

**In the National Company Law Tribunal
Mumbai Bench**

MA-337/2018 In C.P. (IB)-298/(MB)/2018

Aircel Limited : **Corporate debtor.**

In

Vijaykumar V. Iyer : **Applicant/ Resolution Professional**

V/s

Union of India : **Respondent**

&

MA-336/2018 In C.P. (IB)-302/(MB)/2018

Dishnet Wireless Limited : **Corporate debtor.**

In

Vijaykumar V. Iyer : **Applicant/ Resolution Professional**

V/s

Union of India : **Respondent**

For the Applicant : Senior Counsel Mr. Ravi Kadam a/w Senior Counsel Mr. Prateek Seksaria & Salonee Kulkarni i/b Shardul Amarchand Mangaldas & Company.

For the Respondent : Mr. Anil C. Singh Learned Asst. Solicitor General a/w Mr. Advait H. Sethna a/w Ms. Ruju R. Thakkar for Union of India.

Order delivered on : 27/11/2019

Coram: Hon'ble Mr. M.K. Shrawat, Member (Judicial)
Hon'ble Mr. Chandra Bhan Singh, Member (Technical)

Per: M.K. Shrawat, Member (Judicial)

ORDER

1. These two Applications are submitted on 10.04.2018 by the Resolution Professional of Aircel Limited and Dishnet Wireless seeking following reliefs :-

- A. *That this Hon'ble Tribunal be pleased to declare that the moratorium under Section 14 of the Code, applies to all the licenses including the **Telecom Licenses granted** by Respondent; and **Spectrum purchased** by the Petitioner Company, as well as the Petitioner Company's unpaid dues, if any, to the Respondent;*

- B. Pending hearing and final disposal of this Application, direct the Respondent to refrain from suspending/terminating and/or taking any other action against the Petitioner Company in relation to the Telecom Licenses and Spectrum allocation;
- C. Pending hearing and final disposal of this Application, direct the Respondent from taking any action/steps against the Petitioner Company in relation to any unpaid dues;

2. **FACTS IN BRIEF :-** Facts of the case are that an Application/Petition was moved by **Aircel Limited, Corporate Debtor/Petitioner U/s 10 of I&B Code, 2016** to declare itself insolvent. The said Petition under section 10 of I&B Code, 2016 was '**Admitted**' vide an Order dated 12.03.2018 by declaring Moratorium and appointing Interim Resolution Professional. This is a case where the Corporate Debtor is under heavy debt i.e. operational debt of about Rs. 19,889 Crores and financial debt of about Rs. 7,378 Crores. On appointment, the Resolution Professional has taken charge over the debtor company so as to commence the Corporate Insolvency Resolution Process proceedings (CIRP).
3. The present application is revolving around the fundamental question of Telecom License granted by **Department of Telecommunication/ DoT (Licensor)** to the Petitioner /**Aircel (Licensee)** under the provisions of Section 4 of Indian Telegraph Act, 1885. The Petitioner Company also holds spectrum of 900 MHz, 1800 MHz and 2100 MHz frequency across various circles in India ("**Spectrum**"), which has been allotted to it by the Department of Telecommunication (DoT). The Petitioner Company along with group entities i.e. Dishnet Wireless Limited and Aircel Cellular Limited operated under the brand name "AIRCEL" offering 2G and 3G Services across India. The details of Telecom Licenses obtained is tabulated below :-

Sr. No.	Circle	Telecom License No	Date of grant of license	Expire Date
1.	Andhra Pradesh	UASL	05.12.2006	04.12.2026
2.	Delhi	UASL	05.12.2026	04.12.2026
3.	Gujarat	UASL	05.12.2026	04.12.2026
4.	Karnataka	UASL	05.12.2026	04.12.2026
5.	Maharashtra	UASL	05.12.2026	04.12.2026
6.	Mumbai	UASL	06.12.2026	04.12.2026
7.	Rajasthan	UASL	05.12.2026	04.12.2026
8.	All India	IP-1	02.05.2022	N.A.
9.	Tamil Nadu and Chennai	CMTS	31.12.1998	30.12.2018

- 3.1 Therefore, the Petitioner Company happened to be the holder of Telecom Licenses (Unified Access Service License/UASL) granted by Respondent for various circles across India which includes Andhra Pradesh, Delhi, Gujarat, Karnataka, Maharashtra, Mumbai, Rajasthan and Tamil Nadu. However, licenses of Gujarat and Maharashtra were stated to be surrendered in the past.

