(2014) 02 BOM CK 0045

Bombay High Court

Case No: Company Petition No. 496 of 2013

Indiabulls Properties Pvt. Ltd.		APPELLANT
	Vs	
Treasure World Developers Pvt. Ltd.		RESPONDENT

Date of Decision: Feb. 28, 2014

Acts Referred:

- Companies Act, 1956 - Section 433 433(e) 434 434(1)(a)
- Contract Act, 1872 - Section 73 73 74 74 75
- Wealth Tax Act, 1957 - Section 2(m)

Citation: (2014) 2 ABR 766 : (2014) 4 BomCR 76 : (2014) 121 CLA 242 : (2014) 183 CompCas 491

Hon'ble Judges: G.S. Patel, J

Bench: Single Bench

Advocate: S.H. Jagtiani, Mr. Saket Mone, Ms. Anshula Grover, instructed by M/s. Vidhii Partners, for the Appellant; Z.T. Andhyarujina, Bhoomin Badani instructed by K. Ashar and Co., for the Respondent

Judgement

G.S. Patel, J.

The respondent-company, Treasure World Developers Pvt. Ltd. ("Treasure World") took premises on leave and license from the petitioning-creditor, Indiabulls Properties Pvt. Ltd. ("Indiabulls"). The leave and license agreement has what is commonly known as a "lock-in period", a contractually agreed minimum tenure. Treasure World vacated the premises before the end of that lock-in period. Indiabulls claims it is entitled to claim the license fee for the remainder of that lock-in term. It says this is a "debt" within the meaning of Sections 433 and 434 of the Companies Act, 1956. Treasure World contends that it is not; that the claim, if there is one, is only in damages; that, therefore, needs adjudication, absent which there can be said to be no "debt" due to Indiabulls from Treasure World. This is the matter in issue. The facts are largely undisputed. Indiabulls owns a substantial property of some 39,000 and odd sq mts. in Lower Parel, now a significant business hub in Mumbai. This was once Jupiter Mills, one of Mumbai''s many textile mill lands. Indiabulls has constructed two towers on this land. Tower 1 is ground and 18 floors; Tower 2 (with two wings 2A and 2B) is ground and 20 floors. Together, these towers are known as "One Indiabulls Center".

2. On 14th June 2011, Treasure World took premises on leave and license from Indiabulls. These are commercial premises on the 11th floor of wing 2B of One Indiabulls Center''s Tower 2. The area of the premises is 6,209.89 sq ft. The leave and license agreement was dated 14th June 2011. It was registered. It provided for a monthly license fee of Rs. 10,86,731/-, plus maintenance and electricity charges on actuals. The term of the leave and license agreement was five years (60 months), commencing 15th June 2011. The agreement had a 36-month (three year) lock-in period. It also provided that should Treasure World terminate the agreement before the end of that three-year lock-in period, it would incur a contractual liability to pay Indiabulls the license fee, car parking fee and maintenance charges for the remainder of that lock-in period. There is also a separate provision for liquidated damages. These are the provisions of clauses 3.1, 13.2 and 9.9 of the leave and license agreement, and their interpretation and effect lie at the heart of the present dispute. I will consider these clauses and their implications presently.

3. Treasure World paid Indiabulls a three-part refundable interest-free security deposit: Rs. 65,20,384/- as six months'' license fee; Rs. 2,79,445/- equivalent to three months'' common area maintenance charges; and Rs. 5,12,316/- equivalent to two months'' electricity and HVAC charges. These three security deposits were to continue during the tenure of the leave and license agreement. They were to be refunded when Treasure World returned possession. Indiabulls was entitled to adjust this security deposit against amounts contractually due from Treasure World.

4. Indiabulls claims that Treasure World was persistently in default in paying the license fee and other charges. Indiabulls had to send repeated reminders for payment. On 29th September 2012, Indiabulls sent Treasure World a notice (Exhibit "E" to the petition), demanding payment of the license fee and service tax from June through September 2012; maintenance charges from July through September 2012; and electricity charges from July 2012 onward. Indiabulls also demanded interest on all these claims. In default, it threatened termination of the agreement.

5. On 29th October 2012, Treasure World emailed Indiabulls saying it would vacate the premises in question on 31st October 2012. It asked for a grace period for packing and moving. There followed, between 31st October 2012 and 12th December 2012, some email correspondence between the parties. This relates principally to the matter of Treasure World vacating the premises.

6. On 14th January 2013, Indiabulls wrote to Treasure World demanding payment, inter alia, of the license fees and other charges for the remainder of the lock-in

period. That letter also contains a demand for liquidated damages in the amount of Rs. 32,75,923.96. After adjusting Treasure World''s security deposit, but including the claim for liquidated damages, Indiabulls demanded payment of Rs. 2,54,11,397.94. This was not, it must be noted, a demand under Sections 433 and 434 of the Companies Act, 1956.

7. Treasure World replied on 4th February 2013. It denied all liability. It said that there were mutual discussions and an oral agreement that superseded the written leave and license agreement, and that both parties had agreed to abandon the terms of the written contract. But Treasure World did not stop there. In its reply of 4th February 2013, it also said that the lock-in clause (not the liquidated damages clause) was illegal or voidable, and that it had not terminated the agreement at all: it had merely vacated the premises.

8. In its response of 28th February 2013, Indiabulls denied Treasure World''s contentions and reiterated its demand. This letter was issued as a statutory notice under sections 433 and 434 of the Companies Act, 1956. The petition was thereafter filed and served. Treasure World filed an affidavit in reply, to which Indiabulls filed a rejoinder.

9. I have heard Mr. Jagtiani for Indiabulls, the petitioning-creditor, and Mr. Andhyarujina for Treasure World, the respondent-Company. They have each relied on the terms of the leave and license agreement. As some of these terms are material, they are set out below.

10. Clause 3.1 of the Agreement reads thus:

3 Grant of License

3.1 License Term:- The Licensor hereby grants a leave and license to occupy and use the Licensed Premises for a period of 60 (sixty) months ("The License Period") commencing from License Commencement Date, i.e., 15-06-2011 and expiring on the completion of 60 (sixty) months from the License Commencement Date i.e. 15-06-2011 or sooner termination in accordance with clause 13 of this Agreement. However there shall be a 36 (thirty-six) months Lock in period for the Licensee during which period the Licensee shall not be permitted to terminate the Leave and License Agreement.

11. The relevant termination clause is 13.2:

13 Termination

13.1 It is hereby agreed that save and except for the Licensor''s right to terminate the agreement under clause 12 of this Agreement, the Licensor shall not be entitled to terminate this Agreement during the License Period.

13.2 If the Licensee desires to terminate this Agreement before the expiry of the Lock in Period or the Licensor is compelled to terminate this Agreement before the expiry of the Lock in Period for defaults of the Licensee not cured within a period of one month as provided in clause 12, then the Licensee shall be required and liable to pay to the Licensor the License Fee, Car Parking Fees, Maintenance charges for the entire un-expired Lock in Period.

12. Two other clauses are material. Clause 9.9 deals with liquidated damages, and clause 15.2 with amendments to the agreement. This is how they are cast:

9. Covenants of the parties

...

