

**THE NATIONAL COMPANY LAW TRIBUNAL
COURT V, NEW DELHI**

I.A No. 594/2024

In

Company Petition No. (IB) – 264/PB/2023

*Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read
with Rule 11 of the National Company Law Tribunal Rules, 2016.*

IN THE MATTER OF:

GO AIRLINES (INDIA) LIMITED

....CORPORATE APPLICANT

AND IN THE MATTER OF-

MACK STAR MARKETING PRIVATE LIMITED

KALEDONIA, 19 SAHAR ROAD,
ANDHERI (E), MUMBAI-400 069

....APPLICANT

VERSUS

GO AIRLINES (INDIA) LIMITED

(UNDER CORPORATE INSOLVENCY RESOLUTION PROCESS)

REPRESENTED BY ITS
RESOLUTION PROFESSIONAL,
MR. SHAILENDRA AJMERA
ERNST & YOUNG LLP,
3rd FLOOR, WORLDMARK 1,
AEROCITY HOSPITALITY,
NEW DELHI-110 037

....RESPONDENT

Order Pronounced on: 21.08.2024

CORAM:

**SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)
DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)**

APPEARANCES:

For the Applicant : Ms. Neha Mathew, Mr. Shubhansh Thakur, Advs.

For the RP : Mr. Diwakar Maheshwari, Ms. Pratiksha Mishra,
Mr. Shreyas Endupuganti, Ms. Karunya Lakshmi,
Advts.

ORDER

PER: MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

1. This application has been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 by the Applicant, M/s MACK STAR MARKETING PRIVATE LIMITED, seeking directions to resolution professional to handover physical possession of property situated in Andheri, Mumbai to the Applicant.
2. The Applicant in the present application has prayed for the following reliefs:
 - a) *Direct the Respondent to vacate the Licensed Premises (Units 401,402, 403, and 404 located on the 4th Floor of the building 'Kaledonia' located at 19 Sahar Road, MHADA Colony, Vijay Nagar, Andheri East, Mumbai-400 069, Mumbai) and handover possession of the Licensed Premises to the Applicant on an immediate basis;*
 - b) *Direct the Respondent to make payment of License Fees accruing under the First and Second License Agreements to the Applicant within contractually stipulated timelines, till the time it vacates the Licensed, Premises;*
 - c) *Direct the Respondent to pay the sum of INR 1,80,18,729.15/- owed to the Applicant towards shortfall in License Fees under the First License Agreement for the period from 01.01.2022 to 09.11.2022; and*
 - d) *Direct the Respondent to pay the net sum of INR 23,86,74,416.59/- owed to the Applicant towards Liquidated Damages that the Respondent is liable to pay in terms of Clause 25.2 of the First License Agreement and Clause 22.2 of the Second License Agreement for failing to vacate the Licensed Premises within 30 days of termination becoming effective after deducting the amounts paid by Respondent towards License Fees during these periods (detailed break-up of which has been provided in Annexure - 9) on an immediate basis;*

- e) *In the alternative to prayer (d) above, direct the Respondent to pay the sum of INR 5,32,63,388.03/-owed to the Applicant towards unpaid License Fees for the period between 10.11.2022 to January 2024 (detailed break-up of which has been provided in Annexure - 9) on an immediate basis;*
- f) *Ad-interim/ interim reliefs in terms of the above prayers; and*
- g) *Grant any such other further reliefs) as this Hon'ble Tribunal deems appropriate.*

3. Brief facts of the case as mentioned in the instant application, which are just and necessary for adjudication, are as follows: -

