipulated. Aircel Entities shall continue to be holders of such rights upon assumption of shareholding control by the successful Resolution Applicant. Thus, there is no legal prohibition on the Resolution Plans providing for a future transfer of the right to use spectrum and telecom licences which in any event will need to be transferred in accordance with the DOT Guidelines and with their consent but without prejudice to the settlement of dues and continuation of assets with the Corporate Debtor as resolved under the Resolution Plan.

39. In regard to question whether the spectrum can be subjected to resolution proceedings when the Government has declined the permission to trade for non-fulfillment of the conditions stipulated in the licence agreement, it is submitted that breach under contracts is not a ground to prevent initiation of I&B Code. I&B Code does not preclude the admission into CIRP of a Telecom Company merely because it is in breach of any of the conditions of the allotment of spectrum or telecom licence or on account of permission to trade having been rejected prior to the CIRP by DOT. The wiping off of the

Government dues under the Resolution Plan cannot be a ground to vitiate the initiation of a company into insolvency proceedings or approval of a resolution plan which otherwise meets the requirements of I&B Code. In absence of express prohibition under the I&B Code, there is no restriction for a Telecom Company to be subject to insolvency proceedings.

40. It is further submitted that the Resolution Plans do not propose dispensation of DOT's approval. It is provided that transfer of right to use spectrum and the telecom licences shall take place only upon obtaining approval from the DOT which is specifically noted in the approval order. It is further submitted that the Resolution Plans only provide for the right of the Corporate Debtors to seek DOTs permission to transfer the right to use spectrum and licence related dues in accordance with the spectrum trading guidelines. The trading guidelines are not substituted under the CIRP but only required to be construed in accordance with the Resolution of pre-CIRP dues made in accordance with provisions of the I&B Code.

41. It is submitted that the CIRP of the Corporate Debtors had commenced long before decision of the Hon'ble Supreme Court on AGR dated 24th October, 2019 and does not appear to have been triggered as a consequence of the judgment or to avoid DOT's dues but due to various defaults. During CIRP commencement, order dated 29th February, 2016 passed by the Hon'ble Supreme Court was still in force as per which the DOT had undertaken not to

enforce AGR demand on the Corporate Debtors. The CIRP stands concluded pursuant to the approval order.

42. So far as question regarding the spectrum being treated as a security interest and its mode of enforcement in the context of Tripartite Agreement is concerned, it is submitted that such agreement clearly provided that the same was executed to protect and secure the lender's interest arising out of grant of financial assistance to the Licensee. Licences/ spectrum are held in security by the lenders in terms of the agreement to which the DOT is also a party. It is enforceable in accordance with the terms laid down therein. The dues payable to the DOT being dischargeable operational debt under I&B Code can be discharged as a part of the Resolution Plan in the manner and as per priority set out in the Code.

43. Mr. Dhruv Dewan, Advocate representing UVARCL (Respondent No. 2) while adopting submissions made by the learned senior counsel appearing on behalf of the Monitoring Agency and Committee of Creditors on the issues formulated by Hon'ble Apex Court further submits that a licence granted under the proviso to sub-section (1) of Section 4 of the Telegraph Act is in the nature of a contract between the Central Government and the Licensee. He further submits that the right to use spectrum obtained by the CDs for valuable consideration pursuant to auctions conducted by the DOT, constitutes an intangible assets of the CDs which would continue to remain vested with the

CDs despite the commencement of CIRP and even after approval of the Resolution Plans. Such right would never perish and would be available as an asset of the CDs once the resolution is complete. It is further submitted that the telecom licences constitute an instrument within the meaning of Section 238 of I&B Code and in so far as its terms are contrary to the mandate of I&B Code, the same would stand overridden by the provisions of the I&B Code. It is further submitted that it is the overarching concern to maintain the going concerns status of the CD, preservation of assets and property of the CD during CIRP besides paramount considerations of revival, rehabilitation and amelioration of the CD which must inform the adjudication of issues in the present case. The right to use spectrum is central to the resolution of Aircel Entities and the fundamental asset of the CD cannot eviscerate only for the reason that the CD is in CIRP.

44. He further submits that the devolution of the right to use spectrum in favour of the CDs is complete.

45. On the issue whether DOT is an Operational Creditor of the Aircel Entities, the Successful Resolution Applicant adopts the arguments advanced by learned counsel for the Monitoring Agency that the dues owed to DOT constitute operational debt. It is submitted that keeping in view the essential attributes of financial debt and financial creditor, it is clear that DOT cannot be regarded as a 'Financial Creditor'.

46. It is lastly submitted that for the reasons assigned in order dated 12th March, 2018 passed by the Adjudicating Authority for admitting the petitions under Section 10 I&B Code and commence CIRP in respect of the Aircel Entities, it cannot be said that such initiation was malafide or for meeting oblique ends.

47. Mr. Ramji Srinivasan, learned senior counsel representing State Bank of India and rest of the members of the Committee of Creditors of Aircel Entities (Respondent No. 3 in Company Appeal (AT) (Insolvency) No. 733 of 2020) submitted that telecom spectrum is a public asset with the Government acting as its trustee. However, the right to use spectrum becomes an asset in the books of the allottee company when a licence is granted for a specific period and on payment of fees/ consideration. It is submitted that Aircel Entities/ CDs are holders of telecom licences for various circles under Unified Access Service Licence Agreement (UASL/ Licence Agreements) which are valid for a period of twenty years i.e. till the year 2026. It is further submitted that the Aircel Entities obtained the right to use spectrum through NIA for spectrum auction in 2010, 2014, 2015 and 2016 on payment of huge consideration. It is further submitted that the financial statements of the Aircel Entities include the Licence as well as the right to use spectrum as intangible assets which are most valuable assets. The right to use spectrum and licence are transferrable/tradable assets under the Spectrum Trading Guidelines and UASL. TRAI's consultation paper dated 7th March, 2012 and Guidelines for the

Reporting System on Accounting Separation Regulations, 2016 also categorize the right to use spectrum and licence / spectrum fee as intangible assets. The Indian Accounting Standards – 38 also recognize right to use spectrum and licence as intangible assets. It is submitted that the word ‘assets’ means a man’s property of whatever kind which may be used to satisfy debts or demands existing against him as held by Hon’ble Apex Court in *Maharashtra State Cooperative Bank Ltd. vs. The Assistant Provident Fund Commissioner*, AIR 2010 SC 868. It is submitted that the word ‘asset’ must be given its ordinary and natural meaning given that is in context of the Corporate Debtor under the provisions of I&B Code and must include everything that’s available to discharge the debts of the Corporate Debtor. It is further submitted that Section 3(27) of I&B Code is of the widest amplitude and defines property to include every description of interest including present or future or vested or contingent interest arising out of or incidental to property whereas Section 2(7) of the Sale of Goods Act, 1930 defines ‘goods’ to mean every kind of movable property and thus would include the spectrum and licence. It is submitted that ownership of property is a bundle of rights and a licence or a right of use is very much a sub-set of such rights. Therefore, it is submitted, Section 3(27) of the I&B Code covers the right to use the spectrum within its ambit. It is further submitted that under Section 18 of I&B Code, IRP is obligated to take in custody all assets as recorded in the balance sheet of CD with intangible assets specifically included under Section 18 (f)(iv). It is further submitted that

the explanation to Section 14(1) of the I&B Code clearly provides that licences, grants etc. given by Government or any other authority is an asset of the CD which cannot be suspended or terminated during the moratorium period. With reference to judgment rendered by Hon'ble Apex Court in *Rajendra K. Bhutta vs. Maharashtra Housing and Area Development Authority, 2020 SCC Online SC 292*, it is submitted that when a moratorium is imposed by Section 14, the idea is to alleviate corporate sickness and a statutory status quo is pronounced so that the insolvency resolution process may proceed unhindered by any of the obstacles that would otherwise be caused. It is submitted that the licences and right to use spectrum granted by the Government are valuable assets of the Aircel Entities which require protection by way of moratorium during the CIRP period so as to achieve the primary object of the I&B Code i.e. revival and rehabilitation of Corporate Debtor. Recovery of any property in occupation or possession of CD by an owner or lesser is prohibited during moratorium. Right to use spectrum is the property of the licensee who is in possession of the spectrum and has the right to enjoy the use of spectrum as also the right to transfer the same. The licence cannot be terminated by virtue of any document in view of prohibition imposed under Section 14 of I&B Code.