9.9 Upon the expiry of this license or on sooner determination/termination thereof the Licensee shall on its own remove all articles and things belonging to the Licensee, or its employees and hand over and/or deliver the vacant, quiet and peaceful charge of the Licensed Premises without any claim or hindrance and the Licensor shall refund of the Security Deposits subject to deduction of outstanding dues, if any, payable by the Licensee, as provided herein in this Agreement within 15 (fifteen) days from the date of possession. In the event the Licensee fails to hand over and/or deliver the vacant, quiet and peaceful charge of the License Premises on the expiry or sooner determination of the Agreement although the Licensor is ready and willing to refund the Security Deposits to the Licensee at the time the Licensee is unable to hand over possession of the Licensed Premises and the Licensee shall be liable and shall pay to the Licensor as and by way of liquidated damages double the amount of License Fee per day together with double the amount of maintenance charges and additional car parking charges per day for each day of delay in vacating the Licensed Premises. Such condition shall be without prejudice to any other legal rights/remedies available to the Licensor. During this period, the Licensee shall also be liable to make all other payments payable by the Licensee under this Agreement. In the event of the Licensor not refunding the Security Deposits upon the expiry or sooner determination of the License but not at the time of termination during the lock in period, the Licensee shall be entitled to use the Licensed Premises without payment of any License Fee, however other charges i.e. maintenance charges and additional car parking charges shall be payable on actual under this Agreement till the refund of the Security Deposit, in such event the Licensor shall also be liable to pay the Licensee interest calculated at 18% p.a. on the Security Deposits calculated from the date when the said Security Deposits because due till the date of actual payment.

15 Entirety

15.1 This Agreement, schedules and the annexures attached to this Agreement together with all the documents and agreements to be executed pursuant thereto constitute the entire agreement between the parties with respect to the subject matter of this Agreement.

15.2 This Agreement shall not be amended, altered or modified except by an instrument in writing and signed by both the parties. Where the amendment, alteration, modification is done by e-mail or fax or any other recognised mode (whether electronic, digital or optic), the same shall immediately thereon be reduced in writing and signed by both the parties.

(Throughout, the emphasis is mine, not in the original.)

13. Mr. Jagtiani restricts his claim to, first, the arrears of license fees and other charges and, second, the license fees and charges for the unexpired term of the lock-in period. This, he submits, is in any event more than the statutory minimum, and Treasure World has neglected to pay it without just cause. Clause 13.2 gives Treasure World the option of a no-fault exit; but that option comes at a price. Its plain meaning, strengthened by clause 3.1, is that Treasure World agreed to be bound to a three-year term. It was obliged to pay the monthly license fees, maintenance charges and other dues for that period. It could not pay less, even if it quit before the three-year term ended. Indiabulls was well within its rights to adjust the security deposit against its claim, and it has done so. The remainder of the lock-in period is 19 months and 14 days, from 1st November 2012 to 14th June 2014. Treasure World must be held to the contract it signed. This is not in the nature of damages. Liquidated damages are separately provided in clause 9.9. This is a debt in an ascertained sum, and it is due now. Treasure World not having paid a legitimately due debt, and not having shown good cause for that non-payment, it must be deemed to be unable to pay its debts within the meaning of Section 434(1)(a) of the Companies Act, 1956.

14. Mr. Andhyarujina places his case at different levels. To begin with, he reiterates the stand taken in Treasure World''s correspondence. Its email of 29th October 2012 was not, says Mr. Andhyarujina, a termination at all. It was simply information from Treasure World to Indiabulls that, following certain conversations, it was surrendering possession. Treasure World''s liability, if there was one, to pay the license fees, etc., for the remainder of the lock-in period, was triggered only by a termination. Absent a termination, it incurred no liability at all. An agreement to surrender or take back possession is not, Mr. Andhyarujina says, equivalent to a termination. In any event, there is, according to him, material in the 29th October 2012 prima-facie indicative of an agreement or understanding to rescind the entire contract.

15. This is an argument singularly lacking in appeal. We are here concerned with a leave and license agreement. There are, as is well-established, two primary legal components to any such agreement: the permission or license to use and occupy without creating any rights in the licensee in the property in question, and the licensee''s obligation to pay the licensor the stipulated license fee. Possession is, therefore, the sine-qua-non of any such agreement. The surrender of possession cannot but be a termination of the agreement, whether these words are used or

not. Without possession, there is no question of any leave and license agreement of immovable property.

16. The argument is also self-defeating. If, as Mr. Andhyarujina says, there is no termination, then its obligation to pay the license fee must continue till the expiry of the entirety of the term of the agreement. Treasure World cannot possibly have it both ways: an agreement that subsists but without the attached financial obligation. This submission envisions an eviscerated contract, one that subsists on paper but carries no obligation. It is rather like the pushmi-pullyu from Dr. Doolittle, a creature with two heads pulling in opposite directions at once.

17. Mr. Andhyarujina''s next submission, that the leave and license agreement was modified by an oral contract, is one that need not detain us. Of this, there is, of course, no evidence at all other than Treasure World''s email of 29th October 2012 supposedly "in continuation of personal meetings and telephonic discussions" saying that it would vacate the premises at the end of that month. Without further particulars, this is at best indicative of a prior termination by Treasure World; it cannot evidence a supervening oral agreement. I also cannot see how Treasure World can rely on or plead an oral agreement in variation of the terms of a written contract. In any event, the terms of the contract themselves are unambiguous: clause 15.2 required all modifications or amendments to be in writing and signed by both parties. There is no such written, signed modification.

18. It is of some concern that any corporate entity should take a stand of the kind that Treasure World does. It has all manner of insidious implications: that a company may persuade another to enter into a high-value transaction on assurances solemnly made with no intention of honouring them; that the party to whom these promises are made must then be driven to a civil proceeding to establish its claim. But establish what, exactly? The agreement is undisputed. Its terms are known. The company''s premature exit is not denied. There is no material to evidence any oral understanding and, in any case, the contract forbids any such oral understanding[1]. What Treasure World therefore asks Indiabulls to prove is the negative -- i.e., was there not an oral understanding to abandon the written contract? I do not see how Indiabulls can possibly do this, or even why it should be asked to, especially since Treasure World has been unable to produce anything to indicate that this state of affairs ever existed. It seems to me highly improbable that, had there been any such understanding, it would not have been recorded. Treasure World had multiple opportunities to do this. Received wisdom has it that such a recording of abandonment would and should have been done at the first such opportunity, and that the record must so show. What Treasure World''s email of 29th October 2012 is merely interesting; what it does not say is crucial.

