

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No. 389 of 2021
& I.A. No. 850 of 2022**

[Arising out of Order dated 18.03.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court No.I in I.A. No. 453/MB/2020 in C.P.(IB) No. 2205/MB/2019]

In the matter of:

Mack Star Marketing Pvt. Ltd.

....Appellant

1102, 11th Floor, Tower B, Peninsula Business
Park, Lower Parel, Mumbai- 400013

Vs.

Ashish Chawchharia

...Respondent

Resolution Professional of Jet Airways (India) Pvt. Ltd.,
Having his office at Siroya Centre, Sahar Airport Road.

For Appellant:

Mr. Jayant Bhushan, Sr. Advocate with Shri Abhijeet Sinha, Mr. Aditya Shukla, Mr. Prakshal Jain, Ms. Angelika Awasthi and Ms. Shivani Rawat, Advocates.

For Respondent:

Mr. Dhiraj Kumar Totala, Ms. Tanya Chib, Ms. Trisha Sarkar and Mr. Rohan Rajadhyaksha, Advocates for RP.

JUDGMENT

(06th May, 2022)

Ashok Bhushan, J.

1. This Appeal has been filed against the impugned order dated 18.03.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court No. I in I.A No.453/MB/2020 filed by the Appellant. Brief facts of the case and sequence of the events necessary to be noted for deciding this Appeal are:-

The Appellant and the Corporate Debtor- 'Jet Airways (India) Private Limited' ("Jet" for short) entered into a License Agreement for license of office premises in a building owned by the Appellant on 24.02.2011. A security deposit was also made by the Corporate Debtor to the Appellant in pursuance of License Agreement. In the year 2018, Jet vacated four office units and substantial unpaid dues were set-off by the Appellant from the security deposit. Balance security deposit with the Appellant of the Corporate Debtor was INR 1,35,08,352/-. Monthly fees for two units that was retained by Jet was INR 28,51,031/-. On 28.02.2019, the Appellant wrote to Jet that all future monthly fees payable by the Corporate Debtor be deposited in the ICICI Bank account and all future communications with the Appellant must be addressed to the e-mail address of the Appellant's Managing Director. The Corporate Debtor did not deposit the monthly license fees in the months of March and April, 2019. On 30.04.2019, the Appellant issued a notice to the Corporate Debtor giving an opportunity to the Corporate Debtor to pay monthly fees within 30 days. It was further mentioned that if deposit is not made, the Appellant will have the right to terminate the Leave and License Agreement and the Corporate Debtor shall be required to immediately vacate all the office space. After the Notice dated 30.04.2019, Jet neither paid the monthly license fees nor vacated the premises. On 20.06.2019, the Corporate Insolvency Resolution Process (CIRP) was commenced against the Corporate Debtor. A letter dated 28.11.2019 was issued to the Resolution

Professional of the Jet (Corporate Debtor) by the Appellant praying for vacation of premises by 31.12.2019. It was mentioned that dues and arrears of the premises are outstanding. The Resolution Professional was called upon to ensure that premises are vacated by 31.12.2019. On 05.01.2020, another letter was written by the Appellant to Insolvency Resolution Professional (IRP) asking the IRP to confirm on or prior to 15.01.2019 that the monthly fees payable to Appellant for the relevant period form a part of the CIRP costs and be paid once the proceeds under the Resolution Plan or under the Liquidation Process are distributed in terms of the IBC. The letter dated 05.01.2020 was not replied. The Appellant filed an I.A being I.A No. 453 of 2020 before the Adjudicating Authority praying for following reliefs:-

- “a. Declare that the Monthly Fees payable to the Applicant under the Service Agreements for the Relevant Period shall for 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; and*
- e. Such further and other reliefs as this Hon’ble Tribunal may deem fit in the facts and circumstances of the present case and in the interest of justice.”*

2. A reply was filed by the Resolution Professional contending that the Corporate Debtor is entitled to continue in the occupation of the licensed premises until the receipt of the entire security deposit. Referring to Notice dated 30.04.2019, it was pleaded that notice being in the nature of notice of eviction and no further payment having been paid by the Corporate Debtor, the License Agreement stood automatically terminated on 31.05.2019. No further license fee is payable to the Applicant in terms of Clause 21.3 of the Agreement. Reliance was also placed on letter dated 17.08.2019 written by the Resolution Professional to the Appellant seeking for refund of security deposit. The Adjudicating Authority after hearing the Counsel for the parties took the view that under Clause 21.3 of Leave and License Agreement, the Respondent was not required to handover the possession till the security deposit was refunded and further the Corporate Debtor need not to pay any license fee for the premises from 01.06.2019. It was held that Applicant is not entitled to any payment with respect to license fee after 31.05.2019. The Applicant i.e. Appellant was directed to refund the security deposit to the Respondent after deducting the license fee payable from 01.03.2019 to 31.05.2019. Aggrieved by the order passed by the Adjudicating Authority, this Appeal has been filed.