48. As regards deferred spectrum payments and the AGR dues, it is submitted that the same being payable for the grants arising prior to commencement of CIRP would not be required to be paid during the moratorium period. The full amount in respect of spectrum due to DOT by the

allottee is payable in the form of upfront payment and installment for the deferred payment in terms of NIA schedule. It is pointed out that the DOT itself has filed claims for entire deferred spectrum payments as well as AGR dues as part of its claims as an Operational Creditor. Thus, such dues are not current dues and the entire deferred payment installment is an operational debt owed to the DOT, which will be settled in terms of the Resolution Plan. Such claims which became due before initiation of CIRP are required to be treated as pre-CIRP claims and not as current dues. It is submitted that the grant of the licence/ right to use spectrum by Government to a TelCo is a service and amounts payable for the same would be an operational debt making the Government an Operational Creditor. DOT itself has submitted claim in Form B and participated in the entire CIRP of the Aircel Entites as an Operational Creditor. It is submitted that the debt is a debt even when the obligation to pay arises from a regulatory condition, therefore, payment obligation towards DOT is an operational debt which are to be settled in accordance with the terms of I&B Code which aims at balancing the interests of all the stakeholders including alteration in the order of priority of payment of Government dues. It is submitted that telecom services are purely contractual in nature and recognized as such by Hon'ble Apex Court in the AGR judgment. Thus, the dues of DOT are purely contractual dues and cannot have precedence over the dues of CoC in terms of provisions of I&B Code. It is submitted that Section 238 of I&B Code overrides other laws and even crown

debts do not take precedence over Secured Creditors. The provisions of I&B Code read with Section 238 override any existing contracts between the DOT, Lenders and the Aircel Entities. It is submitted that the claims of the DOT will be subservient to that of the Lenders as charge override to use spectrum and licence has been created in favour of the CoC with the consent of the DOT, therefore the CoC are Secured Financial Creditors of the Aircel Entities. The Tripartite Agreement has been executed to facilitate financing and the terms and conditions therein regulate transfer/ assignment of licence to secure the loans extended by the Lenders. Lastly, it is submitted that the CoC had extended loans to the Aircel Entities only upon creation of charge over the spectrum and with the consent of the Appellant. Thus, the Appellant's claim over the spectrum will be subservient to the CoCs claim. CoC comprising of Public Sector Banks are custodians of public money and have advanced loans and financial assistance based on the Tripartite Agreement. The Public Sector Banks are in the business of providing financial facilities for betterment of National economy and should be allowed to recover money as per their security.

49. Mr. Anoop Rawat, Advocate seeking intervention on behalf of Reliance Communication and Reliance Telecom was permitted to address. He adopted the arguments advanced by Mr. Ravi Kadam, Senior Advocate representing the Resolution Professional.

50. Mr. Amit Mahajan, learned CGSC representing the Appellant, in rebuttal, submitted that the Corporate Debtor faltered in clearing the dues though the monies were recovered from public, therefore, CDs cannot be heard to say that their rights need to be protected when they were not having any rights qua the use of spectrum on the date of triggering of CIRP. It is submitted that the spectrum suffers continuous waste. Since the CDs had no right to use in previous years for breach of the terms of licences, they cannot claim any such rights for future. It is further submitted that the Government has been reiterating time and again its demand in respect of dues payable as per contract which has not been complied with and CIRP triggered with malafide intent to evade the liability. It is lastly submitted that DOT was not a party to any loan agreements inter se the CDs and the Lenders but only a party to the Tripartite Agreement, therefore, same do not in any way affect the rights of DOT qua the spectrum which is a National asset.

51. Heard learned counsel for the parties as also the applicants seeking intervention at length and waded through the record and the written submissions filed by learned counsel. In our considered opinion it would be appropriate first to deal with the questions raised in Para 22 of the Judgment which strike at the very root of the matter.

52. Whether spectrum is a natural resource and Government is holding the same as cestui que trust?

The question whether spectrum is a natural resource is no more *res integra*. In the “*Center for Public Interest Litigation & Ors vs. Union of India & Ors, (2012) 3 SCC 1*”, the Hon’ble Apex Court observed:

“65. *Spectrum has been internationally accepted as a scarce, finite and renewable natural resource which is susceptible to degradation in case of inefficient utilization. It has a high economic value in the light of the demand for it on account of the tremendous growth in the telecom sector. Although it does not belong to a particular State, right of use has been granted to States as per international norms.*”

Dealing with the natural resources, it observed that natural resources are generally understood as elements having intrinsic utility to mankind. The natural resources may be renewable or non-renewable and same are considered as individual elements of the natural environment that provides economic and social services to human society thus being valuable in their natural form. Of course its value rests upon the quantum available and demand for it. The observations of the Hon’ble Apex Court are of great relevance and are reproduced as under:

“63. *..... Natural resources belong to the people but the State legally owns them on behalf of its people and from that point of view natural resources are considered as National*

Assets, more so because the State benefits immensely from their value. The State is empowered to distribute natural resources. However, as they constitute public property/national asset while distributing natural resources the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest. Like any other state action constitutionalism must be reflected at every stage of the distribution of natural resources.”

It further observed that the ownership regime rests upon the concept of sovereignty which, in International law seeks to respect the principle of permanent sovereignty of peoples and Nations over their natural resources. The Hon’ble Apex Court took note of the fact that the common law recognizes States as having the authority to protect natural resources in so far as the resources are within the interest of the general public. It further observed that the State is deemed to have a propriety interest in natural resources and must act as guardian and trustee in relation to the same.

While referring to provisions contained in Article 38, 39, 48, 48A and 51A(g) of Constitution invoked by courts for protection and distribution of natural resources, it observed that the constitutional principles in process of distribution, transfer and alienation of natural resources to private persons

have been repeatedly insisted upon. Noting that the Doctrine of Public Trust evolved in *'Illinois Central Railroad Company vs. People of the State of Illinois'* has been applied as a part of the Indian Jurisprudence in *'M. C. Mehta vs. Kamal Nath, (1997) 1 SCC 388'*, and a host of subsequent judgments, the Hon'ble Apex Court observed that the States and its instrumentalities actions must be for the public good, achieving the objects for which they exist and should not be arbitrary or capricious. The following observations made in *'Fomento Resorts and Hotels Ltd. Case'* are of immense significance and are reproduced as under:

"53. The public trust doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. This doctrine puts an implicit embargo on the right of the State to transfer public properties to private party if such transfer affects public interest, mandates affirmative State action for effective management of natural resources and empowers the citizens to question ineffective management thereof.

54. The heart of the public trust doctrine is that it imposes limits and obligations upon government

agencies and their administrators on behalf of all the people and especially future generations. For example, renewable and non-renewable resources, associated uses, ecological values or objects in which the public has a special interest (i.e. public lands, waters, etc.) are held subject to the duty of the State not to impair such resources, uses or values, even if private interests are involved. The same obligations apply to managers of forests, monuments, parks, the public domain and other public assets. Professor Joseph L. Sax in his classic article, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention" (1970), indicates that the public trust doctrine, of all concepts known to law, constitutes the best practical and philosophical premise and legal tool for protecting public rights and for protecting and managing resources, ecological values or objects held in trust.

55. The public trust doctrine is a tool for exerting long-established public rights over short-term public rights and private gain. Today every person exercising his or her right to use the air, water, or land and associated natural ecosystems has the obligation to secure for the

rest of us the right to live or otherwise use that same resource or property for the long-term and enjoyment by future generations. To say it another way, a landowner or lessee and a water right holder has an obligation to use such resources in a manner as not to impair or diminish the people's rights and the people's long-term interest in that property or resource, including down slope lands, waters and resources.”

The Hon’ble Apex Court finally concluded:

“72. In conclusion, we hold that the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good.”

Respondents have not raised any controversy in regard to spectrum being a natural resource, it being property of the public vested in the State as a Trustee and same being always used in the interests of the country (Para 113 at page 46 of Respondent No. 1’s Reply Vol.I). None of the contesting parties disputed the proposition that the actions of the State in relation to the

spectrum are to be guided by public interest and public good. The right to use of spectrum is granted by DOT to Telecom Service Providers through licence in lieu of consideration which partakes of the character of a contract governing relations between the Licensor and Licensee with terms and conditions of licence regulating the right to use spectrum by the Licensee for the period of licence. It, however, remains to be seen whether upon parting of the right to use spectrum by DOT by way of grant of licence to TSPs, such right vests in the Licensee as an asset and if so, what is the nature of the asset and whether the same is capable of being transferred/ traded irrespective of breach of terms of licence.

