

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 03 of 2018

[arising out of Order dated 8th December, 2017 by NCLT, Chennai in Case No. CP/625/(IB) /CB/2017]

IN THE MATTER OF:

Rahul Gupta
S/o Shri Raj Kumar Gupta,
R/o E-1101, The Palm Springs,
Golf Course Road, Sector 54,
Gurgaon,
Haryana – 122 001.

...Appellant

Versus

1. Mahesh Madhavan
No. 247, Race Course Road,
Coimbatore,
Tamil Nadu – 641 018.

2. M/s. Black N. Green Mobile Solutions Pvt. Ltd.
GEE GEE Universal
7th Floor, No. 2, Mc. Nicholas Road,
Chetpet,
Chennai – 600 031.
Tamil Nadu

.... Respondents

For Appellant : **Mr. Anish R. Shah, Advocate**

For Respondents: **Mr. A.K. Mysamy, Ms. Shalini Kaul and**
Mr. Chaman Choudhary, Advocates

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The appellant – Rahul Gupta, shareholder of second respondent – ‘M/s. Black N Green Mobile Solutions Pvt. Ltd.’ (‘Corporate Debtor’) has preferred

this appeal against order dated 8th December, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Chennai Bench whereby and whereunder application preferred by the respondent – ‘Mahesh Madhavan’ under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the ‘I&B Code’) has admitted, order of moratorium has been passed and the ‘Resolution Professional’ has been appointed with certain directions.

2. The main plea taken by the appellant is that the appeal under Section 9 of the I & B Code was not maintainable against the second respondent, who was not the lessee or tenant of the Mahesh Madhavan (Operational Creditor).

3. The question arises for consideration in this appeal is whether a ‘sub-tenant’ can be treated to be a ‘Corporate Debtor’ of the owner of the house (lessor)?

4. It is not in dispute that an ‘Agreement of Lease’ was executed on 3rd day of December, 2012 between ‘Mr. Mahesh Madhavan’ and one ‘M/s. Universal Power Systems Pvt. Ltd.’ for the lease of 8942 sq.ft. of super built up area of the premises for the purpose of office. ‘Mr. Mahesh Madhavan’ (Operational Creditor) has been shown as “Lessor” and ‘M/s. Universal Power Systems Pvt. Ltd.’ as “Lessee”. The relevant terms and conditions of the agreement, are as follows:

“B. RENT

That the ‘LESSEE’ herein agrees that they shall for the duration of the lease, pay the ‘LESSOR’ monthly

rent circulated at Rs. 70/- per sq. ft. excluding common area maintenance charges on or before 5th of every English Calendar month for which it is due for a period of 1 year with effect from 16th January 2013 and 5% increase every year on the existing rent for next 2 years as under :

PERIOD	RENT/MONTH	DEPOSIT
16.01.2013 TO 15.01.2014	Rs.6,25,940/-	Rs.62,59,400/-
16.01.2014 TO 15.01.2015	Rs.6,57,237/-	
16.01.2015 TO 15.01.2016	Rs.6,90,099/-	

- (i) The 'LESSEE' agree to deposit the above said monthly rent into LESSOR's Bank Account No. 53019310146 **with State Bank of India, Avishanshi Road, NRI Branch, Coimbatore – 641 018** ; Any delay in payment of rent would attract interest at 18% per annum;
- (ii) The 'LESSEE' confirms that the said monthly rent is exclusive of taxes and levies charged by the Government such as Service Tax and that

any such taxes or levies shall be borne by the 'LESSEE' only;

- (iii) The 'LESSEE' further confirms that he shall furnish the 'LESSOR' the yearly certificates for Tax Deducted at Source (TDS) for the rents paid with respect to the demised premises.*

C. SECURITY DEPOSIT:

- (i) The 'LESSEE' has agreed to pay to the 'LESSOR' an Interest free Security Deposit of Rs.62,59,400/- (Rupees Sixty Two Lakhs Fifty Nine Thousand and Four Hundred Only) being ten months rent, as follows:-*
- a. Rs.40,00,000/- (Rupees Forty Lakhs Only) at the time of execution of this agreement vide RTGS through Axis Bank Ltd. UTR No. UTI30000248 SET 1 STP 12557/43318662*
- b. Balance of Rs.22,59,400/- (Rupees Twenty Two Lakhs Fifty Nine Thousand Four Hundred Only) on or before 15th December, 2012.*
- (ii) The Lessor shall refund the Interest Free Refundable Security Deposit to the Lessee on the expiration or earlier termination of the lease. The Lessor shall refund the said*

Security Deposit less any arrears of payment due from the Lessee simultaneous with the handover of the Premises by the Lessee to the Lessor.

