

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 31st July, 2019**

+ **CS(OS) 653/2015**

TVB MARKETING INDIA PVT LTD **..... Plaintiff**

Through: Mr. Rajshekhar Rao, Mr. Varun
Mishra & Mr. Karthik Sundar,
Advs.

Versus

ITC LTD **..... Defendant**

Through: Mr. Anil Airi, Sr. Adv. with
Mr. L.K. Bhushan & Ms.
Sukanya, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has sued the defendant, for (i) declaration that the defendant is in breach of the Marketing Agreement dated 29th August, 2011 and the plaintiff is entitled to damages for the loss suffered on account of breach, and, (ii) recovery of damages in the sum of Rs.2,00,00,100/- with *pendente lite* and future interest, pleading that (a) the parties entered into a Marketing Agreement dated 20th September, 1994 whereunder the defendant appointed the plaintiff as its exclusive marketing representative for its membership programme “Welcom Group Sheraton Plus”, for a maximum period of 24 weeks or until 4,000 memberships were sold, whichever was earlier; (b) satisfied with the marketing skills of the plaintiff, the defendant renewed the arrangement with the plaintiff, with similar agreements, from time to time; (c) the parties entered into a Marketing Agreement dated 29th August, 2011 whereunder the plaintiff was to market and

sell the Culinary Plus Membership Programme (including distribution of membership cards) and authorize certain discounts and benefits at defendant's hotels etc.; (d) the plaintiff, under the said Marketing Agreement, marketed the Culinary Plus Membership programme of the defendant, selling the primary and spouse memberships to seven hotels of the defendant and each of which entitled its members to discounts at the restaurants, rooms and other value added vouchers and benefits at the defendant's hotels; (e) it was agreed, that the defendant shall pay the plaintiff a fixed fee of 42% of membership fee, less taxes; (f) the plaintiff, to fulfil its obligations under the said Marketing Agreement, made substantial investments towards renting office space, computers, training of employees, software and maintaining database of members, telephones etc.; (g) suddenly on 30th April, 2013, which was eleven months prior to the expiry of the aforesaid Marketing Agreement, the plaintiff received an e-mail from the defendant, not to carry out any fresh member enrolments to the Culinary Plus Programme or renew any membership and requesting the plaintiff, "to continue to conduct the Program in accordance with the terms of the Agreement for the members currently having a valid Culinary Plus membership card..."; (h) the plaintiff, immediately on receiving such unilateral instructions from the defendant, notified the defendant of how, stopping the sales of membership and / or renewals, would financially impact the plaintiff and its employees; (i) the defendant made multiple assurances to the plaintiff, that the plaintiff's grievances would be met; (j) however, to the shock and surprise of the plaintiff, the defendant, vide its letter dated 27th December, 2013,

terminated the Marketing Agreement with the plaintiff with effect from 1st April, 2014; (k) the plaintiff's revenue was dependent on enrolment of new memberships and the same formed the substratum of the contract between the parties; (l) the defendant, by unilateral direction to the plaintiff to discontinue enrolment of new memberships, committed a breach of the contract with the plaintiff and though the plaintiff was entitled to discontinue its services and terminate the Marketing Agreement, but restrained from doing so on account of past long association with the defendant and assurances even then meted out by the defendant to the plaintiff; and, (m) the plaintiff is entitled to a decree of damages of Rs.2,00,00,100/- on account of expenses incurred by it on behalf of defendant and towards loss of earning due to illegal unilateral discontinuation of the Marketing Agreement by the defendant.

2. The suit was entertained and summons thereof ordered to be issued.

3. The defendant has contested the suit by filing a written statement, pleading that (i) the defendant is not liable under the Agreement to reimburse the plaintiff for any impact suffered by the plaintiff on account of the defendant, vide its communication dated 30th April, 2013, requesting the plaintiff to continue to conduct the programme in accordance with the terms of the Marketing Agreement for the then current members; (ii) the Marketing Agreement was for a term extending to 31st March, 2014 and was to be automatically renewed unless notice was given in writing by defendant to plaintiff