53. Respondents have not asserted title to spectrum itself. They only claim to be owners of the right to use spectrum which is stated to have been parted with by the Government in their favour on payment of consideration for a specific period of time. The case set up by the TSPs is that they can be said to be owners qua the right to use spectrum which right accrues to them under the licence granted to them by the DOT. It is not in controversy that auctions were held by Government in which TSPs including Aircel Entities participated and emerging as successful bidders obtained the right to use spectrum in lieu of consideration. This emerges from the terms of Licence Agreement/ UASL dated 5th December, 2006 executed inter se DOT and M/s Aircel Ltd. (forming Annexure A at page 1651 of Vol. VIII of convenience compilation of Respondent No.1), which serves as model licence agreement for all. A bare look at the

licence agreement for Unified Access Services (UAS) would reveal that the DOT - the Licensor enjoying privilege to grant licence in terms of provisions of Section 4 of Indian Telegraph Act, 1885 agreed to grant licence to provide UAS in Andhra Pradesh as per terms and conditions described in the schedule appended thereto. The grant of licence was made on the request of M/s Aircel Ltd. - the Licensee for providing UAS in the Andhra Pradesh service area. The licence came to be granted in lieu of consideration of licence fee and due performance of the terms and conditions enumerated in the Licence Agreement on the part of Licensee on a non-exclusive basis to set up and operate the UAS in the licensed service area. The licence was agreed to remain valid for twenty years from the effective date unless revoked earlier for any reason whatsoever. The Licensee agreed and unequivocally undertook to fully comply with all terms and conditions stipulated in the Licence Agreement. The period of licence was to commence from the effective date viz. 5th December, 2006. The licence Agreement specifically provided that additional licences may be issued to the Licensee's service area without any restriction of number of operators. A peep into the terms and conditions of the Licence Agreement would reveal that the Licensee was not entitled to assign or transfer the licence to a third party or enter into any agreement for sub-licence or partnership relating to any subject matter of the licence to any third party without the prior written consent of the Licensor. It is manifestly clear that sub-leasing/ partnership/creation of third party interest was prohibited. These restrictions are incorporated in Clause 6

of the Licence Agreement. Clause 6.3, however, provides for transfer or assignment of Licence Agreement by Licensee with prior written approval of the Licensor on fulfillment of certain conditions which include such transfer of assignment being in compliance with the terms and conditions on fulfillment of procedures of Tripartite Agreement, if already executed amongst the Licensor, the Licensee and the Lenders provided the transferee/ assignee is fully eligible in accordance with eligibility criteria contained in tender conditions or any other document for grant of fresh licence in that area and expresses its willingness to comply with the terms and conditions of Licence Agreement including past and future roll out obligations. This sub-clause further provides that such transfer or assignment shall also be subject to all the past dues being fully paid till the date of transfer/ assignment by the Transferor Company and the Transferee Company undertakes to pay all future dues inclusive of anything remained unpaid of the past period by the outgoing company. Clause 7 provides that the Licensee shall be responsible for providing the UAS under the Licence Agreement. Clause 8 provides that the Licensee should commission the applicable systems within one year from the effective date of the licence. Clause 9.1 provides that the Licensee shall furnish to the Licensor/ TRAI such documents and accounts and returns etc. as may be prescribed. Clause 9.2 places an embargo upon the Licensee to permit service to any TSP whose licence has been terminated or suspended or is not in operation. Clause 10 vests the right of suspension, revocation or termination

of licence in the hands of Licensor. In public interest, interest of the security of the State or for proper conduct of telegraph, the Licensor may terminate the licence in given circumstances for breach of any conditions of licence by a written notice of 60 days. This is without prejudice to any other remedy. One of the conditions, breach whereof gives the right to Licensor to terminate the license, is the failure to perform obligations under the licence including timely payments of fee and other charges due to the Licensor.

54. A holistic view taken after a bare look at the provisions and terms and conditions of the Licence Agreement lays bare that the Licensor continues to exercise control over the subject of Licence Agreement notwithstanding the licence having been granted to Licensee for providing UAS in the licensed services area for a period of twenty years in lieu of consideration viz. payment of licence fee. The terms and conditions governing the grant of licence and the power vested with the DOT – Licensor to withhold consent for assignment or transfer of licence by the Licensee in any manner whatsoever to a third party or sub-lease, enter into partnership or create third party interest coupled with the fact that the Licensee is bound to furnish all required documents, accounts and information to the Licensor/ TRAI and refrain from providing services to any TSP whose licence has been terminated or suspended or is not in operation, superadded to it the fact that the Licensor may in public interest or in the interest of security of the State or for the proper conduct of the telegraph suspend the operation of the licence or terminate the licence by written notice

of 60 days for breach of any conditions of licence in regard to performing of any obligations under the licence including timely payments of fee and other charges due to the Licensor as also in the event of Licensee going into liquidation or ordered to be wound up leaves no room for doubt that the Licensee enjoys a limited right of use of spectrum even after obtaining right to use for a fixed period and in lieu of payment of licence fee. The effective control lies in the hands of Licensor, who for breach of terms of the licence and failure on the part of Licensee to perform its obligations or for the reason that the Licensee goes into liquidation or is ordered to be wound up and also in the event the TRAI recommending termination of licence for non-compliance of its terms and conditions, can suspend, revoke or terminate licence. It is abundantly clear that the affairs of Licensee and the subject of licence is regulated by the Licensor and the Licensee has a limited right of use of spectrum which, apart from conditions of licence, is regulated by the provisions of Indian Telegraph Act and TRAI Regulations. In the face of the terms and conditions of agreement, ascribing a role to the Licensor only commensurate with its exercise of rights as absolute owner exercising effective and meaningful control over the affairs of the Licensee qua the subject matter of licence, it needs to be examined whether the spectrum granted under the Licence Agreement is a tangible asset of Licensee qua which CIRP could be initiated at the instance of Corporate Debtor notwithstanding the fact that it had defaulted

in payment of licence fee and failed to perform its obligations under the Licence Agreement.

55. To appreciate the arguments advanced by Mr. Ravi Kadam, Senior Advocate representing Respondent No. 1 that the spectrum, while being an asset of the Nation, use thereof in terms of the Licence Agreement is an intangible asset of the TelCos and under the Licence Agreement Aircel Group's right to use spectrum would last upto 2026 which cannot be overridden and the factual position emerging from the terms and conditions of the Licence Agreement would support such proposition, it would be relevant to refer to provisions of I&B Code to determine what are the assets of a Corporate Debtor. Section 3(27) of I&B Code defines 'property' as under:

“3. In this Code, unless the context otherwise requires,—

x xx

(27) “property” includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property;”

Section 3 (36) of General Clauses Act defines 'property' as under:

“movable property” shall mean property of every description, except immovable property;”

Section 18 of I&B Code enjoins upon the Interim Resolution Professional (IRP) to collect all information, inter-alia, related to the assets of the Corporate Debtor for determining the financial position of the Corporate Debtor. Section 18(1)(f) mandates that the IRP shall take control and custody of any asset over which the Corporate Debtor has ownership rights as recorded in balance sheet of the Corporate Debtor or with information utility etc. that records the ownership of assets including intangible assets which include intellectual property. Section 25 of I&B Code dealing with duties of Resolution Professional inter-alia provides that the Resolution Professional shall take immediate custody and control of all the assets of the Corporate Debtor including the business records of Corporate Debtor. Assets owned by a third party in possession of the Corporate Debtor held under trust or under contractual arrangements including bailment have been excluded from the purview of assets which the Interim Resolution Professional is required to take in his control and custody.

56. The million dollar question is whether limited right to use of spectrum vested with the Licensee for the licence period would constitute assets of Licensee.

In Black's Law Dictionary (11th Edition, 2019), the expression 'asset' is defined as (1) an item that is owned and has value; (2) the entries on a balance sheet showing the items of property owned, including cash, inventory, equipment, real estate, accounts receivable and good will; (3) all the property of a person (especially a bankrupt and deceased person) available for paying debts or for distribution. (refer page 1167 of Convenience Compilation (for short CC) of Respondent No. 1 Vol. VI).

In the same dictionary, 'intangible asset' is defined as any non-physical asset or resource that can be amortized or converted to cash, such as patents, good will and computer programs or a right to something such as services paid for in advance. (refer page 1168 of CC of Respondent No. 1 Vol.VI)

In Merriam Webster dictionary, the expression 'asset/ assets' is defined under 3a: as an item of value owned and under 3b: 'assets' is defined as the items on a balance sheet showing the book value of property owned. (refer page 1177 of CC of Respondent No. 1 Vol.VI)

Learned senior counsel for Respondent No. 1 invited our attention to page 1178 of CC of Respondent No. 1 Vol.VI which is the stand alone balance sheet of Aircel Ltd. as on 31st March, 2017 wherein intangible assets of the value of Rs.62,447,618,927/- have been reflected. Learned counsel has further referred to page 1201 of CC of Respondent No. 1 Vol.VI providing particulars of intangible assets of Aircel Ltd. in the form of licence fees/ spectrum etc. Note V

appended thereto records that during the year viz. ending March, 2013, the Company has disposed of its DWA spectrum in three circles to another telecom operator as per the Guidelines for Trading of Access Spectrum by Access Service Providers issued by the WPC wing of the DOT on 12th October, 2015.

