2026 INSC 153

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 1810 OF 2021

STATE BANK OF INDIA ...APPELLANT(S)

VERSUS

UNION OF INDIA & ORS. …RESPONDENT(S)

WITH

CIVIL APPEAL NO(S). 2227 OF 2021

WITH

CIVIL APPEAL NO(S). 4570 OF 2021

WITH

CIVIL APPEAL NO(S). 2263 OF 2021

WITH

CIVIL APPEAL NO(S). 4571 OF 2021

WITH

CIVIL APPEAL NO(S). 6546 OF 2021

J U D G M E N T

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I. Introduction

1. The question for our consideration is whether telecom service providers (TSPs), called upon to pay the license dues by the Department of Telecommunication (DoT) can invoke moratorium on the basis of *voluntary corporate insolvency resolution process* under Insolvency and Bankruptcy Code, 2016 (IBC) for restructuring of their assets. The asset in question is the Spectrum allocated to the TSPs through auction. The endeavour to treat spectrum as an asset in the hands of TSPs gives rise to a fundamental question as to its ownership, possession, use, transfer, or assignment. Its definition and legal province are the subject matter of our inquiry.

1.1. This issue is not as complicated as it seems. We could demystify the legal challenge by first understanding spectrum as a material resource, precisely as what our Constitution refers to as *the material resource of the community.* If that be so, it is easy to find the path by simply following the State policy to ensure that spectrum and its benefits sub-serve *common good* - not uncommon good. For this purpose, its *"ownership"* and more importantly its *"control"* with all its attributes, including benefits, have to be secured for the *citizens*.

1.2. Our judgment is therefore in three parts. In the first part, we define the legal implications of spectrum and in the second part we identify its true legal province. In the third part, we examine treatment of an "asset"

under IBC and in this context its application to telecommunication laws that govern ownership of spectrum. Finally, we could reach our conclusion, as naturally as water knows its slope, IBC cannot be the guiding principle for restructuring the ownership and control of spectrum.

II. Prelude to the NCLAT's judgment: Facts leading to the filing of these appeals.

2. The Aircel Group entities - Aircel Limited, Aircel Cellular Limited and Dishnet Wireless Limited (hereinafter collectively referred to as "the corporate debtors") - were granted telecom licences by the DoT under Unified Access Service Licences (UASL) pursuant to Licence Agreements dated 05.12.2006, each valid for a term of twenty years. Domestic lenders, including the State Bank of India, extended rupee term loan facilities aggregating to ₹13,729 crores under a Rupee Loan Facility Agreement dated 29.03.2014, followed by execution of Indentures of Mortgage dated 02.05.2014 in favour of the lenders. In spectrum auctions conducted by DoT during the years 2010, 2014, 2015 and 2016, the corporate debtor acquired rights to use spectrum in the 900 MHz, 1800 MHz and 2100 MHz bands upon payment of ₹6,249.27 crores.

3. Corporate debtors failed to pay licence fee. When DoT attempted to recover these amounts, they invoked IBC by filing an application

under Section 10 for voluntary corporate insolvency resolution process. The application was admitted by the National Company Law Tribunal, Mumbai Bench, vide order dated 12.03.2018 in respect of Aircel Limited, appointing Vijaykumar V. Iyer as the Interim Resolution Professional. By a subsequent order dated 19.03.2018, Aircel Cellular Limited and Dishnet Wireless Limited were also admitted into CIRP.

4. Upon constitution of the Committees of Creditors (CoC) for Aircel Cellular Limited and Dishnet Wireless Limited on 30.03.2018, claims were invited from all stakeholders. The DoT was invited to participate in the CoC meeting held on 06.06.2018, and thereafter filed its claim on 16.08.2018 in Form-F, asserting a claim of ₹9,894.13 crores as a licensor, arising from Annual Licence Fee and Spectrum Usage Charges payable under the Licence Agreements.

5. A resolution plan submitted by UV Asset Reconstruction Company was approved by the CoC on 13.05.2019 and thereafter sanctioned by the NCLT by order dated 09.06.2020. Aggrieved, DoT assailed the NCLT order approving the resolution plan before the appellate tribunal, NCLAT.

6. During the pendency of the aforesaid proceedings, this Court delivered its judgment in *Union of India v. Association of Unified Telecom Service Providers of India*[1], affirming the definition of Adjusted Gross Revenue (AGR) as stipulated in the licence agreements executed

1 (2020) 3 SCC 525. (Hereinafter 'AUSPI (II))

between the DoT and the TSPs. Pursuant thereto, the Union of India filed M.A. (D) No. 9887 of 2020 on certain aspects relating to payment of the AGR dues. In the course of consideration of the said application, it was brought to the notice of this Court that several TSPs, including the Aircel Group entities, were undergoing insolvency proceedings under the IBC and in view of the moratorium recovery of amount is impermissible. In the said proceedings, this Court passed an order on 20.07.2020[2] observing as under:

> "*We have heard the learned counsel appearing for the parties at length with respect to the prayer made by the Central Government and the time frame for making the payment as per the order passed by this Court. During course of hearing, again an attempt was made to wriggle out of our judgment and orders, which were passed by this Court under the guise of reassessment and recalculation. That is not at all permissible. In view of decision, there is no scope of raising any further dispute with respect to any item or to raise fresh dispute. No dispute can be raised with respect to dues and they have to be paid. New round of litigation is prohibited. In the second inning, we have heard the same after remand of the issues to the TDSAT. Thereafter, there is no question of entertaining any kind of dispute with respect to the payment and dues worked out. No dispute shall be entertained. The calculations which have been given and the amount to be recovered at pages 180181 of M.A.D. No. 9887 of 2020 (application for modification) in C.A. No. 63286399 of 2015 are taken to be as final amount and there can be no dispute raised about it. No recalculation and selfassessment can be undertaken.*
>
> *….*
>
> *However, when we consider the dues of Telecom Service Providers under insolvency, we find that there are several companies which have dues to the extent of Rs. 38,964.27 crores, which have gone under liquidation. Since the dues are huge, we propose to examine the bonafides of the initiation of the proceedings under the IBC. Let all the*

2 In Re Mandar Deshpande, 2020 SCC OnLine 758.

documents of the companies viz. Aircel Group of Companies, Reliance Communication/Reliance Telecom Limited, Sistema Shyam Teleservices Ltd. and Videocon Telecommunications Ltd. relating to liquidation and orders passed in proceedings be placed on record within 10 days from today.

We have closed the matter with respect to the prayer made for making the payment in installments and the offer made by the Government, the time frame thereto and how to secure the amount. The order is reserved on that aspect.

However, we will hear the matter separately with respect to the companies under liquidation and test the bonafides of their action and how to ensure that the amount is recovered. Let all the documents be placed on record within 10 days from today and the matter be listed for hearing about these companies on the above aspect on 10.08.2020."

7. In continuation of the above proceedings, this Court[3], by order dated 01.09.2020, noted that the question whether spectrum could be subjected to proceedings under the IBC raised issue of considerable significance. Accordingly, specific questions of law were formulated and referred for adjudication to NCLAT on 25.09.2022 with a direction to consider the same after hearing all concerned parties and to return a reasoned determination. The following were the questions framed and referred by this Court:

"20. 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

3 Union of India v. Association of Unified Telecom Service Providers of India, (2020) 9 SCC 748.

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.

21. 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?

22. 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.

23. 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.

24. 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.

25. 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."

8. The questions referred can be restated as follows;

(i) Whether spectrum is a natural resource held by the Union of India in public trust, and the legal consequences flowing therefrom.

(ii) Whether the conferment of a right to use spectrum under a licence granted under Section 4 of the Telegraph Act, 1885 vests any ownership or proprietary interest in TSPs, or whether such right constitutes a limited, conditional and revocable privilege.

(iii) What is the true nature of the relationship between ownership, possession and occupation in respect of spectrum, and whether possession or control of spectrum usage correlates with ownership rights.

(iv) Whether spectrum, or the right to use spectrum under a licence, can be treated as an “asset” of the corporate debtor so as to fall within the ambit of Section 18 of the IBC.

(v) Whether spectrum licences or spectrum usage rights can be transferred or traded in insolvency proceedings when such transfer, under the Spectrum Trading Guidelines, is expressly subject to prior governmental approval and clearance of past dues.

(vi) Whether spectrum or spectrum usage rights can be treated as a security interest in favour of lenders by virtue of licence conditions or tripartite arrangements, and whether such security can be enforced under the Code.

(vii) Whether approval of a resolution plan under the IBC can substitute or override the requirements contained in the Spectrum Trading Guidelines, including Guidelines 10, 11 and 12, particularly where the Government has declined permission to trade on account of non-fulfilment of licence conditions.

(viii) Whether invocation of CIRP, particularly voluntarily, raises issues of bona fides of the corporate debtor in triggering proceedings under the IBC.

9. By the order impugned before us NCLAT heard parties in detail and returned the following conclusions on the questions referred;

> *“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.

10. Appeals and cross appeals have been filed assailing the said order impugning the different conclusions arrived at by the NCLAT. The lead appeal has been instituted by the State Bank of India, representing the financial creditors of the corporate debtor, assailing certain conclusions of the appellate tribunal on the questions referred. Similarly, the erstwhile Resolution Professional of the corporate debtor laid identical challenge to the findings. On the other hand, Union of India through the DoT, challenged the impugned judgment on some fundamental grounds. Appeals have also been filed by "outsiders"- the Resolution Professionals of Reliance Telecom Limited (RTL) and Reliance Communication Limited (RCOM), contending that the findings of the NCLAT would have a direct bearing on, and adversely affect, the adjudication of the pending applications seeking approval of the resolution plans under the IBC.