90 days before expiry; the defendant, by letter dated 27th December, 2013 i.e. prior to 90 days before expiry, intimated the plaintiff of its intention not to renew the agreement; (iii) no assurances and representations of any nature were meted out by the defendant to the plaintiff at any time; (iv) the plaintiff, under the Marketing Agreement, was not entitled to any other amounts other than those provided therein; (v) if no new membership sales were made after 30th April, 2013, there is no question of the plaintiff incurring any expenses; (vi) “there was no embargo on the defendant to deal exclusively with the plaintiff”; (vii) under the Marketing Agreement, the defendant was only responsible for payment of the commission of the plaintiff and the plaintiff was to bear all operational costs of performing its obligations under the Marketing Agreement; and, (viii) the defendant is not in breach of the Marketing Agreement with the plaintiff and the plaintiff is not entitled to damages / compensation in the sum of Rs.2,00,00,100/- or any other amount from the defendant.

4. Though replication is found to have been filed by the plaintiff but need to advert thereto is not felt.

5. On 2nd August, 2016, when the suit was ripe for framing of issues, on a *prima facie* reading of the admitted agreement between the parties, it appeared that there was no need for any evidence and no substantial disputed question of fact arose, as far as the issue of breach was concerned, and which was a matter of interpretation of the terms of the Marketing Agreement between the parties. It was accordingly ordered that the question of recording of evidence for assessing the

damages if any suffered by the plaintiff would arise only if on an interpretation of the terms of the Marketing Agreement, a case of breach by the defendant of the terms thereof was found. Accordingly, the following issues were framed in the suit:

- “(i) Whether the defendant, vide communication dated 30th April, 2013 at page 166 of Part-III file, has breached the agreement dated 29th August, 2011 and if so whether the plaintiff is entitled to any damages from the defendant in lieu thereof? OPP
- (ii) If the above issue is decided in favour of the plaintiff, to what damages if any is the plaintiff entitled to? OPP
- (iii) If the above issue is decided in favour of the plaintiff, whether the plaintiff is entitled to any interest and if so on what amount, for what period and at what rate? OPP
- (iv) Relief.”

6. It was clarified in the order dated 2nd August, 2016, that though the plaintiff in the plaint had referred to the expenses incurred by the plaintiff on assurances of the defendant, but in the relief paragraph of the plaint, only damages of Rs.2,00,00,100/- had been claimed and thus no issue was being framed on the said plea. Accordingly, the suit was posted for hearing arguments.

7. The counsel for the plaintiff and the senior counsel for the defendant have been heard.

8. The admitted Marketing Agreement dated 29th August, 2011 Exhibit P-13 in which the plaintiff is described as ‘TVB’ and the defendant as ‘ITC’, *inter alia* provides as under:

“1. RECITALS

(a) ITC is involved in multi business activities including the business of owning and operating hotels which include lodging, entertainment, food and beverages and related services.

(b) TVB is, inter alia, in the business of telemarketing services.

(c) ITC and TVB desire to enter into an agreement whereby TVB would carry out for ITC, telemarketing program activities described hereinafter, which will include the marketing of the Culinary Plus membership program (including the distribution of membership cards), authorizing certain discounts and benefits at specified hotels operating under the Brand Name of ITC Hotels or any other mark which ITC may decide and develop for its chain of Hotels owned and/or operated by ITC.

(d) The Parties agree that TVB shall exclusively associate itself with ITC towards conducting telemarketing program activities. Should an association seek to be entered into with any ITC affiliate and/or subsidiary company, TVB shall, prior to entering such an arrangement, intimate ITC and seek written permission towards the same, in the absence of which, TVB shall not commence such an arrangement. TVB shall be free to take up training programs and internet marketing activities in industries other than the hospitality industry, without in any manner affecting or impacting the exclusivity and commitment to ITC, its associates and subsidiary companies and also avoiding any conflict of interest with ITC.

Now, therefore, in consideration of the recitals, mutual covenants and conditions set forth herein, the parties agree as follows:

2. SCOPE OF WORK

TVB shall conduct telemarketing activities for each of the cities mentioned herein below (hereinafter “Program”) for marketing and sale of the Culinary Plus Program. Each Program shall be co-terminus with the Term of this Agreement:

- New Delhi
- Mumbai
- Chennai
- Kolkata
- Bengaluru

- Hyderabad
- Jaipur
- Vadodara
- Visakhapatnam
- Any other cities, as may be mutually agreed by and between ITC and TVB.