The acquisition of spectrum in 900 Mhz, 1800 Mhz and 2100 Mhz was procured through an auction process which was in terms of "Notice inviting Auction of Spectrum". At present the Petitioner Company is holding the Spectrum and the Spectrum Rights are available to circles viz. AP, Delhi, Karnataka, Mumbai etc.

4. The most important feature of holding the Spectrum and the license is that the Telecom Licenses and Spectrum are required for operation of the Petitioner Company as a going concern. The **Telecom License is a valuable asset** for the Telecom Company; as vehemently pleaded by the Resolution Professional. Furthermore, Petitioner Company also holds "Spectrum" across various circles in India, that too, is a valuable asset of the Petitioner Company.

- 4.1 **ARGUMENTS OF APPLICANT/ RP** : The apprehension is that "Telecom Licenses" and grant of "Spectrum" may be **terminated** during the 'Moratorium' Period because the Debtor Company had defaulted in payment of annual installments. The apprehension is that DoT may take steps against the Company. However, at this juncture Learned Counsel of the Resolution Professional has informed that up till the commencement of the Corporate Insolvency Resolution Process the Company had **paid the license fees**.

5. It is vehemently pleaded that during "**Moratorium**" in operation the Telecom License and Spectrum cannot be terminated as prescribed **U/s 14 of I&B Code**. So the prayer is that the DoT be directed not to take any action against the Company such as termination of Telecom License and Spectrum Allocation. Learned Counsel has raised a serious concern that in case of termination the value of the Petitioner should get severely eroded. A great prejudice shall be caused if any action is taken by the said department.

- 5.1 Further it is informed that the Company had made a huge **investment of Rs. 6249.27 Crores for procuring the license**. It is further pleaded that the terms and conditions of "License Agreement for Provision of Unified Access Services" do not permit for revocation of license when the period has not expired. In support placed reliance on the following Clauses of the Agreement:-

“NOW THIS AGREEMENT WITNESSETH AS FOLLOWS :-

1. *In consideration of the payment of Licence fee, and due performance of all the terms and conditions mentioned in this Licence Agreement on the part of the LICENSEE, the LICENSOR does, hereby grant under Section 4 of the Indian Telegraph Act, 1885 on a non-exclusive basis, this Licence to **set up and operate the Unified Access Services in the licensed service area** described in SCHEDULE appended hereto.*

2. *The LICENSE hereby granted will **remain valid for 20 (Twenty) years** from the Effective date unless revoked earlier for any reason whatsoever.*
6. **ARGUMENTS OF DoT / U.O.I :-** On the other hand from the side of the Department, Learned Additional Solicitor General Mr. Anil Singh appeared and pleaded that the **Union of India has exclusive ownership right** over the Spectrum. According to him in this case the default of non-payment of license fees had already occurred therefore, the licensor/DoT otherwise has right to terminate the impugned facility to the Company. The moment 'licensee'/AIRCEL fails to pay the fees, the 'licensor'/DoT has every right to deprive of the licensee from the 'License'. The ownership and the control over the Spectrum at all times is the property of Union of India and never vested with the Licensee. The terms of the said license also confirm the same that the Licensor reserves the right to suspend the operation of the license in whole or in part at any time if in the opinion of the Licensor it is necessary or expedient to do so in public interest. The Spectrum had never been sold as per the Agreement because this a natural resource of the country which belongs to the people of India. Reliance was placed on *W.P. (C) 423 of 2010 Centre for Public Interest Litigation and others V/s Union of India and Others with Writ Petition (C) No. 10 of 2011 Subramanian Swamy V/s Union of India and Others.*
- 6.1 Learned ASG has further pleaded that the Petitioner Company was granted "Right to use" and not the "Right to own" the Spectrum. Through an auction held in the year 2010 it was advertised as under :-
- "1.1 The Government of India (the "Government") through the Department of Telecommunications ("DoT"), proposes to allot the rights to use certain specified radio spectrum frequencies in the 2.1GHz band (the "3G Spectrum") and in the 2.3GHz band (unpaired) (the "BWA Spectrum") by means of auction in various telecom service areas in India."*
- 6.2 In the "Notice Inviting Applications" (NIA) for Spectrum Auction 2010 had granted only Transfer of "Right to use" and in case of breach of condition the revocation has also been specified as per the terms, only relevant portion reproduced below :-
- "2.1 Spectrum to be auctioned.
Rights to use spectrum at specified frequencies in the following bands (subject to fulfilment of eligibility conditions, relevant license conditions and any particular conditions related to specific frequency blocks) for a period of 20 years (from the date of award of right to commercially use the allocated spectrum block) are being offered for award."
The relevant provisions in case of breach of those conditions, as per the NIA 2010 are :-*
- 3.7 *Breach, revocation and surrender
The spectrum assignment may be revoked, withdrawn, varied or surrendered in accordance with applicable license conditions or any other applicable laws, rules, regulations or other statutory provisions.*