III. Submissions of the Learned Counsels:

11. ***Submission on behalf of TSPs and financial institutions:*** Ld. Sr. Counsel Rakesh Dwivedi, appearing on behalf of the State Bank of India representing the CoC, submitted that the impugned judgment of the NCLAT proceeds on fundamentally inconsistent premises and is

contrary to the scheme, object and overriding mandate of the IBC. Further, Ld. Sr. Counsel Shyam Divan, appearing for the erstwhile Resolution Professional, and Mr. Gopal Jain, Ld. Sr. Counsel appearing for the Resolution Professional of RCOM and RTL, advanced substantial submissions, all of which can be articulated as follows:

11.1 The NCLAT adopted inconsistent conclusions. Having held that spectrum usage rights constitute an intangible asset of the corporate debtor and that DoT dues are operational in nature, it nevertheless concluded that spectrum cannot be utilised unless past dues are cleared and that such dues survive the CIRP. These findings rest on mutually destructive premises and cannot co-exist within the scheme of the Code.

11.2 Having accepted that spectrum usage rights are assets and that DoT is an operational creditor, the NCLAT erred in relying upon the Tripartite Agreement and the Spectrum Trading Guidelines, 2015 to accord preferential treatment to DoT. This results in elevation of one operational creditor over others, contrary to the *pari passu* treatment mandated by Sections 30 and 53 of the Code.

11.3 Telecom licences, together with the right to use spectrum for a defined term, constitute valuable intangible assets of the corporate debtor. While spectrum remains a sovereign resource, the grant of a licence upon payment of consideration creates a legally enforceable right of commercial exploitation. The Tripartite Agreement and the

Spectrum Trading Guidelines themselves recognise the transferability and encumbrance of such rights, subject to regulatory approval.

11.4 Once treated as assets of the corporate debtor, the licence and spectrum usage rights fall within the exclusive domain of the insolvency framework. During CIRP, all assets vest in the custody of the resolution professional for preservation and value maximisation. Their treatment under a resolution plan lies within the commercial wisdom of the CoC and is immune from judicial reappraisal except on limited statutory grounds.

11.5 By virtue of Section 238, the Code prevails over any inconsistent contractual or statutory instrument. To the extent that the UASL, the Tripartite Agreement or the Spectrum Trading Guidelines impose conditions inconsistent with the resolution process or the binding effect of an approved plan, they must yield to the Code. Judicial precedent consistently affirms that an approved resolution plan overrides prior contractual and statutory claims.

11.6 Once DoT's dues are admitted as operational debt, their treatment stands crystallised and can be governed only by the approved resolution plan. Conditioning post-resolution use or transfer of spectrum on clearance of residual pre-CIRP dues amounts to an impermissible reordering of priorities outside the statutory waterfall and violates Sections 30(2)(b) and 31. DoT, having filed its claims and not challenged

their classification before the NCLT, is estopped from contending otherwise

11.7 Secured lenders hold valid and subsisting security interests under the loan and mortgage documents executed by the corporate debtors. The NCLAT failed to give effect to these instruments and, in substance, subordinated secured creditor rights by according priority to DoT dehors the IBC, contrary to the legislative scheme of insolvency resolution.

11.8 The NCLAT exceeded its jurisdiction in imposing payment of "requisite dues" as a precondition for use or transfer of spectrum. The IBC vests all commercial decisions, including creditor treatment and value distribution, in the collective wisdom of the CoC. Judicial interference on equitable or regulatory considerations amounts to an impermissible substitution of such wisdom, contrary to the law laid down in *K. Sashidhar v. Indian Overseas Bank*[4] and *Committee of Creditors Essar Steel India Ltd. v. Satish Kumar Gupta*[5].

11.9 A clear demarcation must be maintained between DoT's role as regulator and its position as creditor. While regulatory powers may be exercised prospectively in accordance with law, pre-CIRP dues resolved under an approved plan cannot be revived under the guise of regulation. The moratorium under Section 14 protects critical operating assets,

4 2019 (12) SCC 150.
5 2020 (8) SCC 531.

including spectrum usage rights, and bars enforcement of past claims during CIRP and plan implementation.

12. ***Submissions on behalf of DoT/Union of India***: Ld. Attorney General R. Venkataramani, assisted by Ld. ASG Vikramjit Banerjee assailed the impugned judgment of the NCLAT insofar as it holds that spectrum constitutes an intangible asset of the corporate debtor amenable to insolvency proceedings, that DoT dues are operational debts, and that spectrum usage rights or licences are transferable under the Code, 2016.

12.1 Spectrum is a scarce and finite natural resource owned by the people of India, with legal title vesting exclusively in the Union of India, which holds it in trust for the public. Licensees acquire no proprietary interest in spectrum. The doctrine of public trust, as consistently affirmed by this Court in *Centre for Public Interest Litigation v. Union of India*[6], as well as *Natural Resources Allocation, In Re, Special Reference No.1 of 2012*[7], governs its allocation and use.

12.2 The grant of spectrum under a licence does not effect a transfer of property or title. It confers only a limited, conditional and revocable privilege to use spectrum, subject to statutory requirements, licence conditions and overriding public interest. The NCLAT, therefore, erred in

6 (2012) 3 SCC 1.
7 (2012) 10 SCC 1.

treating spectrum usage rights as assets of the licensee/corporate debtor capable of transferred in insolvency or liquidation.

12.3 Section 4 of the Telegraph Act, 1885 vests exclusive privilege in the Union to establish and operate telecommunication systems and to grant licences on such terms and payments as it determines. The licence, though contractual in form, emanates from sovereign statutory power and does not create proprietary rights. Judicial precedents, including *AUSPI (II) (Supra)*, reiterate the State's obligation to retain control over spectrum and secure fair value for its use.

12.4 The Notice Inviting Applications for spectrum auctions issued on 28.09.2012 and the Tripartite Agreement expressly clarify that licensees acquire only a right to use spectrum and that transfer, renewal or continuation remains subject to satisfaction of dues and compliance with licence conditions. The rights of lenders are subordinate to sovereign control and cannot override statutory mandates.

12.5 Treating spectrum as an asset of the corporate debtor is inconsistent with *Explanation* to Section 18 and Section 36(4)(a)(iv) of the Code, which exclude assets not owned by the debtor and contractual arrangements conferring only a right of use. The resolution professional cannot assume control over spectrum, which is neither owned nor transferable as property by the licensee.

12.6 DoT dues do not fall within the definition of “operational debt” under Section 5(21) of the Code. Licence fees and spectrum usage charges arise from the grant of a sovereign privilege and represent regulatory consideration, not payment for goods or services. The relationship between the Union and the licensee is that of sovereign licensor and licensee, not a commercial creditor-debtor relationship. Treating such dues as operational debt would permit insolvency proceedings to undermine statutory and regulatory control over natural resources.

12.7 Alternatively, if right to use spectrum is held to be constituting asset of the TSPs, then DoT would fall within ambit of “financial creditor” since the definition of “financial debt” under Section 5(8) hinges on the concept of *time value of money*. The right to use spectrum was granted on a deferred payment basis, forming the very foundation of the TSPs entitlement to use such spectrum. The deferment of consideration, in exchange for the right to use a resource of enduring value, therefore partakes the character of a financial arrangement, and such liability is appropriately classifiable as a financial debt.

12.8 The summation of the submissions is hence that TSPs does not “own” spectrum either in law or in fact, nor do they have absolute possession. What they hold is a limited, a case specific, and conditional right to use spectrum. The combined effect of the Telegraph Act, public

trust doctrine, judicial precedents, Tripartite Agreements and statutory exclusions under Sections 18 and 36 of the IBC unequivocally establishes that spectrum cannot form part of the assets of the corporate debtor capable of transfer during CIRP or liquidation.

IV. Nature of Spectrum and the Constitutional Framework Governing the Natural Resources:

A. Spectrum as a Finite Natural Resource:

13. In simple terms, spectrum may be understood as an invisible rainbow of radio waves enabling wireless services such as phone calls, television signals, Wi-Fi, and 5G internet. Physical science describes it as the electromagnetic spectrum, encompassing the full range of electromagnetic frequencies from radio waves to gamma rays. Spectrum refers to a range of radio frequencies used for wireless communications, such as mobile calls and internet services. The radio spectrum, which is a finite portion of the electromagnetic spectrum, is particularly suited for wireless communication. The electromagnetic spectrum is a finite, non-renewable resource comprising frequencies ranging from extremely low frequency (ELF) waves to gamma rays. The portion of spectrum usable for wireless communications is inherently limited due to several factors such as; (a) *propagation characteristics*, as different frequencies exhibit varying propagation properties affecting their suitability for specific applications, (b) *interference*, including co-channel and adjacent-channel

interference, which restricts the number of users that can share the same frequency band, and (c) *technological limitations*, since existing technology cannot efficiently utilise all frequencies, rendering certain bands impractical for use.

13.1 The International Telecommunication Union (ITU), a specialised agency of the United Nations responsible for global telecommunications regulation, divides the world into three regions, each with specified frequency allocations. The ITU has allocated various spectrum bands to India for mobile telecommunications, satellite-based services, and other applications such as broadcasting. The spectrum needs of our fast-growing economy has been projected to be around 2000 MHz by 2030. This is said to be far below the needs of defense, telecommunications and other sectors. In *CPIL (Supra)*, this Court explained spectrum as;

> *"77. 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 the States as per international norms."*

14. Beyond its technical description, spectrum has consistently been recognized as a public resource and it is precious also for the reason that it is finite and limited.

B. Concept of ownership over natural resources and its Constitutional Underpinnings:

15. Dealing with spectrum as a limited natural resource, this Court in *CPIL Case* (Supra) had the occasion to deal with ownership and control of the natural resource in the following terms;

> *"74. …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.*
>
> *75. 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…."*

16. Applying the doctrine of public trust, recognized in *M. C. Mehta v. Kamal Nath*[8] this Court held that spectrum as a natural resource of the nation is administered by the Central Government as a Trustee. In a nuanced approach, this position was reaffirmed by the Constitution Bench in *Natural Resources Allocation, In re (Supra)* by holding that while the State may adopt different modalities of allocation, it cannot part with the natural resource when the policy of the State is not supported by social or welfare purpose.