19. Treasure World''s reply of 4th February 2013 to Indiabulls'' letter of 14th January 2013, is, to my mind, precisely the kind of illegitimate defence that no court should countenance. It is one thing to say, as Treasure World also did, that the amount

demanded is not a ''debt'' within the meaning of the Companies Act, 1956, either because it is indistinguishable from damages or otherwise. That is a legal argument, one that requires consideration. It is quite another thing to say that every clause that provides for a lock-in period is per se illegal, void, or voidable and can never be recovered in any proceeding. That, as Mr. Jagtiani says with justifiably righteous indignation, is commercial deceit. The two parties were not of unequal bargaining strength. Treasure World knew precisely what it was committing itself to when it signed the agreement. If the case in its letter of 4th February 2013 is to be accepted, it can only mean that Treasure World signed a contract it knew to be illegal. The world of commerce and corporate transactions may sense legal security in the linguistic opacity of legal documents, but underlying this is a fundamental premise that is the bedrock of all contract law: a party will, normally, be held to the bargain it struck and will not be permitted to resile from it. The exceptions to this are well-known and clearly defined. This generalized so-called ''illegality'' of a lock-in clause is not among them. In fairness, Mr. Andhyarujina did not even attempt to develop this line, and quite rightly. I have only dealt with it because it has been so emphatically stated and pleaded.

20. Indiabulls'' claim for ''liquidated damages'' is wholly distinct. It arises only under clause 9.9,[2] one that provides for liquidated damages. But it does not operate where there is a termination by the licensee before the end of the lock-in period. It comes into effect only when the licensee has overstayed his welcome: when it has not vacated, though bound to do so, though the licensor is ready to refund the security deposits. Indiabulls'' claim for liquidated damages is for a period from 1st November 2012 to 11th December 2012. It stands apart from Indiabulls'' claim for arrears (for the period from June 2012 to 31st October 2012) when Treasure World was undeniably in possession, and, too, from Indiabulls'' claim for license fees and other charges from 1st November 2012 to the end of the lock in period, 14th June 2014.

21. There are, therefore, three distinct claims that Indiabulls makes: Claim 1 is for a total of Rs. 61,16,648.25 as arrears for June 2012 to 31st October 2012, the time Treasure World used the premises as a licensee but did not pay the license fees and charges[3]. Claim 2, not pressed, is for Rs. 32,75,923.96 as liquidated damages for the period 1st November 2012 to 11th December 2012[4]. Claim 3 is for Rs. 2,33,30,970.73 as the license fee and maintenance charges for the unexpired term of the lock-in period from 1st November 2012 to 14th June 2014[5].

22. Claim 1 is soon despatched. It was undoubtedly payable by Treasure World. It is, however, in the aggregate amount of Rs. 61,16,648.25, lower than the security deposit of Rs. 73,12,145/-. Once the latter is adjusted, Claim 1 is fully paid. If the other two claims are also not legally due, then there is no debt at all; indeed, it is Indiabulls that would be indebted to Treasure World, as it would have to refund the balance security deposit after adjusting the security deposit. Claim 2, for liquidated

damages, is also not a debt. By its nature, it must be first adjudicated. That, as we shall see, is now well settled[6]

23. That leaves Claim 3, for the unexpired term of the lock in period. It is this claim that tilts the balance. For, if that, too, is not a debt, as Mr. Andhyarujina contends, then there is no debt at all and the petition must be dismissed.

24. Mr. Jagtiani relied on the decision of a Division Bench of this court in Lonza India Pvt. Ltd. v Corporate Management Council of India Pvt. Ltd. [7] The appeal came up from a conditional order of admission of the single Judge[8]. The learned single Judge held that a claim for the license fee and charges for the entirety of a lock-in period is not a claim in damages. He ordered the respondent-company before him to make a deposit within a prescribed time, following which the petitioner would file a suit; and, in default, made an order of admission and advertisement. The respondent-company appealed. The appeal was allowed. Mr. Jagtiani relied on paragraph 4 of the decision of the Division Bench. There, the court held that it was not possible to say that the only meaning of the relevant clause/s was that the licensee-appellant became liable to pay for the entire lock in period even if the license period had not commenced. It was possible, the Court said, to construe the relevant clause as meaning that if the license was terminated after the lock-in period began, then the licensee was bound to pay the license fee for the remainder of that term. Two phrases in the clause determined the Court''s opinion. The first was that for the lock-in period liability clause to begin, the termination should have been before the end of that period; i.e., the lock-in period should have begun. The other was the use of the term "sum equal to the balance period left of the lock-in period". This, the Division Bench said, could not possibly mean the entirety of the lock-in period, but only so much of it as remained. In Lonza, the termination was before the licensee took possession at all. The Division Bench held that a possible view was that for such a clause to operate, the lock-in period must have commenced and the claim must be for the remainder of the term. However, the Division Bench also said that the contrary view of the learned single Judge was equally plausible; and since two views were possible, the learned single Judge ought not to have ordered winding up. The Court said:

4. ... This should not be understood to say that this is the only interpretation possible of clause 7. The other interpretation accepted by the learned Single Judge may also be possible. However, in our opinion, as the other interpretation is also possible and this was not a case where winding up petition can be admitted. In our opinion, when there is bonafide dispute on the interpretation of the terms or the words in the agreement, it would have been appropriate for the learned Single Judge not to entertain the company petition and leave the parties to their remedy under the Civil Law. In our opinion, remedy of filing winding up petition cannot be allowed to be used in a case where it is possible to take different view than the one propounded by the petitioner. In our opinion, the learned Single Judge, therefore,

was not justified in entertaining the petition.

25. Mr. Jagtiani submits that his case is on even firmer ground. The lock-in period had commenced, and that is indisputable. The termination was before the expiry of that lock-in period. The claim is for the remainder of that term. All the elements contemplated by the Division Bench to accord with its interpretation exist. It is not, he says, possible to hold otherwise.

26. Mr. Andhyarujina, too, relies on this very paragraph, as also a portion of the previous paragraph where the Division Bench noted that the learned single Judge had assumed that the claim was in an amount of liquidated damages and had reduced the amount ordered to be deposited. Mr. Andhyarujina''s submission is that every such claim for license fees for the remainder of a lock-in period is nothing if not in the nature of liquidated damages. The license fee is the monthly consideration for the right to use and occupy. It is due month-to-month against actual use and occupation. If there be no use or occupation of the premises, then no services are being rendered; there is no consideration; and the claim is, resultantly, nothing but a claim for damages. That being so, it must be adjudicated. Absent an adjudication, there is no debt.

27. In support of this submission, he relies on a Division Bench decision of the Delhi High Court in Tower Vision India Pvt. Ltd. Vs. Procall Private Limited, . That decision dealt with four separate company petitions for winding up. Some had claims for liquidated damages expressly so stated. One, Company Petition No. 302 of 2009, was similar to the present case. The decision must, therefore, be carefully parsed; for it is only that portion of the decision that deals with the claim for license fees for the remainder of the lock-in period that can be said to be of relevance to the present case. Now Company Petition No. 302 of 2009 before the Delhi High Court was also a case of a leave and license agreement, a lock-in period (of 33 months) and a claim for the license fee for the remainder of that term after the licensee terminated the agreement. The question before the court was whether the amount representing the lock-in period "can be treated as ''debt'' for the purposes of a company petition" for winding up[9].