- a) The Applicant entered into two separate leave and license agreements dated 18.07.2018 and 18.02.2022 with the Respondent/Corporate Debtor for use of Units 401, 402, 403, and 404 located on the 4th floor of a commercial building named 'Kaledonia' situated at 19, Sahar Road, Andheri East, Mumbai, 400069. First agreement dated 18.07.2018 pertains to Unit No 402 & 403 including all furniture and fittings, and 18 reserved parking spaces, for a term of 5 years ending on 19.08.2023. Similarly, second agreement dated 18.02.2022 includes Units 401 & 404 along with 16 car parking spaces, for the tenure of 5 years ending on 01.02.2027.
- b) According to the terms of these agreements, the Respondent have to pay licensed fee for licensed premises by 10th of each month subject to TDS. Respondent has paid security deposit of INR 2,11,79,070/- and INR 50,00,000/- for both the agreements respectively. Both parties agreed that the security deposit would be refunded to the Respondent only after 60 days from the date of vacating and handing over the licensed premises, following the adjustment and deduction of any outstanding arrears, charges, liquidated damages, or dues payable by the Respondent.
- c) The Applicant on request of Respondent for the financial assistance, the Applicant waived the license fee under the first agreement for two months and adjusted the fee for the third month against the security deposit. Additionally, the Applicant offered further discounts on the license fee payable under the first agreement. Notably, a 27% discount was provided

- via an email dated 01.06.2021, applicable from July 2021 to December 2021. No discounts were agreed upon for the period after 31.12. 2021.
- d) The parties later executed a discount agreement dated 18.02.2022 under second license agreement, wherein it was agreed that Respondent would pay license fee at the rate of INR 70/- per square foot representing a 30% discount on the already reduced fee under the second agreement. No discount was agreed upon under second agreement for the period beyond 31.12.2023.
- e) Due to precarious financial situation of Respondent, Applicant continued to accept discounted license fees even after agreed discounts expired on 31.12.2021 because the security deposit deposited by the Respondent was sufficient to cover the shortfall in the license fee for a few months. However, despite substantial discounts Respondent consistently defaulted on the payment of reduced license fee.
- f) The Applicant issued default notice on 08.09.2022 on account of non-payment of discounted license fee for the months of June 2022 to August 2022, constituting breach of Clause 12.1 and 22.1 of first agreement and Clause 10.1 And 19.1 of second agreement. The Respondent was given a 30-day period to remedy the default, as stipulated under Clause 24.7 of the first agreement and Clause 21.7 of the second agreement.
- g) Upon the Respondent's failure to cure the default within the 30-day period, the Applicant terminated the license agreements with effect from 09.10.2022 as communicated to Respondent vide letter dated 11.10.2022. Respondent was required to vacate the licensed premises by 09.11.2022. Despite repeated requests, Respondent failed to vacate the licensed premises and continued to unlawfully retain possession of licensed premises.
- h) Subsequently, the Respondent filed a Section 10 Petition under the Insolvency and Bankruptcy Code, 2016, leading to the initiation of Corporate Insolvency Resolution proceedings, with a Resolution Professional appointed by an order dated 10.05.2023. Applicant informed the current situation to Resolution Professional, however, despite being fully aware that license agreements stood terminated prior

to initiation of CIR Proceedings, Respondent failed to handover the licensed premises to the Applicant. Further, the agreements stood terminated 7 months prior to the initiation of CIRP in respect of the Corporate Debtor/Respondent on 10.05.2023 and as a result Respondent as a licensee had lost its rights to remain in occupation or possession of the licensed premises much prior to initiation of CIRP.