> *"149. …Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximising private entrepreneurs, adoption of means other than those that are competitive and maximise revenue*

8 (1997) 1 SCC 388.

may be arbitrary and face the wrath of Article 14 of the Constitution. Hence, rather than prescribing or proscribing a method, we believe, a judicial scrutiny of methods of disposal of natural resources should depend on the facts and circumstances of each case, in consonance with the principles which we have culled out above. Failing which, the Court, in exercise of power of judicial review, shall term the executive action as arbitrary, unfair, unreasonable and capricious due to its antimony with Article 14 of the Constitution."

17. The constitutional framework reinforces this understanding by mandating that the ownership and control of this material resource of the community be so distributed as best to subserve the common good. Constitution obligates the State to ensure that *access* to and *use* of such resource is regulated in a transparent, non-discriminatory manner, so that, its benefit enure to the benefit of the nation, rather than being treated as objects of private ownership or unfettered commercial exploitation. This position is clear from the following passage in *CPIL (Supra)*;

"75. … 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. In Article 39(b) of the Constitution it has been provided that the ownership and control of the material resources of the community should be so distributed so as to best subserve the common good, but no comprehensive legislation has been enacted to generally define natural resources and a framework for their protection…."

V. Statute, Policy and Contractual Framework Governing Spectrum Allocation, Licensing and Use

A. Statutory Framework of Spectrum:

18. The Statutory regime governing spectrum is conceptualized in the above referred constitutional principle and it is reflected in Section 4[9] of the Indian Telegraph Act, 1885. Spectrum is vested and secured in the custody of the Central Government not as a property but as the exclusive privilege of establishing, maintaining and operating telecommunication systems, and for granting licences. In *Union of India v. Association of Unified Telecom Service Providers of India*[10] this Court, has interpreted Section 4 in the following manner:

> *"37. A bare perusal of sub-section (1) of Section 4 of the Telegraph Act shows that the Central Government has the exclusive privilege of establishing, maintaining and working telegraphs. This would mean that only the Central Government, and no other person, has the right to carry on telecommunication activities.*

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9 4. **Exclusive privilege in respect of telegraphs, and power to grant licenses**.— [(1)] Within [India], the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs:

Provided that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of [India]:

[Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working—

(a) of wireless telegraphs on ships within Indian territorial waters [and on aircraft within or above [India], or Indian territoral waters], and

(b) of telegraphs other than wireless telegraphs within any part of [India].]

[Explanation.—The payments made for the grant of a licence under this subsection shall include such sum attributable to the Universal Service Obligation as may be determined by the Central Government after considering the recommendation made in this behalf by the Telecom Regulatory Authority of India established under sub-section (1) of section 3 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997)]…

10 (2011) 10 SCC 543. (Hereinafter, 'AUSPI (I)')

38. Interpreting the expression "exclusive privilege" of the State Government under the State Excise Act to sell liquor, this Court has held in State of Orissa v. Harinarayan Jaiswal.[11]

> *"13. … The fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive owner of those privileges, reliance on Article 19(1)(g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government—nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights."*

This position of law has been reiterated by this Court in Har Shankar v. Excise & Taxation Commr.[12] *and in subsequent decisions of this Court.*

39. The proviso to sub-section (1) of Section 4 of the Telegraph Act, however, enables the Central Government to part with this exclusive privilege in favour of any other person by granting a licence in his favour on such conditions and in consideration of such payments as it thinks fit. As the Central Government owns the exclusive privilege of carrying on telecommunication activities and as the Central Government alone has the right to part with this privilege in favour of any person by granting a licence in his favour on such conditions and in consideration of such terms as it thinks fit, 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.

40. A Constitution Bench of this Court in State of Punjab v. Devans Modern Breweries Ltd.[13] *relying on Har Shankar case*[14] *and Panna Lal v. State of Rajasthan*[15] *has held in para 121 at p. 106 that issuance of liquor licence constitutes a contract between the parties. Thus, once a licence is issued under the proviso to sub-section (1) of Section 4 of the Telegraph Act, the licence becomes a contract between the licensor and the licensee. Consequently, the terms and conditions of the licence*

11 [(1972) 2 SCC 36] : (SCC p. 44, para 13)
12 [(1975) 1 SCC 737]
13 [(2004) 11 SCC 26]
14 [(1975) 1 SCC 737]
15 [(1975) 2 SCC 633]

including the definition of adjusted gross revenue in the licence agreement are part of a contract between the licensor and the licensee. We have to, however, consider whether the enactment of the TRAI Act in 1997 has in any way affected the exclusive privilege of the Central Government in respect of the telecommunication activities and altered the contractual nature of the licence granted to the licensee under the proviso to sub-section (1) of Section 4 of the Telegraph Act."

19. It is important to note that the exclusive privilege of the Central Government under Section 4, enabling it to grant a license, subject to such terms and conditions, specifically include payments towards of Universal Service Obligations (USO). Section 9-D also empowers the Central Government to establish and administer the Universal Service Obligation Fund. Following this the Telecom Regulatory Authority of India (TRAI) has formulated guidelines for utilization of funds for the specified purposes. The purpose of referring to these provisions is to indicate that the monies received towards parting with the privilege of exploiting spectrum under Section 4 is intended to be ploughed back for subserving the common good.

B. The Successive Telecom Policies including unbundling of licensing spectrum allocation

20. Until the early 1990s, the establishment, operation and maintenance of telecommunication services in India were the exclusive preserve of the Union of India. A decisive shift occurred with the announcement of the 24th July 1991 Economic Policy, pursuant to which telecommunication sector progressively opened to private participation.

The liberalization process was institutionalized with the announcement of the New Telecom Policy, 1994, under which licences were granted for Cellular Mobile Telephone Services and Basic Telephone Services, along with paging services across various cities and circles. These licences were bundled with spectrum and awarded through a competitive tendering process. However, the financial and operational challenges faced by licensees under the fixed-fee regime prompted a re-evaluation of policy.

20.1 The New Telecom Policy, 1999 formulated following a comprehensive review, marked a paradigm shift from a fixed licence fee model to a revenue-sharing regime. Existing licensees were permitted to migrate to the new framework, with licence fees linked to a percentage of AGR, and licences standardized to a 20-year term.

21. In furtherance of the Telecom Policy, Parliament also enacted the Telecom Regulatory Authority of India Act, 1997. Relevant portion of the preamble, as also the Statement of Objects and Reasons, indicating the need to establish a telecom regulator is extracted below for ready reference:

> *"An Act to provide for the establishment of the Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure*

orderly growth of the telecom sector and for matters connected therewith or incidental thereto.

Statement of Objects and Reasons.—*In the context of the National Telecom Policy, 1994, which amongst other things, stresses on achieving the universal service, bringing the quality of telecom services to world standards, provisions of wide range of services to meet the customers demand at reasonable price, and participation of the companies registered in India in the area of basic as well as value added telecom services as also making arrangements for protection and promotion of consumer interest and ensuring fair competition, there is a felt need to separate regulatory functions from service providing functions which will be in keeping with the general trend in the world. In the multi-operator situation arising out of opening of basic as well as value added services in which private operator will be competing with Government operators, there is a pressing need for an independent telecom regulatory body for regulation of telecom services for orderly and healthy growth of telecommunication infrastructure apart from protection of consumer interest.*"

22. The interplay between the power coupled with obligations of the Union with respect to licensing on the one hand and jurisdiction of TRAI to regulate the telecom sector is succinctly explained in *AUSPI (I) (Supra)* as follows:

"*41. Section 2(e) of the TRAI Act quoted above defines "licensee" to mean any person licensed under sub-section (1) of Section 4 of the Telegraph Act for providing specified public telecommunication services and Section 2(ea) defines "licensor" to mean the Central Government or the telegraph authority who grants a license under Section 4 of the Telegraph Act. Sub- section 2(k) defines "telecommunication service" very widely so as to include all kinds of telecommunication activities. These provisions under the TRAI Act do not affect the exclusive privilege of the Central Government to carry on telecommunication activities nor do they alter the contractual nature of the license granted under the proviso to sub-section (1) of Section 4 of the Telegraph Act.*

43. These provisions in the TRAI Act show that notwithstanding sub-section (1) of Section 4 of the Telegraph Act vesting exclusive privilege in the Central Government in respect of telecommunication activities and notwithstanding the proviso to sub-section (1) of Section 4 of the Telegraph Act vesting in the Central Government the power to decide on the conditions of license including the payment to be paid by the licensee for the license, TRAI has been conferred with the statutory power to make recommendations on the terms and conditions of the licence to a service provider and the Central Government was bound to seek the recommendations of TRAI on such terms and conditions at different stages, but the recommendations of TRAI are not binding on the Central Government and the final decision on the terms and conditions of a license to a service provider rested with the Central Government. The legal consequence is that if there is a difference between TRAI and the Central Government with regard to a particular term or condition of a license, as in the present case, the recommendations of TRAI will not prevail and instead the decision of the Central Government will be final and binding.

44. In contrast to this recommendatory nature of the functions of TRAI under clause (a) of sub-section (1) of Section 11 of the TRAI Act, the functions of TRAI under clause (b) of sub-section (1) of Section 11 of the TRAI Act are not recommendatory. This will be clear from the very language of clause (b) of sub-section (1) of Section 11 of the TRAI Act which states that TRAI shall discharge the functions enumerated under sub-clauses (i), (ii) and (ix) under clause (b) of sub-section (1) of Section 11 of the TRAI Act. Under clause (c) of sub-section (1) of Section 11 of the TRAI Act, TRAI performs the function of levying fees and other charges in respect of different services and under clause (d) of sub-section (1) of Section 11, the Central Government can entrust to TRAI other functions. These functions of TRAI under clauses (c) and (d) of sub-section (1) of Section 11 of the TRAI Act are also not recommendatory in nature. That the functions of TRAI under clause (a) are recommendatory while the functions of TRAI under clauses (b), (c) and (d) are not recommendatory will also be clear from provisos first to fifth which refer to the recommendations of TRAI under clause (a) of sub-section (1) of Section 11 of the TRAI Act and not to clauses (b), (c) and (d) of sub-section (1) of Section 11 of the TRAI Act.