28. Before I proceed further, I must note the circumstances in which Tower Vision came to be decided. On 2nd November 2010, a learned single Judge of the Delhi High Court held, in Manju Bagai Vs. Magpie Retail Ltd., that a claim for license fees for the remainder of a lock-in period specifically expressed as liquidated damages was not a ''debt'' sufficient to order winding up. The clause in question in Manju Bagai specifically said that "liquidated damages from tenant at the rate of rent for the balance period of 3 years'' lock-in period" were recoverable by the landlord/licensor. Khanna, J said that he was not inclined to accept the petitioner''s contention that this clause imposed liquidated damages and was not a penalty clause as there was nothing to show that it was a genuine pre-estimate of damages.

29. On 31st October 2011, another learned single Judge of the Delhi High Court expressed his reservations about the correctness of Manju Bagai. He made a reference to the Division Bench for an authoritative pronouncement, in these terms:

i) Whether in a contract for rendering of service/use of a site, a stipulation to pay an amount for the ''lock-in'' period is an admitted debt within the meaning of Section 433(e) of the Companies Act, 1956 or whether the same is in the nature of damages?

30. Tower Vision thus took up the issue, clubbing the matter in which the reference was made with three others, including the one in which there was, expressly, a claim for license fees for the unexpired term of the license period.

31. The Division Bench of the Delhi High Court reviewed the legal position regarding ''debts'' u/s 433(e) of the Companies Act, 1956. It summarized the findings in Manju Bagai where a winding up petition was dismissed.

(a) Whether a given clause is genuine covenanted pre-estimate of damages or is a penalty is case-specific. In Manju Bagai, no circumstances were pleaded to show that the lock-in period is a genuine pre-estimate of damages that the petitioner-claimant was likely to suffer on account of a premature exit during the lock-in period. It could not, therefore, be said affirmatively whether the claim was or was not in the nature of a penalty or a genuine pre-estimate of damages.

(b) To prove that the claim is a genuine pre-estimate of damages, specific evidence is needed.

(c) The doctrine of mitigation of damages may also apply in such cases, even if the tenant/licensee is in breach by exiting prematurely. It is then for the licensor to show that he has taken steps to mitigate his loss.

32. The Tower Vision court then considered Chapter VI, Sections 73 to 75 of the Contract Act. A party is entitled to compensation for any loss or damage suffered by reason of a breach of contract. That loss must be one that naturally arises in the usual course of things, or which the contracting parties knew, at the time when they made the contract, to be the likely result. Remote or indirect losses or damages are not recoverable. A mere breach, absent proof of loss or damage, does not entitle the other party to claim damages. The Court said:[10]

When there is a breach of contract, the party who commits the breach does not eo instant i.e. at the instant incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. No pecuniary liability thus arises till the Court has determined that the party complaining of the breach is entitled to damages. The Court in the first place must decide that the defendant is liable and then it should proceed to assess what the liability is. But, till that determination, there is no liability at all upon the defendant. Courts will give damages for breach of contract only by way of compensation for loss suffered and not by way of punishment.

33. Section 74 provides for a genuine pre-estimate of damages. If this sum be reasonable, this is the maximum to which the aggrieved party may be entitled, provided it is not penal in nature. This merely dispenses with proof of actual loss or damage. It does not, however, justify the award of compensation when, consequent on such breach, no legal injury at all has resulted.

34. The Division Bench then considered the law enunciated in Union of India (UOI) Vs. Raman Iron Foundry, . Four decades after it was delivered, that decision is still a locus classic us. In Indian law, Raman Foundry says, there is no qualitative difference between liquidated damages and unliquidated damages. All that Section 74 does is to eliminate the nice distinctions between contractual provisions for liquidated damages and those in the nature of a penalty, or in terrorem clauses. The latter are not enforced. The amount of liquidated damages is only the outer limit of what is recoverable. It is not automatically guaranteed as the claimant''s entitlement. It does not, eo instanti, create any pecuniary liability or obligation, or a corresponding entitlement to the claimant. The Supreme Court cited with approval the decision of Chagla, CJ in Iron and Hardware (India) Co. Vs. Firm Shamlal and Bros., a decision that has also stood the test of time:

In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.

(emphasis supplied)

35. Tower Vision also notes the discussion in Raman Foundry on when a debt is said to be due, and when it is said to be owing.

Now a sum would be due to the purchaser when there is an existing obligation to pay it in present. It would be profitable in this connection to refer to the concept of a ''debt'', for a sum due is the same thing as a debt due. The classical definition of ''debt'' is to be found in Webb v. Stenton [1883] 11 Q.B.D. 518 where Lindley, L.J., said: "... a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation". There must be debitum in praesenti; solvendum may be in praesenti or in future -- that is immaterial. There must be an existing obligation to pay a sum of money now or in future. The following passage from the judgment of the Supreme Court of California in People v. Arguello [1869] 37 Cal 524 which was approved by this Court in Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta, clearly brings out the essential characteristics of a debt:

Standing alone, the word ''debt'' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is debt due.

(emphasis supplied)

36. The Division Bench of the Delhi High Court then considered the Supreme Court decision in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., In particular, it cited paragraph 65:

But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach ...

37. Thus, where the claim is for liquidated damages, this must be established in a court. It is, as Chagla, CJ held, the fiat of the court that makes it a debt due. A court must assess whether the claim, styled though it may be as liquidated damages, is in the nature of a penalty or is a genuine pre-estimate of damages. It is only after this judicial enquiry that a court will decide whether or not to award liquidated damages. The court may, possibly, require proof of loss and also, possibly, evidence of steps taken in mitigation of that loss, though this may not be necessary where it finds that the claim is a genuine pre-estimate of damages. A provision for liquidated damages is only the outer limit beyond which a claim cannot be made.

38. The Tower Vision court then cited the decision of the learned single Judge of this court in E-City Media Private Limited a Private Limited Company Vs. Sadhrta Retail Limited a Public Limited Company, There, too, the claim was for ''losses and damages'' and a minimum guaranteed amount. This was held to be in the nature of damages and hence not a debt that could found a petition for winding up. E-city Media in turn cited the decision of the Karnataka High Court in Greenhills Exports (Private) Limited, Mangalore and Others Vs. Coffee Board, Bangalore, where, on a

comprehensive review of the law, the Court held:[11]

(i) A "Debt" is a sum of money which is now payable or will become payable in future by reason of a present obligation. The existing obligation to pay a sum of money is the sine qua non of a debt.

"Damages" is money claimed by, or ordered to be paid to; a person as compensation for loss or injury. It merely remains a claim till adjudication by a court and becomes a "debt" when a court awards it.

(ii) In regard to a claim for damages (whether liquidated or unliquidated), there is no "existing obligation" to pay any amount. No pecuniary liability in regard to a claim for damages, arises till a court adjudicates upon the claim for damages and holds that the defendant has committed breach and has incurred a liability to compensate the plaintiff for the loss and then assesses the quantum of such liability. An alleged default or breach gives rise only to a right to sue for damages and not to claim any "debt". A claim for damages becomes a "debt due", not when the loss is quantified by the party complaining of breach, but when a competent court holds on enquiry, that the person against whom the claim for damages is made, has committed breach and incurred a pecuniary liability towards the party complaining of breach and assesses the quantum of loss and awards damages. Damages are payable on account of a fiat of the court and not on account of quantification by the person alleging breach.