57. The material relied upon by learned counsel for Respondent No. 1 leads to one and the only irresistible conclusion that spectrum under the Licence Agreement between DOT and the Licensee TSPs is an asset being a valuable thing and same has been treated so and reflected as intangible asset in the balance sheet of the Licensee. Mr. Kadam has referred to page 1202 of CC of Respondent No. 1 Vol.VI which records the factum of Company having participated in the auction held by DOT and obtained additional spectrum in Tamil Nadu Circle which was put to use. It records that the Company has categorized the spectrum fees as an 'intangible asset'. This is besides acquisition of some SAP upgradation software which has been disclosed under 'intangible assets under development'. This would lead to conclusion that while acquisition of SAP upgradation software was shown as intangible asset, the use of additional spectrum acquired in Tamil Nadu Circle through auction held by DOT was reflected by the Company as intangible asset. Thus, for duration of licence spectrum is shown as the assets of user. Section 4 of the Indian Telegraph Act, 1885 dealing with establishing, maintaining and working of telegraphs provides that within India the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs. It is

manifestly clear that the Central Government has the exclusive right of establishing, maintaining and operating the telegraph. The proviso to Section 4 empowers the Central Government to grant a licence on such conditions and in consideration of such payments as it thinks fit to any person to establish, maintain and work a telegraph within any part of India. The second proviso empowers the Central Government to permit establishment, maintenance and working of wireless telegraphs on ships, aircraft or of telegraph other than wireless telegraph within any part of India in accordance with the rules made under the Act and subject to such restrictions and conditions as it thinks fit to be imposed. The explanation makes it clear that for determination of payment for grant of a licence, the sum attributable to the universal service obligation may be determined by it after considering recommendation of TRAI. The Central Government is further empowered to delegate all or any of its powers under the proviso to the Telegraph Authority subject to such restrictions and conditions as it may impose. Section 20A provides that if the holder of a licence granted under Section 4 of the Indian Telegraph Act, 1885 contravenes any condition contained in his licence, he shall be punished with fine of a specified amount with further fine for every week during which the breach of condition continues. This further goes to show that the Licensor not only retains the power to suspend, revoke or terminate the licence for breach of its terms but also can levy penalty in the nature of fine for the breach and enhanced penalty (fine) for continued breach (page no. 1162 to 1164 of CC of

Respondent No. 1 Vol.VI). The expression telegraph, as defined in Section 3(1Aa) of the Act means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, radio waves or hertzian waves, galvanic, electric or magnetic means. The explanation clarifies that radio waves or hertzian waves would mean electro-magnetic waves of frequencies lower than 3000 giga cycles per second propagated in space without artificial guide. A bare look at this definition unmistakably shows that besides the hardware in the form of appliances, instruments, material or apparatus used or being capable of used for transmission or reception of signals etc. by wire, visual or other electro-magnetic emissions, electro-magnetic waves of frequencies lower than 3000 giga cycles per second are included within the definition of telegraph. Appliances etc. are the hardware used for transmission of the **radio or hertzian waves, the later being the spectrum covering the frequencies of permissible range which is incapable of being perceived, touched or stored.** While there is no difficulty in holding that the apparatus, instruments, appliances or other material used for transmission of signals etc., being material objects, fall within the purview of tangible assets, it is to be determined whether spectrum or its use would embrace the concept of intangible assets which constitutes a primary asset of Telecom Operator.

58. The consultation paper on auction of spectrum dated 7th March, 2012 prepared by the TRAI incorporates the decisions of the Government at page 1332 of CC of Respondent No. 1 Vol.VII. A cursory look at this consultation paper would reveal that pursuant to the judgment of Hon'ble Apex Court in "*Center for Public Interest Litigation & Ors vs. Union of India & Ors (supra)*", Government decided that in future the spectrum will not be bundled with the licence. The licence to be issued to Telecom Operators will be in nature of 'unified licence' and the licence holder will be free to offer any of the multifarious telecom services. If the licence holder would like to offer wireless services, it will have to obtain spectrum through a market driven process. On the aspect of 3G spectrum and DWA services being allowed to trade, the licence, spectrum fee paid by the Licensees, in terms of the consultation paper, is considered as an intangible asset in the books of the licensees. It is suggested that TRAI may initiate a consultation process with RBI for treating the spectrum fees as a tangible asset for the purpose of lending by Banks. This is reflected at page 1421 of CC of Respondent No. 1 Vol.VII, which also records the factum of the licence/ spectrum fee paid by the Licensees being treated as 'intangible assets' as per RBI instructions, thus, the spectrum being treated as a primary asset of Telecom Operator to implement its business. The suggestion to treat spectrum fee as a 'tangible asset' for purpose of lending by banks appears to have been made by RBI to overcome reluctance on the part of Lenders to fund business plans considering the unsecured nature of lending as

spectrum fee being paid by the Licensees was treated as 'intangible assets' in the books of the Licensees. The loans provided by the Banks for roll out of business plan had to be treated as unsecured loans. The statement of gross block, depreciation and net block – service (at page 1493 of CC of Respondent No. 1 Vol.VII) forms part of the Guidelines for the Reporting System of Accounting Separation Regulations, 2016 which treats right to use spectrum/ auction money for spectrum and licence fee/ one time entry fee as 'intangible assets' of the Company. Indian Accounting Standard (IndAS) 38 (at page 1519 of CC of Respondent No. 1 Vol.VII) deals with the standard applied in accounting for intangible assets other than financial assets or intangible assets falling within the scope of another standard. Amortization has been defined as the systematic allocation of the depreciable amount of an intangible asset over its useful life (at page 1522 of CC of Respondent No. 1 Vol.VII). It is provided that an intangible asset must be identifiable to distinguish it from goodwill. At page 1524 of CC of Respondent No. 1 Vol.VII an asset is defined as being identifiable if it either is separable from the entity and sold, transferred, licensed, rented or exchanged either individually or together with a related contract asset or liability or arises from contractual or other legal rights irrespective of such rights being separable from the entity. At page 1526 of CC of Respondent No. 1 Vol.VII, it is stated that an intangible asset shall be recognized if, and only if, it is probable that the expected future economic

benefits attributable to the asset will flow to the entity and the cost of the asset can be measured reliably.

59. 'Asset' is defined as a present economic resource controlled by the entity as a result of past events. An economic resource is a right that has the potential to produce economic benefits (at page 1581 of CC of Respondent No. 1 Vol. VIII – Conceptual Framework for Financial Reporting). Going by this definition, it is unambiguously clear that if as a result of past events a present economic resource is controlled by the entity clothing it with a right that has potential of generating income, it falls within the purview of an 'asset'. It is clear that on account of licence creating a right of use of spectrum in favour of the Licensee for a period of twenty years, the Licence Agreement executed in the past gives a recurring right to present economic resource in the hands of Licensee to generate income thereby bringing the same within the fold of Licensee's asset.

60. Guidelines for Trading of Access Spectrum by Access Service Providers issued by DOT on 12th October, 2015 (at page 1747 of CC of Respondent No. 1 Vol.VIII) is a sequel to the recommendations of TRAI on spectrum trading which were made in pursuance of National Telecom Policy to move towards liberalization of spectrum to enable use of spectrum in any band to provide any service in any technology as also to permit spectrum pooling, sharing and later trading to enable optimal utilization of spectrum through appropriate

regulatory framework. The Guidelines for Trading of Access Spectrum provide for spectrum trading being allowed only between two Access Service Providers holding inter-alia UASL licence in a licensed area. It further provides that all access spectrum bands earmarked for access services by the Licensor will be treated as tradable spectrum bands. The Access Service Provider transferring the right to use spectrum would be known as 'Seller' and the Access Service Provider acquiring the right to use spectrum would be known as 'Buyer'. It further provides that only outright transfer of right to use the spectrum shall be permitted. Leasing of spectrum is not permitted. It also specifies the block sizes (band-wise) for which spectrum trading shall be permitted. It is significant to take note of the provision in the Guidelines that only that spectrum is permissible to be traded which has either been assigned through an auction in the year 2010 or afterwards or on which the Telecom Service Provider has already paid the prescribed market price. In such case, entire spectrum would be tradable. It also provides that both licensees trading the spectrum shall jointly give prior intimation for trading the right to use spectrum at least 45 days before the proposed effective date of the trading to DOT. They are also required to furnish undertaking regarding compliance with terms and conditions of the spectrum trading. A mere glance at the Guidelines for Trading of Access Spectrum by Access Service Providers would reveal that the trading of access spectrum is a step taken under the National Telecom Policy which envisaged a swift move towards liberalization of spectrum for

providing any service in any technology and achieving the object of optimal utilization of spectrum with regulations adopted for innovation, better services made available to consumers at cheaper tariffs with options being available. The policy envisaged permitting of spectrum pooling, sharing and subsequent trading for optimum utilization of spectrum to facilitate ease of doing business by allowing free play in the commercial decisions. The trading of access spectrum by Access Service Providers being based on recommendations of TRAI on spectrum trading and in pursuance of National Telecom Policy providing the status of Seller to the Access Service Provider transferring the right to use spectrum with corresponding status of Buyer to the Access Service Provider acquiring the right to use spectrum is only compatible with the hypothesis that the Access Service Provider/ Licensee has the capacity and is possessed of right to transfer the right to use the spectrum that had been acquired by it under the Licence. So long as the licence is not suspended, revoked or terminated or until the expiration of period of licence, the Access Service Provider/ Licensee continues to have right to trade subject to observance of the Spectrum Trading Guidelines and terms and conditions of the regulatory framework. The trading activity envisaged under the Guidelines is subject to approval of DOT which has the right to recover the dues for the period prior to the effective date of trade. It is a trading of limited nature with the trading being permitted only between companies eligible to trade and the Buyer satisfying the eligibility criteria.