The list of participating hotels is enclosed in Annexure B.

TVB will market membership cards for the Culinary Plus program as per the scheme which is appended in Annexure 'A' to this Agreement.

3. REPRESENTATION AND WARRANTIES

TVB represents that in its Program, it will advise potential membership purchasers, in a manner as may be permissible under the statutory guidelines laid down for the tele-marketing agencies from time to time, of the actual benefits of discounts specifically conferred by the membership program, subject to the conditions and limitations contained therein. It will only use promotional materials approved or provided by ITC.

On request by TVB, ITC shall provide TVB with requisite information regarding its accommodation, dining facilities and other services as TVB may reasonably request, during the term of this Agreement.

TVB shall have the sole responsibility and be solely liable for any misrepresentations by TVB, or its employees or agents to the public and ITC shall incur no liability for such misrepresentations that may occur. TVB shall promptly notify ITC of any anomaly and take correct steps as advised by ITC including reimbursing ITC for any loss or damage it may suffer on account of such misrepresentation including the legal costs incurred by ITC to defend its claim.

ITC shall have the sole responsibility and shall be solely liable for providing and maintaining the benefits as described in the SCHEME.

4. FINANCIAL ARRANGEMENT

TVB is authorized by ITC to collect membership fees from members on ITC's behalf. All membership fees so collected shall be deposited by TVB in ITC's designated account.

ITC shall pay TVB a fee calculated on the basis of 42% of the membership fees (less taxes) earned by ITC and deposited as stated above by TVB.

The following expenses shall borne by TVB:

TVB shall bear all operational expenses which may include:

Collateral

Embossing and distributing of membership card costs

Necessary infrastructure to distribute and market membership

Salaries & Wages

Office Rent

Telephone/Communication

Database software

It is understood by TVB that the printing of Collaterals/Cards would be undertaken by ITC or if done by TVB, with ITC's prior approval, by ITC's approved vendors only.

All expenses towards providing the Program of the Culinary Plus membership program including, without limitation, expenses towards any cancelled memberships shall borne by TVB as specified above. Save and except the above fees payable to TVB. ITC shall not bear any expenses in relation to this agreement unless volunteered by ITC at its sole option and without any obligation to do so.

For institutional sales/bulk sale, TVB will be entitled to a fixed fee (inclusive of associated expenses, if any) of 15% of the sale price, excluding taxes.

All fees shall be paid by ITC in 10 working days on a fortnightly basis, upon receipt by ITC of a valid invoice from TVB, and shall be subject to applicable statutory deductions. All other taxes shall be borne by the party on whom the same is applicable, except for service tax, which shall be borne and paid as specified below.

All service tax arising out of the transaction between TVB and ITC under this Agreement shall be borne by ITC. However, TVB shall be solely responsible for making the statutory payments of service tax to the service tax authorities in a timely manner and shall be responsible for all costs and consequences for any failure to do so.

The fees mentioned above shall be fixed. If there is an upward revision in the membership fees during the term of the agreement, the parties shall arrive at a new mutually agreed rate for calculation of the portion of the

revenue relatable to the incremental membership fees. This shall constitute a modification to this agreement, upon being communicated in writing by ITC and accepted by TVB.

TVB shall provide ITC with complete daily reports of its membership sales. Such sales report shall be submitted to ITC on the following business day. Further, a weekly sales report shall be submitted to ITC on the first day of the following week. The proceeds from the marketing of memberships, whether by cash, cheque or by credit cards shall be included in the sales report. ITC authorizes TVB to sign and issue on its behalf, collection receipts for the memberships sold.