(iii) When the contract does not stipulate the quantum of damages, the court will assess and award compensation in accordance with the principles laid down in Section 73. Where the contract stipulates the quantum of damages or amounts to be recovered as damages, then the party complaining of breach can recover reasonable compensation, the stipulated amount being merely the outside limit.

(iv)...

(v) Even if the loss is ascertainable and the amount claimed as damages has been calculated and ascertained in the manner stipulated in the contract, by the party claiming damages, that will not convert a claim for damages into a claim for an ascertained sum due. Liability to pay damages arises only when a party is found to have committed breach. Ascertainment of the amount awardable as damages is only consequential.

39. On this assessment, the Division Bench of the Delhi High Court affirmed the pronouncement of law in Manju Bagai and dismissed, inter alia, Company Petition No. 302 of 2009, the one closest on facts to the case at hand.

40. This, then, is how this aspect of the law unfolded: A learned single Judge in February 2009 in Lonza India proceeded on the footing that a claim in liquidated damages was a ''debt'' for the purposes of Section 433(e). In July 2009, the appeal court reversed the single Judge. It noted the approach of the court below, but it did

not in terms say that a claim for liquidated damages is never a debt within the meaning of Section 433(e). The pivotal fact in the appellate decision was that the claim for license fees was for the entirety of the lock-in period though it had not commenced. Since an alternative view was plausible, the appeal court said, the single Judge ought not to have admitted the winding up petition. There can be no doubt at all that the Lonza India appellate decision lays down no law at all. It is certainly not an authority for the proposition that a claim of this nature, for license fees for the unexpired portion of a lock-in period, is a debt properly so-called for the purposes of Section 433(e) of the Companies Act, 1956.

41. In November 2009, another single Judge of this Court took the view in E-City Media that a claim for liquidated damages can never be a ''debt'' for the purposes of Section 433(e) of the Companies Act, 1956. The two Lonza India decisions were not placed before the E-City Media court. It is doubtful whether, since the Lonza India decisions were narrowly decided on the facts of that case, they would have altered the E-City Media decision. E-City Media did, however, cite Greenhills and Saw Pipes; neither was noticed in the two Lonza India decisions.

42. A year later, in November 2010 came the decision in Manju Bagai of a learned single Judge of the Delhi High Court. It was doubted in October 2011 and referred to a Division Bench. The decision of the Division Bench in Tower Vision references E-City Media, Greenhills, Saw Pipes, Raman Foundry, and Firm Shamlal Brothers.

43. Are the decisions of E-City Media and Tower Vision (to the extent it affirms Manju Bagai) in any way distinguishable to make them inapplicable to the present case? The relevant contractual in E-City Media was clause 8(a)(A):

8(a)(A) In case Sadhrta Retail Pvt. Ltd. fails to make payment or if the cheque is dishonoured for any reason whatsoever of the Royalty/MG amount for a period of any one month during the term of this Agreement then E City Media shall be at liberty to terminate this Agreement after giving 7 days'' notice and dispose of the rights herein granted to Sadhrta Retail Pvt. Ltd. in any manner as E City Media may deem fit and proper and in such an event Sadhrta Retail Pvt. Ltd. shall make good the losses and damages which may be suffered by E City Media. On occurrence of such an event, Sadhrta Retail Pvt. Ltd. shall be liable to pay to E City Media on demand the entire Royalty/MG amount mentioned in this Agreement with interest at 18% per annum.

(emphasis supplied)

44. Clearly, this was a case in damages. The clause says so. The provision for payment of "Royalty/MG amount" is, as the Court held, a provision for liquidated damages, stemming from the respondents'' default in paying royalty and the minimum guaranteed ("MG") amount.

45. In Manju Bagai, the Court was concerned with clause 5:

5. That this Agreement to Lease shall not be cancelled before the lock-in-period of 3 years. A monthly rent will be liable to be enhanced by 15 % of the last paid rent after every 3 years. In case Tenant surrenders the Unit/Shop/Space before the lock-in-period then the Landlord/owner will be entitled to the liquidated damages from Tenant at the rate of rent for the balance period of 3 years lock-in-period. To illustrate, if Tenant surrenders the Unit/Shop/Space, after 6 months from the date of offer of the possession of the said Unit/Shop/Space, then he will have to pay the liquidated damages at the rate of rent for the period of remaining 30 months.

(emphasis supplied)

46. Here, too, is the specific use of the phrase ''liquidated damages''. But the terminology used is irrelevant. What must be considered is the nature of the claim. What is the present Claim 3, the claim for license fees and charges for the unexpired term of the lock-in period, if not an opportunity cost? asks Mr. Andhyarujina. And what is an opportunity cost claim if not one in damages? There is, he says, simply no escaping the legal inevitability of such a claim.

47. Mr. Jagtiani responds by pointing out that the Tower Vision Court also cited the decision of the Supreme Court in Kesoram Industries & Cotton Mills Ltd. vs. Commissioner of Wealth-Tax (Central), Calcutta.[12] This decision, and not Raman Foundry, he submits, deals with what constitutes a debt; Raman Foundry was more directed to an analysis of when a debt can be said to be due. Clause 3.2 of the present leave and license agreement is, Mr. Jagtiani says, a liability or a debt contingent upon a single event: termination by the licensee, Treasure World. Clause 3.2 uses the words "liable to pay". That is a present contingent liability payable in futuro. A company petition can always be brought on such a liability, provided the contingency has happened. This aspect -- whether such a claim is in the nature of a contingent debt -- was not considered in Tower Vision.

48. As both Mr. Jagtiani and Mr. Andhyarujina cited Kesoram but commended contesting readings of it, it is perhaps best that I extract the relevant passages to which they referred. The paragraph numbers in the following extract do not appear in the ITR but in the report on Manupatra. I have used this report for convenience. The text in all reports is identical. Emphasis, wherever it is shown, is mine.

22. The problem presented can satisfactorily be solved by answering two questions, namely, (1) what does the expression "debt owed" mean? and (2) when does the liability to pay income tax and super-tax under the income tax Act become a debt owed within the meaning of that expression?

23. If we ascertain the meaning of the word "debt", the expression "owed" does not cause any difficulty. The verb "owe" means "to be under an obligation to pay". It does not really add to the meaning of the word "debt". What does the word "debt" mean? A simple but a clear definition of the word is found in Webb v. Stenton 1883.11 Q.B.D. 518 wherein Lindley L.J. said:

... a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, debitum in praesenti, solvendum in future.

...

31. This question fell to be decided again in Dawson v. Preston (Law Society, Garnishee) [1955] 3 All. 318 The question there was whether a sum representing damages paid to the legal aid fund could be attached by a creditors of a legally aided plaintiff. At the time when the garnishee order was sought to be issued, a part of the decree amount was with the Law Society, subject to any charge conferred on the Law Society to cover the prescribed deduction which remained to be quantified, e.g., deduction for the taxed costs of the action. The Court held that there was an existing debt although the payments of the debt was deferred pending the ascertainment of the amount of the charge in favour of the Law Society. Ormerod J., observed:

... that is merely a question of ascertaining the debt which has to be paid over to the assisted persons and does not prevent that debt from being an existing debt at the material date.