> *45. The scheme of the TRAI Act therefore is that TRAI being an expert body discharges recommendatory functions under clause (a) of sub-section (1) of Section 11 of the TRAI Act and discharges regulatory and other functions under clauses (b), (c) and (d) of sub-section (1) of Section 11 of the TRAI Act. TRAI being an expert body, the recommendations of TRAI under clause (a) of sub-section (1) of Section 11 of the TRAI Act have to be given due weightage by the Central Government but the recommendations of TRAI are not binding on the Central Government. On the other hand, the regulatory and other functions under clauses (b), (c) and (d) of sub-section (1) of Section 11 of the TRAI Act have to be performed independent of the Central Government and are binding on the licensee subject to only appeal in accordance with the provisions of the TRAI Act.*"

23. Further, structural reforms were followed with the introduction of the Unified Access Services Licensing regime in 2003, pursuant to which basic and cellular services were unified within service areas. Licensees were given the option to migrate to the unified regime while retaining their existing spectrum allocations, subject to revised licensing terms. This reflected a move towards technological neutrality and operational flexibility within a regulated framework.

24. A more fundamental change was introduced under the National Telecom Policy, 2012, which consciously “de-linked” spectrum from licensing. The shift was not one of relinquishment of control but of restructuring the method through which the State would discharge its obligations of securing the best price for spectrum by enabling private participation in the development of telecom industry. Even after spectrum being unbundled with licence and private enterprise permitted to develop

spectrum for provisioning services, the fundamental principle of Central Government being the licensor under Section 4 continues. In *AUSPI (II) (Supra)*, this Court held that the State has a duty to obtain fair value for natural resources and to ensure compliance with licence conditions. It was observed that;

> *"86. DoT has urged that the Central Government has exclusive privilege under Section 4 of the Telegraph Act; thus, it is bound to get the best price for natural resources. To part with the exclusive privilege under the revenue-sharing regime is extremely beneficial to the licensees. Thus, the State must get the price for its valuable right as mandated under Article 14. In our opinion, there is no doubt that the State is a trustee of the natural resources and is obliged to hold it for the benefit of the citizens but also to ensure equal distribution to subserve the common good as observed under Article 39 of the Constitution of India in Natural Resources Allocation, In re, Special Reference No. 1 of 2012 [Natural Resources Allocation, In re, Special Reference No. 1 of 2012, (2012) 10 SCC 1] . The Government being the sole repository of all the resources in the country, also has the exclusive power to determine the licence conditions at which it parts with the exclusive right to the resources. The Government has to make an effort to get the best price for its valuable rights and cannot throw them away, and there would be no arbitrariness in the same as observed in State of Orissa v. Harinarayan Jaiswal."*

C. Guidelines for Trading of Access Spectrum by Access Service Providers, 2015

25. Telecom Policy envisioned liberalization of spectrum to enable use of spectrum in any band to provide any service in any technology as well as to permit spectrum pooling. Following recommendations of TRAI, Government also permitted spectrum trading to enable optimal utilization of these material resources through appropriate regulatory framework.

This also facilitates ease of doing business in India by allowing free play in the commercial decisions and leads to optimization of resources apart from improving the spectral efficiency and quality of service. It is apt to provide the perspective in which the Guidelines for Spectrum Trading were issued. It is necessary refer to a portion of recommendation made by TRAI;

> "*1.1 Historically, the use of radio spectrum has been highly regulated. In most countries, the regulator has used command and control mechanism to decide the allocation of spectrum. However, over the past two decades, there has been a growing consensus that because of a significant increase in the demand for spectrum, the hitherto prevalent regulatory paradigm would prove inadequate to deal with the situation in hand. Spectrum license holders, needed flexibility to respond quickly to changes in market demand and technology; the old paradigm would only result in inefficient use of available spectrum and creation of artificial scarcity. This is why policymakers and regulators worldwide have devoted their attention to new ways of spectrum regulation with an increasing emphasis on evolving more flexible and market oriented models to increase opportunities for efficient spectrum usage. Spectrum managers are following diverse approaches for sharing frequencies viz. spectrum sharing, spectrum leasing, spectrum trading, as well as unlicensed spectrum combined with the use of low power radios or advanced radio technologies including ultra wideband and multi-model radios.*
>
> *1.2 Spectrum trading contributes to a more economical and efficient use of frequencies. This is because a trade will only take place if the spectrum is worth more to the new user than it was to the old user, reflecting the greater economic benefit the new user expects to derive from its use. It allows the present user to decide when and to whom the spectrum authorisation will be transferred and what sum it will receive in return. The market, not the regulator, determines the value. Spectrum trading makes it possible for companies to expand more quickly than would otherwise be the case. It also makes it easier for a new market entrant to acquire spectrum in order to enter the market.*

1.7 The Authority also observed that consolidation could also be facilitated by allowing market forces to operate i.e. by permitting spectrum trading as it allows far more specific and targeted reallocations of spectrum than can be reached through M&A activity. A TSP holding spectrum that is paid for but in excess of its current requirements would then be able to directly trade these holdings with another TSP which requires additional spectrum for its operations. This would help to ensure optimal allocative efficiency of this limited natural resource, making the sector as a whole better off in the bargain. Clarity on the policy framework with regard to spectrum trading would help to unlock the full potential value of spectrum that was proposed to be auctioned."[16]

26. Accordingly, the Guidelines for Trading of Access Spectrum, issued in 2015, enabled transfer of the right to use spectrum between a seller and a buyer, while expressly prohibiting leasing. Such trading is confined between licensees and is permissible only upon prior intimation of 45 days to the DoT. Guidelines No. 10, 11 and 12, relevant for our purpose are reproduced hereinbelow for ready reference:

"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 stage 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

16 Recommendations on Working Guidelines for Spectrum Trading; (accessible at: https://www.trai.gov.in/sites/default/files/2024-11/Recommendation_Spectrum_28012014.pdf)

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."

27. A plain reading of the Spectrum Trading Guidelines demonstrates that the Central Government, as Licensor, has retained comprehensive supervisory and corrective control over spectrum trading. *Guideline 10* expressly reserves to the Government the power to take appropriate action, including annulment of a trading arrangement, where undertakings furnished by the seller or buyer at the stage of prior intimation are found to be false, misleading, incomplete, or not in conformity with the Spectrum Trading Guidelines or the licence conditions. This power is not confined to scrutiny at the threshold but also extends to subsequent discovery of non-compliances. The Guideline thus safeguards the Government's role as licensor, controlling access to spectrum at every time. *Guideline 11* further reinforces this control by mandating that all outstanding dues of the seller be cleared prior to conclusion of any spectrum trading agreement, and by transferring liability for dues arising up to the effective date of trade to the buyer thereafter. Significantly, it vests discretion in the Government

to recover any subsequently discovered dues from either or both parties, jointly or severally. These provisions collectively establish that spectrum trading is not a private commercial arrangement, but a part of the privilege vested in the Central Government under Section 4. Trading is conditional subject to adherence to financial and regulatory obligations owed to the State.

28. When these guidelines are read conjointly with the terms of the Licence Agreement, it becomes manifest that absolute control over the licence and spectrum vests with the Licensor, namely the DoT. The licence, though granted for a fixed term, is subject to revocation, suspension, or termination on enumerated grounds, including non-payment of dues, public interest, or security considerations. The Licensee has no independent right to assign or transfer the licence or create third-party interests without prior written consent of the Licensor. Any transfer or assignment is permissible only upon fulfillment of prescribed conditions, foremost among them being complete clearance of past dues by the transferor and an undertaking by the transferee to discharge future liabilities. Clause 6 of the Licence Agreement, read with Guidelines 10 and 11, places an embargo on any transfer or spectrum trading where dues remain unpaid or consent is procured on the basis of non-conforming undertakings. Even where transfer is sought pursuant to a Tripartite Agreement with lenders, the Licensor’s approval remains

conditional upon strict compliance with contractual and regulatory procedures. Consequently, where consent for spectrum trading or licence transfer is obtained on the basis of incorrect or non-compliant undertakings, the Government is statutorily empowered to annul the arrangement. The obligation to clear dues prior to trading is absolute, and default by either seller or buyer disqualifies them from effecting a valid transfer, including under insolvency proceedings.

29. *Guideline 12* does not dilute this position. Its plain language indicates that where spectrum is subject to dispute in a pending litigation, the seller must ensure that all rights and liabilities are transferred to the buyer as per the prescribed procedure. The forum before which an “issue pertaining to the spectrum proposed to be transferred is pending adjudication”, cannot be the adjudicatory authority or the NCLAT under IBC. The Spectrum Trading Guidelines cannot be overridden or substituted by the insolvency resolution framework. Dues payable to the Licensor, which must be cleared prior to spectrum trading, cannot be relegated to treatment under a Resolution Plan. While a licence and allocation of spectrum may, in abstract terms, constitute an intangible asset, it is always subject to the telecommunication laws of the nation, *viz*. the Telegraph Act, 1885, Wireless Telegraphy Act, 1993 and the TRAI Act, 1997, followed by the rules, regulations, guidelines including contractual obligations arising thereunder. A defaulting seller or

buyer, failing to comply with the mandatory requirements of the Spectrum Trading Guidelines, cannot indirectly seek modification of telecom dues by applying for corporate insolvency resolution process.

30. The Spectrum Trading Guidelines, 2015 are not mere executive instructions but draw their legitimacy and enforceability from out of the province of telecommunication laws and the regulatory framework within which licenses are issued and operated. The conditions stipulated therein, including those relating to eligibility, prior approvals, clearance of dues and transfer restrictions, are mandatory and binding on all licensees and transferees. The use, transfer or trading of spectrum is permissible only in strict conformity with the Guidelines, and any deviation would amount to a breach of licence conditions, the statute and its policy. The operation of the laws concerning telecommunications governing spectrum trading cannot be overridden or bypassed on the basis of an interpretation adopted to the expression “asset” and its treatment as also Section 238 of IBC. We have clarified and explained this position in more detail in later part of our judgment.

