

Through Videoconference

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT No. - I

I. A. No. 453/MB/2020
in
C.P. (IB) No. 2205/MB/2019

(An Application under Section 60(5) of the I & B Code, 2016 r/w
Rule 11 of the National Company Law Tribunal, Rules, 2016)

Mack Star Marketing Private Limited,
1102, 11th Floor, Tower B,
Peninsula Business Park,
Lower Parel, Mumbai – 400 013.

... Applicant

Versus

Ashish Chhawchharia,
Resolution Professional of Jet Airways (India) Limited,
Siroya Centre, Sahar Airport Road,
Andheri (East), Mumbai – 400 009.

... Respondent

IN THE MATTER OF:

State Bank of India

... Financial Creditor

Versus

Jet Airways (India) Private Limited

... Corporate Debtor

Order Dated: 18.03.2021

Coram:

Janab Mohammed Ajmal, Hon'ble Member (Judicial)

Shri V. Nallasenapathy, Hon'ble Member (Technical)

Appearance:

For the Applicant : Mr. Mustafa Doctor, Senior Advocate with Ms. Tine Abraham, Mr. Vividh Tandon and Mr. Prakshal Jain, Advocates i/b Trilegal.

For the Respondent : Mr. Rohan Rajadhyaksha, Advocate with Mr. Dhirajkumar Totala, Ms. Neeraja Balakrishnan and Mr. Hardik Jain, Advocates i/b AZB & Partners.

Per: V. Nallasenapathy, Member (Technical)

ORDER

1. This is an Application filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (the Code) seeking the following reliefs:
 - a) *Declare that the monthly fees payable to the Applicant under the service agreements for the relevant period shall form part of the IRP Costs in terms of the IBC;*
 - b) *Permit and allow the Applicant to file its claims with the Respondent / Liquidator for payment of the monthly fees for the relevant period under the service agreements;*
 - c) *Direct the Respondent / Liquidator to treat any claims of the Applicant relating to monthly fees for the relevant period under the service agreements as IRP Costs;*
 - d) *Ad interim / interim reliefs in terms of the above.*
2. This Bench by an order dated 20/06/2019, initiated the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor on a petition under Section 7 of the Code filed by the Financial Creditor. The Respondent herein was appointed as the Resolution Professional (RP) of the Corporate Debtor.
3. The following are the submissions of the Applicant:

- a) The Applicant permitted the Corporate Debtor to use its premises at 301B, 302, 401 and 404 of Kaledonia, Sahar Road, Andheri (E), Mumbai, for office purpose on Leave and License basis pursuant to a Leave and License Agreement dated 24/02/2011 executed between the Applicant and the Corporate Debtor. Further an Amenities Agreement dated 24/02/2011 was also executed between them to use certain amenities and facilities in connection with the Corporate Debtor's occupation and use of the licensed premises.
- b) The Corporate Debtor failed to pay the monthly rent w.e.f. March, 2019 to the Applicant. The Applicant sent a notice dated 30th April, 2019 to the Corporate Debtor calling upon to make the payments under the service agreements, failing which the Corporate Debtor would have to vacate the licensed premises. The said notice is extracted below.

- i) *We write pursuant to instructions from, and on behalf of our client Mack Star Marketing Private Limited (Our Client).*
- ii) *We refer to our letter dated 28 February, 2019 (Our Letter) pursuant to which Our Client had requested that you deposit license fees in connection with the office space used by you in 'Kaledonia', Andheri (Kaledonia), to Our Client's account in ICICI Bank.*
- iii) *Our Client notes that despite this request being shared with you almost two months ago, you have not yet deposited such amount in the ICICI Bank Account. Our Client is hereby giving you an opportunity to cure the breach of your obligations by depositing the payments in the ICICI Bank Account within 30 days of this letter. If this is not done, Our Client will have the right to terminate the leave and license agreement and you will be required to immediately vacate all the office space (together within any common and parking area) occupied by you in Kaledonia.*
- iv) *Please note that Mr. Sumit Ranjan Saha, director of Mack Star (i.e. Our Client), is the sole authorized representative of Mack Star, authorized to negotiate, deal on behalf of, and represent Mack Star in relation to this issue. All future communications*

with Our Client must be directed to sumit.saha@post.harvard.edu or to us at the address specified on this letterhead.