3. We have heard Shri Jayant Bhushan, Learned Senior Counsel for the Appellant and Shri Rohan Rajadhyaksha, Learned Counsel for Respondent.

4. Learned Counsel for the Appellant submits that the Adjudicating Authority committed error in rejecting the Application of the Appellant for treating the license fee obligation of the Corporate Debtor during CIRP period as CIRP costs. Admittedly, the Corporate Debtor was in use and occupation of the premises and never offered to handover the possession. It is submitted that the Notice dated 30.04.2019 was issued by the Appellant since license fee was not paid for two months. The notice clearly stated that if the amount is not paid within 30 days, the Appellant **will have the right to terminate the Leave and License Agreement**. It is submitted that by subsequent letter dated 28.11.2019 also the Respondent was asked to vacate the premises by 31.12.2019. At no point of time, the Appellant terminated the Leave and License Agreement. The Respondent- Corporate Debtor being in possession of the premises was liable to pay monthly license fees as CIRP costs for which I.A was filed before the Adjudicating Authority. It is submitted that the Resolution Professional had been changing its stand regarding Leave and License Agreement. In letter dated 17.08.2019 written by the Respondent No.1 to the Appellant, it was claimed that the Corporate Debtor has terminated the Leave and License Agreement. Subsequently, the Resolution Professional claimed that the Appellant had terminated

the agreement. In reply to the I.A, stand was taken that by virtue of Notice dated 30.04.2019, Leave and License Agreement stood automatically terminated under Clause 19.5 of the Leave and License Agreement. It is submitted that the Resolution Professional has been challenging its stand to somehow continue to occupy the premises. The Corporate Debtor having been in use of the occupation of premises during CIRP is liable to pay the amount of CIRP costs. The amount of security deposit lying with the Appellant after giving a set-off of the license fee up to 20.06.2019 is only Rs.42,86,632.34. Under the Leave and License Agreement, even according to the case of the Respondent, Leave and License Agreement automatically terminated, it was incumbent on the Respondent to handover the possession of the premises to the Appellant and thereafter claim any refund of security amount, if any. It is submitted that the order of the Adjudicating Authority holding that Respondent is entitled to retain the possession by virtue of Clause 21.3 is wholly erroneous. The Adjudicating Authority has not appreciated the relevant clauses of the Leave and License Agreement.

5. Shri Rohan Rajadhyaksha, Learned Counsel for the Respondent refuting the submissions of the Counsel for the Appellant submits that the Respondent being Resolution Professional of the Corporate Debtor is obliged to protect the assets and properties of the Corporate Debtor. The security deposit lying with the Appellant is assets of the Corporate

Debtor which need to be protected by the Respondent. Learned Counsel for the Respondent heavily relied on Clause 21.3 of the Agreement and submits that since security deposit has not been refunded by the Appellant, the Respondent is entitled to retain the possession of the licensed premises till the security deposit is not refunded. It is submitted that there is automatic termination of the Leave and License Agreement under Clause 19.5 after issuance of 30 days' notice by the Appellant on 30.04.2019. It is submitted that in view of the automatic termination of Agreement, it was incumbent on the Appellant to refund the security deposit and after refund of the security deposit only the Respondent is liable to handover the possession of the premises. It is submitted that although the premises were in possession of the Corporate Debtor during the CIRP but the Appellant is not entitled to claim any license fee during the CIRP period, the Agreement having stood terminated prior to initiation of CIRP. The security deposit lying with the Appellant as against the licensed premises was INR 1,35,08,352/-.