D. Spectrum Licenses and Contract:

31. Having examined the telecommunication laws, the subordinate legislation, including the rules, regulations and guidelines that govern

spectrum, we will now proceed to refer to the provisions of the contract, that is, the license and also the tripartite agreement.

32. In *Bharti Airtel Ltd. v. Union of India*[17] this Court had an occasion to examine the provisions of the license agreement as a contract in the context of the Government parting with the privilege of dealing with spectrum under Section 4 of the Telegraph Act. It clarified that a license granted under Section 4 is, in form, a contract between the licensor and the licensee. However, the Court simultaneously emphasised that such a contract is not an ordinary commercial agreement. It emanates from a statutory grant of sovereign privilege and is indelibly shaped by constitutional and public law obligations. The Court asked the right question as to – what are the obligations of the licensor and answered it in terms of private and public law perspective, or, arising under the contract or the Constitution. It has been held that;

> *"37. The question which requires examination is — What are the obligations of the licensor on receipt of such an application? The obligations of the licensor flow from two sources, (i) from the contract, (ii) from the Constitution of India and the relevant provisions of the statute (Indian Telegraph Act, 1885). In the event of any conflict between the said two sets of obligations, the further question would be which one of the conflicting obligations prevail?*
>
> *39. However, the licensor being the Union of India, its discretion to stipulate terms and conditions is regulated by certain constitutional mandates apart from stipulations of any law applicable.*

17 (2015) 12 SCC 1.

41. The licensor/Union of India does not have the freedom to act whimsically. As pointed out by this Court in 2G Case[18] in the above-extracted paragraph, the authority of the Union is fettered by two constitutional limitations: firstly, that any decision of the State to grant access to natural resources, which belong to the people, must ensure that the people are adequately compensated and, secondly, the process by which such access is granted must be just, non-arbitrary and transparent, vis-à-vis private parties seeking such access.

42. By a statutory declaration made under Section 4 of the Indian Telegraph Act, 1885, it is declared that the Government of India shall have the exclusive "privilege for establishing, maintaining and working telegraphs" (which includes telephones). The proviso to Section 4 of the said Act authorises the Government of India to grant licence to establish, maintain and work telegraphs (which includes telephones) "on such conditions and in consideration of such payments" as it thinks fit. Telephones include both wired and wireless telephones like cellular mobile phones, the establishment and working of which necessarily requires access to spectrum which again is controlled by the Government of India as it is already declared to be a natural resource by this Court. It can thus, be seen that no person other than the Government of India has any right to establish, maintain and work telephones. It is the exclusive privilege of the Government of India, which could be permitted to be exercised by others by a grant from the Government of India.

43. In other words, such licences are in the nature of largesse from the State. No doubt, the authority of the State to distribute such largess is always subject to the condition that the State must comply with the conditions of Article 14 of the Constitution i.e. the distribution must be on the basis of some rational policy. Even the language of the proviso to Section 4 of the Telegraph Act, which stipulates that the grant of licence should be "on such conditions and in consideration of such payments as it thinks fit", must necessarily be understood that the conditions must be rational and the payments forming the consideration for the grant of licence must be non-discriminatory. The conditions contained in the licences in question stipulate that the term of the licence could be extended on mutually agreed terms, if the Government of India deems it expedient. The obligations of the Government of India flowing from the Constitution as well as a statute necessarily require the

18 *Centre for Public Interest Litigation v. Union of India,* (2012) 3 SCC 1.

> *Government of India to grant licences as rightly pointed by the Tribunal (TDSAT) only "in public interest and for public good".*
>
> *48. The conditions of licences/contracts in whatever language provided for consideration for the extension of a licence are necessarily required to be interpreted in consonance with the obligation of the licensor/Union of India under the Constitution and the laws. Otherwise, the contract would be rendered void for being inconsistent with public policy, the principle expressly incorporated under Section 23 of the Contract Act, 1872."*

33. The distinction drawn in *Bharti Airtel (Supra)* is crucial; while the licence has contractual attributes, the licensor's powers and obligations do not arise solely from contract. They flow concurrently from the Constitution and the statute. In the event of conflict, obligations flowing from constitutional and statutory mandate necessarily prevail over contractual stipulations. Spectrum access, as explained in *Bharti Airtel (Supra)*, is in the nature of State largesse. While such largesse must be distributed in conformity with Article 14, ensuring fairness, transparency and adequate compensation to the public, it does not translate into transfer of ownership or creation of proprietary rights in favour of the licensee. The grant of a telecom licence, including the right to use spectrum, does not effect a transfer of ownership or proprietary interest. What is conferred is a limited, conditional and revocable privilege to use spectrum for specified purposes and for a defined duration.

34. It is undisputed that TSPs, including the Aircel entities, participated and emerged as successful bidders, thereby obtaining the right to use spectrum upon payment of consideration. The relationship is governed

by UASL dated 05.12.2006 executed between the DoT and Aircel Ltd. The licence was granted by the Government in exercise of its exclusive privilege under Section 4 of the Indian Telegraph Act, 1885, to provide Unified Access Services in the specified service area. The grant was non-exclusive, subject to payment of licence fees and strict compliance with the terms and conditions stipulated therein. The licensee unequivocally undertook to comply with all contractual obligations, acknowledging that the grant conferred only a regulated right to use spectrum and not any proprietary interest therein.

35. The terms of the Licence Agreement unequivocally restrict the autonomy of the licensee in dealing with the licence or spectrum. *Clause 6* prohibits assignment, transfer, sub-licensing, partnership, or creation of any third-party interest without prior written consent of the licensor. *Clause 6.3* carves out a limited exception permitting transfer or assignment only upon fulfilment of stringent conditions, including compliance with eligibility criteria, adherence to the Tripartite Agreement where applicable, and complete clearance of all past dues by the transferor, coupled with an undertaking by the transferee to discharge future liabilities. The licence further imposes operational and regulatory obligations on the licensee, including timely rollout of services, furnishing of information to the Licensor and TRAI, and prohibition on dealing with entities whose licences stand suspended or terminated. *Clause 10* vests

in the Licensor the power to suspend, revoke, or terminate the licence, inter alia, for breach of conditions, non-payment of dues, public interest, or security considerations, upon issuance of notice. These provisions underscore that continuation of the licence is contingent upon ongoing compliance with contractual and statutory obligations.

36. A cumulative reading of the Licence Agreement leaves no manner of doubt that effective and pervasive control over the licence and spectrum vests with the Licensor notwithstanding the fixed tenure of the licence and payment of consideration. The licensee's rights are circumscribed by regulatory oversight, disclosure obligations, restrictions on transfer, and the ever-present power of the Licensor to suspend or terminate the licence for breach, liquidation, or winding up of the licensee. The licence does not confer an unfettered or absolute right, but merely a conditional and defeasible permission to use spectrum, which remains subject to statutory control under the Telegraph Act and the regulatory framework administered by TRAI. The ability of the Licensor to withhold consent, impose conditions, and enforce compliance demonstrates that the licensee's interest is limited and subordinate to statutory and regulatory imperatives of telecommunication laws. The ownership, particularly as a trustee of the natural resource, by the Licensor, coupled with the power to suspend or terminate the licence for default in payment or performance, negates any claim of proprietary

ownership in the licensee. Where the licensee has defaulted in payment of licence fees or failed to perform its obligations, the very substratum of its right to use spectrum stands impaired.

E. Tripartite Agreement:

37. As we realised that the operation of our *economic system* to distribute material resources of the community could well be subserved through the participation of private enterprise, it became compelling to involve the financial institutions also. In furtherance of the successive telecom policies, to develop the telecommunication sector, DoT collaborated with TSPs and financial institutions. This collaboration is evidenced in the large number of Tripartite Agreements. One such agreement governs the contractual relationship between DoT, the corporate debtor and the State Bank of India, all three are appellants and respondents before us. We will now proceed to examine the implications of the Tripartite Agreement, details of which were shown to us by Mr. Rakesh Dwivedi appearing for the State Bank of India.

38. The Tripartite Agreement executed between the DoT, the TSP and the Bank is a contractual mechanism devised to enable TSPs to secure financial assistance and also to protect the interests of the Bank (Lender). Under this Agreement, the DoT agrees, in principle, to transfer or assign the licence by endorsement in favour of a “Selectee” identified

by the Lender, subject to the DoT's final and binding approval. That the Lenders themselves are expressly barred from operating the licensed services reinforces the principle that the licence remains a regulated privilege rather than a freely alienable asset.

39. The Agreement enables the licence to be treated as security for financial assistance advanced to the TSPs, permitting transfer or assignment only in the event of default and strictly in accordance with its terms. Upon occurrence of a default, duly notified by the Agent acting on behalf of the Lenders, and failure of the TSP to cure such default within the stipulated period, the Lenders are empowered to invite and negotiate bids for takeover and transfer of the project along with all its assets, including the licence, to a Selectee who must assume all liabilities and obligations of the Licensee towards the Licensor. Even where the Licensor elects to transfer the licence to a person other than the Selectee, the Agreement mandates due consideration of both the Licensor's and the Lenders' outstanding dues. In the event no Selectee is found, the licence stands terminated, and the assets of the defaulting Licensee are to be disposed of, with the Licensor enjoying first charge over the proceeds, followed by adjustment of Lenders' dues, and any residual amount reverting to the Licensee. The Agreement thus underscores that while the licence may be conditionally transferable to

safeguard lender interests, such transfer remains subject to the Licensor's paramount authority and regulatory control.