The spectrum assignment may also be revoked if the Government determines the user of the spectrum to be in serious breach of any of the conditions of the award of the spectrum (including adherence to the Auction Rules) and the consequent obligations.”

6.3 One of the legal argument is that as per the provisions of **Section 18 (1)(f) of the I&B Code, 2016** to be read along with "Explanation" an asset if owned by the Third Party but in possession of the Corporate Debtor, can be repatriated back to the owner. In this regard reliance was placed on the decision NCLT Chandigarh dated 26.04.2019 in the case of *Weather Makers Pvt. Ltd. V/s Parabolic Drugs Ltd. in CA-206/2019 In C.P.(IB)-102/CHD/2018 Order was passed on 26.04.2019* wherein it was held that although vide Section 18 of the Code Resolution Professional is authorized to take control and custody of any asset over which the Corporate Debtor has ownership right or an asset which is in possession of the Corporate Debtor, whether tangible, moveable, immovable, intangible etc., however, an exception is carved out by inserting "**Explanation**" to Section **18(1)(f)** of the Code that an asset owned by a Third Party but in possession of the Corporate Debtor held under contractual arrangement shall not be an asset over which the Resolution Professional can take control. So the Argument is that once it is an admitted factual position that the asset in question i.e. "Spectrum" is under ownership of Union of India thus at any time can be taken back from the possession of the Debtor Company. Hence it is intensely pleaded that the Company had breached the terms of the license agreement hence the DoT is authorized to cancel the usage of license.

6.4 Reliance has also been placed on a decision of NCLAT in the case of *Rajendra K. Bhuta V/s Maharashtra Housing and Area Development Authority, Order dated 14.12.2018 bearing Company Appeal (AT) (Insolvency) No. 119 of 2018* it was held that :-

"On perusal of record it was found that the land of MHADA was handed over to the Corporate Debtor over which no right had accrued to the Corporate Debtor and the land belonged to MHADA thus cannot be treated as an asset of the debtor company hence out of the ambits of the provisions of section 14(1)(d) of the Code.”

The Learned Counsel has therefore pleaded that this case law is squarely applicable on the facts that the Spectrum being not the asset of the Corporate Debtor thus out of the ambits of Moratorium.

6.5 Reliance has also been placed on an Order of Hon'ble Supreme Court dated 14th May, 2015 pronounced in the case of *Bharti Airtel Limited and others V/s Union of India in C.A. No. 2803 of 2014 with C.A. 1969 of 2014* for the legal proposition that the Licensee has no automatic right of renewal or extension

on expiry of original tenure of license. Renewal is at sole discretion of Licensor/ DoT. It is the exclusive privilege of the Government of India which could be permitted to be exercised by others only by way of grant from the Government of India. Therefore, the argument is that the license/Spectrum is a National Asset, therefore, no individual or a corporate body can demand a claim over this property. Almost on identical lines a legal proposition has been laid down by the Hon'ble Supreme Court in the case of (2012) 3 Supreme Court Cases 1 (Writ Petition No. 423 of 2010) in *Centre for Public Interest Limitation and others V/s Union of India and Others with Writ Petition (C) No. 10 of 2011 Subramanian Swamy V/s Union of India and Others dated 02.02.2012* that :-

"Natural resources belong to the people but the State legally owns them on behalf of its people and from that point o 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 the public interest."