32. This decision also recognized that, if there was a liability in praesenti, the fact that the amount was to be ascertained did not make it any the less a debt.

...

35. We shall now notice some of the decisions of the Indian Courts on this aspect.

36. A Special Bench of the Madras High Court in Sabju Sahib v. Noordin Sahib ILR (1899) 22 Mad. 139 held that a claim for an unliquidated sum of money was not a debt within the meaning of the Succession Certificate Act, 1889, s. 4(1)(a). The claim was to have an account taken of the partnership business that was carried on between the deceased and others and to have the share of the deceased paid over to him as the representative of the deceased. Shephard, Officiating C.J., said:

It is quite clear that this not a debt, for there was at the time of the death no present obligation to pay a liquidated sum of money. The claim is one about which there is no certainty; it may turn out that there is nothing due to the plaintiff.

...

38. The decision of a Full Bench of the Calcutta High Court in Banchharam Majumdar Vs. Adyanath Bhattacharjee, throws considerable light on the connotation of the word "debt". Jenkins C.J. defined that word thus:

... I take it to be well established that a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation.

39. Mookerjee, J., quoted the following passage with approval from the judgment of the Supreme Court of California in People v. Arguello (1869) 37 Cal 524

Standing alone, the word ''debt'' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. In other words, debts are of two kinds: solvendum in praesenti and solvendum in future. ... A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt, or does not become a debt, until the contingency has happened.

40. This passage brings out with clarity the essential characteristics of a debt. It also indicates that a debt owing is a debt payable in future. It also distinguishes a debt from a liability for a sum payable upon a contingency.

...

43. We have briefly noticed the judgments cited at the Bar. There is no conflict on the definition of the word "debt". All the decisions agree that the meaning of the expressing "debt" may take colour from the provision of the concerned Act: it may have different shades of meaning. But the following definition is unanimously accepted:

a debt is a sum of money which is now payable or will become payable in further by reason of a present obligation: debitum in praesenti, solvendum in future.

44. The said decisions also accept the legal position that a liability depending upon a contingency is not a debt in praesenti or in future till the contingency happened. But if there is a debt the fact that the amount is to be ascertained does not make it any the less a debt if the liability is certain and what remains is only the quantification of the amount. In short, a debt owed within the meaning of s. 2(m) of the Wealth Tax Act can be defined as a liability to pay in praesenti or in future an ascertainable sum of money.

49. Now this was a decision under taxation law. For the purposes of a winding up petition, slightly different considerations must apply. It is not enough that there be a debt; that debt must be ascertained; it cannot be one whose amount is unknown. A mere liability is insufficient. It must be a liability in a known amount. That liability in a known amount is the debt, and that must also be now due. Perhaps, to use the language of established authority, we may put it thus: it must be both a debitum in praesenti and solvendum in praesenti. Evidently, it cannot be a liability on a contingency yet to occur; that contingency must already have come to pass. But it must be a debt payable at the date of the winding up petition; indeed, it must be payable at the time of the preceding statutory notice. It cannot be a debt yet to become due. This, for the purposes of winding up, is the confluence of Kesoram Industries and Raman Foundry.

50. What Mr. Jagtiani says is that the claim for license fees for the three-year lock-in period is in no sense one for damages. It is a claim for unpaid consideration. But for that agreement, the leave and license agreement would never have been executed. It is also consideration for Indiabulls agreeing not to increase the license fee during the entirety of that three-year term. It is, therefore, indistinguishable from a situation in which, say, the licensor insisted on an up-front and immediate payment on or before execution of the agreement of the license fee for 36 months as a non-refundable consideration. The deferral of that consideration was, Mr. Jagtiani submits, only a matter of commercial expediency. It does not alter the nature of the claim.

51. Manju Bagai, Mr. Jagtiani says, did not consider whether every such claim for license fees for the remainder of a lock-in period is, of necessity and ipso facto, in the nature of liquidated damages. There can be no such a priori assumption. The Manju Bagai clause was expressed to be in the nature of liquidated damages, and must be so construed. The plain meaning of a contractual clause cannot be ignored. In the present case, there is a separate clause and a wholly distinct fact situation in which liquidated damages are contemplated. In Manju Bagai, the two were conflated. Once this is accepted then, Mr. Jagtiani submits, Indiabulls has no legal duty to mitigate. That duty attaches only to a claim in damages, not a claim for unpaid consideration. Consider, he says, the first enunciation in Greenhills:

A "Debt" is a sum of money which is now payable or will become payable in future by reason of a present obligation. The existing obligation to pay a sum of money is the sine qua non of a debt. "Damages" is money claimed by, or ordered to be paid to; a person as compensation for loss or injury. It merely remains a claim till adjudication by a court and becomes a "debt" when a court awards it.

52. Indiabulls'' claim is precisely this: a sum of money payable now; expressed even at the time of the execution of the agreement to be payable but only on the happening of a contingency; and that contingency having happened, the amount is ascertained, payable immediately and is therefore a debt due and a debt owed sufficient to sustain a petition for winding up. The obligation was ever eo instanti; it was only, at the time of the execution of the agreement, solvendum in futuro. Now that the contingency contemplated by the contract has occurred, it is solvendum in praesenti.

53. Mr. Jagtiani''s formulation turns on an interpretation of the termination clause. That clause is in two parts. The first, clause 13.1, prevents Indiabulls from terminating for the entire period of the license except where Treasure World is in default and has failed to cure its defaults within the time specified in clause 12. The second, clause 13.2 itself has two components. The first is a non-fault/no-cause termination option given to Treasure World; the second is Indiabulls'' right to terminate for cause. We are concerned here only with the first of these components. That, Mr. Jagtiani submits, requires no evidence at all. It is only the second that

might: whether Treasure World was in default; whether Indiabulls asked it to cure defects; whether it did so or not; and so on. The termination is not under the second part or component of Clause 13.2. It is only under the first, the no-fault/no-cause termination option given exclusively to Treasure World. There is, therefore, no question of any evidence being required.

54. Mr. Andhyarujina invites attention to the relevant clause in Manju Bagai. It is, he submits, for all intents and purposes indistinguishable from the present clause. Both are compensatory; they are provisions that seek to contain loss or damage likely to be suffered by the licensor on the happening of a defined event or contingency. That contingency itself requires adjudication and judicial determination, and therefore the claim cannot be otherwise than in liquidated damages. Indeed, every such claim, no matter how worded, is only in damages. It is therefore not debt, nor even a contingent debt. The contingency, Mr. Andhyarujina says, attaches to the time of payment of the debt, not to the liability to pay itself. Further, he submits, E-City Media binds me. Indeed it does; provided it applies. That was a case where the claim was expressly said to be one in damages: "shall make good the losses and damages which may be suffered". There then followed a method of computing these losses and damages. That could only be a claim in liquidated damages. Such a claim is never a debt within the meaning of Section 433(e).