61. Coming to the next question pertaining to sale of assets of a Corporate Debtor as a part of the Resolution Plan within the ambit of I&B Code and regulated under Regulation 37 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, it would be appropriate to first have a conspectus of the Tripartite Agreement. The Tripartite Agreement, sample whereof is at page 1721 of CC of Respondent No. 1 Vol.VIII, is executed inter-se the Licensor, the Licensee and the Lender, in terms whereof the Licensor agreed to transfer or assign the licence by endorsement thereon in favour of the Selectee selected by the Lenders. Perusal of the stipulations in the Tripartite Agreement would further lay bare that the decision of Licensor in selection of Selectee shall be final and binding on the Licensee and the Lender. It further emerges that all actions of Lender pursuant to the Agreement shall be for the benefit of Lenders and if the Licensor decides to transfer the licence to any person other than the Selectee, it shall take into account the Lenders dues as well as the Licensors dues while inviting bids from the prospective transferees. However, the Lenders are not entitled to operate the service under licence themselves as a Licensee. The agreement appears to have been worked out to facilitate the financing of the project to be set up by the Licensee pursuant to the licence and provide for transfer/ assignment of licence to protect and secure the Lenders interest arising out of grant of financial assistance to the Licensee. Article 2 of the Tripartite Agreement provides for transfer or assignment of licence as security for financial assistance. Under Article 2.1

Licensor agrees to transfer or assign the licence by endorsement thereon in favour of the Selectee selected by the Lenders and proposed to the Licensor for purpose of assignment/ transfer of licence. In the event of a default, the agent (a Financial Creditor acting for itself and as agent for other members of a consortium of Lenders who agreed to provide financial assistance to the Licensee for a project) shall notify the Licensee and the Licensor about such default and require the Licensee to remedy the same within 30 days from the date of notice which shall be conclusive evidence of the event of default. Upon such default and failure of Licensee to remedy the default, the Lenders may invite, negotiate and procure offers or tenders for the takeover and transfer of the project together with all the assets pertaining to the project of the Licensee including the license to the Selectee. This leaves no room for doubt that the license is treated as a tradable asset and such transfer/ assignment of licence is executed with the Lenders financing the project setup by the Licensee to protect and secure Lender's interest arising out of grant of financial assistance. The Lenders, in the event of default and failure of Licensee to remedy the default despite service of notice, can exercise their right of initiating steps for takeover and transfer of the project together with all the assets pertaining to the project of the Licensee including the licence to the Selectee upon such Selectee's assumption of the liabilities and obligations of the Licensee towards the Licensor. Even Article 3.4 takes care of the interests of the Lenders while providing that in the event of Licensor deciding to transfer the licence to any

person other than the Selectee, it shall take into account the Lender's dues as well as the Licensor's dues while inviting bids from the prospective transferees. Article 3.5 is specific to provide for a situation where a Selectee is not found. In such situation the Licence Agreement shall stand terminated and the assets/ infrastructure of defaulting Licensee shall be disposed off with Licensor having the first charge/ right/ precedence from proceeds of such disposal. Remainder, if any, shall go to offset the dues of Lenders to the extent possible and any balance left would go to defaulting licensee. **These provisions read as a whole, lead to the irresistible conclusion that in terms of Tripartite Agreement the interests of the Lender are secured by creation of security interest in its favour which includes takeover and transfer of the project together with all the assets pertaining to the project including the licence to the Selectee. DOT is a party to the Tripartite Agreement and it cannot shrug off its shoulders in claiming that the Tripartite Agreement was in the nature of binding agreement only between the Licensee and the Lender with no obligations created for it to perform. DOT is a constituent and a party to the Tripartite Agreement which provides for transfer/ assignment of licence by the Licensee in favour of the Selectee of the Lenders with the consent and approval of DOT. It is flabbergasting to hear DOT advancing the proposition that use of spectrum in terms of the licence does not constitute the assets of the Licensee and that the licence granted to Licensee and use of spectrum thereunder is not a tradable**

asset. In the face of provisions of Tripartite Agreement read in juxtaposition with the Guidelines for Trading of Access Spectrum, it is inconceivable that DOT as Licensor is not aware of the import of the provisions and the effect of the stipulations in the Tripartite Agreement and the Guidelines for Trading of Access Spectrum based on National Telecom Policy and formulated by Central Government on the recommendations of TRAI. Presence of DOT in the Tripartite Agreement is neither cosmetic nor an idol formality. The combined effect of all this is that the DOT has taken a stand which is in direct conflict with the factual proposition emanating from record and the role it has played all along. The argument raised on the score that the use of spectrum under the licence granted to it is not an intangible asset in the hands of Licensee being devoid of merit has to be repelled.

62. Next question for consideration would be whether spectrum can be subjected to proceedings under the I&B Code. In this regard the nature of the resource has to be kept in view while determining whether same can be subjected to insolvency/ liquidation proceedings. It having been found that the Telecom Licence and right to use spectrum are assets of the Licensee/ Corporate Debtor falling within the purview of Section 18 and 25 of the I&B Code for purposes of control and custody in the hands of Interim Resolution Professional/ Resolution Professional during CIRP Proceedings, be it seen that the Telecom Licences and right to use spectrum being assets of the Corporate

Debtor are covered under moratorium slapped under Section 14 of the I&B Code as a sequel to the admission of an application seeking triggering of the CIRP. Explanation to Section 14(1) and sub-section (2A) introduced in Section 14 (inserted by Amending Act 1 of 2020 w.e.f 28.12.2019), in clear and unambiguous terms provide that the licences and concessions issued by the Government Authorities cannot be terminated or suspended during CIRP so long as the current dues were being paid, which has the object of ensuring maintenance of the substratum of the business during the CIRP period and keeping the Corporate Debtor as a going concern. The protection has been granted to telecom licences and right to use spectrum being assets of the Corporate Debtor and the slapping of moratorium prohibits the Owner/Lessor during CIRP period from recovering property occupied or possessed by the Corporate Debtor. This protection is only limited to moratorium period and obtains only on the condition of there being no default in payment of current dues.

63. Under Section 14(1)(d), the Adjudicating Authority is empowered to declare moratorium for prohibiting the recovery of any property by an owner or Lessor where such property is occupied by or in the possession of the Corporate Debtor. In this regard, preservation of the Corporate Debtor as a going concern during continuation of CIRP being of primary importance as the Appellant was the sole purchaser of power from Corporate Debtor under Power Purchase Agreement, the termination of which on account of triggering of CIRP

would result in corporate death, the following observations of Hon'ble Apex Court in para 164 of the '*Gujarat Urja Vikas Nigam Ltd. vs. Mr. Amit Gupta & Ors.*' (Civil Appeal No. 9241 of 2019) are of great significance:

“164. In this case, the PPA has been terminated solely on the ground of insolvency, which gives the NCLT jurisdiction under Section 60(5)(c) to adjudicate this matter and invalidate the termination of the PPA as it is the forum vested with the responsibility of ensuring the continuation of the insolvency resolution process, which requires preservation of the Corporate Debtor as a going concern. In view of the centrality of the PPA to the CIRP in the unique factual matrix of this case, this Court must adopt an interpretation of the NCLT's residuary jurisdiction which comports with the broader goals of the IBC.”

The Hon'ble Apex Court, while dealing with the scope of Section 14(1)(d) of I&B Code in a case of licence granted to a Corporate Debtor under a joint development agreement in '*Rajendra K. Bhutta vs. Maharashtra Housing and Area Development Authority & Anr.*' (Civil Appeal No. 12248 of 2018) observed as under:

“7. A bare reading of Section 14(1)(d) of the Code would make it clear that it does not deal with any of the assets or

legal right or beneficial interest in such assets of the corporate debtor. For this reason, any reference to Sections 18 and 36, as was made by the NCLT, becomes wholly unnecessary in deciding the scope of Section 14(1)(d), which stands on a separate footing. Under Section 14(1)(d) what is referred to is the “recovery of any property”. The ‘property’ in this case consists of land, ad-measuring 47 acres, together with structures thereon that had to be demolished. ‘Recovery’ would necessarily go with what was parted by the corporate debtor, and for this one has to go to the next expression contained in the said sub-section.

8. One thing is clear that “owner or lessor” qua “property” is then to be read with the expression “occupied or in the possession of”. One manner of reading this clause is to state that whether recovery is sought by an owner or lessor, the property should either be occupied by or be in the possession of the corporate debtor. The difficulty with this interpretation is that a “lessor” would not normally seek recovery of property “occupied by” a tenant – having leased the property, a transfer of property has taken place in favour of a tenant, “possession” of which would then have to be

recovered. This is where the latin maxim reddendo singularis comes in.

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15. The conspectus of the aforesaid judgments would show that the expression “occupied by” would mean or be synonymous with being in actual physical possession of or being actually used by, in contra-distinction to the expression “possession”, which would connote possession being either constructive or actual and which, in turn, would include legally being in possession, though factually not being in physical possession. Since it is clear that the Joint Development Agreement read with the Deed of Modification has granted a license to the developer (Corporate Debtor) to enter upon the property, with a view to do all the things that are mentioned in it, there can be no gain saying that after such entry, the property would not be “occupied by” the developer.

16. There is no doubt whatsoever that important functions relating to repairs and re-construction of dilapidated buildings are given to MHADA. Equally, there is no doubt that in a given set of circumstances, the Board may, on such

terms and conditions as may be agreed upon, and with the previous approval of the Authority, handover execution of any housing scheme under its own supervision. However, when it comes to any clash between the MHADA Act and the Insolvency Code, on the plain terms of Section 238 of the Insolvency Code, the Code must prevail. This is for the very good reason that when a moratorium is spoken of by Section 14 of the Code, the idea is that, to alleviate corporate sickness, a statutory status quo is pronounced under Section 14 the moment a petition is admitted under Section 7 of the Code, so that the insolvency resolution process may proceed unhindered by any of the obstacles that would otherwise be caused and that are dealt with by Section 14.”