VI. The Insolvency and Bankruptcy Code, 2016

A. First principles

40. IBC sought to fundamentally restructure the manner in which insolvency proceedings are undertaken in India, in response to the evident inadequacies of the earlier statutory regime governing insolvency and bankruptcy, which had proved ineffective in delivering timely and meaningful outcomes. The Code, therefore, brought together the disparate insolvency laws into a unified legislative framework. It is anchored in a set of core principles, including expeditious resolution aimed at preservation and maximisation of economic value, reduction of information asymmetry between debtors and creditors, certainty in the order of priority for discharge of liabilities, and decision-making autonomy of stakeholders in commercial matters, subject to overarching legislative design and judicial supervision of the process.[19]

41. Capturing the core principles of the Code, 2016, this Court in *Swiss Ribbons (P) Ltd. v. Union of India*[20] noted;

> "*27. … The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore,*

19 Government of India, Report: Bankruptcy Law Reforms Committee (Ministry of Finance, November 2015).
20 (2019) 4 SCC 17.

maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme – workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark….

28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests…."

42. Hence, the scope and ambit of IBC is to speed up the process providing for insolvency[21], and achieving maximisation of value of the asset of the entity undergoing CIRP.

B. Difficulty in Expecting NCLAT to rule on Spectrum

21 Innoventive Industries Ltd. v. ICICI Bank & Anr. (2018) 1 SCC 407.

43. Before we proceed to analyse the applicability of the Code, 2016 to the matter concerning telecommunication, we may first indicate the difficulty which the NCLAT faced in answering the questions referred to it by this Court. We may recall that this Court was hearing appeals against the judgment of the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) with respect to the liability of TSP's to pay licence fees calculated on the basis of Annual Gross Revenues. Having finally decided the controversy in calculating the licence fee in *AUSPI* (*II)*, this Court sought to ensure that TSP's remit the outstanding DoT dues expeditiously. It is in that context that the present controversy was raised by some TSP's by submitting that they had invoked proceedings under IBC to corporate insolvency resolution and as such payments cannot be recovered due to moratorium. Taking note of this unusual plea, this Court formulated certain fundamental questions and asked NCLAT to give its opinion on the fundamental question about applicability of IBC for recovering telecom dues.

44. Expecting a statutory appellate authority under the IBC to answer issues about applicability of IBC has its own problems. Though tribunals constituted by statutes will exercise that much of jurisdiction as is empowered by the statute, they have primary duty to examine and determine a "jurisdictional fact." However, the perspective in which the statutory tribunals could examine the matter would be limited for more

than one reason. It has fallen upon us to examine the matter independently by posing probing questions to the Ld. Attorney General and the Senior Counsels assisting us. We have no hesitation to say that they have risen to occasion and have rendered invaluable assistance.

C. Implications of Treating Spectrum as an Asset by TSPs/Corporate Debtor and the Financial Institutions

45. Allocation of spectrum to TSPs, coupled with the policy to permit trading of spectrum has given rise to the spectrum being treated as an asset in the hands of TSPs. The expression “asset” pervades the contractual terms and this is the sheet anchor of the TSPs/corporate debtor and the Bank to contend that spectrum as an asset can be restructured only through IBC and no other law. A nuanced argument is advanced that there is no transfer of ownership at all and that its ownership continues to vest in DoT. It is only in the context of restructuring the asset, that the Interim Resolution Professional (IRP) takes control of it and processes it as per the provisions of the IBC. This is legitimate and inevitable for the reason that spectrum is an intangible asset, thereby triggering the application of the special statute, the IBC, which operates notwithstanding any other law to the contrary. Whether the recognition of spectrum as an asset in the books of account of the licensee/TSP, the corporate debtor, would also be the asset falling for

reconstruction under the Insolvency and Bankruptcy Code, 2016 is therefore an issue for our consideration.

46. As per Section 129 of the Companies Act, 2013 the financial statements shall give a true and fair view of the state of affairs of the company and comply with the accounting standards as notified under Section 133 of the Act by the Central Government on the recommendation of the Institute of Chartered Accountants of India.[22]

47. TSPs recognise spectrum licensing rights as an intangible asset in their balance sheet in compliance with the Accounting Standards (AS). AS 26 on Intangible Assets which *inter alia* applies to rights under licensing agreements, defines an intangible asset as an identifiable non-monetary asset, without physical substance, held for use in the production or supply of goods or services, rental, or for administrative purposes.[23] Para 6.1 of AS 26 is as follows:

> *"6.1 An intangible asset is an identifiable non-monetary asset, without physical substance, held for use in the production or supply of goods or services, for rental to others, or for administrative purposes."*

48. The elements of the definition of intangible assets under AS 26 are as follows:[24]

a) *Identifiability* – Asset is separable if it can be distinguished from goodwill and can be used to rent, sell, exchange or distribute future

22 Section 129(1) and Section 133, Companies Act, 2013.
23 Para 6.1 , ICAI.
24 Paras 8, 11-13, 14-17 and 18 Accounting Standard (AS) 26, ICAI.

economic benefits specific to it. However, separability is not a necessary condition for identifiability as long as the entity can identify the asset in some other way

b) *Control*: It indicates the power to obtain and restrict access to the future economic benefits from the resource through enforceable legal rights. However, legal enforceability of rights is not a necessary condition for exercising control

c) *Future Economic Benefits* (FEB): It may include revenue from the sale of products or services, cost savings, or other benefits resulting from the use of the asset by the enterprise

49. Similar elements of identifiability, control over resources and flow of future economic benefits are also provided in the definition of intangible assets under Indian Accounting Standard,[25] Ind AS 38.[26]

50. Spectrum licensing rights are identifiable as they are separable and can be sold, transferred, licensed, or exchanged, either individually or together with the underlying contract. They arise from legal rights by way of government auctions or assignment. They confer power on TSPs to obtain economic benefits by providing telecom services and raise loans under tripartite agreements with the Bank and Dept. of Telecom. TSP's can also restrict access to such economic benefits based on the exclusivity conferred on them through the terms of the license. Hence,

25 (Ind AS).
26 Paras 8, 10, 11-12, 13-16 and 17 , ICAI.

TSPs exercise control over the licensing rights. The expectation of future economic benefits from the licensing rights is also probable as TSPs develop infrastructure under the state policy and provide telecom services to the public. Thus, the spectrum licensing rights satisfy all the ingredients of an intangible asset.

51. To recognise an intangible asset in the financial statements, the recognition criteria has to be met, i.e., probable flow of future economic benefits attributable to the asset, and reliable measurement of the cost of the asset. The recognition provided in AS 26 and Ind AS 38 is the same.[27] The recognition criteria as per AS 26 is reproduced below:

> *"19. The recognition of an item as an intangible asset requires an enterprise to demonstrate that the item meets the:*
> *(a) definition of an intangible asset (see paragraphs 6-18); and*
> *(b) recognition criteria set out in this Standard (see paragraphs 20-54).*
> *20. An intangible asset should be recognised if, and only if:*
> *(a) it is probable that the future economic benefits that are attributable to the asset will flow to the enterprise; and*
> *(b) the cost of the asset can be measured reliably."*

52. The probability of future economic benefits is to be assessed using reasonable and supportable assumptions that represent the best estimate of the set of economic conditions over its useful life.[28] Further, an intangible asset should be measured initially at cost.[29] There are different methods for the acquisition of intangible assets, including:[30]

27 Paras 19-23 Accounting Standard (AS) 26, ICAI and Paras 18-24 Indian Accounting Standard 38, ICAI.
28 Para 21 Accounting Standard (AS) 26, ICAI and Para 22 Indian Accounting Standard 38, ICAI.
29 Para 23 Accounting Standard (AS) 26, ICAI and Para 24 Indian Accounting Standard 38, ICAI.
30 Paras 24-26, 27-32, 33, and 34 Accounting Standard (AS) 26, ICAI and Paras 25-32, 33-43, 44 and 45-47 Indian Accounting Standard 38, ICAI.

a) Separate Acquisition; or
b) Acquisition by way of government grants.

53. In the case of a separate acquisition, the price that the entity pays normally reflects expectations of future economic benefits satisfying the probability prong of the recognition criteria. Further, the cost of such an asset can be measured reliably comprising its purchase price, non-refundable duties and taxes and any directly attributable expenditure for making the asset ready for its intended use.[31]

54. Spectrum licensing represents a grant of right to use spectrum by the Government by way of transfer or administrative allocation. As discussed above, the flow of future economic benefits is probable due to its revenue-generating capacity from the provision of telecom services. Further, licensing rights are auctioned for a price or are administratively assigned for a licence fee. The cost of a spectrum licence can thus be measured reliably under the separate acquisition method comprising the acquisition cost (auction price or licence fee), non-refundable duties and taxes and any expenditure incurred to make the asset ready for its intended use. As the recognition criteria is satisfied, TSPs record spectrum licensing as an intangible asset in their balance sheet.

55. It is to be noted that the understanding of assets in the context of accounting standards is different from the traditional understanding of

31 Paras 24-26 Accounting Standard (AS) 26, ICAI and Paras 25-32 Indian Accounting Standard 38, ICAI.

property, as in the case of the Transfer of Property Act, 1882 and the Sale of Goods Act, 1930, which indicate title or ownership in the property or goods. In Accounting Standards, asset is defined as a resource controlled by an enterprise from which future economic benefits are expected to flow.[32] Para 6.2 of AS 26 on the definition of asset is reproduced below:

> *"6.2 An asset is a resource: (a) controlled by an enterprise as a result of past events; and (b) from which future economic benefits are expected to flow to the enterprise."*

56. Thus, AS 26 and Ind AS 38 recognise intangible assets if the aspect of control over economic benefits is satisfied and the cost can be measured reliably. Ownership is not recognised as an essential condition to recognise an asset in the balance sheet. This is also clarified by the Framework for the Preparation and Presentation of Financial Statements in accordance with Ind AS.[33] This Framework is not a standard and does not override any specific standards. However, it sets out the concepts that underlie the preparation and presentation of financial statements and guides the formulation of Ind AS.[34] Para 57 of the Framework is extracted below:

> *"57. Many assets, for example, receivables and property, are associated with legal rights, including the right of ownership. In determining the existence of an asset, the right of ownership is not essential; thus, for example, property held on a lease is an asset if the entity controls the benefits which are expected to*

32 Para 6.2 Accounting Standard (AS) 26, ICAI and Para 8, Indian Accounting Standard 38, ICAI.
33 Para 57,
34 Paras 1-4 .

flow from the property. Although the capacity of an entity to control benefits is usually the result of legal rights, an item may nonetheless satisfy the definition of an asset even when there is no legal control. For example, know-how obtained from a development activity may meet the definition of an asset when, by keeping that know-how secret, an entity controls the benefits that are expected to flow from it."