- v) *This letter is without prejudice to any of the rights or remedies available (or which may be available) to Our Clients, in connection with any matter discussed herein, whether now or in future, and under law, contract, equity, or otherwise, each of which are hereby expressly reserved.*
- c) The Corporate Debtor failed to respond to the notice. On 28/11/2019, the Applicant issued a notice to the Respondent to vacate the premises and handover the possession of the premises by 31/12/2019. The Respondent failed to reply to this notice.
- d) On 05/01/2020, i.e. after the expiry of 31/12/2019 deadline, the Applicant issued another notice to the Respondent requiring him to confirm whether the licensed premises and related amenities were being used by the Respondent for the CIRP period. Relevant paras are extracted below:

Dear Sir,

Sub: Occupation of Office units, 301B, 302, 401 and 404 at Kaledonia, Ville Parle, Andheri Sahar Road, Andheri East, Mumbai (the licensed premises)

Ref: (i) Leave and license agreement dated 24 February 2011 executed by Jet Airways (India) Limited (Jet Airways) and Mack Star Marketing Private Limited as amended and extended from time to time (the Leave and License Agreement); and

(ii) agreement dated 24 February 2011 executed by Jet Airways and Mack Star Marketing Private Limited (Mack Star) in respect of certain amenities and facilities as amended and extended from time to time (the amenities agreement)

We write on instructions from, and on behalf of our client, Mack Star, we refer to the Leave and License Agreement and Amenities Agreement (together, the Service Agreements).

In this regard, we state as under:

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6. *Mack Star's services of providing office space and related amenities to Jet Airways for the period commencing on the Insolvency Commencement Date and terminating on the earlier of: (a) completion of CIR Process; or (b) termination of the service agreements by you (such period, the Relevant Period), contribute towards keeping Jet Airways as a going concern and any related costs incurred by Jet Airways fall squarely within the ambit of the definition of Insolvency Resolution Process costs enshrined in Section 5(13)(c) of the IBC (such costs, the IRP Costs)*
7. *Your conduct of continued acceptance of services under the service agreements for running an office of Jet Airways without any demur also indicates that you have accepted that the consideration for such services shall form a part of the IRP Costs.*
8. *In light of the foregoing, we request you, on behalf of Jet Airways, to confirm to us on or prior to 15 January 2019, that the monthly fees payable to Mack Star (along with the administrative fee prescribed for processing delayed payments) for the Relevant period shall: (a) form a part of the IRP Costs and attain priority over payments to any other creditor of Jet Airways; and (b) be paid once the proceeds under the resolution plan or under the liquidation process are distributed in terms of the IBC".*

- e) The Respondent did not respond to the above letter. Hence it is submitted that the license fee and amenities charges for the CIRP period should be treated as CIRP costs as contemplated under Section 5(13)(c) of the Code. Since the Respondent availed the services

without any demur and in defiance of the Applicant's request to vacate the premises, the charges towards the same shall have to be treated as CIRP costs.

4. The Applicant further submits that it is the primary duty of the Respondent to preserve and protect the assets and continued business operations of the Corporate Debtor as mandated under Section 25(1) of the Code. Hence the Respondent is duty bound to honour the service agreements. More particularly when the Respondent has opted not to terminate the service agreements upon the commencement of CIRP, the service agreements continue to be in force.
5. The Applicant further submits that Section 5(13)(c) of the Code explicitly includes the cost incurred by the Respondent to keep the Corporate Debtor as a going concern as part of CIRP costs. Respondent not only continued to accept the services of the Applicant without any demur but also ignored the Applicant's express request to vacate the licensed premises making it evident that the services availed during CIRP are essential for maintaining the Corporate Debtor as a going concern.
6. Despite the Applicant's express request to vacate the licensed premises, the Respondent kept a part of the licensed premises under lock and key. The Respondent's conduct evidences not only the unqualified acceptance of the services but also underscores the importance of the services to the Corporate Debtor during CIRP. Therefore, this cost should be included in the CIRP. By not doing so, Respondent is attempting to unjustly enrich the Corporate Debtor or its Creditors at the expense of the Applicant.
7. It is submitted that the Applicant had acted in a *bona fide* manner by providing services to the Respondent and therefore the Applicant ought not to be deprived of the legitimate consideration owed to it for the services.

8. It is submitted that the correspondence made by the Applicant shows that the Applicant did not intend to render *pro gratis* services to the Respondent after commencement of CIRP. The Applicant is entitled to payment of the consideration in priority as provided under Section 70 of the Contract Act, 1872 read with Section 53 of the Code.
9. The Respondent filed reply to the Application and pleaded as below.
- a) Clause 19 of the Leave and License agreement provides as below:

“Events of default entitling the licensor to pre-determine the license:

Notwithstanding any contained in this agreement, it is agreed that the following shall be treated as Events of Default whereby the licensor shall be entitled, though not obliged to, pre determine/terminate this agreement, at any time during the term of this agreement:

[...]