7. **FINDINGS** : - Arguments of both the sides heard at some length. Undisputedly the Corporate Debtor i.e. Aircel Limited had paid a sum of **Rs. 6249.27 Crores** to get License and Spectrum. These licenses are being used across India being Telecom License is required to run the business of the Company. The apprehension is that by issuance of demand notice for a sum of Rs. 55.70 Crores dated 13.04.2018 by DoT, that notice may lead to cancellation of license. Cancellation of license shall adversely affect the business of the Company. Only on the basis of license the Company is running the telecom business in the Country. Therefore, license is an essential requirement for the business of the Corporate Debtor.
- 7.1 The facility of Spectrum and License was obtained by the Petitioner after huge payment. Since presently the Company is in Insolvency, the expectation is to get a reasonably good Resolution Plan. Any Resolution Applicant shall show interest in the business of the Company if the Company holds license. Without license, since no other valuable asset is available to the Company, no Resolution Applicant may show any interest in the business of this Debtor Company for it's revival. Without License this Company be as good as a shell company. Resolution Professional has

informed that in response to advertisement inviting EOI, few parties have shown interest but all are interested in running the Telecom Business. Therefore, the presence of the license is a *sine qua non* for getting good Resolution Plan.

7.2 As far as the legal question is concerned, the Application of Section 14(1)(d) of the Code is in respect of a property by an owner and the restriction is that on commencement of Insolvency the Adjudicating Authority shall declare Moratorium for prohibiting recovery of any property by an Owner or Lessor in the possession of the Corporate Debtor. Section 14(1)(d) reads as under :-

“MORATORIUM Section 14 (1) - Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall be order declare moratorium for prohibiting all of the following, namely :-

- (a) -----
 - (b) -----
 - (c) -----
 - (d) *the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*
- (2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium.”*

7.3 As a fundamental principle, if a property is in possession of the Corporate Debtor the same cannot be demanded back by the Owner/Lessor/DoT of the property as long as the same is in use and in possession of the Corporate Debtor/ Licensee. To this extent there should not be any controversy that since the intangible asset is used for business purpose by the Corporate Debtor, the provisions of Moratorium must apply. The Licensor/DoT can be prohibited from taking any step which may be prejudicial to the interest of the Licensee/ Aircel.

7.4 An exception to this general rule is that if an asset is in possession of the Corporate Debtor under contractual arrangement the same can be demanded back by the owner of the asset, refer Section 18(1) (f) of the Code. In this regard a decision of NCLT Chandigarh has also been relied upon by UOI. On examination of facts we have noticed that while admitting the Petition of the Corporate Debtor (Aircel Limited) under section 10 of the I&B Code, vide Order dated 12.03.2018 it was duly

acknowledged that on one hand the employees of the debtor company and other Trade Creditors are regularly demanding their outstanding dues, however, on the other hand there was an apprehension of suspension of Telecom License. For ready reference para 3.4 and 4 of the said NCLT Order are reproduced below :-

“ 3.4 A pressing urgency has also been stated for Admission of this Petition that the Banks have frozen TRA Account. It is a common practice and a general mechanism to ask the debtor to have a Trust and Retention Account which is opened and controlled by the Lenders to protect Credit Risk i.e. the risk of Debt Service Default. In this account substantial deposit is lying, however, the Debtor Company is not allowed to use the same for running day to day business. Due to this reason, the entire revenue generation is frozen resulting into non-payment of Salary and necessary expenditure. There is an apprehension of Law and Order situation because the Vendors, employees and other small Trade Creditors are seriously agitating for their respective dues. Naturally, this situation is to be avoided as early as possible so that the business of the Company must not affect adversely.

4. The apprehension of suspension of Telecom License by the DoPT is also well founded, due to the overall stressed financial position. For the revival a Resolution Plan can be an appropriate answer to all these problems.”