55. But what of Manju Bagai and Tower Vision? There are, as I conceive it, two material points of distinction between those two cases and this one. The Manju Bagai claim was expressly stated to be in the nature of liquidated damages. The learned single Judge proceeded to consider the claim on that basis and that basis alone. At page 388 of the Company Cases report, he said:

Even otherwise the claim for ''liquidated'' damages is not sustainable. It may be noted that Clause 5 relied upon by the petitioner uses the term ''liquidated'' damages in case the tenant vacates the property during the lock-in-period of first three years. It is a contention of the petitioner that the respondent company, as a tenant, is liable to pay the balance rent for the unexpired period of the lease of three years. The distinction between ''liquidated'' and ''un-liquidated'' damages is well settled. Mere use of the term

''liquidated'' damages in a document cannot be the criteria to determine and decide whether the amount specified in the agreement is towards ''liquidated'' damages or ''un-liquidated'' damages. Amount specified in an agreement is liquidated damages; if the sum specified by the parties is a proper estimate of damages to be anticipated in the event of breach. It represents genuine covenanted pre-estimate of damages. On the other hand ''un-liquidated'' damages or penalty is the amount stipulated in terrorism. The expression ''penalty'' is an elastic term but means a sum of money which is promised to be paid but is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained in consequence of the breach. Whether a clause is a penalty clause or a clause for payment of liquidated damages has to be judged in the facts of the each case and in the background of the relevant factors which are case specific. Looking at the nature of the Clause and even the pleadings made by the petitioner, I am not inclined to accept the contention of the petitioner that Clause 5 imposes liquidated damages and is not a penalty clause. No facts and circumstances have been pleaded to show that Clause 5 relating to lock-in-period was a genuine pre-estimate of damages which by the petitioner would have suffered in case the respondent company had vacated the premises. No such special circumstances have been highlighted and pointed out.

56. This, then, is not a discussion of whether such a claim is always a claim for liquidated damages but rather of whether, even when such a claim is said to be for liquidated damages, it is to be automatically so construed, or whether the court can examine if it is in the nature of a penalty, a genuine pre-estimate of damages or otherwise. Now, in our case, Mr. Jagtiani does not once say that Claim 3 is for liquidated damages, or damages of any kind. There is no such pleading. This claim is carefully separated from a wholly distinct claim for liquidated damages, one that is based on its own separate contractual provision, clause 9.9. He is not pressing this claim for liquidated damages at all.

57. Tower Vision affirmed Manju Bagai. That affirmation could only have been of what Manju Bagai decided. It is now far too well settled to merit repetition that a decision is a precedent only for what it actually decides. What Mr. Andhyarujina seeks is a legal extrapolation of the narrow factual contours of Manju Bagai and Tower Vision to something that could never have been intended. I must disagree with Mr. Andhyarujina when he says the contingency requires determination. That is only another way of saying that Indiabulls must establish that an oral understanding of abandonment of the written contract did not exist. The moment the contingency occurs, Treasure World''s liability is instantly crystallised. It immediately incurs a debt payable immediately.

58. I am unable to see how Claim 3, for license fees for the remainder of the lock-in period, couched in the manner it is in the contract, can be said to be one for damages of any kind. Treasure World''s liability arises not from Clause 3.2, which makes no mention of any payment at all, but only says that there is a lock-in period of 36 months during which Treasure World may not terminate. It arises under clause 13.2: should Treasure World, despite the interdiction of clause 3.2, terminate after that lock-in period commences but before it ends, it incurs an immediate liability to pay for the remainder of the 36-month term. This is a debt. It is payable eo instanti; debitum in praesenti and solvendum in praesenti.

59. Now Mr. Andhyarujina''s argument, one that he canvasses with much gusto, that it is most unjust that Indiabulls should be at liberty to, as he put it, "earn twice over" from the same property is the garden-variety post hoc, ergo prompter hoc fallacy:

because Indiabulls is now free to license the property to someone else, therefore it has a duty to mitigate, and since mitigation applies only to damages, Indiabulls'' claim can only be one in damages. What this overlooks is that Indiabulls'' liberation -- so to speak -- from Treasure World is of the latter''s own making. Indiabulls was content to let Treasure World continue for the entirety of the lock-in period. Indeed, the contract bound it not to terminate at all for the full tenure of the agreement unless, of course, Treasure World was in default under clause 12 and did not cure its defaults despite a cure notice as provided in that clause. In assessing the nature of Indiabulls'' claim, it is not, I think, possible to run this sort of forensic regression or to approach it from the perspective of what it might or might not be able to do following a termination by Treasure World. The side-effects or fall out of the termination cannot determine the nature of the claim.

60. Once it is held that there was a termination, the rest must follow. Mr. Andhyarujina''s argument that there was no termination but rather a supervening oral agreement of abandonment of the prior written contract is one that I have already held to be unsustainable. The contract itself militates against the acceptance of this submission. Treasure World''s correspondence with Indiabulls indicates that it was not wanting for legal resources of some considerable, if not justifiable, ingenuity. The document itself is unambiguous. It was for Treasure World to show by some cogent material, and not in this inferential and circuitous manner, to merely suggest that there is some possibility, however caliginous, to indicate that the parties had mutually agreed to rescind this agreement. No such possibility exists. Without any material of any kind, leave alone evidence of any real heft, the so-called possibility is too chimerical to constitute a substantial or bona fide defence.

61. The learned single Judge''s decision in Lonza India contains two powerfully articulated passages, undisturbed in appeal, and of general application. Vazifdar, J. said:

24. Agreements of leave and licence cannot be equated with agreements for the sale of goods or properties. In an agreement for sale it is normally easy to ascertain the damages, if any. In the case of leave and licence agreements, it is not so. Whereas, a party may be willing to sell an asset to anyone, a party would be particular about the person with whom he enters into a leave and licence agreement. In an agreement for sale it would not normally matter who pays the consideration so long as it is paid or payment is secured. On the other hand, a party may understandably and justifiably insist on several terms in a leave and licence agreement other than the term as to the price/compensation. The choice of the licensee itself is of crucial importance to any licensor. The mere fact that a particular licensor offers a better price is not the sole consideration. The licensee may well refuse to enter into the agreement with a particular licensor for a variety of reasons, including his reputation, his financial capacity to honour the terms of the agreement throughout the tenure of the agreement and the purpose for which the premises

are to be used. On the contrary, a licensor may well agree to a lower license fee for a particular licensee for a variety of very valid reasons including the licensee''s reputation. Even if the purpose is common for eg. commercial, the licensor may not agree to let the premises for certain types of commercial activities. Again, the other terms and conditions would play a significant part in a leave and license agreement. For example, a licensor may insist on a lock-in-period as in this case. He may not agree to a short duration at all.

25. It is thus not always possible or easy to assess the loss in the case of a breach of a leave and licence agreement by the licensee. Indeed, for these reasons, it is not always necessary for a licensor to mitigate loss in the case of a breach of a leave and licence agreement by the licensee. Unlike in the case of a sale it would not always be permissible to compel a licensor to let the premises to another with a view to mitigating the loss.

