

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH, MUMBAI  
C.P. NO. 508/I&BP/NCLT/MAH/2017**

**Coram:** B. S.V. Prakash Kumar, Member (Judicial) &  
V. Nallasenapathy, Member (Technical)

In the matter of under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules 2016.

Sunil Packaging Pvt. Ltd.  
217 Civil Lines  
Meerut  
Uttar Pradesh.

... Applicant/ Operational Creditor

Dishnet Wireless Limited  
Opus Centre, 47  
Central Road, Opposite Tunga Paradise  
MIDC Andheri (East)  
Mumbai – 400 093.

... Corporate Debtor

Counsel for Applicant/Operational Creditor: Dhir & Dhir Associates

Counsel for Corporate Debtor: Mr. D. J. Kakaria, Advocate  
Ms. Raghavi Sharma

**ORDER**

*(Heard on 03.05.2017)*

*(Pronounced on 14.6.2017)*

Per V Nallasenapathy, Member (Technical)

1. Sunil Packaging Pvt. Ltd., the Operational Creditor herein, filed this Insolvency and Bankruptcy Petition against the Corporate Debtor, Dishnet Wireless Ltd., alleging that a sum of Rs.40,40,726 is in default as on 26.2.2017, by the Corporate Debtor for initiation of proceedings under Insolvency and Bankruptcy Code, 2016 (the Code) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (the Rules) seeking relief under Section 9 of the Code.

2. The Operational Creditor says that their property situated at Khasra No.2150, Village Mawana Kalan, Mawana Road, District Meerut, Uttar

Pradesh admeasuring 36,495 sq.ft. with the constructed area of 2,260 sq.ft. leased to the Corporate Debtor for using it as warehouse to store their optic fibre materials and other telecommunication equipments by a Lease Agreement dated 25.10.2013, for a total period of 36 months commencing from 25.10.2013. The Lease Agreement states that the parties shall not be entitled to terminate the lease before expiry of 24 months from the date of commencement of the lease. The lease rent was fixed at Rs.1,25,000 per month payable on or before 7<sup>th</sup> of every month. The Lessee, i.e. the Corporate Debtor has also paid an interest free refundable security deposit of Rs.3,75,000 which is equivalent to three months rent payable to the Lessor, i.e. the Operational Creditor. In the covenants portion of the Lease Deed, the Lessor (Operational Creditor) represented, declared and agreed, that the Lessor have not created any tenancy, license and lease deed or any right in favour of any person in respect of the leased premises, nor has created any such charge or encumbrance on the said leased premises, nor shall create or purport to create any such charge or encumbrance hereafter that may adversely affect the rights of the lessee(corporate debtor) over the leased premises under the Lease Deed.

3. The Operational Creditor says that rent was paid upto February-March, 2014 and there was no subsequent payment of lease rent by the Corporate Debtor.

4. The Advocate for the Operational Creditor issued a legal notice under Section 8(1) of IB Code on 13.1.2017, demanding a sum of Rs.39,15,726 as due and payable in terms of the said Lease Deed for the lease period with interest at the rate of 24% per annum on Rs.39,15,726, within 10 days, being the debt due and payable, failing which Insolvency Resolution Process will be initiated against the Corporate Debtor under the provisions of Section 9 of IB Code. In the said notice, at Para 3 it was stated that a Lease Deed dated 3.7.1989 was executed by the Operational Creditor in favour of one M/s. Greenfield Corporation Ltd. for a period of 99 years for the property situated

at Khasra No.2150, comprising of a piece and parcel of land admeasuring 2800 sq. yards (same property leased to the Corporate Debtor), the said Lease Deed empowered Greenfield Corporation Ltd. to mortgage the said property to UP Financial Corporation Ltd., as security for a loan of Rs. 31,45,000 disbursed by UP Financial Corporation Ltd. in favour of Greenfield Corporation Ltd. The said notice further states that the loan was duly discharged by Greenfield Corporation Ltd pursuant to which no charge in favour of UP Financial Corporation Ltd. exists. It further says that the Operational Creditor by a notice dated 21.3.2003 terminated the Lease Deed dated 30.7.1989 entered with M/s. Greenfield Corporation Ltd.

5. The Operational Creditor contended that the Greenfield Corporation, the lessee under the lease deed dated 03.07.1989 who has mortgaged the subject property in favour of UP Financial Corporation Ltd. as a security for a loan of Rs.31,45,000/-, as empowered to mortgage the property in the said lease deed, had discharged the said loan and hence UP Financial Corporation Ltd. has no right against the property.

6. The Operational Creditor further contended that the Hon'ble High Court of Judicature Allahabad by an order dated 06.02.2004 stayed the recovery proceedings initiated by UP Financial Corporation Ltd. against the Operational Creditor.

