



Credits Google Images



Advocates
& Solicitors

CASE BRIEF

Union of India v. Association of Unified Telecom Service Providers of India Etc.

Case No.	M.A. (D) No. 9887 OF 2020 in Civil Appeal Nos. 6328-6399 of 2015
Citation	2020 SCC OnLine SC 703
Date	01 September 2020
Court	Supreme Court of India
Coram	Arun Mishra J., S. Abdul Nazeer J., M.R. Shah J.

1. Facts

24.09.2015 The Union of India ('UoI') framed the Guidelines for Trading of Access Spectrum by Access Services Providers ('**2015 Guidelines**').

24.10.2019 The Supreme Court of India in its judgement Union of India v. Association of Unified Telecom Service Providers of India, C.A. Nos. 6328-6399 of 2015 ('**2019 AGR Judgement**') defined the constituents of Adjusted Gross Revenue ('**AGR**') under the Indian Telegraph Act, 1885 ('**1855 Act**') and adjudicated the AGR dues payable by the Telecom Service Providers ('**TSPs**').

27.11.2019 National Company Law Tribunal ('**NCLT**'), Mumbai passed an order and held that license is an asset of State, however in view of the moratorium imposed under the Insolvency and Bankruptcy Code, 2016 ('**IBC**'), the license could not be revoked.

The UoI's appeal against the said order before the NCLAT was dismissed on the grounds of limitation.

Aggrieved, the UoI preferred an appeal before the Supreme Court of India.

20.09.2020 During the consideration of the matter, the UoI preferred an application for the extension of time till 20 years to make the payment of the AGR dues by the TSPs. The Court strictly ordered against any as re-calculation or self-assessment of the dues.

However, the Court ventured into examining the bonafides of the companies against whom liquidation proceedings under the IBC has begun, thus, to ensure that the said dues can be recovered.

01.09.2020 The Supreme Court of India delivered its Judgement, which has set a definite timeline of 10 years period for the repayment of AGR dues by the TSPs in a structured manner.

2. UoI's Contentions

2.1 The UoI maintained that by virtue of Section 4 of the 1855 Act, it has exclusive privilege and powers to establish, maintain, and work on telegraphs. The licenses granted by the Department of Telecommunications ('**DoT**') are in the form of

- contractual arrangements, and hence both the licensor (DoT) and licensee (TSPs) were bound by its terms and conditions, of which payment being first and foremost.
- 2.2 The UoI argued that the spectrum is a scarce recognised natural resource, and as per the Supreme Court judgement in Centre for Public Interest Litigation and Ors. v. Union of India and Ors., (2012) 3 SCC 1 (**'2G Judgment'**), the natural resources must always be used in the country's interests, not private interests. Thus, the *cestui que trust* (the beneficiary of a trust) doctrine and the balance of convenience lies in favour of UoI.
 - 2.3 The UoI assailed the applicability of IBC, and submitted that per the Section 18 of the IBC, only the assets those are in corporate debtor's ownership can be taken into control and custody by the resolution professionals, which clearly, a spectrum is not. Further, the *explanation* to Section 18, clarifies that the that assets owned by a third party, in possession of the corporate debtor shall be excluded from the term '*assets*' from the proceedings under IBC. This meant, the dues under the licence towards the spectrum's use cannot be put in the category of operational dues.
 - 2.4 Furthermore, the UoI submitted, as per the per Regulation 32 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**'2016 Regulations'**), a spectrum cannot be considered as essential goods. The UoI maintained, that in the guise of the resolution plan, the corporate debtor cannot sell the right to use the spectrum to any third party in any manner whatsoever.
 - 2.5 Hence, if there is any dispute with respect to the licence between the parties, then the applicable law is Telecom Regulatory Authority of India Act, 1997 (**'1997 Act'**) and the appropriate authority is the Telecom Disputes Settlement and Appellant Tribunal. Reliance was placed on the judgement of NCLAT in M/s. Embassy Property Development Pvt. Ltd. v. State of Karnataka, C.A.No.9170 of 2019 (**'Embassy Judgment'**), where it was held that the provisions of IBC shall not apply on license rights granted in respect of mining activities.
 - 2.6 Meanwhile, the UoI received representations from various stakeholders in the telecom industry and banking sector about the hardships in the execution of 2019 AGR Judgement and payment of AGR dues. Hence, the UoI made an application for an extension of upto 20 year for the payment of AGR dues, citing that many major service providers maybe impacted from proceedings under the Code, resulting into drastic consequences. This will also affect the interest of consumers at large, quality of telecom services, banking sector, Disruption of tax and non-tax revenue, locking up of valuable spectrum in Corporate Insolvency Resolution Process, loss of employment, loss of foreign direct investment, imbalance of e-governance services and especially digital connectivity in the rural areas.