62. I do not refer to these passages for an authoritative pronouncement of law. Rather, I see them as a reminder that a commercial court cannot blind itself to the realities of the world of commerce, to the ordinary and usual manner in which parties do business, to the common considerations that weigh when they transact. Mr. Jagtiani is, I believe, correct in saying that if contracts are to be read in the manner Mr. Andhyarujina suggests be done in this case, the result can only be of manifest inequity, driving a stake through the heart of quotidian commerce. A party solemnly binds itself to a three-year license term for premises. The licensor agrees, in exchange, not to increase the license fee for that duration. The agreement is, clearly, that the licensee will pay the licensor the agreed monthly license fee for three years. To allow the licensee not only the option of a premature exit, but also to allow it to slither out of its financial liability, and, correspondingly, to drive the licensor to a protracted civil proceeding in which it needs prove nothing is clearly unjust. A defence that attempts this is not one that is bona fide or substantial. Defences of this stripe evidence commercial and corporate perfidy; they can never be allowed to constitute a bona fide or substantial defence.

63. It is not every defence, no matter how placed, that the company court must accept at its face. This is a court of discretion and of equity. It must assess and weigh in the balance the quality of the defence raised. If that be found to be lacking in substance, the consequences must follow. The test, as the Supreme Court tells us in IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., is whether the defence is bona fide. That implies the demonstration by the company that there exist substantial grounds of defence. But it also indicates that the defence must not be dishonest or perfidious. It cannot be illusory. It cannot be speculative, spurious or specious. Treasure World''s defence is all of these, and more. It is, therefore, no defence at all.

64. The result of this discussion, in summary, is that for the purposes of Section 433 of the Companies Act, 1956:

(a) The liability of the respondent-company must be certain. Where the liability is to be adjudged, i.e., where it remains to be decided by a court whether or not the respondent-company is liable in the first place, there can be no ''debt'' within the meaning of the section. The liability of a company is its obligation to pay. The debt is the amount that it is liable to pay.

(b) The debt must an ascertained, or definitely ascertainable, amount, not one that requires adjudication. [13] A claim in damages is no debt. [14]

(c) The debt must be a debt now due at the time of presentation of the petition. Any contingency contemplated must be one that has come to pass; it cannot be one yet to occur. [15] It is on the happening of a contingency that a company can be said to be ''indebted''. Should the contingency never happen, there can be no debt .24

(d) A contractual provision in a leave and license agreement for a lock-in period is not per se illegal, unlawful, void or even voidable.

(e) Every claim for license fee for the remainder of a lock-in period in a leave and license agreement is not per se a claim for damages, liquidated or unliquidated. In a given case, it may be in the nature of either, or in the nature of a penalty, or it may simply be a component of the contractual consideration and therefore a debt properly so-called when the contingency in contemplation comes to pass. This will depend on an interpretation of the contract in question and an assessment of the conduct of the parties.

65. There is, I find, no valid defence to Claims 1 and 3 taken together. The amounts of Rs. 61,16,648.25 and Rs. 2,33,30,970.73, less the amount of the security deposit, Rs. 73,12,145.00, i.e., Rs. 2,21,35,473.98 is due and payable by Treasure World to Indiabulls. Treasure World has, without valid justification, neglected to pay this amount to Indiabulls. An order of admission and advertisement is justified. However, given the discussion, I am inclined to afford Treasure World a final opportunity to make payment.

66. There will, therefore, be an order in the following terms:

(a) The respondent-Company, Treasure World Developers Pvt. Ltd., shall, on or before 9th May 2014, pay to the petitioner, Indiabulls Properties Pvt. Ltd., the sum of Rs. 2,21,35,473.98.

(b) Should the respondent-Company fail to do so, then--

(i) The petition shall stand admitted without further reference to the Court and shall be made returnable on 20th June 2014;

(ii) Service of the petition under Rule 28 of the Companies (Court) Rules, 1959 shall be deemed to have been waived;

(iii) The petition shall be advertised in two local newspapers, viz., (i) the Free Press Journal (in English); and (ii) Nav Shakti (in Marathi); as also in (iii) the Maharashtra Government Gazette;

(iv) The petitioner shall, on or before 26th May 2014, deposit with the Prothonotary & Senior Master, with intimation to the Company Registrar, an amount of Rs. 10,000/- toward publication charges, failing which the petition shall stand dismissed for non-prosecution without further reference to the Court.

67. This order shall be without prejudice to the petitioner''s rights to file a suit or other proceeding for recovery of its claim for liquidated damages. All contentions of both parties in that respect are expressly kept open.

68. The request for appointment of a Provisional Liquidator and for an injunction is declined for the present.

69. As I have afforded the respondent-Company a sufficiently long time to make payment, and made this order conditional, there is no question of granting a stay to the operation of this order.

70. There will be no order as to costs. I have been greatly assisted in this matter by both Mr. Jagtiani and Mr. Andhyarujina. Each has conducted his case not only with the fixity of purpose that is expected of our Bar, but with an uncommon breadth of mind. There was never a hint of rancour. The proceedings were throughout conducted with the utmost civility and courteousness. Their submissions were studied and careful, the expositions of their rival contentions meticulous. Neither has made my own task easier; but that is something that only further redounds to their credit.

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[1] Indeed, the contract is careful enough to envision a situation where there might be such a variation by email. Even this, clause 15 says, must immediately be set down in writing and signed.

[2] That clause, like much of the rest of the agreement, and like many agreements of this kind, is obfuscated in an impenetrable fog of unnecessary garrulity. There is a powerful case to be made here for greater simplicity and accessibility in the phrasing of these documents. Using fifteen words where five will do does not make a document more legally tenable. Concision is not vulnerability. Fewer words work just as well. Usually, better. As do shorter sentences. The period is not the draftsperson''s enemy, a punctuation mark to be abjured. Nor is the comma always an adequate substitute. Endlessly self-referential clauses occlude purpose and obscure intent. Clause 9.9 is an example of how not to draft a clause.

[3] The total of items 1, 2 and 3 at the particulars of claim, Exhibit "J" to the petition.

[4] Item 4 of the particulars of claim, Exhibit "J" to the petition.

[5] Items 5 and 6 of the particulars of claim, Exhibit "J" to the petition.

[6] E-City Media Private Limited a Private Limited Company Vs. Sadhrta Retail Limited a Public Limited Company, ; Union of India (UOI) Vs. Raman Iron Foundry,

[7] Appeal No. 175 of 2009 in Company Petition No. 898 of 2008; decision dated 1st July 2009.

[8] Corporate Management Council of India P. Ltd. Vs. Lonza India P. Ltd. (formerly known as Camber India P. Ltd.),

[11]Per R.V. Raveendran, J as he then was.

[12] Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta, ; The three-Judge bench of the Supreme Court comprised K. Subba Rao, J.C. Shah and S.M. Sikri, JJ. K. Subba Rao and Sikri, JJ delivered the majority decision; Shah, J dissented (from p. 785 of the ITR)

[13] Y.P. Associates v Pawar Textiles P. Ltd., [1992] 1 Comp L.J. 76 (Del)

[14] Newfinds (India) Vs. Vorion Chemicals and Distilleries Ltd.,

23 Registrar of Companies, Gujarat Vs. Kavita Benefit Pvt. Ltd.,

[15] IBA Health (India) Pvt. Ltd., supra.