7. The Operational Creditor says legal notices were issued on 09.02.2015, 21.03.2015 & 21.09.2016 calling upon the corporate debtor to make payment forthwith for which there was no response, authorised representatives was sent to the office of the Corporate debtor at Gurgaon & Meerut and emails were exchanged between the parties. It is further averred that, in view of the default and negligent approach of the Corporate debtor, on 07.11.2016 a legal notice under section 434 (1)(a) of the Companies Act, 1956 was sent claiming a sum of Rs. 39,15,726/- with further interest, for which, the corporate debtor replied on 01.12.2016 through an advocate raising the dispute/ defence with regard to notices received from UP Financial Corporation Ltd., and

contended that lease deed was terminated on 12.11.2014 and also claimed refund of the deposit of Rs.3,75,000/- from the Operational Creditor. The Operational Creditor says that the Corporate debtor raised the above claim malafidely after receipt of winding up notice dated 07.11.2016. The Operational Creditor averred that lease deed provided that parties are not entitled to terminate the lease before the expiry of 24 months from the date of commencement of the lease.

8. The Corporate Debtor in its reply dated 23.1.2017, inter alia among others, stated that on 4.4.2014 and 24.6.2014 received letters from UP Financial Corporation Ltd. stating that due to default in the payment of loan availed by M/s. Greenfield Corporation Ltd., a recovery proceeding was initiated under Section 29 of the State Financial Corporation Act and therefore the corporate debtor was asked to vacate the premises. In response to that the Corporate Debtor, left with no other option than to believe the notice of the statutory body, paid the rental amount to the Operational Creditor till the month of March, 2014 and on 8.10.2014 the Corporate Debtor informed the Operational Creditor, due to the reasons stated in the notices issued by UP Financial Corporation Ltd., they are not interested in keeping the leased premises and requested the Operational Creditor to take possession of the premises within 15 days. Subsequently, on 12.11.2014, the Corporate Debtor, informed the Operational Creditor that the Lease Deed stood terminated on 23.10.2014 and the premises is lying vacant and unused and also requested the Operational Creditor to refund the Security Deposit of Rs.3,75,000. The Corporate Debtor further averred that the Operational Creditor wilfully mislead and induced them to believe that the Operational Creditor was the absolute and lawful owner of the leased premises, and entered into the Lease Deed by suppressing material fact that a charge in favour of UP Financial Corporation Ltd was created by M/s. Greenfield Corporation Ltd. The Corporate Debtor states that non-disclosure of execution of previous Lease Deed on 30.9.1989 for 99 years in favour of Greenfield Corporation Ltd. is against the covenant entered between the

parties in terms of Lease Deed dated 25.10.2013, and hence the Lease Deed dated 25.10.2013 was illegal since the sub-letting of the mortgaged property without the approval of UP Financial Corporation Ltd is illegal. The Corporate Debtor denied the liability and instead called upon the Operational Creditor to refund the Security Deposit of Rs.3,75,000 along with the interest, paid in terms of Clause 5 of the Lease Deed.

9. Section 5 (6) of the Code provides that dispute includes a suit or arbitration proceedings relating to-

- (a) The existence of the amount of debt;
- (b) The quality of goods and service; or
- (c) The breach of a representation or warranty;

10. The non-disclosure of a pre-existing lease in favour of Greenfield Corporation Ltd and the mortgage created in favour of UP Financial Corporation Ltd by the said Greenfield Corporation Ltd. is evident from the documents filed with the application and the demand notice sent by the operational creditor. On top of that the covenant in the lease deed provides as below;

*"8. Covenants*

*The LESSOR hereby represents, declare and agree:*

- a. That LESSOR is lawful and absolute owner of the Leased Premises and shall continue to remain so during the period of this Lease Deed.*
- b. That LESSOR have not created any tenancy, license and lease deed or any right in favour of any person in respect of the Leased Premises nor has created any such charge or encumbrance on the said Leased Premises nor shall create or purport to create any such charge or encumbrance hereafter that may adversely affect the right of the LESSEE over the Leased Premises under this Lease Deed.*
- c. The LESSOR will keep the Leased Premises maintained in good and tenable condition and carry out all necessary repairs to the Leased....."*

11. On hearing the submissions of either side and in view of the ratio laid by the Hon'ble National Company Law Appellate Tribunal in the matter of *Kirusa Software Pvt. Ltd. Vs. Mobilex Innovations Pvt Ltd.* that the dispute in Insolvency and Bankruptcy must relate to specified nature in clause (a), (b) or (c) of sub-Section 6 of Section 5 of the Code, this Adjudicating Authority holds that the case on hand, in view of the clear violation of covenant provided in the Lease Deed executed between the parties in this case, squarely falls under section 5 (6) (c) of the Code.

12. There being vacation, in between, there has been a delay of more than one month in passing this order.

13. Accordingly, this Petition is dismissed with liberty to the operational creditor to approach appropriate forum for suitable remedy if eligible under any other law in force.

14. The Registry is directed to communicate this order to the Operational Creditor and to the Corporate Debtor.

Sd/-  
V. NALLASENAPATHY  
Member (Technical)

Sd/-  
B. S. V. PRAKASH KUMAR  
Member (Judicial)