IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: December 14, 2020

\+ OMP(I)(COMM) 285/2020

BRACE IRON AND STEEL PRIVATE LIMITED ..... Petitioner
Through: Mr. Kapil Sibal, Sr. Adv. with
Mr. Sharad Kumar, Koshy John &
Mr. Harshit Malik, Advs.

versus

TATA STEEL BSL LIMITED ..... Respondent
Through: Dr. Abhishek Manu Singhvi, Sr. Adv.
& Mr. Arvind Nigam, Sr. Adv. with
Mr. Rajshekhar Rao, Mr. Amit Mishra,
Mr. Shashank Gautam,
Ms. Devna Arora, Mr. Arvind
Thapliyal, Mr. Manik Ahluwalia,
Ms. Apeksha Dhanvijay, Mr. Varad
Chowdhary, Mr. Siddhant Pattnayak,
Ms. Rajshree Jaiswal, Mr. Shreeyash
Lalit and Mr. Amit Bhandari, Advs.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The present petition has been filed with the following prayers:

"In view of the aforesaid facts and circumstances, it is therefore, most respectfully prayed that this Hon'ble Court may kindly be pleased to:

a. restrain the Respondent from utilizing the Leased Equipment situated at the integrated steel plant, Meramandli, Odisha without making payment of the Lease rentals in terms of Clause 6.3(a) read with Clause 5 of the Lease Agreement dated 26.02.2015;

b. direct the Respondent to immediately pay the entire defaulted amount of Rs.49,54,00,000/(Rupees Forty-nine Crores Fifty-four Lakhs only) alongwith interest on delayed payment totalling to Rs.78,74,446/- (Rupees Seventy eight Lakhs Nineteen Thousand Three Hundred and Fifty-one only) totaling to Rs.50,32,74,446/- (Rupees Fifty Crores Five Lakhs Nineteen Thousand Three Hundred & Fifty-one only) to the lead Lender Banker of the Petitioner at TRA account being Account No. 34502995786, State Bank of India, Industrial Finance Branch, IFSC- SBIN0009996 subject to the final outcome the Arbitration; and

c. Pass any other orders as this Hon'ble Court may deem fit and appropriate."

2. The petitioner herein is a private company incorporated under the provisions of the Companies Act, 1956. The respondent (formerly Bhushan Steel Limited or BSL) is a subsidiary of the industry giant Tata Steel Ltd. BSL underwent corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 ('IBC', for short) and was acquired by

Bamnipal Steel Ltd., a wholly owed subsidiary of Tata Steel Ltd and was subsequently renamed as Tata Steel BSL Ltd with effect from November 27, 2018.

3. The respondent prior to undergoing insolvency and resolution process had availed financial assistance in the form of secured term loan, secured working capital loans and other secured fund and non-fund based facilities from various Banks / Financial Institutions ('Lenders', for short). Subsequently, as part of deleveraging exercise and decisions taken at the meeting of Lenders of the respondent held on August 18, 2014, the respondent was required to monetize four oxygen plants having capacity of 1200,1120,405 and 340 tons per day (TPD) ('Oxygen Plants', for short), which are part of integrated steel facility at Mermandali, Odisha ('Integrated Steel Facility', for short) through 'Sale and Lease Back Arrangement'.

4. The Lenders of the respondent thereafter issued an NOC on February 21, 2015 permitting respondent to execute a Sale and Lease Back Agreement with the petitioner on the condition that interest over the lease for the Oxygen Plants shall be charged for the benefit of the Lenders. In pursuance, respondent sold the

Oxygen Plants situated at the Integrated Steel Facility to the petitioner.

5. The petitioner on February 26, 2015 entered into separate agreement with the Lenders to raise Rs.850 Crores in debt to finance the acquisition of the Oxygen Plants and additionally Rs.149 Crores were invested by SREI Infrustructure Finance Ltd. in the form of compulsory convertible debentures. In the form of equity, Rs.1 Crore was invested into the petitioner by Bharat Nirman Fund. All these funds were utilized for acquiring the four Oxygen Plants.

6. Simultaneously, a Lease Agreement dated February 26, 2015 ('Lease Agreement', for short) was executed between the petitioner and the respondent for leasing of the Oxygen Plants located at the Integrated Steel Facility, for an initial period of 10 years along with the option of renewal available to respondent for a further period of 5 years.

7. In pursuance of the Lease Agreement, on February 26, 2015, respondent issued an invoice for the payment of Rs.10,00,12,50,000/- (Rs. One Thousand Crores Twelve Lakhs and Fifty Thousand only) which included Rs. 47.62 Crores

towards VAT, for the sale and transfer of the Oxygen Plants.