- (iii) *If upon expiration or earlier termination of the lease, the Lessee is ready to handover the vacant possession of the Premises to the Lessor and the Lessor fail to refund the Security Deposit to the Lessee, the Lessee will be entitled to retain the possession of the Premises without paying any applicable Rent until such time as the entire Security Deposit is repaid along with interest at the rate of 18% per annum for the delayed period. In case, the Lessee is continuing its operations from the Premises in such a scenario, the Lessee shall pay the Maintenance Charges and utility charges on consumption basis only.*
- (iv) *The monthly rent shall be paid by the 'LESSEE' as per para B above and under no circumstances the 'LESSEE' can request the 'LESSOR' for adjustment of the Security Deposit against the monthly rent."*

5. Subsequently, another 'Lease Agreement' was entered into on 27th March, 2015 between one 'Mrs. Kaneez Fathima Khader and four others' with 2nd Respondent 'M/s. Black N Green Mobile Solutions Pvt. Ltd.' whereby the premises in question has been sub-leased in favour of the 2nd Respondent. The relevant part of the agreement is as follows:

"The Agreement of Lease entered into at Chennai on this 27th day of March in the Year Two Thousand and Fifteen (2015)

BETWEEN

1. **Mrs. Kaneez Fathima Khader**, wife of Dr. A.K.Sait, aged about 63 years, residing No. 21, Rutland Gate IV Street, Nungambakkam, Chennai – 600 006.
2. **Mrs. Zebunissa Hashim**, Wife of Late M. Hashim Sulaiman, aged about 75 years, residing at No. 13, Sulaiman Zackria Avenue, Casa Major Road, Egmore, Chennai – 600 006.
3. **Mrs. Razia Humayune Dada**, wife of Mr. Humayune Dada, aged about 76 years, represented by her Power of Attorney Holder Mrs. Zebunissa Hashim, Wife of (late) M. Hashim Sulaiman, residing at 13, Sulaiman Zackria Avenue, Casa Major Road, Egmore, Chennai – 600 008.
4. **Mrs. Khamrunissa Y Dada**, wife of Mr. Imran Yusuf Dada, aged about 53 years, residing at 13, Sulaiman

Zackria Avenue, Casa Major Road, Egmore, Chennai – 600 008.

5. **GHYAZ Hashim**, son of (late) M. Hashim sulaiman, aged about 50 years, residing at No. 13, Sulaiman Zackria Avenue, Casa Major Road, Egmore, Chennai – 600 008. hereinafter referred to as “the **LESSOR**” (which expressions shall unless be repugnant to the context or meaning thereof deem to mean and include his representatives, administrators, nominees, assigns and Successors-in-title) of the **ONE PART** :

AND

Black N Green Mobile Solutions Pvt. Ltd., a company registered under the Companies Act of 1956 operating from Gee Gee Universal 2, Mc. Nichols Road, Chetpet, Chennai – 600 031 and represented herein by its director, **Mr. Karthik Shankar** as authorised by the board resolution dated 8th April, 2011.

Herein after referred to as the **LESSEE**

Of the **OTHER PART**:

Wherever the context so requires in the agreement the singular shall mean and include the plural and the masculine gender shall mean and include the feminine gender and references to the individual shall also

wherever the context so requires mean and include other legal entities.

The **LESSOR** and the **LESSEE** if admitted in the context are individually referred to as "**Party**" and collectively as "**Parties**"

Whereas the **LESSOR** has agreed to grant by way of Lease to the **LESSEE** and the **LESSEE** is desirous of taking on Lease the 7th floor admeasuring 8942 sq.ft.(super built up area), in the building known as "Gee Gee UNIVERSAL", No. 2 Mc.Nichols Road, Chetpet, Chennai – 600 031 together with 8 reserved open to sky car part around the building and furniture and fittings more particularly described in "**Schedule – A**" hereunder and hereinafter referred to as the "**DEMISED PREMISES**" for use as its own office.

AND WHEREAS the Parties hereto are desirous of reducing the terms and conditions into writing by executing this Agreement

NOW THIS AGREEMENT OF LEASE WITNESSETH AS FOLLOWS:

1. DURATION OF THE LEASE

The **LESSOR** doth hereby confirm that they have granted unto the **LESSEE** herein a lease to use

and occupy the **DEMISED PREMISES** with effect from 1st May 2015 and valid up to 30th April, 2017 both days inclusive i.e. for a period of twenty four (24) months (The "**Lease Period**")

2. **RENT**

That the "LESSEE" herein agrees that it shall for the duration of the lease, pay the 'LESSOR' monthly rent calculated as under on or before 5th of every English Calendar month for which it is due. It is agreed between the parties herein that the below mentioned rent payable by the 'LESSEE' shall be for a period of Four years and as enhanced in clause 4 infra.