- i) Therefore, the bar under Section 14(1)(d) of the Code is not applicable in the present case as the termination had taken much before CIRP commencement. The Respondent defaulted in timely payment of license fees for the months of May to August 2023 and only made belated payments of the discounted license fees for this period till August, 2023 despite being aware that discounts for first agreement were not applicable after 31.12.2021.
- j) Respondent failed to make payment of even discounted license fees since September due to the fact that Respondent was not able to seek interim finance. Despite defaulting on license fees and termination of Leave and license agreements well before the commencement of the CIRP, Respondent failed to vacate the licensed premises. Consequently, the Applicant issued letter dated 20.12.2023 to the Respondent demanding immediate vacation of licensed premises and the payment of outstanding dues amounting to INR 2,53,40,475.95/-. Respondent made meagre sum of INR 24,29,253.70/- on 27.12.2023. However, no response has been received till date to the Applicant's letter dated 20.12.2023 nor has the Respondent indicated when payment of the outstanding license fees will be made.
- k) Though as contended by the Respondent that licensed premises are essential for the Corporate Debtor to be run as going concern, the Respondent has failed to pay the monthly license fees as per the terms of license agreements. Thus, the Resolution Professional act in contrary to the Code as in view of Section 14(2A) of the Code, mandatorily requires the Resolution Professional to pay the dues toward supply of essential goods/services availed by the Corporate Debtor during the moratorium period.

- l) The Resolution Professional in breach of its duty under Section 25(2)(c) failed to raise interim finance as necessary to carry on the operations of Corporate Debtor which include payment of license fees for the premises occupied by the Respondent.
- m) The Applicant contended that no waiver or abandonment of termination notice dated 11.10.2022 was done as the fact of termination as well as the consequences of termination as per the agreements were specifically communicated to the Respondent vide letter dated 11.10.2022 wherein Respondent categorically informed that it was required to vacate the Licensed Premises prior to 09.11.2022, in terms of Clause 25.1 of the first agreement and Clause 22.1 of the second agreement. The Resolution Professional being fully aware of this situation were in advance talks with the Applicant regarding handover of half of licensed premises i.e. Units 401 & 404 in December, 2023, Respondent also sought the Applicant's assistance in obtaining quotes from scrap purchasers for the fit-outs that may left behind after vacating the licensed premises.
- n) Furthermore, in terms of Clauses 32 & 29 of the respective license agreements, any waiver of the terms of the agreement must be made through written instrument executed by the party waiving such term/provision. Here no such express waiver of termination of License agreement was issued by the Applicant.
- o) In response to a query raised by this Adjudicating Authority regarding whether the acceptance of rent after the issuance of the termination notice amounts to a continuation of the license agreement under the Transfer of Property Act, 1881, the Applicant clarified that unlike a lease, a license is not covered by provisions of Transfer of Property Act, 1881. A license does not create an interest in the property; it only grants the licensee the right to occupy the premises, which is revoked upon termination. Clause 25.2 of first agreement and Clause 22.2 of second agreement provides that Respondent provides for payment of additional fees on occupancy of premises beyond termination notice. Therefore, the Applicant is well within its right to continue accepting the license fees

after termination of aforesaid license agreements and the same would not be construed as waiver of termination.

- p) The Applicant has not revised or novated the license agreements to reduce the license fees under both agreements to INR 57,33,039/-. The parties only agreed to temporary discounts: 27% under the first agreement until December 31, 2021, and 30% under the second agreement until December 31, 2023. Additionally, Clauses 6.2 and 4.2 of the respective license agreements stipulate that the Respondent's obligation to pay the license fees is independent of the invoices issued; thus, the invoices do not affect the Applicant's right to the full license fees. The Applicant accepted the discounted fees with the understanding that the monthly shortfall would be adjusted against the available security deposit. There were instances where the Respondent made payments without invoices, and the Applicant raised invoices for the original license fees for September and October 2023, as no security deposit remained to cover the shortfall.
- q) Thus, Respondent is liable to pay both interest on delayed license fee payments as well as liquidated damages for failing to vacate the license premises pursuant to termination calculated in terms of clause 25.1 and Clause 22.2 of both agreements respectively.

4. Contentions asserted by the Learned Counsel appearing on behalf of the Respondent, Resolution Professional in reply to the present Application.