7.5 It has also been observed in para 5 of the said Admission Order of NCLT that :-

“5. Prima facie it has also been demonstrated that there is a scope of revival of the Company and also betterment in revenue generation. In the connected case of the Group (Aircel Limited) the Applicant has placed certain figures of revenue generation that in the month of December 2017 GSM revenue was Rs. 5811 Million which has gone down in the January 2018 to 5148 Million. However, ABS and other revenue was better from Rs. 574 Million to Rs. 640 Million. On the same lines, the Applicant has, therefore, expressed that under the supervision of experts and Judicial Body, the gross revenue generation shall be better in the months to come. In addition to the scope of increase in revenue generation, it has also been demonstrated that the Debtor Company has enough valuable assets to satisfy the major portion of the outstanding Debt. A provisional Assets and Liabilities drawn as on 20th February, 2018 of Dishnet Wireless Limited and annexed in Volume-VIII, Page 1583 which reflects under the Head “Current Assets”, Loans and Advances are to the tune of Rs. 22,50,27,638/- and Other Financial Assets Rs. 195,25,78,756/- and other Non-Current Assets Rs. 256,07,69,485/-. As against that, the major Liability shown as Financial Borrowings to the tune of Rs. 25,21,60,00,511/-. There are other Financial Liabilities of Rs. 22,87,13,45,246/-. Attention has also been drawn on the Trade Receivables totaling Rs. 432,30,02,623/-. As against that, Trade Payables are Rs. 35,58,40,94,097/-.

Therefore, since inception of the Insolvency Proceedings the advantage of having license to run telecom business has been acknowledged by this Bench. Without such an asset, no party shall take interest in acquiring this Debtor company, hence approved the commencement of CIRP.

- 7.6 As far as the apprehension of cancellation of license by DoT is concerned, on examination we have noticed that there is a clause of "*Force Majure*" which prescribes that in addition to any act of God even by an act of State or direction from Statutory Authority the licensor shall not be entitled to terminate the license. Since the signing parties have duly agreed upon the terms and conditions, therefore, it shall be unfair on the part of the DoT to suspend the license at this juncture.
- 7.7 An important point which has been brought to our notice is that the Applicant or the Resolution Professional is not demanding the 'ownership' of the license as a product but simply seeking uninterrupted use of the said intangible asset. Otherwise also, through agreements only 'right to use' is granted and not the 'right to ownership'. Therefore, 'right to use' should remain, during the period agreed upon, with the Corporate Debtor which is always beneficial for the company as well as for all stake holders. This argument can further be buttressed by placing reliance on Sub-sec. (2) of Section 14 of the I&B Code which prescribes that the supply of essential goods or services to the Corporate Debtor shall not be terminated or suspended or interrupted during Moratorium Period. The usage of license/spectrum is akin to "Essential Goods or Services" because without usage the Company cannot run its Telecom Business. This prohibition shall, therefore, also applicable on DoT.
8. To conclude this Bench is of the view that, admittedly the License/Spectrum is an asset of State over which the Corporate Debtor has no right of ownership, therefore, up to this extent the argument of the Government is hereby accepted. The relief sought by the Corporate Debtor is that due to issuance of Demand Notice by DoT an apprehension is that the same may be suspended. We hereby direct that the clauses of "Moratorium" are squarely applicable on this Corporate Insolvency Resolution Process Proceedings, hence need not be interrupted or hampered by any authority. It has also been brought to

our notice that worst come if the department is aggrieved then it can approach TRAI or TDSAT, regulatory authorities constituted to supervise the functioning of Telephone Companies. As far as the Insolvency Proceedings are concerned, we are governed by the object set out in the 'Preamble' of the Insolvency Code wherein it is prescribed to maximize the assets of the Company as well as to protect the value so as to get good Resolution Plan for the revival of the debtor company. Our objective is limited to this extent that too governed by the Code, therefore, within the scope and ambit of Insolvency and Bankruptcy Code, 2016 hereby instruct the concerned DoT authority not to make any attempt to cancel the impugned license issued in favour of the debtor company. Both the applications are disposed of and Ordered accordingly.

SD/-
CHANDRA BHAN SINGH
MEMBER (TECHNICAL)

SD/-
M. K. SHRAWAT
MEMBER (JUDICIAL)

DATE: 27/11/2019
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