If the licensee defaults in and or delays payment of any amount on due dates payable under this agreement, save and except the events of default set out in sub clauses 19.3 and 19.4 above, the licensor shall for the purposes of pre-determining and terminating this agreement give a notice requiring the licensee to rectify and/or comply with the requirements of the notice within 30 (thirty) days of the receipt of such notice and in the event of licensee having failed to rectify or comply with the same within the said notice period, this agreement shall stand pre-determined / terminated without any further notice.”

- b) Clause 21 of the Leave and License agreement provides as below:

“[...]

21.3. In the event the licensor does not refund the security deposit (less deductions as set out in clause 21.2 hereinabove), the licensee shall be entitled to continue to occupy the licensed premises until receipt of the entire security deposit amount (less deductions as set out in clause 21.2 hereinabove) without payment of any further licensee fee during the period of occupation. Any such extended occupation by the licensee, shall not be treated as unauthorised or

illegal. Against receipt of such Security Deposit, the licensee shall ensure that vacant possession of the licenses premises is handed over and made available to the licensor.”

10. It is submitted that on a conjoint reading of the above clauses, it would be clear that the agreements stood terminated and the Applicant was under an obligation to refund the security deposit. In case of failure to do so, the Corporate Debtor was entitled to continue the occupation of the licensed premises until the receipt of the entire security deposit without payment of any further licence fee during the period of occupation.
11. The Applicant on 30/04/2019 issued notice to the Corporate Debtor. In the notice the Applicant stated that despite being called upon to deposit the licence fee for the occupied premises in February, 2019, the Corporate Debtor failed to do so. The Applicant further called upon the Corporate Debtor to cure the breach of the agreement within 30 days thereof and invoked its right to terminate the agreement in case the breach was not cured within the period. The notice being in the nature of a notice for eviction, no further payments was to be made by the Corporate Debtor subsequent thereto. Clause 19.5 of the Leave and License Agreement provides that upon the Applicant issuing the eviction notice, and upon the Corporate Debtor failing to rectify default of non-payment within 30 days, the agreement would stand pre-determined or terminated without any further notice. The Corporate Debtor having failed to make the payment within the period the agreements stood automatically terminated on 31/05/2019. Thus no further licence fee was payable to the Applicant in terms of the clause 21 of the Agreement.
12. It is submitted that on 17/08/2019, a letter (extracted below) was sent to the Applicant by the Respondent, referring the termination of the agreement and sought refund of the security deposit furnished by the Corporate

Debtor. However, the Applicant failed to annex this letter to this Application.

“JET/RP/NCLT/19-20/092

17th August, 2019

To
Mack Star Marketing Pvt. Ltd.
Dheeraj Apartment II,
P.P. Dias Compound, Natwar Nagar,
Road No. 1, Jogeshwari East,
Mumbai – 400 060

Dear Sir,

Sub: Refund of Security Deposit given by Jet Airways (India) Ltd for the use of Licensed premises at Kaledonia, Village Vile Parle, Andheri Sahar Road, Andheri (East), Mumbai.

1. I am writing to you in the capacity of the Resolution Professional of Jet Airways (India) Limited hereinafter called as the Company.
2. I wish to inform you that the Company is currently undergoing Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code (“Code”) as directed vide order dated 20 June 2019 (Order attached as “Annexure A”) of the Hon’ble National Company Law Tribunal at Mumbai (“NCLT”). Pursuant to this order, I have been appointed as the Interim Resolution Professional of the Company and subsequently appointed as the Resolution Professional by the Committee of Creditors at the first meeting of the Committee Creditors held on 16th July 2019.
3. Section 25(1) requires the Resolution Professional to preserve and protect the assets of the Corporate Debtor, including the continued business operations of the Corporate Debtor. In order to facilitate the Resolution Professional in the preservation and protection of the assets, section 25(2) (a) of the Code empowers the Resolution Professional to take the immediate custody and control of the assets of the Corporate Debtor.
4. While taking the custody and control of the assets of the Corporate Debtor, it has come to the notice of the undersigned that the License

Agreement in respect of the premises at Kaledonia, situated at village Vile Parle Andheri Sahar Road, Andheri (East) Mumbai, had been terminated by the Company prior to the Insolvency Commencement Date ("ICD") and the Security Deposit of INR 3,29,61,490 (Three Crore Twenty Nine Lakh Sixty One Thousand Four Hundred Ninety) has not been refunded to the Company.