- a) The Respondent contended that the present application is not maintainable as the dispute raised by the Applicant is purely contractual dispute having no nexus with the Corporate Insolvency Resolution Process of the Corporate Debtor/Respondent and thus not come under the ambit of Section 60(5) of the Code. Further, payment of dues prior to CIRP period and vacation of premium is not permissible in view of Section 14(1)(d) of Insolvency and Bankruptcy Code, 2016.
- b) The Applicant continued to raise invoices at the discounted license fees even after December, 2021. Post February, 2022, the Applicant started raising combined invoices under the license agreements for INR

57,33,039/- per month which is the discounted amount as agreed. Moreover, even on 08.09.2022, the Applicant has demanded only INR 57,33,039/- per month toward the license fees payable for June, 2022 to August, 2022. The Respondent argues that if the discounts had ended in January 2022, the amount demanded in the default notice would have been higher than INR 57,33,039/-.

- c) The Respondent further submitted that the Applicant has waived its right under the Termination Notice issued on 11.10.2022 by continuing to abide by the agreement, including issuance of invoices toward license fees and accepting the payment of such invoices by the Respondent. Besides this, Applicant never objected the possession of licensed premises by the Respondent. After issuance of termination notice, no correspondence was ever issued by the Applicant demanding vacation of the premises nor any legal proceedings were initiated in furtherance of such Termination Notice. Though, Applicant demanded vacation of said premises 14 months after issuance of Termination Notice i.e., on 10.05.2023.
- d) It was contended by the Respondent that the parties have novated the license agreements to the extent of license fees payable, through their conduct. It is noteworthy to see that the Applicant since February, 2022 has raised invoices with discounted sum of license fees and even post CIRP Applicant continued to raise invoices with same discounted rate till August, 2023 which was paid by the Respondent/Resolution Professional. But out of nowhere, Applicant vide letter dated 20.12.2023 demanded enhanced amount of license fees i.e., INR 78,82,429.56.
- e) Respondent alleged that the prayer sought by the Applicant is particularly relates to the license agreements, enhanced fees to be payable from January, 2022 which is pre-CIRP period. Thus, it have no nexus with the CIR Proceedings of the Corporate Debtor/Respondent. Counsel for the Respondent relied on **Supriyo Kumar Chaudhuri v. Jhunjhunwala Oil Mills Ltd., 2023 SCC Online NCLAT 1579**, wherein Hon'ble NCLAT stated that NCLT cannot adjudicate upon dispute

between the parties pertaining to rental agreement. Assessment of rental value and payment of rents is to be decided by District Magistrate.

- f) Section 14(1)(d) of IBC prohibit recovery of property by any owner or lessor where such property is occupied by or in possession of the Corporate Debtor. Further, Termination Notice dated 11.10.2022 was never acted upon by the Applicant as the Respondent continued to occupy licensed premises without any demur or protest by the Applicant. Further, Applicant sought dues of license fees of pre-CIRP period which can only be effectuated through filing of Claim Form as per the Code in spite of filing of present Application.

Analysis and Findings

5. We have heard the Learned Counsels for the Applicant and the Respondent, and further perused the averments made in the Application, Reply, Rejoinder and the Written Submissions presented by the Parties. The Applicant has filed the present Application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 seeking vacation of licensed premises, payment of unpaid license fees and liquidated damages of INR 23,86,74,416/-.
6. On perusal of submissions made before us and documents produced on record, it is admitted fact that both the parties have entered into Leave and License Agreements dated 18.07.2018 and 18.07.2022 for which Applicant has issued Default Notice on 08.09.2022 and subsequently Termination notice on 11.10.2022. The Respondent has raised the following issues before us
- (i) Firstly, the Applicant has waived off or abandoned the Termination Notice dated 11.10.2022 by its conduct and continues to abide the terms of license agreements,
 - (ii) Secondly, there is a novation of license agreement to the extent that license fees under both the agreements stood revised to INR 57,33,039/- as the Applicant for a long time continues to receive discounted fees as per the discount agreement, and