All membership acquired by credit cards, including but not limited to American Express MasterCard, Visa, Diners Club or other recognized credit cards or vouchers, including cash and/or cheques received from the membership marketing, shall be submitted to ITC for processing by its accounting department on a daily basis. Any dishonored cheques or declined payment of credit cards/charge backs or cancellation/return of membership will be informed to ITC and returned by TVB. TVB will try to recover the payment from the client within 30 working days or process its cancellation. Only recovered amounts (less taxes) shall constitute membership fees earned by ITC for the purpose of calculation of the fee payable to TVB. Amounts towards membership fees returned by ITC to members towards cancelled memberships shall be deducted from the revenue for the purpose of calculation of the fees to TVB. If the fees have already been paid to TVB and then the refund is made by ITC to the member, the incremental fee amount already received by TVB shall be adjusted by ITC against future payments to TVB.

5. ITC's RESPONSIBILITIES

ITC shall provide the following facilities at the premises mutually agreed between the Parties for a period not exceeding 52 weeks or any extended period mutually agreed by both the parties

- (a) Office space of a suitable size, with windows where possible, to be utilized by TVB and is adequate to sustain upto 25 telemarketing stations plus secretarial area and an area for ancillary material. It will also provide adequate electrical fixtures and requisite office furniture and will ensure the area is appropriately painted / white washed. This space (including servicing) will be provided without cost. It will also make available meeting rooms / banquet space for the purposes of orientation, selection and training of the program staff, without cost, as and when required.

- (b) One room without cost for the President / Vice President of TVB collectively, when on visits for supervision, hotel staff training, launch of new program, administration, on-going support for the marketing program etc. These visits shall be restricted to a maximum of 30 room nights per Program per year. Accommodation at the hotel shall be subject to room availability. Any alternative arrangement or accommodation in the event of stays over and above 30 room nights shall be as advised by ITC from time to time. TVB shall make prior intimation to ITC of such visits in writing.
- (c) A fifty percent (50%) food and alcoholic beverage discount on all food ordered (including in-room dining) at ITC, for the President / Vice President and TVB Management and principals, when on Program business.
- (d) Telephone calls, including local, STD and ISD to be charged at administrative rates at ITC, for the President / Vice President and TVB Management and principals, when on Program business.
- (e) Laundry will be provided free of cost at ITC for the President / Vice President and TVB Management and principals, when on Program business.

6. TVB's OTHER RESPONSIBILITIES

- (a) TVB will conduct the Program in a professional manner and in accordance with the standards and broad guidelines communicated by ITC from time to time. TVB shall not at any point of time, compromise on the quality of personnel, services and / or other resources. TVB shall endeavour to keep costs within limits. ITC shall review the costs at the end of each financial year.
- (b) TVB in its own rights will be fully responsible for its employees and ensure their conduct. TVB will be fully responsible for taxes, insurance and any other liability with regard to its employees. In the event of any liability made in this connection on ITC, it shall fully indemnify ITC including without limitation, legal costs, attorneys fees etc.

- (c) TVB undertakes that it will use the aforementioned facilities being offered by ITC for operating the marketing program for ITC. Any marketing program(s) sought to be conducted by TVB in India shall be identified to ITC and wherever possible, networking of membership privileges shall be offered to ITC. It will be ITC's discretion to accept or decline such networking propositions.
- (d) TVB uses certain telemarketing techniques and non methodologies which are not otherwise known to other telemarketing companies which it may use while marketing the membership cards of ITC. TVB may also develop and design certain new telemarketing techniques and systems which are not in use in the Industry and are the intellectual properties of TVB during the course of this Agreement. All such techniques, methodologies, systems, designs etc. relating to the concept of telemarketing in which TVB has intellectual property rights will always remain a property of TVB. ITC will have no right to all or any of such intellectual properties during and subsequent to the expiry of this Agreement. If TVB develops any techniques/ systems for ITC under this Agreement, consideration paid by ITC, IPR shall vest with ITC and not with TVB. TVB undertakes that during the subsistence and after the termination of this Agreement, all material and techniques, tangible or intangible, developed by TVB for ITC under this Agreement, shall be used exclusively for the benefit of ITC.
- (e) TVB will be fully responsible for collecting Service Tax at the prevailing rate on every membership sold and subsequently deposit the same with ITC.

