



INDIAN INSTITUTE OF INSOLVENCY PROFESSIONALS OF ICAI

(Company formed by ICAI under Section 8 of the Companies Act 2013)

IBC Case Law Capsule

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BHARTI AIRTEL LTD. AND ANOTHER. v VIJAYKUMAR V. IYER AND Ors.
CIVIL APPEAL NOS. 3088-3089 OF 2020
Date of Supreme Court Judgement: January 03, 2024

Facts of the Case:-

The present appeal is filed by the M/s Bharti Airtel Ltd. and others (hereinafter referred as 'Appellants') after being aggrieved by the Appellate Tribunal's order dated 17.05.19.

In 2016, the Appellant entered into eight spectrum trading agreements with Aircel Limited and Dishnet Wireless Limited (collectively called as CDs), for purchase of the right to use the spectrum allocated to the latter in the 2300 MHz band. The Appellants were to pay ₹4,022.75 crores to the CDs. The agreement was contingent on approval of the Department of Telecommunications (DoT) who demanded bank guarantees from the CDs. Upon request, the Appellants furnished bank guarantees to DoT on behalf of CDs.

Later the bank guarantees were cancelled and thereupon the Appellant made a payment of Rs 341.80 Crs due to the CD and the balance amount of ₹145.20 Crs was set off by the CD on the ground that the amount was owed by CD to the Appellants.

In the meantime, the CIRP application was admitted against the CDs in 2018 by the AA. According to the Appellant ₹145.20 crores was the net amount payable by the CDs towards operational charges, SMS charges and interconnect usage charges to the Appellant.

The Appellant submitted a claim of ₹203.46 crores in the CIRP of CD's which was admitted by RP (hereinafter referred as 'Respondent') to the extent of ₹ 112 Crores. However, the Appellant also owed ₹64.11 Crs towards interconnects charges to the CDs. The RP informed the Appellant that they have *suo moto* adjusted ₹112.87 crores from the amount of Rs. 453.73 consequent to the discharge and cancellation of bank guarantee. The Appellant claimed set-off of the amount due to them by CDs. The RP rejected the reply and claim of the Appellants. Upon appeal, the Appellate Authority vide its order dated 17.05.2019 held that the set-off is violative of the basic principles and protection under IBC.



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Supreme Court Observations: -

The Apex court scrutinized various types of set-offs. In its analysis of statutory set-off, the Apex Court highlighted that as per Code of Civil Procedure, a defendant can claim set-off against the plaintiff demand for any ascertained sum of money. Mutual cross-obligations, indicating crossclaims between the parties in the same right, are essential for a set-off in law. The Apex Court noted that under United Kingdom law, insolvency set-off is permissible when there are mutual debts, mutual credits, and other mutual dealings between parties at the relevant cut-off time, typically at the commencement of the liquidation process.

It was further emphasized that unlike the Companies Act, the IBC doesn't grant indebted creditors the right to set off against the CD in the case of CIRP. The insolvency set-off under the IBC is neither automatic nor self-executing. While Section 173 of the IBC allows set-off in partnerships and individual bankruptcies, Regulation 29 of the Liquidation Regulations, dealing with mutual credits and setoff, doesn't apply to Chapter II Part II of the IBC, which pertains to CIRP.

The Court outlined two exceptions to the applicability of statutory or insolvency set-off to CIRP:

1. Statutory set-off or insolvency set-off cannot be applied to CIRP, except in cases where a party is entitled to contractual set-off effective before or on the date the CIRP commencement. The moratorium during CIRP does not preclude the application of contractual set-off, as the terms of the contract remain binding.
2. The second exception is for 'equitable set-off,' applicable when the claim and counterclaim are linked due to one or more transactions. For this set-off to be valid, it must be genuine, clearly established on facts and in law, and involve a quantifiable and unquestionable monetary claim.

Order/Judgement: The Apex Court rejected the Appellant's plea for set off since 'Amounts' to be set-off is not the part of the CDs assets in the present fact and upheld the order dated 17.05.2019 passed by the Appellate tribunal.

Case Review: Appeal is dismissed. No Costs.