- (iii) That the dispute regarding leave and license agreement falls outside the scope of CIR Proceedings, thus this Adjudication Authority have no jurisdiction in terms of Section 60(5).
7. The Respondent has alleged that the Applicant has abandoned its termination notice issued pursuant to alleged default committed by the Respondent/Corporate Debtor. As per Clause 25 of the first agreement and Clause 22 of the second agreement, it is covenanted between that the parties that the Respondent would be liable to vacate the licensed premises within 30 days from the issuance of Termination Notice. However, as stated by the Respondent, after issuance of termination notice, Applicant continued to issue invoices of composite and agreed discounted license fees of INR 57,33,039/- which was duly honored by the Respondent. Moreover, while going through the letter dated 20.12.2023 attached with the Application as **Annexure-8** it is evident that after 14 months of issuance of Termination Notice the Applicant only sought vacation of licensed premises on the pretext of aforesaid Termination Notice despite knowing the fact that it has admitted the payment of license fees since the 11.10.2022.
8. Section 63 of the Indian Contract Act, 1872 provided for *Doctrine of waiver* wherein it is propounded that any party to the agreement/contract can voluntarily relinquish its right either through its conduct or otherwise. One party may dispense the other party with the performance of any stipulation either expressly through performance or impliedly by conduct. Section 63 of the Indian Contract Act, 1872 is reproduced below:
- 63. The promisee may dispense with or remit performance of promisee.— Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.*
9. In the above context, it is pertinent to refer to the judicial precedent laid down by the Hon'ble Supreme Court in **Kanchan Udyog Ltd. v. United Spirits Ltd., (2017) 8 SCC 237** which clarified the principle of waiver through conduct in terms of Section 63 of the Indian Contract Act, 1872. The relevant extract of the precedent is reproduced below:

“22. The learned Single Judge framed an issue also with regard to waiver, estoppel and acquiescence, then answered it in the negative in a singular line, without any discussion. Waiver and acquiescence may be express or implied. Much will again depend on the nature of the contract, and the facts of each case. Waiver involves voluntary relinquishment of a known legal right, evincing awareness of the existence of the right and to waive the same. The principle is to be found in Section 63 of the Act. If a party entitled to a benefit under a contract, is denied the same, resulting in violation of a legal right, and does not protest, foregoing its legal right, and accepts compliance in another form and manner, issues will arise with regard to waiver or acquiescence by conduct. In the facts of the present case, the conduct of the appellant in placing orders and receiving supply of concentrates directly from M/s VEC, for a period of nearly one year, and continuing to do so even after it wrote to the Respondent in this regard, without recourse to any legal remedies for denial of its legal right to receive concentrates from the Respondent, undoubtedly amounts to waiver by conduct and acquiescence by it to the new arrangement. The plea that it was done under compulsion, and not voluntarily, is devoid of any material, substance and evidence. It is unacceptable and merits no consideration. Alternatively, if it was an assignment under Clause 5 of the agreement, there had been no termination of the contract by the Respondent.”

10. In the context of present case, the Applicant has issued termination notice on 11.10.2022 and subsequently raised invoices on Respondent for payment of agreed and discounted license fees of INR 57,33,039/- per month both prior to initiation of Corporate Insolvency Resolution Process and after the appointment of Resolution Professional vide order dated 10.05.2023. Further, Respondent has satisfied the invoices so issued and were in undisturbed possession since then. Thus, it can be inferred from the conduct of Applicant that it had voluntarily waived its right under termination notice so issued 14 months prior to letter dated 20.12.2023 demanding vacation of licensed premises. More so, parties were in their ordinary conduct post issuance of aforesaid termination notice as it was as per original License Agreements.
11. Further, the Respondent contended that the parties have revised and novated the license agreements to the extent that the license fees under both the agreements stood revised to INR 57,33,039/- per month as per the Discount Agreements dated 01.06.2021 and 18.02.2022. in terms of

their understanding, discount under first agreements only continues till 31.12.2021 and discount under second agreement was to be expired on 31.12.2023. however, the Applicant since February, 2022, continued to raise such discounted invoices which was duly paid off by the Respondent. Furthermore, after commencement of CIRP, Applicant again issued invoices of same composite discounted amount of INR 57,33,039/-. It was stated by the Respondent was regularly paying that aforementioned amount as license fees till April, 2024 even after expiration of discount period under first agreement. Thus, it can be inferred from the conduct of Applicant that the payments made by the Respondent of agreed discounted license fees was accepted by the Applicant without demur though such discount was only of certain period as per discount agreement dated 01.06.2021. It is also pertinent here that Applicant also issued invoices of such discounted fees.