6. We have considered the submissions of the Learned Counsel for the parties and perused the record.

7. There is no dispute with regard to certain facts between the parties which are:

- (i) Leave and License Agreement was entered between the Appellant and Jet on 24.02.2011. Under the Leave and License

Agreement, office premises on 3rd and 4th Floor were licensed to the Jet. Under the Agreement, security for due-performance was to be given by the licensee. In the year 2018, 4th Floor was vacated and security deposited with the Appellant was set-off against the outstanding dues. Jet retained two office premises in 3rd Floor. For proportionate security deposit still lying with the Appellant for 3rd Floor of the premises was INR 1,35,08,352/-. The monthly license fees for the premises in occupation of Jet was INR 28,51,031/-.

(ii) No license fee was paid w.e.f. March 2019 to the Appellant. The CIRP commenced against the Corporate Debtor w.e.f. 20.06.2019.

(iii) Even during CIRP, the office premises at 3rd Floor remained in the occupation of Respondent- Resolution Professional, possession of which were never offered by the Respondent to the Appellant.

8. Learned Counsel for the parties referred to and relied several clauses of the Agreement which has come for consideration in the present Appeal. Clause 19 of the Agreement which deals with 'events of default entitling the licensor to pre-determine the license' and Clause 21 deals with 'effect of termination/ expiration of the Agreement'. Clause 19 and Clause 21.1 to Clause 21.4 are as follows:-

“19. Events of Default entitling the licensor to pre-determine the License:

Notwithstanding anything contained in this Agreement, it is agreed that the following shall be treated as Events of Default ("Event of Default") whereby the Licensor shall be entitled, though not obliged to, predetermine/terminate this Agreement, at any time during the term of this Agreement:

19.1 *if any of the representations made by the Licensee turning out to be materially false or misleading or there be breach of Licensee's Covenants or material breach of any covenants, conditions and stipulations herein contained on part of the Licensee, provided that the Licensee has been given an opportunity to remedy such breach and has failed to do so after expiry of 30 days from the receipt of the written notice in this regard from the Licensor; or*

19.5 *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 the 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.”*

“21. Effects of Termination /Expiration of the Agreement:

21.1 *In the event of pre-determination/termination of this Agreement which has been effected in terms of clauses 19 and 20 hereinabove or in the event of expiration of the Agreement by efflux of time, the Licensee undertakes to ensure that vacant and peaceful occupation of the Licensed*

Premises is handed over to, and becomes available to **the Licensor** (without any damage to the Licensed Premises or Kaledonia) **within 30 days of pre-determination/termination/** expiration of the Agreement. However, during the said period of 30 days, the Licensee shall be liable to pay the License Fee and all other charges payable by the Licensee under this Agreement and otherwise observe and perform all its obligations under this Agreement. Similarly, during such period, the Licensor shall ensure that all the terms and conditions of this Agreement are performed and observed. It is clarified and confirmed by the Parties that the furniture and fittings as listed in Annexure B hereto are the property of the Licensor and the Licensee shall not be entitled to and shall not remove such furniture and fittings from the Licensed Premises.

21.2 In the event of pre-determination / termination / expiration of the Agreement, the Licensor shall, within 60 (sixty days) from such termination, refund the entire amount of the interest free refundable Security Deposit, as received by it from the Licensee under this Agreement. Provided however, that **the Licensor shall be entitled to deduct from the Security Deposit** any unpaid License Fees or other charges / amounts under this Agreement as well as **any amount to be incurred by the Licensor to repair any damage caused to the Licensed Premises except normal wear and tear.**

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 License Fee during the period of occupation. Any such extended occupation by the Licensee, shall not be treated as unauthorized or illegal. Against receipt of such Security Deposit, the Licensee shall ensure that vacant possession of the Licensed Premises is handed over and made available to the Licensor.

21.4 Without prejudice to any other remedy that the Licensor may have against the Licensee under this Agreement or in law, **if the Licensee (ails to ensure that vacant and peaceful possession of tile Licensed Premises is handed over and made available to the Licensor** and to remove from the Licensed Premises all personnel, belongings, installations and merchandise **within 10 (ten) days from the date the pre-determination/ termination of this License becomes effective** in terms of Clause 19 hereinabove, then (in addition to the License Fees payable as per Clause 21.1 hereinabove and the other rights and remedies o fthe Licensor,) **the Licensee shall be liable to pay to the Licensor 1.5 (one and a half) times the daily License Fee payable at that time for every day that the Licensed Premises is not handed over to the Licensor.**”

9. The submission of the Appellant is that the Appellant never terminated the Leave and License Agreement dated 24.02.2011. The Notice dated 30.04.2019 cannot be treated to be notice terminating the Agreement. Paragraphs 3 and 5 of the Notice dated 30.04.2019 which are relevant are as follows:-

“3. Our Client notes that despite this request being shared with you almost two months ago, you have not yet deposited such amounts 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 area0 occupied by you in Kaledonia.