10. PERIOD OF AGREEMENT

This term of this Agreement shall be effective from 1.4.2011 and remain in effect till 31.03.2014 from the date of execution and shall be automatically renewed thereafter for a 3 year period, unless notice is given in writing (to the address indicated on this Agreement) ninety (90) days before the anniversary date of this Agreement by ITC to TVB. A renewed agreement will supersede this Agreement, from its effective date. Should an on-site program sought to be terminated, a 90 days notice in writing shall need to be issued by either party, towards the same.

Neither this nor any provision hereof may be amended, waived or terminated, except in writing signed by the two parties.”

(emphasis added)

9. Annexure A titled “THE SCHEME” to the Marketing Agreement is as under:

“ANNEXURE A

THE SCHEME

1. ITC has authorized TVB to conduct the Program including the telemarketing and sale of the membership program viz. Culinary Plus.
2. Discount accommodation, from the printed room tariff of the hotel with availability and space allotment restrictions. This discount will be given on the rack rate to the member upon membership card presentation. Rack rate means a standard published rate for a room and does not include any other discounts, packages or promotions and taxes.
3. All room reservations shall be subject to availability and cannot be used in conjunction with any other reductions, promotions, special packages or events.
4. ITC shall print or cause to be printed a sample of the membership card bearing the title CULINARY PLUS, for the Program or any other name approved by ITC. No printed material shall be used without the prior approval of ITC.
5. As a part of the marketing Program, membership cards and ancillary material for the services described in paragraph one (1) shall be prepared, marketed and distributed by TVB within the market area of India.
6. The membership term (validity period) shall end on a date twelve (12) calendar months from the date of membership issuance and shall entitle the membership card holder to those privileges specified on the membership card and ancillary material and subject to all limitations, restrictions and/or disclaimers contained in such membership material, for the period of validity stated therein. Membership cards shall have no cash value or redemption

value. ITC shall have the right of final approval on all limitations, restrictions and/or disclaimers stated on membership cards and ancillary material, directly representing ITC.

7. The restaurants at ITC identified hotels agree to honour the membership cards and shall give to the holder of a membership card, a fifty percent (50%) discount on the total food and soft beverages purchased by the holder and one (1) guest, a one third (1/3-33%) discount with the holder and two guests, one quarter (1/4-25%) discount with the holder and three guests, one fifth (1/5-20%) discount with holder and four or more guest (20%) when holder dines alone. There will be a 20% flat discount on alcoholic beverages. The discount shall be exclusive of all taxes, central or state and shall be payable by the card member. The benefit shall not be applicable to of premises or room service ordering and banquets, or any discounted dining specials or promotions. A flat 15% discount on food and soft beverages only with no other Program benefits, applicable at Fortune Hotels and WelcomeHeritage Hotels upto a maximum of 8 persons, including the member, while dining. However, ITC reserves the right to introduce or withdraw any such offer/participating hotels without any notice.
8. ITC agrees to accept payment in the form of cash or those credit cards (accepted by the hotel) on the total bill after discount. All foods purchased during the restaurants' valid membership program hours are to be ordered from the restaurants regular menu, including any and all special menus, attachments, or clip-on."

(emphasis added)

10. The counsel for the plaintiff has argued, that (i) the plaintiff, for performance of its obligations under the Marketing Agreement, was to arrange the entire infrastructure; (ii) though the plaintiff was not the exclusive marketeer of the Culinary Plus Programme of the defendant, but the defendant had insisted upon the plaintiff rendering the services exclusively to the defendant; (iii) the obligation of the plaintiff under the Marketing Agreement was of not only marketing the membership cards of the Culinary Plus Programme of the defendant, but to also