3. TSPs Contentions

- 3.1 TSPs maintained that the Supreme Court have limited scope, that to only check whether the present proceedings by TSPs have been initiated to subterfuge or avoid their payment of AGR dues. Since the questions, such as whether the licence/spectrum can be transferred and be a part of the resolution process, and whether assets belongs to TSPs, and whether the AGR dues are operational dues are technical in nature, same can only be decided by NCLT.
- 3.2 TSPs argued that telecom licence and right to use the spectrum form a part of the intangible assets under Section 18(f)(iv) of the IBC. In this respect, reliance was placed upon on Consultation Paper dated 7.3.2012 and Guidelines for the Reporting System on Accounting Separation Regulations, 2016 (**Accounting Regulations 2016**), according to which, the right to use spectrum is shown as ownership of an intangible asset.
- 3.3 TSPs contented, that as per The Indian Accounting Standards-38, an asset is a resource controlled by the entity, i.e. TSP in the said matter, for their economic benefits. Hence, according to TSPs, the spectrum and telecom licences are assets of the TSPs can be subjected to the liquidation proceedings under the IBC.
- 3.4 TSP's argued that the government dues forms part of operational debt under Section 5(21) of the IBC, thus, claims of DoT for unpaid dues are operational debts, and hence DoT is an operational creditor. Reliance has also been placed on Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Ors., (2019) SCC OnLine SC 1478 (**Essar Steel Judgement**).
- 3.5 Furthermore, the licences issued by the DoT contains provisions for Tripartite Agreement between the licensor, licensee, and the lenders. The TSPs have offered lenders the spectrum as a security against the loans advanced. Hence, the TSPs maintained that DoT's claim over the spectrum will be to subservient their claims against those of other lenders. The TSP's contended that they entered a pure business transaction with the UoI for the grant of the licence and paid fees against the same. AGR dues are contractual dues and cannot have precedence over the dues of secured creditors.
- 3.6 The TSPs argued that the Section 238 of the IBC contains a non-obstante clause, to the effect, that anything inconsistent therewith contained in any other law for the time being in force, the IBC shall prevail. Hence, the adjudication power is with the NCLT and not any other tribunal.

4. Issues Involved

The Supreme Court of India carefully perused the arguments presented by both the UoI and TSPs, and broadly framed these issues:

- I. Whether spectrum can be subjected to proceedings under IBC?
- II. In the case of sharing, how the payment is to be made by the TSPs?
- III. In the case of trading, how the liability of the seller and buyer is to be determined?
- IV. Can an extension in payment of Adjusted gross revenue (AGR) dues beyond the date specified in the 24.10.2019 order can be given to the TSP's?

5. Judgement by the Supreme Court

A. Whether spectrum can be subjected to proceedings under IBC?

- 5.1 The Supreme Court of India, after duly considering the arguments presented by both the parties, concluded that there are significant inherent jurisdictional questions involved in the present matter, which initially requires adjudication by the NCLT.
- 5.2 Thus, the court suggested questions involving whether spectrum can be subjected to proceedings under IBC, ownership of spectrum, whether the spectrum is a natural resource, and whether the IBC overrides the other relevant laws to be dealt by the NCLT.

B. In the case of sharing, how the payment is to be made by the TSPs?

- 5.3 The court analysed the 2015 Guidelines, and the affidavit and compliance order submitted by the DoT, and came to an understanding, that it does not stipulate anything about the past dues of the sharing operators.
- 5.4 The court held that the liability of the said operators (Sharee) would be to the extent of using the said spectrum only, and the liability of the sharing operator would be to the extent of the remaining spectrum used by it.
- 5.5 The court thus concluded the liability of operator of the AGR, would only be to the extent it has used the said spectrum. Shared operator TSPs cannot be saddled with the liability to pay the past dues of AGR of licensee, that have shared the spectrum with the original licensees.

C. In the case of trading, how the liability of the seller and buyer is to be determined?

- 5.6 The TSPs sought clarification whether the transfer of spectrum is for a specific area, and whether the buyer will be jointly or severally liable for only those dues if found recoverable after the effective date of trading, which were not known to the sellers at the time of the effective trade date.
- 5.7 The court considered the fact that at the time of agreement for spectrum trading, the AGR dues of the seller were also known to the buyer. Thus, by giving a con-joint reading to para 11 of the 2015 Guidelines and Office Memorandum dated 12.05.2016, the court held that the seller's dues prior to the concluding of the agreement/spectrum of spectrum trading shall not be borne by the buyer.
- 5.8 The court reaffirmed that the TSP's has to pay all the AGR dues as adjudicated and calculated in its 2019 AGR judgement.

D. Extension in payment of AGR dues by TSPs

- 5.9 The court decided payment structure through instalments up to 20-year time-period, as proposed by the CG cannot be accepted, since there is need to set a reasonable time considering the financial stress and the banking sector's involvement.
- 5.10 It was ordered that the TSP's will have to make payment of 10% of the total dues as demanded by DoT by 31.3.2021. Subsequently, it ordered the TSPs. to make payment in yearly instalments commencing from 1.4.2021 up to 31.3.2031 payable by 31st March of every succeeding financial year, on the condition that all the dues shall be paid punctually within the time stipulated by the Court.
- 5.11 It further ordered that interest payment on AGR, before the said judgment shall be exempted, however, it was ordered that interest on subsequent defaults post the issuance of the said judgment shall be charged on the TSP's.

6. PSL Opinion

- 6.1 The judgment rendered by the Supreme Court of India has set a definitive and realistic time limit of 10 years for the TSP's to pay their unpaid AGR dues in a structured manner. The judgement gives due consideration to the concerns raised by various stakeholders and the effects it would have on other sectors of the economy. The judgment has resolved the ambiguities pertaining to payment of AGR dues with respect to spectrum trading and sharing. However, the clarity on issues pertaining to monetisation of 'Spectrum' and whether it may categorized as an 'asset' qua IBC proceedings will now be provided in the NCLT adjudication in coming two months as directed by the Supreme Court.