

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 136 of 2017**

**IN THE MATTER OF :**

**M/s. Sunil Packaging Pvt. Ltd.**

**... Appellant**

**Versus**

**Dishnet Wireless Limited**

**... Respondent**

**Present: For Appellant : Ms. Varsha Banerjee, Shri Milan Singh Negi  
and Shri Kunal Godhwani, Advocates.**

**ORDER**

**21.08.2017** This appeal has been preferred by the appellant-‘Operational Creditor’ against order dated 14<sup>th</sup> June, 2017 passed by the learned Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai (hereinafter referred to as ‘Adjudicating Authority’) in C.P. No. 508/I&BP/NCLT/MAH/2017, whereby and whereunder the application preferred by the appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘I&B Code’) has been dismissed.

2. From paragraph 7 of the impugned order, we find that there is an existence of dispute between the parties with regard to the execution of lease of the land in question.

3. Learned counsel appearing on behalf of the appellant submits that the land in question belongs to the appellant and it was a frivolous objection, raised by the respondent stating that the land belonged to U.P. Financial Corporation Ltd.

4. From the record, we find that the appellant served a legal notice dated 7<sup>th</sup> November, 2016 on the 'Corporate Debtor' under Section 434(1)(a) of the Companies Act, 1956 claiming a sum of Rs. 39,15,726/- (Rupees Thirty Nine Lakhs Fifteen Thousand Seven Hundred and Twenty Six only) with interest, for which, the 'Corporate Debtor' replied on 1<sup>st</sup> December, 2016, through its counsel, raising dispute, the relevant portion of which, reads as follows :

*"4. Our Client has instructed us to inform you that your notice under reply is misconceived and unsustainable as clearly issued without being aware about the facts and circumstances of the case. All the allegations made therein are frivolous, without any substance and hence denied. Your Client has not only suppressed the material facts but also misinformed you about sequence of events. Your Client has clearly not come with clean hands as your notice under reply has been issued without verifying the facts on record We submit that the following facts assume relevance in this regard:-*

- i. On 25<sup>th</sup> October, 2013 a Lease Deed was executed between your Client and our Client wherein factory shed admeasuring 36495 sq. ft (2260 sq. ft. including constructed area) being part of Khasra No.2150, Meerat-Mawana Road, Village Mawana, Kalan, District Meerut (hereinafter referred as 'Leased Premises') was leased out to our Client.
- ii. At the time of execution of Lease Deed, your Client wilfully misled and induced our Client to believe that your Client was the absolute and lawful owner and was in peaceful possession of the Leased Premises. Your Client also represented that they had not created any right or charge or encumbrance in favour of any entity or person in respect of the Leased Premises that may adversely affect the right of the Lessee (Our Client) over the Leased Premises under this Lease Deed. The relevant Clause in this regard is reproduced as under:-

**"8. Covenants**

**The LESSOR hereby represents, declare and agree;**

*(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;”*

- iii. To the shock and surprise of our Client, on 4<sup>th</sup> April, 2014 and 24<sup>th</sup> June, 2014, our Client received successive notices from UP Financial Corporation Limited (UPFCL) threatening therein that since the leasehold rights with respect to the subject Leased Premises were mortgaged with UPFCL and due to your Client’s default, UPFCL has initiated recovery action under Section 29 of State Financial Corporation Act and as such going to take over the possession of the Leased Premises that was leased to our Client.*
- iv. The aforesaid fact clearly indicate that your Client entered into the Lease Deed by suppressing material facts which if informed*

*earlier our Clients would not have executed the Lease Deed in question since the Leased Premises were encumbered and a charge in favour of UPFCL was created by your Client having consented to mortgage of the properties including Lease Premises in favour of UPFCL by one M/s Greenfield Corporation Ltd. M/s Greenfield Corporation were reported to have failed in repaying the loan amount leading UPFCL to issue the notice dated 4<sup>th</sup> April, 2014 and 24<sup>th</sup> June, 2014 and also published notices in the newspaper. Copies of the notices dated 4<sup>th</sup> April, 2014 and 24<sup>th</sup> June, 2014 and newspaper cutting is enclosed herewith for your ready reference as ANNEXURE-B, collectively. UPFCL called upon our Client to vacate the Leased Premises on the ground that arrangement between your and our Client was without prior approval of UPFCL. The very edifice of the alleged claim of your Client as such is illegal as your Client did not enter into legally enforceable Lease Deed much less entitling your Clients to seek alleged rent which our Clients rightly stopped and terminated the Lease Deed in the circumstances being*

*threatened dispossession by UPFCL holding superior rights than your Clients. In view of facts as above your Client's notice under 434 (1) (a) is a gross abuse of process of the law and not maintainable.*

- v. On 8<sup>th</sup> October, 2014, our Client informed your Client that they are not interested in keeping the Leased Premises due to the reasons stated in the UPFCL notices and issued notice in terms of Clause 11 of the Lease and requested your Client to take possession of the Leased Premises within 15 days. However, your Client, with a malafide intention, deliberately failed to take the possession of the Leased Premises. On 12<sup>th</sup> November, 2014, our Client was constrained to communicate to your Client that the Lease Deed with respect to the said Leased Premises stands terminated on 23<sup>rd</sup> October, 2014 and the same are lying vacant and unused. Our Client further called upon your Client to refund our Client's security deposit amounting to Rs.3,75,000/- (Rupees Three Lakh Seventy Five Thousand Only) paid in terms of Clause 5 of the Lease Deed which has not been refunded by your Client and*

*thus they are liable to refund the same with interest.*

*The aforesaid facts clearly indicate that our Client has acted on good faith and is not liable to pay any amounts whatsoever to your Client or as claimed by your Client and the contentions vide notice under reply are devoid of any merits hence denied. The notice under reply has been clearly instructed with a sole motive to foist illegal claim by putting pressure and threat of winding-up.”*

5. From the aforesaid reply, it is clear that there is ‘an existence of a dispute’. The case of the appellant is covered by this Appellate Tribunal’s decision in ‘**Kirusa Software Private Ltd. Vs. Mobilox Innovations Private Ltd.**’ – [Company Appeal (AT)(Insolvency) No. 6 of 2017 (24<sup>th</sup> May, 2017)]. In these circumstances the application under Section 9 was not maintainable. The Adjudicating Authority rightly dismissed the application.

6. In absence of any merit, the appeal is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

[ Justice S.J. Mukhopadhaya ]  
Chairperson

[ Balvinder Singh ]  
Member (Technical)