provide after sale services with respect thereto; (iv) on enquiry, as to what after sale services the plaintiff was required to render, it is stated that the purchasers of the membership could call the plaintiff for making reservations / bookings in the hotels of the defendant under the said membership and / or for renewal of membership and / or for cancellation of membership, and for any other clarifications with respect to the membership, and the plaintiff was to render accounts from time to time to the defendant; (v) the defendant, in its defence to the claim of the plaintiff is relying on the last sentence of Clause 7 of Annexure-A to the Marketing Agreement, providing “....However, ITC reserves the right to introduce or withdraw any such offer / participating hotels without any notice” and which cannot be understood as entitling the defendant to terminate the Marketing Agreement at any time; (vi) thus the communication dated 30th April, 2013 of the defendant to the plaintiff, asking the plaintiff to not carry out any fresh membership enrolments to the Culinary Plus Programme, about 11 months prior to the date when the Marketing Agreement was to come to an end, is clearly in breach of the Marketing Agreement; (vii) a bare perusal of the communication exchanged between the parties, particularly the e-mails at pages 168,169 and 172 of the Part-III A file, clearly disclose that the defendant was calling upon the plaintiff to continue to render services; (viii) on enquiry, as to which Clause of the Marketing Agreement obligated the defendant to render such services, attention is invited to Clause 5 of the Marketing Agreement titled “ITC’S RESPONSIBILITIES”; (ix) reference is also made to the

communications at pages 194 and 196 of Part-III A file, to contend that the defendant continued to assure the plaintiff that the defendant was merely changing the scheme; and, (x) however the defendant terminated the Marketing Agreement on 27th December, 2013 and entered into an arrangement with another marketer for its new programme.

11. Per contra, the senior counsel for the defendant has contended, that (a) vide Clause 2 of the Marketing Agreement, the Culinary Plus Programme was co-terminus with the terms of the Marketing Agreement; (b) thus no member enrolled by the plaintiff could enjoy any benefit of the membership sold by the plaintiff after the term of the Marketing Agreement which was till 31st March, 2014; (c) thus the term of the 12 months of membership, as mentioned in Clause 6 of Annexure-A to the Marketing Agreement, was available to those memberships, sold by the plaintiff till 31st March, 2013 and the plaintiff, after 31st March, 2013, was not in any case entitled to effect any sale of memberships; (d) under Clause 5 of the Marketing Agreement, the obligation of the defendant, to provide the facilities mentioned thereunder to the plaintiff, was for a period of 52 weeks only and not thereafter; (e) there is no basis in the Marketing Agreement between the parties, for the plaintiff to claim any reimbursement of expenses incurred from the defendant; and, (f) the defendant, under the Marketing Agreement, was not required to pay anything to the plaintiff for the after sale services which the plaintiff

claims to have provided to the members enrolled by the plaintiff prior to 31st March, 2013.

12. The counsel for the plaintiff, in rejoinder has drawn attention to paragraph 42A of the plaint, where the plaintiff has pleaded that the plaintiff's revenue was dependent on enrolment of new memberships and if the plaintiff was stopped from enrolling new memberships, the plaintiff could not earn any revenue and the defendant, by denying the plaintiff such earning prior to the term of the contract, is in breach of the Marketing Agreement. It is further contended that the last sentence in Clause 7 of Annexure-A to the Marketing Agreement, only permitted the defendant to withdraw any restaurant or hotel and not the scheme in its entirety. Reliance is placed on Section 39 of the Contract Act, 1872 providing that when a party to a contract has refused to perform or disabled himself from performing his promise in entirety, the promisee may put an end to the contract, unless he has signified by words or conduct his acquiescence in its continuance. It is contended that the defendant has no case in any manner whatsoever inasmuch as the plaintiff, immediately on 1st May, 2013 put the defendant to notice that the defendant would be liable for the expenses being incurred by the plaintiff. Reliance is placed on paragraph 49 of ***Nabha Power Ltd. Vs. Punjab State Power Corporation Ltd.*** (2018) 11 SCC 508 to contend that commercial contracts have to be interpreted in the commercial sense in which the parties entered into the sale, and giving such interpretation, any termination of the

Marketing Agreement by the defendant prior to 31st March, 2014 would be in breach of the Marketing Agreement.

13. I have considered the rival contentions.

14. The moot question for consideration, is whether the defendant, vide its communication dated 30th April, 2013 to the plaintiff requiring the plaintiff to stop enrolling new members to Culinary Plus Programme and / or renewing any of the memberships already sold, was in breach of the Marketing Agreement.

15. I may at this stage state that the contention of the senior counsel for the defendant, of the plaintiff in any case being not entitled to sell the memberships after 31st March, 2013 owing to Clause 2 of the Marketing Agreement, is not only beyond the pleadings of the defendant but even otherwise is contrary to the Marketing Agreement.