12. Hon'ble Supreme Court in the matter of **H.R. Basavaraj v. Canara Bank, (2010) 12 SCC 458** clarified the concept of novation in terms of Section 62 of the Indian Contract Act, 1872. Relevant extract is reproduced below:

“18. Now let us examine Section 62 of the Act which reads as follows:

“62. Effect of novation, rescission and alteration of contract. — If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.”

This section gives statutory form to the common law principle of novation. The basic principle behind the concept of novation is the substitution of a contract by a new one only through the consent of both the parties to the same. Such consent may be expressed as in written agreements or implied through their actions or conduct. It was defined thus by the House of Lords in Scarf v. Jardine [(1882) 7 AC 345 : (1881-85) All ER Rep 651 (HL)] : (AC p. 351)

“... that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract.””

Here in the present case after expiry of discount tenure as per Discount Agreements dated 01.06.2021 and 18.02.2022, Applicant still issuing

invoices of discounted fees of 57,33,039/- as usual and Respondent was paying the same alike before 31.12.2021. thus, both the parties have agreed on aforesaid arrangement as Applicant never objected the same since 31.12.2021 and issuing invoices on same discounted rate. It can be concluded that both the parties through their conduct had novated the contract to the extent of license fees.

13. The Applicant further sought for possession of licensed premises in view of its termination notice dated 11.10.2022. It is pertinent to note that as inferred from above observations Applicant never acted on termination notice issued on 11.10.2022 nor claimed possession of licensed premises and thus, waived its right under the same. Moreover, as far as possession of licensed premises is concerned, since the Respondent is in Corporate Insolvency Resolution process, recovery of any property in possession of Corporate Debtor though as a lessor is not permissible in terms of Section 14(1)(d).
14. It is a settled principle enshrined in Insolvency Laws that any creditor whether financial or operational, secured or unsecured who have dues against the Corporate Debtor have to file claim before the Resolution Professional in a stipulated time. In the present case, alleged dues of Applicant arising prior to initiation of CIR Process, thus, the Applicant is required to file claim form for its outstanding dues of license fees, as prescribed under CIRP Regulations, 2016.
15. As regards the claim of liquidated damages are concerned and disputes thereto, we are of considered opinion that the Applicant has right to sue Respondent in accordance of Clause 41 of first agreement and Clause 37 of second agreement and the claims under the said clause will partake character of debt only after its adjudication by the competent court/forum. Further, the aforesaid dispute relates to pre-CIRP period, on which we cannot adjudicate as per settled position of law as enumerated in **Supriyo Kumar Chaudhuri v. Jhunjhunwala Oil Mills Ltd., 2023 SCC Online NCLAT 1579.**
16. In light of the above facts and circumstances, especially in view of the fact that during the CIRP, RP is continuously making payment of license

fees and the Applicant is accepting that payment, we do not find any merit in the prayers made by the Applicant seeking possession of the aforesaid property do not warrant any further directions to the Respondent/Resolution Professional. Consequently, the relief sought by the Applicant lacks merit and is therefore dismissed. Accordingly, **IA No. 594 of 2024 in CP(IB) No. 264/PB/2023** is hereby **dismissed** and is accordingly **disposed of**.

Let a copy of this order be served to parties.

Sd/-
(DR. SANJEEV RANJAN)
MEMBER (TECHNICAL)

Sd/-
(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)