The earlier judgments dealing with the scope of Section 14(1)(d) of I&B Code would be of little value after introduction of explanation by Act 1 of 2020 enforced from 28th December, 2019 which has a non-obstinate clause giving an overriding effect to it. The explanation is clarificatory in nature and provides in unambiguous terms that a licence, permit, registration, quota, concession, clearances or similar grant or right given by Central Government, State Government, Local Authority, Sectoral Regulator or any other authority shall not be suspended or terminated on the ground of insolvency. The only condition is that such protection against suspension or termination of licence

or permit or concession, as the case may be, is that there should be no default in payment of current dues relating to use or continuation of such licence etc. during the moratorium period. After introduction of this explanation, which is attracted in the present case, the statutory protection against suspension or termination of licence would extend to the Corporate Debtor as the Central Government through DOT is the Licensor. Of course it is a contractual relationship but that does not depart from the fact that the Central Government is the Licensor and in that capacity it is covered under the explanation. In conclusion, it can be said without any fear of contradiction that in the event of spectrum being subjected to proceedings under I&B Code, protection would be available to Telecom Licences and spectrum under Section 14(1) of the I&B Code.

64. The next question arising for consideration is whether spectrum being under contract can be subjected to proceedings under Section 18 of the I&B Code. Finding in respect of spectrum as a natural resource being property of the public vested in the State as a Trustee and the right to use of spectrum being granted by DOT to Telecom Service Providers through licence in lieu of consideration which partakes of the character of a contract governing relations between the Licensor and Licensee with terms and conditions of licence regulating the right to use spectrum by the Licensee for the period of licence has already been returned. It has also been found that in terms of the Licence Agreement and Guidelines for Access Trading of Spectrum for Access Service

Providers, the right to use of spectrum vests in the TSPs/ Licensees. Possession is co-related to ownership and entitlement to possession cannot be divorced from the title to property. Spectrum being the property of Nation is in possession of the State as a Trustee, however, right to use spectrum under the Licence Agreement vests in the Licensees/ TSPs, who are in occupation of the same being its actual users irrespective of whether they have a right to hold the same in their possession or not. Bulk of case law cited at the Bar in regard to concept of possession and occupation is of little relevance in this case as the spectrum being a natural resource belonging to the Nation with State holding it in trust for the benefit of the Nation is not in controversy. It is also not disputed that as owner in possession of the spectrum of defined frequencies allocated to the Nation under International Norms, it is only the right of user that is granted to the Licensees/ TSPs under licence permitting it to use the spectrum of specified frequencies for consideration. In the instant case, in terms of the Licence Agreement, provisions whereof have been adverted to elsewhere in this judgment, the Licensees/ TSPs have been granted right of use of spectrum of specified frequencies in the particular telecom service area for twenty years with renewal clause which leads to the conclusion that the right to use of spectrum would be in occupation of the Licensees/TSPs or the Assignees / Transferees in terms of the Tripartite Agreement. It being the duty of the IRP to collect all information relating, inter alia, to the assets of the Corporate Debtor for determining its financial position, monitor its assets and

manage its operations until Resolution Professional is appointed by Committee of Creditors (CoC) and take control and custody of assets over which the Corporate Debtor has ownership rights as recorded in the balance sheet of Corporate Debtor with such assets including intangible assets falling within the purview of Section 18 of I&B Code, there should be no hesitation in holding that the right to use of spectrum under the Licence Agreement or falling within the ambit of Tripartite Agreement can be subjected to proceedings under Section 18 of I&B Code. Therefore, we are of the considered opinion that we need not go into the question of distinction between possession and occupation. The plethora of judgments cited on the issue are irrelevant for purposes of disposal of this matter.

65. The next question arising for consideration is whether a licence can be transferred under the insolvency proceedings particularly when the trading is subjected to clearance of dues by Seller or Buyer as provided in Guidelines No. 10 and 11, whereas in insolvency dues are wiped off and what is the Significance of Guideline 12 of the Guidelines for Access Spectrum Trading for Access Service Providers in case spectrum is an issue in any adjudication pending before a court of law. We have already noticed the broad features of the Guidelines for Trading of Access spectrum by Access Service Providers elsewhere in this judgment. It has been taken note of that based on National Telecom Policy and upon consideration of recommendations of TRAI on spectrum trading the Government decided to allow trading of access spectrum

only between two Access Service Providers holding inter alia UASL with authorization of Access Service in the licensed service area with the earmarked spectrum bands treated as tradable spectrum bands. We have also noticed that only transfer of right to use of spectrum inter-se Seller and Buyer shall be permitted while lease of spectrum would be impermissible. Such trading between the two Licensees would have to give 45 days prior intimation for trading the right to use the spectrum to DOT. Guidelines No. 10, 11 and 12 relevant for our purpose are reproduced hereinbelow:

“(10). Both the licensees shall also give an undertaking that they are in compliance with all the terms and conditions of the guidelines for spectrum trading and the license conditions and will agree that in the event, it is established at any state in future that either of the licensee was not in conformance with the terms and conditions of the guidelines for spectrum trading or/and of the license at the time of giving intimation for trading of right to use the spectrum, the Government will have the right to take appropriate action which inter-alia may include annulment of trading arrangement.

(11). The seller shall clear all its dues prior to concluding any agreement for spectrum trading. Thereafter, any dues

recoverable up to the effective date of trade shall be the liability of the buyer. The Government shall, at its discretion, be entitled to recover the amount, if any, found recoverable subsequent to the effective date of trade, which was not known to the parties at the time of the effective date of trade, for the buyer or seller, jointly or severally. The demands, if any, relating to licenses of seller, stayed by the Court of Law, shall be subject to outcome of decision of such litigation.

(12). Where an issue, pertaining to the spectrum proposed to be transferred is pending adjudication before any court of law, the seller shall ensure that its rights and liabilities are transferred to the buyer as per the procedure prescribed under the law and any such transfer of spectrum will be permitted only after the interest of the Licensor has been secured.”

66. A glance at these guidelines would reveal that the Government has reserved to itself the right to take appropriate action in the event of undertakings given by the Seller and Buyer in regard to terms and conditions of guidelines for spectrum trading and the licence conditions not being in conformity with such guidelines and the conditions in licence at the time of giving intimation. Such appropriate action may include annulment of the

trading arrangement. This provision contained in guideline 10 protects the right of the Government as Licensor and as Authority competent to allow trading of access spectrum which is regulated by the guidelines. It clearly implies that if the Seller, Buyer or both, while giving prior intimation for trading have either provided false information, suppressed a material fact or provided incorrect information in regard to the proposed trading being in conformity with the conditions of licence and the Spectrum Trading Guidelines, the Government would be within its rights to take appropriate action including annulment of trading arrangement.

67. Guideline 11 makes it imperative for the Seller to clear the outstanding dues prior to concluding the spectrum trading agreement whereafter it shall be the liability of Buyer to clear any dues recoverable upto the effective date of trade. This guidelines further vests discretion in the Government to recover any amount found recoverable subsequent to the effective date of trade hitherto unknown to the parties, from the Buyer or Seller, jointly or severally.

68. A combined reading of these two guidelines in conjunction with the terms and conditions of the Licence Agreement would lay bare that the entire control vests with the Licensor i.e. DOT and the Licensee would not be competent to assign or transfer the Licence without prior written consent of the Licensor. Though the licence is valid for a period of twenty years from the effective date, the Licensor has reserved unto itself the right to revoke the licence for any

reasons whatsoever. Further the licence can be suspended if public interest or interest of security of State or proper conduct of telegraph so warrants. That apart, the licence can be terminated by a written notice of 60 days in situations including failure to perform obligations under the licence which include timely payment of fee and other charges due to the Licensor. Trading in spectrum is clearly subject to the Seller having a valid and subsisting right as licensee competent to trade under the Spectrum Trading Guidelines with the prior consent of the DOT. If the Licensee has assigned or transferred the licence by way of sub-leasing/ partnership/ creation of third party interest without the prior written consent of Licensor or the transferee/ assignee is not fully eligible, transfer of licence and trading of spectrum shall not be valid. The Licensee may transfer or assign the Licence Agreement with prior written approval of the Licensor on fulfillment of conditions which inter alia include the condition that all the past dues are fully paid till the date of transfer/ assignment by the Transferor company and the Transferee company undertakes to pay future dues inclusive of anything remaining outstanding against the outgoing company for the past period. Thus, there is an embargo on the Licensee to transfer or assign the licence where past dues are not fully paid till the transfer/ assignment by the Licensee is made with prior written approval of the Licensor. Such prior written approval is contemplated to be granted by the Licensor only on fulfillment of conditions which include clearance of past dues by the Licensee. Clause 6.3 of Licence Agreement further postulates that where