57. Similar criteria are also provided in the New Conceptual Framework titled Conceptual Framework for Financial Reporting under Indian Accounting Standards (Ind AS), 2020 ('Conceptual Framework').[35] It defines an asset as a present economic resource controlled by the entity as a result of past events that has the potential to produce economic benefits.[36] Control is described as that which links an economic resource to the entity.[37] An entity thus controls an economic resource if it has the present ability to direct the use of the economic resource and obtain the economic benefits that may flow from it.[38] The example given in Para 4.19 of the Conceptual Framework on the aspect of ownership is reproduced below:

"… For example, an entity may control a proportionate share in a property without controlling the rights arising from ownership of the entire property. In such cases, the entity's asset is the share in the property, which it controls, not the rights arising from ownership of the entire property, which it does not control."

58. This indicates that recognition of spectrum licensing rights as an intangible asset in the balance sheet is not determinative of

35 The Conceptual Framework is applicable w.e.f. 01.04.2020 for standard setting activity and w.e.f. 01.04.2021 for preparing financial statements.
36 Paras 4.3-4.5 and 4.9 Conceptual Framework, 2020, ICAI.
37 Para 4.19, Conceptual Framework, 2020, ICAI.
38 Para 4.20, Conceptual Framework, 2020, ICAI.

recognition/transfer of ownership of the spectrum to TSPs. It only indicates control over the future economic benefits flowing from the grant of the right to use the spectrum. Hence, even if the right to use spectrum exhibits property-like features such as longer licensing terms, exclusivity, transferability, tradability, etc., they merely represent different sticks in the bundle of rights and falls short of conferring complete ownership of the spectrum on TSPs.[39]

59. IBC explicitly excludes from the scope of insolvency and liquidation framework, assets over which corporate debtor does not have ownership rights. The legislative intent can be traced back to the Bankruptcy Legislative Reforms Committee Report, 2015, on which the IBC is based. The Report in Para 5.5.5, in the context of assets in liquidation, clarifies that not all assets that are present within the entity can be considered for liquidation and it excludes assets held as a part of operational transactions, where the entity has rights over the assets but not the ownership.

60. The IRP under section 18(f) of IBC, shall take control and custody of assets, including intangible assets over which the corporate debtor

39 An analogy can also be drawn to Section 301 of the Communications Act, 1934, as amended by the Telecom Act, 1996 in the United States, which provides that a radio licence confers the right to use the licence for limited periods but does not confer ownership. It further provides that such a license does not confer any rights beyond the terms, conditions, and periods of the license, indicating the restrictive nature of the right. Section 301 of the Telecommunication Act is reproduced:

> "Sec. 301. [47 U.S.C. 301] license for radio communication or transmission of energy: It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license….."

has ownership rights as recorded in the balance sheet.[40] Explanation to Section 18 specifically provides that for the purpose of this section, assets shall not include those assets owned by a third party but are in possession of the corporate debtor held under trust or under other contractual agreements.[41] Relevant portion of Section 18(f) is reproduced below:

> *"**18. Duties of interim resolution professional.—**The interim resolution professional shall perform the following duties, namely*
> *….*
> *(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—*
> *(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;*
> *(ii) assets that may or may not be in possession of the corporate debtor;*
> *(iii) tangible assets, whether movable or immovable; (iv) intangible assets including intellectual property;*
>
> *Explanation.—For the purposes of this [section], the term "assets" shall not include the following, namely:—*
> *(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;*
> *(b) assets of any Indian or foreign subsidiary of the corporate debtor; and*
> *(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator."*
> (emphasis supplied)

61. Similar provisions are also contained in Section 36(3) of the Code in relation to the liquidation estate. Section 36(4) provides that the

40 Section 18(f), Insolvency and Bankruptcy Code, 2016.
41 Explanation to Section 18, Insolvency and Bankruptcy Code, 2016.

liquidation estate shall exclude assets owned by a third party in possession of the corporate debtor, including under other contractual arrangements which do not stipulate transfer of title but only the use of the assets.[42] Section 36(3) and (4) are reproduced as;

> "***36. Liquidation Estate***
> *(3) Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following:—*
> *(a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;*
> *(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;*
> *(c) tangible assets, whether movable or immovable;*
> *(d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;*
> *(e) assets subject to the determination of ownership by the court or authority;*
> *(f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;*
> *(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;*
> *(h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and*
> *(i) all proceeds of liquidation as and when they are realised.*
> *(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:—*
> *(a) assets owned by a third party which are in possession of the corporate debtor, including—*
> *(i) assets held in trust for any third party;*
> *(ii) bailment contracts;*
> *(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;*

42 Section 36(4)(iv), Insolvency and Bankruptcy Code, 2016.

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets;"

(emphasis supplied)

62. Hence, IBC includes only those tangible or intangible assets within the insolvency framework over which the Corporate Debtor has ownership rights, including all rights and interests *therein* as recorded in the Balance Sheet.

63. In conclusion, the framework of IBC is clear in excluding assets over which the corporate debtor has no ownership rights. Mere recognition of spectrum licensing rights as an intangible asset by TSPs in the Financial Statements is not conclusive of their ownership, as it only represents control over future economic benefits. Even assuming that licensing of spectrum rights is one among the bundle of rights, in the absence of transfer of title over the spectrum, no ownership rights are created in TSPs either in the spectrum or in its right to use as governed by licensing conditions. Hence, under the IBC framework, spectrum licensing rights is not a part of the pool of assets for insolvency or liquidation.

VII. Identification of True Legal Province of Spectrum: Reconciliatory Interpretation of Two Statutory Regimes

64. When confronted with a situation where two statutory enactments appear to operate in conflict, this Court is enjoined to interpret the concerned legislations in a manner that gives effect to both, to the extent

such reconciliation is reasonably possible. Only where such harmonious construction is not feasible does the Court proceed to determine which enactment must prevail. Conflicts of this nature may arise either between a general statute and a special statute, or between two statutes each possessing a special character. Over time, this Court has evolved settled principles to guide the resolution of such inter se inconsistencies which are as;

(I) Where two enactments are attracted to the same factual matrix, the initial inquiry must be directed towards determining whether either statute is general or special in relation to the subject-matter in issue. This determination is not made in the abstract, but by examining the dominant subject-matter of the statute, viewed through the prism of its legislative intent. An enactment may, depending on the context, operate as a general law for certain purposes and as a special law for others. The optimal outcome is achieved where each statute is allowed to function within its designated sphere, without trenching upon the field occupied by the other.[43] Bearing this in mind, the provisions of both

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43 LIC of India v. DJ Bahadur, (1981) 1 SCC 315. Relevant paragraph is as follows:

"***52**. In determining whether a statute is a special or a general one, the focus must be on the principal subject-matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law, we have a cosmos of relativity, not absolutes — so too in life….*

***57**. What is special or general is wholly a creature of the subject and context and may vary with situation, circumstances and angle of vision. Law is no abstraction but realises itself in the living setting of actualities. Which is a special provision and which general, depends on the specific problem, the topic for decision, not the broad rubric nor any rule of thumb. The peaceful coexistence of both legislations is best achieved, if that be feasible, by allowing to each its allotted field for play. Sense and sensibility, not mechanical rigidity gives the flexible solution……"*

enactments must be scrutinised to assess whether they can be construed in a manner that permits harmonious construction.[44]

(II) Where it is evident that one enactment is intended to function as a special law governing a defined subject, while the other is a general law operating in a broader or overlapping domain, the established principle embodied in the maxim *generalia specialibus non derogant* applies. In such circumstances, the general provision must give way to the special provision.[45]

(III) In an eventuality where the contestation is between two special enactments, both having non-obstante clauses, the general rule is that later enactment must prevail over the earlier one.[46]

(IV) However, this is not an absolute rule. In the event of a conflict between two special acts, the dominant purpose of both statutes would have to be analyzed to ascertain which one should prevail over the other. The primary effort of the interpreter must be to harmonise, not

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44 Gobind Sugar Mills Ltd. v. State of Bihar, (1999) 7 SCC 76. Relevant paragraph is as fllows:

"***10****. While determining the question whether a statute is a general or a special one, focus must be on the principal subject-matter coupled with a particular perspective with reference to the intendment of the Act….*"

45 State of Gujarat v. Patel Ramjibhai Danabhai, (1979) 3 SCC 347; Commercial Tax Officer, Rajasthan v. Binani Cements Ltd., (2014) 8 SCC 319; Vodafone Idea Cellular Ltd. v. Ajay Kumar Agarwal, (2022) 6 SCC 496.