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5. This letter is without prejudice to any of the rights or remedies available (or which may be available) to Our Client, 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.”

10. In paragraph 3 of the Notice, it is clearly stipulated that if the amount is not paid within 30 days, the Appellant will have the right to terminate the Leave and License Agreement. Thus, the Appellant by the notice reserved their right to terminate the Leave and License Agreement and by the said Notice has not expressly terminated the Leave and License Agreement. Further Notice dated 28.11.2019, by which the Respondent was asked to vacate the premises by 31.12.2019 can also not be said to be the notice terminating the License Agreement. Learned Counsel for the Respondent has relied on Clause 19.5 to submits that since Notice dated 30.04.2019 gave a cure period of 30 days to the Respondent to deposit the payment which having not been done, there shall be automatic termination of Leave and License Agreement. It is to be noted that Notice does not refer to Clause 19.5. Further, the first letter written by the Resolution Professional to the Corporate Debtor is dated 17.08.2019 which has been brought on the record by which Resolution Professional has requested the Appellant to refund of the security deposit. In paragraph 4 of the said letter, it was stated that the Company i.e. Jet has terminated the license prior to the

Insolvency Commencement Date. In paragraph 4 of the letter, following has been stated:-

“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.”

11. As noticed above, before the Adjudicating Authority and before this Tribunal, now the case of the Respondent is that there is automatic termination of the Agreement by virtue of the Notice dated 30.04.2019. We proceed to examine the submission of the Counsel for the Respondent on the premise that there is automatic termination of Agreement.

12. Learned Counsel for the Respondent submits that under Clause 21.3 when the licensor does not refund the security deposit, licensee is entitled to continue to occupy the licensed premises until receipt of the entire security deposit amount less deductions. We need to look into the Clause 21 of the Agreement which provides for ‘effects of termination/ expiration of the Agreement’. Clause 21 has to be conjointly read to give meaning and effect to all clauses. Clause 21.1 contains undertaking of the licensee that vacant and peaceful occupation of the licensed

premises be handed over within 30 days of pre-determination/ termination and during the said 30 days' period, licensee shall be liable to pay the license fee in all other charges. Even if the case of the Respondent is accepted that there is automatic termination, under Clause 21.1, it was obligation of the licensee to handover the vacant possession to the licensor. Clause 21.2 oblige that on termination, licensor shall refund the entire amount of the interest free refundable security deposit after deduction of any unpaid license fees or other charges within 60 days. Clause 21.3 on which much emphasise has been given by the Counsel for the Respondent cannot be read in isolation. The initial burden of handing over vacant possession within 30 days of termination is on the licensee. Under Clause 21.2, the licensor is obliged to refund the entire security deposit within 60 days which clearly means that the said question of refund will arise within 30 days from handing over possession by the licensee. In event, within 60 days, the security deposit is not refunded, entitlement under Clause 21.3 shall come in operation. In event, the interpretation of Clause 21.3 as contended by Respondent is accepted Clauses 21.1 and 21.2 shall become otiose and meaningless.

13. In the present case, from the facts and materials on record, it is clear that at no point of time, the Respondent handed over possession of the premises to the Appellant or asked the Appellant to take possession of the premises. Clause 21.3 is relied only for the purpose of

justifying continuation of the Respondent in the premises during the CIRP period and thereafter. According to the case of the Respondent itself, the security amount which is security deposit is related to premises in question before the commencement of CIRP was Rs. 1,35,08,352/-. In the reply filed in this Appeal, the Respondent has further stated that if the rent from 01.03.2019 to 31.05.2019 is deducted, the security with the Appellant shall be Rs.82,89,516/-. In paragraph 8 of the Reply, following has been stated by the Respondent:-

*“8. The Impugned order inter alia directs the Appellant to refund to the Corporate Debtor, the security deposit after deducting license fee payable from March 1, 2019 to May 31, 2019. Adjusting the same, the Appellant is required to refund to the Corporate Debtor a sum of INR 82,89,516 (Indian Rupees eighty two lakh eighty nine thousand five hundred sixteen only) to the Corporate Debtor (**“Security Deposit”**). Accordingly, the Respondent’s advocate addressed a letter dated May 12, 2021 to the Appellant inter alia seeking a refund of the Security Deposit in compliance with the Impugned Order. A copy of the letter from the Respondent’s advocate to the Appellant is annexed hereto and marked as Annexure A-31.”*