such transfer or assignment is requested in furtherance of the Tripartite Agreement already executed amongst Licensor, Licensee and Lenders, prior written approval of the Licensor shall be granted only on fulfillment of procedures of Tripartite Agreement. Restrictions on transfer of licence imposed under Clause 6 of the Licence Agreement read in juxtaposition with Guidelines 10 and 11 of the Guidelines for Trading of Access Spectrum by Access Service Providers would lead to the conclusion that where the approval of the Licensor for transfer or assignment of the Licence Agreement and trading of access spectrum has been obtained on the basis of undertakings furnished by the Transferor Licensee /Seller and the Transferee Licensee/ Buyer which were not in conformance with the terms of the Guidelines for Spectrum Trading or/and of the Licence at the time of giving intimation for trading of right to use the spectrum, the Government has the right to take appropriate action including annulment of trading arrangement. Same holds true in respect of the Transferor/Seller who is in default in respect of dues prior to concluding any agreement for spectrum trading. It is therefore lucidly clear that the Transferor Licensee has the obligation to clear all its dues prior to concluding any agreement for spectrum trading and both the Licensees (Seller and Buyer) are required to give an undertaking that they are in compliance with the terms and conditions of the Guidelines for Spectrum Trading. Guideline 10 vests discretion in the Government to take appropriate action including annulment of trading arrangement, if there is no compliance with all the terms and

conditions of the Guidelines for Spectrum Trading even if such fact is discovered at a subsequent stage. In view of the same, there should be no difficulty in holding that while a licence can be transferred as an intangible asset of the Licensee/ Corporate Debtor under Insolvency Proceedings in ordinary circumstances, however as the trading is subjected to clearance of dues by Seller or Buyer, as the case may be, in terms of Guidelines 10 and 11 of the Guidelines for Access Spectrum Trading for Access Service Providers, the Transferor/Seller or Transferee/Buyer being in default, would not qualify for transfer of licence under the insolvency proceedings.

69. As regards, Guideline 12, it is deducible from the plain language of this Guideline that in the event of spectrum being the subject of dispute in any pending litigation before a court of law, the Seller would be under an obligation to ensure that the rights and liabilities are transferred to the Buyer in accordance with the legal procedure and the transfer of spectrum would be permitted only after securing the interests of the Licensor. The provision covered by this guideline pertains to the spectrum being the subject of controversy before a court competent to adjudicate on the issue and not an insolvency proceeding. The object of the provision is to ensure transfer/trading of spectrum in conformance of Spectrum Trading Guidelines and permission for such transfer/ trading being subjected to securing of interest of Licensor. The issue regarding spectrum referred to in this guideline is in regard to a dispute which may be before a competent court for adjudication.

The Adjudicatory Authority (National Company Law Tribunal) is not a court of law competent to decide an issue in regard to trading of spectrum. This guideline is to be read as an extension of Guideline 10 and 11 as it bears direct and proximate nexus with spectrum trading and clearance of dues by the Seller. This guideline cannot be read independently. The Spectrum Trading Guidelines cannot be substituted under the CIRP and the dues of the Licensor, which are required to be cleared by the Seller prior to concluding any agreement for spectrum trading in terms of Guideline 11, cannot be subjected to clearance by way of a provision in a Resolution Plan, more so, when the Seller is in breach under contract viz. the Licence Agreement and a self-confessed defaulter who has triggered insolvency by taking recourse to Section 10 of the I&B Code.

70. Admittedly, Central Government objected to grant permission for trading of licence to the TelCos before initiation of insolvency proceedings. It appears that inter alia Central Government declined permission for trading of licence as in its opinion spectrum cannot be subject matter of I&B Code proceedings. It is not disputed that the TelCos were faced with huge arrears concerning the spectrum licence which were required to be cleared before granting of such permission by Central Government. Since the DOT was of the view the spectrum could not be the subject matter of insolvency proceedings and the dues under the licence towards the spectrum use could not be put in the category of operational dues, it did not accept the sharing arrangements made

inter se Telecom Service Providers with respect to spectrum. The issue for consideration would be whether spectrum can be treated as security interest and what was the mode of its enforcement. Admittedly, NOC for trading has been declined by the Government for non-compliance of the terms and conditions stipulated in the Licence Agreement. If the spectrum can be subjected to insolvency resolution proceedings, it is stated to have the effect of wiping off the dues of the Government accumulating to more than Rs.40,000 Crores. In comparison thereto the liability of lenders is much less. This is not a case where a Financial Creditor or an Operational Creditor is seeking initiation of Corporate Insolvency Resolution Process against the Corporate Debtor but the Corporate Debtor itself is seeking such initiation. This would therefore, require to be examined alongwith the question whether such dues as are payable to Government can be wiped off by resorting to the proceedings under the I&B Code and whether insolvency proceedings are bonafide.

71. A conclusion has been reached elsewhere in this judgment that the Licence Agreement is in the nature of a contractual arrangement between the Central Government and the TSPs (Licensee). This position is recognized by the Hon'ble Apex Court in "*Union of India & Anr. vs. Association of Unified Telecom Service Providers of India and Ors.*", (2011) 10 SCC 543. We have already come to conclusion that the right to use spectrum is an intangible asset of the Licensee and can be subjected to insolvency proceedings. It is indisputable that the assets of the Corporate Debtor including the intangible assets can be

subjected to insolvency/ liquidation proceedings. Since right to use spectrum, in our opinion, is an intangible asset in the hands of Corporate Debtor/ Licensee though the spectrum is not the property of the Corporate Debtor/Licensee and it being the admitted case of the Corporate Debtor/ Licensee in *“Union of India & Anr. vs. Association of Unified Telecom Service Providers of India and Ors.”*, (AGR Judgment decided on 1st September, 2020) before the Hon’ble Apex Court that the Licensees /TelCos used the spectrum without paying for it which could have been rectified by paying the AGR dues, there should be no hesitation in holding that the spectrum cannot be utilized without payment of requisite dues which cannot be wiped off by triggering CIRP under I&B Code. The Licensees, in terms of the judgment of Hon’ble Apex Court in *“Center for Public Interest Litigation & Ors. vs. Union of India & Ors.”*(*supra*), holding the right to use spectrum in trust have to use it for the benefit of public at large and not for private or self interest. It is indisputable that the Licensees/ TelCos are the self-confessed defaulters having contravened terms and conditions of Licence Agreement on account of non-payment of contractual dues towards use of spectrum causing huge pecuniary loss to the Nation besides being guilty of breach of trust but instead of rectifying the breach raised disputes of sorts to evade the huge outstanding payment. According to Mr. Amit Mahajan, learned CGSC this went on for nearly two decades. There is considerable force in his submission that having failed to get any respite from judicial apparatus, the defaulting Licensees/

TelCos sought to wriggle out of their liabilities by resorting to triggering of CIRP by seeking initiation of CIRP under Section 10 of I&B Code, not for purposes of resolution but fraudulently and with malicious intent of withholding the huge arrears payable to Government, obtaining moratorium to abort Government's move to suspend, revoke or terminate the Licences and in the event of a Resolution Plan being approved, subjecting the Central Government to be contented with the peanuts offered to it as 'Operational Creditor', if at all anything survives for the Operational Creditors within the ambit of distribution mechanism contemplated under Section 53 of I&B Code. When a Company undergoes insolvency proceedings, the pre-CIRP dues including the statutory dues would have to be dealt with in terms of provisions of I&B Code under an approved Resolution Plan or in Liquidation, as the case may. Therefore, non-payment of full consideration would impact the right of the Licensor with the Licensee - Corporate Debtor continuing to enjoy the benefits under the Telecom Licence and also deriving pecuniary benefits from the right to use spectrum. The admitted claims qua the operational debts would have to be settled as the part of the approved Resolution Plan or in Liquidation, as the case may be. Operational Debt, as defined under Section 5 (21) of the I&B Code includes dues payable towards provision of goods and services and the dues payable to Government under any law for the time being in force which would include the dues of Licensor – DOT. Of course the interests of the Operational Creditor are statutorily protected under Section 30(2)(b) of the I&B Code with the

explanation emphasizing that the distribution shall be fair and equitable to the class of creditors taken care of by the provision. The 'Operational Creditors' are not accorded the same treatment as 'Financial Creditors'. Section 53 lays down a waterfall mechanism for distribution of proceeds from the sale of liquidation assets, dues pertaining to Central Government under Section 53(1)(e)(i), which rank below the Secured and Unsecured Financial Creditors. Such priority has stood the constitutional test in "*Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.*", 2019 SCC Online SC 73, "*Committee of Creditors of Essar Steel Ltd. vs. Satish Kumar Gupta & Ors.*", 2019 SCC Online SC 1478. It would therefore be a foregone conclusion that if CIRP mechanism is allowed to prevail, it would be immensely detrimental to and jeopardize the legitimate interests of the Central Government. It is of relevance to refer to the fact that the Adjudicating Authority, while dealing with the Resolution Plan of Successful Resolution Applicant qua the Corporate Debtor observed that 'the plan does not appear to be a resolution plan but appears to be a winding up, liquidation plan'. This observation appears to have been made after noticing that through the Resolution Plan the Resolution Applicant was planning to monetize most of the assets and continue only with a small portion of the business operations. The Adjudicating Authority in the given circumstances should have examined the bonafide of the Aircel Entities in initiating CIRP by filing applications under Section 10 of the I&B Code which, on the face of it, aimed at monetizing most of the assets for meeting obligations of the

Resolution Applicant towards the Banks which too would depend on when and how the spectrum would be sold, moreso as the Aircel Entities had stopped operations before initiating insolvency proceedings and the spectrum continued to go waste and unutilized.