46 Sarwan Singh & Anr. v. Shri Kasturi Lal, (1977) 1 SCC 750. Relevant portion of the judgment is as follows:

"***20.…****..When two or more laws operate in the same field and each contains a non-obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration….*

21. *For resolving such inter se conflict, one other test may also be applied though the persuasive force of such a test is but one of the factors which combine to give a fair meaning to the language of the law. That test is that the later enactment must prevail over the earlier one….."*

excise.[47] Hence, where both the enactments have the non obstante clause then in that case, the proper perspective would be that one has to see the subject and the dominant purpose for which the special enactment was made and in case the dominant purpose is covered by that contingencies, then notwithstanding that the Act might have come at a later point of time still the intention can be ascertained by looking to the objects and reasons.[48]

65. This Court's decision in *Embassy Property Developments (P) Ltd. v. State of Karnataka*[49]is a case in point to put substance into the view that the jurisdiction of authorities under the Code, 2016 must take a backseat when the same is in conflict with public law. One of the issues before the Court in *Embassy Property (Supra)* was with respect to Adjudicating Authority's power to question and decide upon State Government's decision, in exercise of its powers under the Mines and Minerals (Regulation and Development) Act,1957, rejecting extension of mining lease. In unequivocal terms, this Court held that where the

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47 S. Vanitha vs Deputy Commissioner, Bengaluru Urban District & Ors. (2021) 15 SCC 730. Relevant portion of the judgment is as follows:

"***34****…Principles of statutory interpretation dictate that in the event of two special acts containing non obstante clauses, the later law shall typically prevail. In the present case, as we have seen, the Senior Citizen's Act 2007 contains a non obstante clause. However, in the event of a conflict between special acts, the dominant purpose of both statutes would have to be analyzed to ascertain which one should prevail over the other. The primary effort of the interpreter must be to harmonise, not excise….*"

48 Bank of India v. Ketan Parekh, (2008) 8 SCC 148. Relevant portion of the judgment is as follows:

"***28.*** *…But cases might arise where both the enactments have the non obstante clause then in that case, the proper perspective would be that one has to see the subject and the dominant purpose for which the special enactment was made and in case the dominant purpose is covered by that contingencies, then notwithstanding that the Act might have come at a later point of time still the intention can be ascertained by looking to the objects and reasons...*"

49 (2020) 13 SCC 308.

dispute relates to the exercise of statutory or sovereign power by the State, particularly in matters involving public interest and natural resources, such issues fall outside the domain of the insolvency adjudicatory framework. In *Embassy Property*, this Court emphasised that IBC cannot be invoked to usurp or neutralise powers vested in the State under special statutes, nor can insolvency proceedings be used to compel the State to act contrary to its statutory obligations. The jurisdiction of the NCLT and NCLAT is confined to matters that arise purely within the insolvency framework and does not extend to adjudicating the legality of sovereign actions. The following observations of this Court in *Embassy Property* (supra) lucidly explain why matters involving exercise of sovereign and statutory powers lie outside the insolvency adjudicatory framework and are reproduced hereinbelow:

> "*11. It is beyond any pale of doubt that the IBC, 2016 is a complete code in itself. As observed by this Court in Innoventive Industries Ltd. v. ICICI Bank*[50] *[it is an exhaustive code on the subject-matter of insolvency in relation to corporate entities and others. It is also true that the IBC, 2016 is a single Unified Umbrella Code, covering the entire gamut of the law relating to insolvency resolution of corporate persons and others in a time-bound manner. The Code provides a three-tier mechanism, namely, (i) the NCLT, which is the adjudicating authority, (ii) the NCLAT, which is the appellate authority, and (iii) this Court as the final authority, for dealing with all issues that may arise in relation to the reorganisation and insolvency resolution of corporate persons. Insofar as insolvency resolution of corporate debtors and personal guarantors are concerned, any order passed by the NCLT is appealable to NCLAT under Section 61 of the IBC, 2016 and the*

50 (2018) 1 SCC 407.

orders of the NCLAT are amenable to the appellate jurisdiction of this Court under Section 62…..

29. Therefore as rightly contended by the learned Attorney General, the decision of the Government of Karnataka to refuse the benefit of deemed extension of lease, is in the public law domain and hence the correctness of the said decision can be called into question only in a superior court which is vested with the power of judicial review over administrative action. The NCLT, being a creature of a special statute to discharge certain specific functions, cannot be elevated to the status of a superior court having the power of judicial review over administrative action…..

40. If NCLT has been conferred with jurisdiction to decide all types of claims to property, of the corporate debtor, Section 18(1)(f)(vi) would not have made the task of the interim resolution professional in taking control and custody of an asset over which the corporate debtor has ownership rights, subject to the determination of ownership by a court or other authority. In fact an asset owned by a third party, but which is in the possession of the corporate debtor under contractual arrangements, is specifically kept out of the definition of the term "assets" under the Explanation to Section 18. This assumes significance in view of the language used in Sections 18 and 25 in contrast to the language employed in Section 20. Section 18 speaks about the duties of the interim resolution professional and Section 25 speaks about the duties of resolution professional. These two provisions use the word "assets", while Section 20(1) uses the word "property" together with the word "value". Sections 18 and 25 do not use the expression "property". Another important aspect is that under Section 25(2)(b) of the IBC, 2016, the resolution professional is obliged to represent and act on behalf of the corporate debtor with third parties and exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial and arbitration proceedings. Sections 25(1) and 25(2)(b) reads as follows:

> *"25. Duties of resolution professional.—(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.*
>
> *(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions:*
>
> *(a) ****
>
> *(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the*

corporate debtor in judicial, quasi-judicial and arbitration proceedings;"

(emphasis supplied)

This shows that wherever the corporate debtor has to exercise rights in judicial, quasi-judicial proceedings, the resolution professional cannot short-circuit the same and bring a claim before NCLT taking advantage of Section 60(5).

41. Therefore in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right.

45. A lot of stress was made on the effect of Section 14 of the IBC, 2016 on the deemed extension of lease. But we do not think that the moratorium provided for in Section 14 could have any impact upon the right of the Government to refuse the extension of lease. The purpose of moratorium is only to preserve the status quo and not to create a new right. Therefore nothing turns on Section 14 of the IBC, 2016. Even Section 14(1)(d) of the IBC, 2016, which prohibits, during the period of moratorium, the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor, will not go to the rescue of the corporate debtor, since what is prohibited therein, is only the right not to be dispossessed, but not the right to have renewal of the lease of such property. In fact the right not to be dispossessed, found in Section 14(1)(d), will have nothing to do with the rights conferred by a mining lease especially on a government land. What is granted under the deed of mining lease in ML 2293 dated 4-1-2001, by the Government of Karnataka, to the corporate debtor, was the right to mine, excavate and recover iron ore and red oxide for a specified period of time. The deed of lease contains a schedule divided into several parts. Part I of the Schedule describes the location and area of the lease. Part II indicates the liberties and privileges of the lessee. The restrictions and conditions subject to which the grant can be enjoyed are found in Part III of the Schedule. The liberties, powers and privileges reserved to the Government, despite the grant, are indicated in Part IV. This Part IV entitles the Government to work on other minerals (other than iron ore and red oxide) on the same land, even

during the subsistence of the lease. Therefore, what was granted to the corporate debtor was not an exclusive possession of the area in question, so as to enable the resolution professional to invoke Section 14(1)(d). Section 14(1)(d) may have no application to situations of this nature."

66. The scope and ambit of IBC is to speed up the process providing for insolvency[51], and achieving maximisation of value of the asset of the entity undergoing CIRP. The focus is on the company. On the other hand, Telegraph Act, Wireless Telegraphy Act and TRAI Act forms a complete and exhaustive code for all matters relating to telecom sector. This includes declaration of the nature of the rights and liabilities arising out of holding and using spectrum. Powers of the Union includes restructuring the telecom sector through policy decisions by introducing reforms, provisioning bailout packages for stabilizing the sector, prescribing conditions for grant of license, enabling treatment of spectrum as an asset in the books of account of TSP to raise loans, enable spectrum trading and power to prescribe consequence of failure to pay the dues and also the power to recover the dues. The regulatory jurisdiction for telecommunication sector through TRAI extends to making recommendations to Union in the field enumerated in (i) to (viii) of Section 11(1)(a) of the TRAI Act and to discharge the functions as laid down in (i) to (ix) of Section 11(1)(b). Taken together, the Union as the owner and trustee of spectrum on the one hand and TRAI as the regulator on the other, occupy the entire province of telecommunications.

51 Innoventive Industries Ltd. v. ICICI Bank & Anr. (2018) 1 SCC 407.

67. The statutory regime under IBC cannot be permitted to make inroads into telecom sector and re-write and restructure the rights and liabilities arising out of administration, usage, and transfers of spectrum which operate under exclusive legal regime concerning telecommunications. The disharmony caused by applying IBC to the telecom sector which operates under a different legal regime was never intended by the Parliament.

68. Statutory interpretation adopted by the corporate debtors for applying IBC to the material resource of the nation, the spectrum by referring to it as an asset in its books of account, the License Agreement, Tripartite Agreement, or the Spectrum Trading Guidelines is like the tail wagging the dog. Statutory interpretation cannot be based on a myopic approach of reading the definition clauses out of its context. Merely because spectrum can be treated as an “asset” on the basis of certain attributes, such as possession and usage, lease and assignment, claim and liability or credit and debt, the entirety of the telecom sector cannot be brought under the sweep of IBC. The two statutes have different subjects to deal with, different purposes to subserve, different laws to abide, protect different rights and create different liabilities. It is necessary for the constitutional courts to recognise their respective provinces and to ensure that they operate with harmony and without conflict.

VIII. Conclusion:

69. For the reasons stated above;

(A) We hold that Spectrum allocated to TSPs and shown in their books of account as an “asset” cannot be subjected to proceedings under Insolvency and Bankruptcy Code, 2016.

(B) Civil Appeal No. 1810 of 2021 filed by State Bank of India, Civil Appeal No. 2227 of 2021 filed by (successful resolution applicant of corporate debtor) UV Asset Reconstruction Co. Ltd., Civil Appeal No. 2263 of 2021 filed by the IRP of the corporate debtor/ M/s Aircel Group entities, and Civil Appeal Nos. 4570 and 4571 of 2021 filed by the IRP of RCOM and RTL respectively are dismissed.

(C) Civil Appeal No. 6546 of 2021 filed by Union of India, through Department of Telecommunication is allowed in part.

(D) Parties shall bear their own costs.

……...J.
[PAMIDIGHANTAM SRI NARASIMHA]

……...J.
[ATUL S. CHANDURKAR]

NEW DELHI;
FEBRUARY 13, 2026