5. *The company is entitled to receive the refundable Security Deposit (without any deductions) post termination of the leave and license agreement and you are hereby requested to credit the same to the below mentioned bank account of the Company within 3 days of receipt of this notice.*

Bank Account Details:

Bank Name: State Bank of India

Account No.: 36035234455

IFSC Code: SBIN0004791

6. *Failure to make the payment within 3 days from the date of this notice shall be deemed to be non-cooperation and an obstruction to the CIRP under Section 19(2) of the Code and liable to be reported to the Hon'ble National Company Law Appellate Tribunal ("NCLAT") for necessary directions, which may include fines, penalties and prosecution as well, the costs of which shall be solely borne by you.*
7. *Please also note that Indian law considers me as an officer of the court and any hindrance caused in the performance of my duties under the Code or in the conduct of the Insolvency Resolution Process of the Company will amount to contempt of court, which is liable to be reported to the Hon'ble NCLT.*
8. *Should you have any query or clarification, you may write to me on the below mentioned address.*

Sincerely,

Ashish Chhawchharia

(IBBI/IPA-001/IP-P00294/2017-18/10538)

Resolution Professional for

Jet Airways (India) Limited."

13. It is submitted that several telephone calls made to the Applicant subsequently requesting refund of the security deposit failed to evoke any

response from the Applicant. The Applicant on 28/11/2019, addressed a letter seeking vacation of the premises by 31/12/2019, disregarding the consequences of its own notice.

14. It is submitted that since the agreements stood terminated on account of notice, the question of utilizing the premises of the Corporate Debtor during the CIRP does not arise.

15. The Respondent, on 29/01/2020 in response to the letter of the Applicant dated 05/01/2020 sent a letter stating that:

- (a) *The agreement stood terminated.*
- (b) *The Applicant was to refund the security deposit which it was refusing to do despite communication on going with the Respondent's team*
- (c) *The Corporate Debtor was under no obligation to continue the agreement with the Applicant*
- (d) *There were no dues for the Applicant since the termination of the agreement. All debts due prior to the Admission Order could be claimed by filing a proof of claim.*

16. Upon going through the pleadings and on hearing the counsel from either side the following are the observations of this Bench.

- (a) The Advocate's notice dated 30/04/2019 issued by the Applicant addressed to the Corporate Debtor is an eviction notice wherein it was stated that the Corporate Debtor was called upon to deposit the licence fee for the premises and if the Corporate Debtor failed to do so within 30 days, the Applicant had the right to terminate the Leave and License Agreement and the Respondent was required to immediately vacate the premises. Even though it is stated that the Applicant has the right to terminate the agreement, by operation of Clause 19 of the agreement, on the expiry of 30 days from 30/04/2019, i.e. 31/05/2019 (admitted by both sides, it should however be 30/05/2019), the agreement

stood terminated. The Applicant required the Corporate Debtor to cure the breach of agreement within 30 days and invoked right to terminate the agreement in case the breach was not cured within that period. Admittedly the breach was not cured by the Corporate Debtor. Hence the Leave and Licence agreement stood terminated within 30 days from the period of notice i.e. with effect from 31/05/2019.

- (b) Clause 21.3 of the Leave and License agreement is clear that if the Applicant did not refund the security deposit, the Corporate Debtor would be entitled to continue to occupy the premises until receipt of the entire security amount without payment of any further license fee during the period of occupation. In view of this the Respondent was not required to hand over the possession till the security deposit was refunded and also need not to pay any license fee for the premises from 1st June, 2019.
- (c) The submission of the counsel for the Applicant that the Respondent used the premises while keeping the Corporate Debtor as a going concern and is duty bound to protect the Corporate Debtor etc. does not have any relevance, in view of the fact that the agreement stood terminated on 31st May, 2019. The submission that there is an agreement for service and the Corporate Debtor enjoyed the service etc. had to meet the same fate as Leave and Licence agreement itself was terminated.
- (d) The Applicant even though made elaborate pleadings, the letter dated 17/08/2019 written by the Respondent to the Applicant, was not enclosed to the Application (furnished in the reply). This letter makes it abundantly clear that the Respondent did not require the premises during the CIRP and the Applicant's insistence on the factor that the RP could utilise the premise for

CIRP may not be helpful to the Applicant in aid of this Application.

- (e) The Applicant is not entitled to any payment with respect to the licence fee after 31st May, 2019. Since the security deposit is with the Applicant to ensure the payment of licence fee, the Applicant shall refund the security deposit to the Respondent after deducting the licence fee payable from 1st March 2019 to 31st May 2019.
- (f) On receipt of the balance security deposit, the Respondent shall, within 7 days, hand over the vacant possession of the premises to the Applicant.

Sd/-

V. Nallasenapathy
Member (Technical)

Sd/-

Janab Mohammed Ajmal
Member (Judicial)