72. As regards the nature of debt and the status of DOT, be it seen that apart from the dues payable to the Government, the consequence of parting of the privilege by Central Government in grant of licence to TelCos under the Telegraph Act, the dues payable to the Government would fall within the ambit of 'Operational Dues' thereby clothing the Central Government/ Licensor with the status of an 'Operational Creditor'. That apart, the DOT itself has submitted its claim in 'Form-B' as an Operational Creditor during CIRP proceedings and attended the meetings of CoC where Resolution Plans were evaluated and approved. MCA had issued an Office Memorandum clarifying that the dues arising under the Indian Telegraph Act, 1885 or under the Licence Agreement would be in the nature of operational dues. In view of this admitted factual position, DOT cannot now make a U-turn and raise an issue in regard to nature of its dues styling the same as a 'Financial Debt'. DOT is estopped by its conduct from staging such U-turn. It also operates as estoppel by record. Even otherwise, the payment of dues admissible to DOT is not in the nature of 'a debt disbursed against the consideration for the time value of money' within the meaning of 'Financial Debt' defined under Section 5(8) of the

I&B Code to designate it as a 'Financial Creditor'. Arguments raised by the Appellant on this score are accordingly repelled.

73. Under Section 4 of the Indian Telegraph Act, 1885, establishing, maintaining and working of telegraphs is the exclusive privilege of the Central Government which may grant a licence on such conditions and in consideration of such payments as it thinks fit to any person to establish, maintain and work a telegraph within any part of India subject to such restrictions and conditions as it thinks fit to be imposed. The explanation makes it clear that for determination of payment for grant of a licence the sum attributable to the universal service obligation may be determined by it after considering recommendation of TRAI. Section 20A provides that if the holder of a licence granted under Section 4 of the Indian Telegraph Act, 1885 contravenes any condition contained in his licence, he shall be punished with fine of a specified amount with further fine for every week during which the breach of condition continues. This shows that the Licensor not only retains the power to suspend, revoke or terminate the licence for breach of its terms but also can levy penalty in the nature of fine for the breach and enhanced penalty (fine) for continued breach. The grant of licence in lieu of consideration would be in the nature of dues payable to Government, thereby falling within the definition of 'Operational Dues'. Since under the Revenue Sharing Regime, the spectrum does not change hands and each of the TSPs will continue to make payment of AGR dues arising from the spectrum that each holds, the

nature of dues will not change. Spectrum trading allows operators to pool their respective spectrum for usage which facilitates optimization of resources. Spectrum trading also allows better spectrum usage by transfer of spectrum rights and obligations to another party. In spectrum sharing, right to use spectrum remains with the TSP whereas in spectrum trading it gets transferred from the Seller to the Buyer. The difference between the two lies in volume of utilization of spectrum besides sharing the pool in case of spectrum sharing by the TSPs simultaneously whereas in spectrum trading the right to use gets transferred/ assigned from Seller to Buyer. However, that does not change the nature of dues, which are payable to the Licensor. Such dues continue to be the 'Operational Dues' being payable primarily in terms of the Licence Agreement.

74. For determination of the issue in regard to the spectrum being treated as security interest and mode of enforcement, be it seen that the relationship amongst the Licensor, the Licensee and the Lender are governed by the Tripartite Agreement which envisages priority to the dues of DOT over dues of other creditors, be they secured or unsecured creditors. We have already held a threadbare discussion on the relevant clauses of the Tripartite Agreement and found that the Lender has been permitted to cause assignment of Licence and change of Licensee with permission of DOT on conditions including payment of dues owed to DOT. Such Tripartite Agreement cannot be overridden and nullified. Enforcement of security interest by the Lenders will

be subject to compliance of terms and conditions of Tripartite Agreement which envisages satisfaction of Bank's claims only after settling the dues of DOT. We are therefore of the view that having regard to Clause 3.4 and 3.5 of the Tripartite Agreement according priority/ first charge to DOT, the spectrum cannot be treated as a security interest by the Lenders. That apart, it being within the domain of Licensor to suspend, revoke or terminate the Licence Agreement besides being empowered under Section 20A of the Indian Telegraph Act, 1885 to levy fine for contravention of any condition contained in its licence, the security interest, if any, in the hands of Lenders would be so fragile and vulnerable that would seriously jeopardize its enforcement. In view of this finding, we need not consider the mode of enforcement of security interest.

Summary of Findings

75. In conclusion we summarize our findings as under:

- a) Spectrum is a natural resource and the Government is holding the same as *cestui que trust*.
- b) Spectrum, being intangible asset of the Licensee/ TSPs/ TelCos/ Corporate Debtor, can be subjected to insolvency/liquidation proceedings.

- c) Dues of Central Government/ DOT under the Licence fall within the ambit of Operational Dues under I&B Code.
- d) Deferred/ default payment installments of spectrum acquisition cost also fall within the ambit of Operational Dues under I&B Code.
- e) As per Revenue Sharing Regime and the provisions of Indian Telegraph Act, 1885, the nature of dues payable to Licenser continues to be 'Operational Dues' which are payable primarily in terms of the Licence Agreement.
- f) Natural Resource would not be available to use without payment of requisite dues.
- g) Triggering of Corporate Insolvency Resolution Proceedings under I&B Code by the Corporate Debtor with the object of wiping off of such dues, not being for insolvency resolution, but with malicious or fraudulent intention, would be impermissible.
- h) TSPs have the right to use spectrum under licence granted to them. They cannot be said to be the owners in possession of the spectrum but only in occupation of the right to use spectrum. Ownership of spectrum belongs to Nation (people) with Government only being its Trustee. Possession correlates with the ownership right.

- i) Under Section 18 of the I&B Code, the Interim Resolution Professional is bound to monitor the assets of the Corporate Debtor and manage its operations, take control and custody of assets over which the Corporate Debtor has ownership rights including intangible assets which includes right to use spectrum.
- j) Trading in intangible assets like use of spectrum derives strength from the terms and conditions of the Licence Agreement/ UASL, clause 6.3 whereof vests in Licensee a right to transfer or assign the Licence Agreement with prior written approval of the Licensor and subject to fulfillment of conditions which include payment of past dues in full till the date of transfer. On the other hand, Insolvency Proceedings arise out of default in discharge of financial or operational debt and are triggered for insolvency resolution of corporate persons, etc. in a time bound manner for maximization of value of assets of such persons.
- k) While a licence can be transferred as an intangible asset of the Licensee /Corporate Debtor under Insolvency Proceedings in ordinary circumstances, however as the trading is subjected to clearance of dues by Seller or Buyer, as the case may be, the Transferor/Seller or Transferee/Buyer being in default, would not qualify for transfer of licence under the insolvency proceedings.

- l) The spectrum cannot be utilized without payment of requisite dues which cannot be wiped off by triggering CIRP under I&B Code.
- m) The defaulting Licensees/ TelCos cannot be permitted to wriggle out of their liabilities by resorting to triggering of CIRP by seeking initiation of CIRP under Section 10 of I&B Code, not for purposes of resolution but fraudulently and with malicious intent of withholding the huge arrears payable to Government, obtaining moratorium to abort Government's move to suspend, revoke or terminate the Licences and in the event of a Resolution Plan being approved, subjecting the Central Government to be contended with the peanuts offered to it as 'Operational Creditor' within the ambit of distribution mechanism contemplated under Section 53 of I&B Code.
- n) Having regard to Clause 3.4 and 3.5 of the Tripartite Agreement according priority/ first charge to DOT, the spectrum cannot be treated as a security interest by the Lenders. In view of this finding, we need not consider the mode of Enforcement of security interest.

76. All questions framed in paragraphs 18 to 22 of the judgment dated 1st September, 2020 rendered by Hon'ble Apex Court in "*Union of India vs. Association of Unified Telecom Service Providers of India, etc. etc.*"(Civil Appeal

Nos. 6328-6399 of 2015) having been considered and answered in the aforesaid terms, all the appeals shall now be assigned to Court No. III for consideration where the same shall be listed for hearing on 26th April, 2021.

We appreciate the valuable assistance rendered by Mr. Amit Mahajan, CGSC, Mr. Ravi Kadam, Senior Advocate, Mr. Ramji Srinivasan, Sr. Advocate, Mr. Abhinav Vashisht, Sr. Advocate and others for their articulate oral submissions and lucidly drafted written submissions. It is on account of their immense contribution that this order would see the light of the day within the shortest possible time at our disposal. We acknowledge their sincere effort to adhere to the schedule of hearing despite numerous odds, chiefly attributable to pandemic arising out of outbreak of COVID-19.

**[Justice Bansi Lal Bhat]
Acting Chairperson**

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Shreesha Merla]
Member (Technical)**

New Delhi

13th April, 2021

AM