

Insolvency and Bankruptcy Board of India
7th Floor, Mayur Bhawan, Connaught Place, New Delhi -110001

1st September, 2020

Subject: Judgment¹ dated 1st September, 2020 of the Hon'ble Supreme Court of India in the matter of Union of India Vs. Association of Unified Telecom Service Providers of India Etc. [M.A. (D) No. 9887 of 2020 in Civil Appeal Nos. 6328-6399 of 2015]

The Hon'ble Supreme Court in its order dated 20th July, 2020 calculated that certain sum was due from various telecom service providers (TSPs), including some under insolvency, namely, Aircel Group of companies, Reliance Communications, Sistema Shyam Teleservices Ltd., and Videocon Telecommunications Ltd. Before the initiation of insolvency proceedings, most of the TSPs under the insolvency proceedings had applied to the Department of Telecommunications (DoT) for permission for trading of licence. The DoT had declined the permission as there were huge arrears concerning the spectrum licence, which were required to be paid, as a precondition to such permission. The Hon'ble Supreme Court wanted to examine the bona fides of the TSPs who have resorted to insolvency proceedings and hence invited them to file their response. While examining the bona fides of TSPs, it made important observations in the context of insolvency proceedings as under:

Sl. No.	Issue / Theme	Observation / Ruling	Para / Page No.
1	Subjecting 'spectrum' to proceedings under the Code	The NCLT should consider the following questions and pass a reasoned order after hearing all the parties within the outer limits of two months: (a) Whether spectrum can be subjected to proceedings under the Code? (b) Whether TSPs can be said to be the owner based on the right to use the spectrum under licence granted to them? (c) Whether a licence is a contractual arrangement? (d) Whether ownership belongs to the Government of India? (e) Whether spectrum being under contract can be subjected to proceedings under Section 18 of the Code? (f) Whether the spectrum can be said to be in possession, which arises from ownership? (g) What is the distinction between possession and occupation? (h) Whether possession correlates with the ownership right?	16-23/ 21-26

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	<ul style="list-style-type: none"> (i) What is the difference between trading and insolvency proceedings? (j) 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? (k) When 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, whether 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 crore? (l) 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? (m) Whether the proceedings under the Code are bona fide? (n) Whether spectrum licence is subjected to proceedings under the Code, and whether it overrides the provisions contained in the Indian Telegraph Act, 1885, Indian Wireless Telegraphy Act, 1933, and Telecom Regulatory Authority Act, 1997? (o) 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? (p) 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 (SARFAESI Act) or under any other law? (q) Whether the spectrum is a natural resource, is the Government holding the same as <i>cestui que trust</i>? (r) In view of the nature of the resource, whether the spectrum can be subjected to insolvency / liquidation proceedings? (s) Whether dues under the licence can be said to be operational dues? (t) Whether deferred/default payment instalment/s of spectrum acquisition cost can be termed to be operational dues besides AGR dues? (u) Whether as per the revenue sharing regime and the provisions of the Indian Telegraph Act, 1885, the dues can be said to be operational dues? (v) Whether natural resource would be available to use without payment of requisite dues? 	
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2	Payments to be made by TSPs in case of sharing.	In the present case, only part of the spectrum of the licensee has been shared with some TSPs, which has been approved by the DoT under the Sharing Guidelines, 2015, and there is no provision for the liability of the past dues on the shared operator. Even otherwise, the past dues of sharing operator/ licensee covers AGR for the spectrum used by holder of licence. Certain TSPs came into existence later on, and the liability of such operator of the AGR would only be to the extent it has used the said spectrum. Shared operator TSPs cannot be saddled with the liability to pay the past dues of AGR of licensee, that have shared the spectrum with the original licensees.	26/34
3	Liability of seller and buyer in case of trading.	In the present case, it is not in dispute that in some cases only part spectrum was traded, and the remaining spectrum continued with the seller. At the time of agreement for spectrum trading, the AGR dues of the seller were also known. Therefore, the seller's dues prior to the concluding of the agreement/spectrum trading shall not be upon the buyer.	28/37
4	Directions in respect of payment of AGR dues by TSPs.	<p>(a) For the demand raised by the DoT in respect of the AGR dues based on the judgment of the Hon'ble Supreme Court, there shall not be any dispute raised by any of the Telecom Operators and there shall not be any re-assessment.</p> <p>(b) At the first instance, the respective Telecom Operators shall make the payment of 10% of the total dues as demanded by DoT by 31st March, 2021.</p> <p>(c) TSPs must make payment in yearly instalments commencing from 1st April, 2021 up to 31st March, 2031 payable by 31st March of every succeeding financial year.</p> <p>(d) The companies shall furnish an undertaking within four weeks to make payment of arrears as per the order.</p> <p>(e) The existing bank guarantees that have been submitted regarding the spectrum shall be kept alive by TSPs until the payment is made.</p> <p>(f) In the event of any default in making payment of annual instalments, interest would become payable as per the agreement along with penalty and interest on penalty automatically without reference to Court. Besides, it would be punishable for contempt of Court.</p> <p>(g) All TSPs and DOT shall report compliance of order every year by 7th April of each succeeding year.</p>	38/ 45-46