'FITOUT PERIOD' means a Lease Rental free period of 30 days from 1st April, 2015.

AREA- 8942 SQ.FT.

PERIOD	RENT/MONTH	DEPOSIT
01.04.2015 TO 30.04.2015	FITOUT RENT FREE PERIOD	
01.05.2015 TO 30.04.2017	Rs.4,47,100/-	Rs.35,76,800/-
01.05.2017 TO 30.04.2019	Rs.4,91,810/-	Rs.39,34,480/-

The monthly rent shall be paid by the 'LESSEE' as above and under no circumstances the "LESSEE" can request the 'LESSORS' for adjustment of the Security Deposit against the monthly rent."

6. The case of the respondent is that sub-tenant (Corporate Debtor) was paying part of the rent directly to Mr. Mahesh Madhavan (Financial Creditor). The said sub-tenant having failed to pay, the 'Operational Creditor' moved the application under Section 9 for initiation of Corporate Insolvency Resolution Process against the 'sub-tenant'/'Corporate Debtor' wherein principal sum of Rs.28,04,553 along with 18% interest per annum has been shown towards lease rent for the period from 5th October, 2014 to 5th May, 2015. 'Mr. Mahesh Madhavan' has shown to be 'Operational Creditor' and 'M/s. Black N Green Mobile Solutions Pvt. Ltd.' as Corporate Debtor.

7. From the admitted fact, we find that 'Mr. Mahesh Madhavan' (Operational Creditor) had not entered into any agreement with 'M/s. Black N. Green Mobile Solutions Pvt. Ltd.' (Corporate Debtor). The Agreement dated 3rd December, 2012 was reached between 'Mr. Mahesh Madhavan' (Operational Creditor) with one 'M/s. Universal Power Systems Pvt. Ltd.' and not with the Corporate Debtor in question. 'M/s. Black N. Green Mobile Solutions Pvt. Ltd.' (Corporate Debtor) is not in the occupation of the premises on the basis of aforesaid agreement dated 3rd December, 2012. A separate lease dated 27th March, 2015 was entered into between Mrs. Kaneez Fathima Khader and four others (Lessor) and M/s. Black N. Green Mobile Solutions

Pvt. Ltd. (Lessee). Merely because 'sub-tenant' is occupying the premises does not mean of landlord tenant that Mr. Mahesh Madhavan is 'Operational Creditor' of M/s. Black N. Green Mobile Solutions Pvt. Ltd.. Sub-tenant has no liability to pay the rent to the original owner of the premises, but to the tenant with which it has executed the agreement. If part of the payment was made directly by the 'sub-tenant' to Mr. Mahesh Madhavan (Operational Creditor) it will not create the relationship of 'Operational Creditor' and the 'Corporate Debtor' between the aforesaid two persons.

8. The Adjudicating Authority having failed to notice the aforesaid fact wrongly admitted the application and in absence of any relationship between 'Mr. Mahesh Madhavan' (Operational Creditor) and 'M/s. Black N. Green Mobile Solutions Pvt. Ltd.' as Corporate Debtor, the petition under Section 9 was not maintainable and was fit to be rejected.

9. For the aforesaid reasons, we set aside the impugned order dated 8th December, 2017 in C.P. NO. CP/625/(IB)/CB/2017.

10. In effect, order(s) passed by Ld. Adjudicating Authority appointing 'Resolution Professional', declaring moratorium, freezing of account, and all other order(s) passed by Adjudicating Authority pursuant to impugned order and action taken by the 'Resolution Professional', including the advertisement published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 9 of the I&B Code, 2016 is dismissed. Learned Adjudicating Authority will now close the proceeding. 'M/s. Black N. Green Mobile Solutions

Pvt. Ltd.’ is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

11. Learned Adjudicating Authority will fix the fee of the ‘Resolution Professional’, and ‘M/s. Black N. Green Mobile Solutions Pvt. Ltd.’ will pay the fees and other cost incurred by the Resolution Professional. The appeal is allowed with aforesaid observation and direction. However, in the facts and circumstances of the case, there shall be no order as to cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member(Judicial)

New Delhi

21st May, 2018

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