16. The Marketing Agreement, in Clause 6 of Annexure-A thereto, unequivocally provides that the membership term was to be of 12 calendar months from the date of issuance of the membership. The person purchasing the membership of the defendant, even if from the plaintiff, is not concerned with the internal arrangement between the plaintiff and the defendant and if has purchased the membership for one year, cannot be denied the benefits thereof for any period prior thereto for the reason of the term of the Marketing Agreement between the defendant and the plaintiff having ended. Even otherwise, the word 'Program' in Clause 2 of the Marketing Agreement on which reliance is placed by the defendant, is in relation

to telemarketing for each of the cities mentioned thereunder. What is provided by stating “Each Program shall be co-terminus with the Term of this Agreement” is that the telemarketing by the plaintiff in the cities mentioned therein would be co-terminus with the term of that Agreement.

17. On a reading of the Marketing Agreement, I find that (i) the plaintiff, under the Marketing Agreement, had agreed to carry out for the defendant, the marketing of the Culinary Plus membership programme, including the distribution of membership cards and authorizing certain discounts and benefits at specified hotels operating under the brand of the defendant or under any other brand or mark as the defendant may decide and owned and / or operated by the defendant; (ii) though the right to the plaintiff to market and sell the membership programme was for a fixed term till 31st March, 2014, but while describing the membership programme, it was provided that the same was at the discretion of the defendant, with right to the defendant to withdraw the same at any time; and, (iii) once the defendant was to withdraw the programme, the question of the plaintiff marketing the same would not arise inasmuch as what is not in existence could not have been marketed and sold.

18. I am unable to accept the contention of the counsel for the plaintiff, of the last sentence of Clause 7 of Annexure-A to the Marketing Agreement entitling the defendant only to introduce and withdraw any offer as described in Clause 7 or any participating hotel, without any notice.

19. The Culinary Plus Membership Programme entitled the purchasers of the memberships to the discounts as mentioned in Clause 7 of Annexure-A to the Marketing Agreement and the right to provide which discounts was reserved by the defendant with itself with further right to withdraw the same at any time without any notice.

20. That is the only commercial way in which, according to me, the agreement can be read and once the agreement is so read, the action of the defendant of sending its communication dated 30th April, 2013 calling upon the plaintiff to stop marketing the programme, cannot be construed as breach by the defendant of the Marketing Agreement inasmuch as doing what is agreed and stipulated in the agreement cannot constitute breach. The requirement of giving business efficacy to the Marketing Agreement between the parties and to read into the Marketing Agreement what is not expressly stated in the contract, is necessary only when the contract between the parties does not make business sense without the Court needing to imply such term. (see *Satya Jain Vs. Anis Ahmed Rushdie* (2013) 8 SCC 131). The scope of the Marketing Agreement as per the plaintiff also was not limited to sale and marketing of the membership to Culinary Plus, but also to servicing of existing members and to authorization of discounts and benefits at the defendant's hotels etc. Thus, even if the defendant under Clause 7 of Annexure A withdrew new membership of the Culinary Plus programme, the same would not constitute a breach inasmuch as the other obligations of the plaintiff under the Marketing

Agreement continued till the termination by the defendant on 27th December, 2013.

21. It has been held by the Supreme Court in *Union of India Vs. D.N. Revri* (1976) 4 SCC 147 that the meaning of a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic approach. To hold that the defendant was not permitted to, under the Marketing Agreement, halt the enrollment of new membership of its own programme, would, in my view, be a narrow and legalistic interpretation and would not make common sense.

22. The fact that Clause 4 of the Marketing Agreement titled 'Financial Arrangement' explicitly provides for the plaintiff to bear all operational expenses under the contract, and limits the financial liability of the defendant to the membership fees provided therein, is also indicative of the lack of entitlement of the plaintiff of any damages from the defendant.

23. The suit is accordingly dismissed. However no costs.

RAJIV SAHAI ENDLAW, J.

JULY 31, 2019

'gsr'

(corrected and released on 5th October, 2019)