14. Admittedly, the monthly rent of the premises is Rs.28 Lakhs and odd. No amount has been paid towards the license fee after March, 2019 on the ground that security amount of Rs.82 lakhs and odd is payable by the Appellant. The Respondent is continuing in the premises occupying the same for last more than three years whereas the security lying with the Appellant at best is avail to cover the license fee for about three months only. The Appellant’s case in the I.A filed before the

Adjudicating Authority was that the occupation of the premises by Corporate Debtor is continuing, hence, the monthly license fee be treated as CIRP costs. The Adjudicating Authority has rejected the Application relying only on the submission of the Respondent that under Clause 21.3 till the security deposit is refunded, the Respondent is entitled to continue in possession. The Adjudicating Authority has committed error in ignoring Clauses 21.1 and 21.3. The licensor under the Agreement is entitled to deduct the amount as provided in Clause 21.3. Thus, refund of security can be effectuated only after licensor determines the amounts which are to be deducted, which deduction can be finalised only after licensor receives the possession of the premises and find out what amount may be incurred by the licensor to repay and damages costs to the licensed premises. The submission raised on behalf of the Respondent is placing the cart before the horse. The Respondent has no right or entitlement to continue in the premises on the ground that security deposit has not yet been refunded without giving any opportunity to the licensor to determine whether as to any security is refundable or not. When we read Clauses 21.1, 21.2 and 21.3 conjointly, it is clear that the licensee is under obligation to handover the possession within 30 days of the date of termination and licensor has time of 30 days thereafter to refund the security deposit. When the licensee has not handed over possession, there is no occasion to determine whether any amount is to be given back to the licensee or not.

15. Present is a case where the Resolution Professional has continued in the possession of the premises and exposed the Corporate Debtor for liabilities to pay license fees during the CIRP period which could be CIRP costs. The mere fact that CIRP has triggered and Moratorium has been imposed does not absolved the Corporate Debtor to pay for premises and facilities which is being enjoyed by the Corporate Debtor during the CIRP period. Sufficient ground has been made out by the Appellant in this Application to treat the license fees of the premises to be treated as CIRP costs. The Adjudicating Authority erroneously relying on Clause 21.3 alone has justified the continuance of occupation of the Respondent in the premises. The Adjudicating Authority directed for refund of security without any direction to the Respondent to handover the possession of the premises. The premises which was in occupation of the Corporate Debtor is a commercial premises and the Appellant have been deprived for the use of the premises for long period without any justifiable reason.

16. We have been informed by the Counsel for the parties at Bar that the Resolution Plan with regard to Corporate Debtor has been approved by the Adjudicating Authority by order dated 22.06.2021. By approval of the Resolution Plan, the CIRP period has come to an end and after 21.06.2021 still the premises are in occupation of the monitoring professional. It is not the case of the Respondent that any amount towards the license or damages have been paid or determined. On a

pointed query, Learned Counsel for the Respondent submitted that no amount towards any payment to the leave and license fees of the premises have been contemplated in the Resolution Plan. Thus, Resolution Plan does not deal with any entitlement to the Appellant. Resolution Plan having been approved with no provision for making any payment to the Appellant since the Resolution Professional never accepted the amount as CIRP costs which was also approved by the Adjudicating Authority on 18.03.2021 by the impugned order erroneously. We, thus, are of the view that no direction in this Appeal can be given for payment of leave and license fees to the Appellant during the CIRP period even though we are satisfied that the Appellant was entitled for determination that monthly fees payable to the Appellant under the Service Agreement should have been treated as part of the CIRP costs. We, thus, dispose of this Appeal with following directions:-

- (i) The impugned order dated 18.03.2021 is set aside.
- (ii) It is held that no monthly fees shall be payable to the Appellant during the CIRP period.
- (iii) The Respondent is directed to handover the vacant possession of the premises within 15 days from today.
- (iv) The Appellant is at liberty to take appropriate steps for its claim of license fees subsequent to 22.06.2021 (end of the CIRP period).

(v) After possession of the premises is handed over to the Appellant by the Respondent, the Appellant shall communicate within 30 days to the Respondent with regard to refund of security deposit, if any.

The parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

[Shreesha Merla]
Member (Technical)

New Delhi
Anjali