8. To bring out the broad scheme of the Lease Agreement, the petitioner has relied upon the following Clauses of the Lease Agreement:

> *"2.1 Subject to the provisions of the Lease Agreement and in consideration of the Rent to be paid by the Lessee as set out in this Agreement, the Lessor on and with effect from the Effective Date grants, demises and leases unto the Lessee, the Equipments, on an operating lease basis, in the manner provided in this Lease Agreement (Lease). From the Effective Date, the Lessee shall have exclusive right to use and enjoyment of and uninterrupted access to Equipments for its Business during the Lease Term, subject to the terms and conditions of this Lease Agreement."*
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> *"5.1 In consideration of the Lease being granted, the Lessee shall pay to the Lessor a monthly rent (not of all taxes and tax deduction at source), details of which are set out in Schedule 2 hereof, in arrears on or before 2 (two) business days prior to the last date of each month (Rent) .*
> *. . . Further, the Parties acknowledge that the above Rent is based on, among others, a benchmark rate (based on the cost of financing the purchase of the equipments by the Lessor) that has been agreed between the Parties prior to the date of execution of this Lease Agreement. .. "*
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> *"5.2 Notwithstanding anything contained in this Lease Agreement, the Lessee shall be liable to pay the Rent to the Lessor in accordance with the terms hereof with effect from the Han dover Date (Rent Commencement Date), and the Rent and other amounts payable by the Lessee in accordance with terms hereof shall always be paid in/ to the credit of the Lessor's Designated Bank Account."*

"6.3 Use and enjoyment (a) The Lessee shall, subject to making timely payments and compliance with the terms and conditions of the Lease Agreement, have quiet, peaceful use, enjoyment and possession of the Equipments without any interference from or disturbance by the Lessor, its representative or any person claiming under the Lessor."

"11.2 Arbitration Procedure If a Dispute is not resolved within 20 (twenty) business days after the service of a Dispute Notice, whether or not a Dispute Meeting has entitled to refer the Dispute to arbitration by a notice to the other party (Notice of Arbitration) and the Dispute will be finally resolved in the manner set out in this Clause 11. The pendency of a Dispute in any arbitration proceeding shall ot affect the performance of the obligations (which are not the subject matter of this Dispute) under this Lease Agreement.

11.4 Venue, Language, and Rules of Arbitration The seat of the arbitration shall be in Delhi and the arbitration shall be conducted under, and in accordance with, the Arbitration and Conciliation Act, 1996. The language of arbitration shall be English."

9. It is stated by the petitioner that the Lease Agreement was structured to ensure that the interests of the Lenders are secured and the respondent has an unconditional obligation to pay the agreed rent amount without an option to excuse non-payment under Clause 5 thereof. The Oxygen Plants were leased out as mandated by the Lenders for a monthly consideration of Rs.15

Crores, exclusive of taxes, for the period ending on March 31, 2020 and Rs. 18 Crores, exclusive of taxes, for the remaining term of the lease, thereafter, i.e., April 1, 2021 onwards.

10. It is stated by the petitioner, referring to Clause 5.1 of the Lease Agreement that the rent as payable was based on a benchmark rate based on the cost of financing the purchase of Leased Equipment (Oxygen Plants) by the lessor. This was as per the understanding with the Lenders since the Lease Agreement was executed in furtherance of deleveraging exercise undertaken by the Lenders.

11. By referring to Clause 6.3(a) of the Lease Agreement, it is stated by the petitioner that the condition precedent for the quiet, peaceful use, enjoyment, possession and uninterrupted control of the Leased Equipment was the timely payment of rent. It is also stated that as per Clause 5.2, the respondent was strictly obligated to pay timely rent notwithstanding any other clause of the Lease Agreement.

12. Thereafter, on June 19, 2015, the petitioner, respondent and SBICAP Trustee Company Limited entered into a Substitution Agreement ('Substitution Agreement', for short)

giving the Security Trustee the right on behalf of Lenders of substituting the Lessee in case it does not meet its financial responsibilities towards the Lessor or the Lenders. It is stated by the petitioner that this legal arrangement was especially important as the petitioner had undertaken a substantial debt of Rs.850 Crores based on the warranties and knowledge of the respondent and as per the terms of the Lease Agreement and that the Lease Agreement and the Substitution Agreement rest on the respondent's timely payment of dues towards discharge of amounts to the Lenders.

13. On May 15, 2018, the CIRP proceedings under the IBC initiated as C.P. IB NO. 201 (PB) of 2017 filed by State Bank of India stood concluded and on May 18, 2018, the present management took over the respondent.

14. It is stated by the petitioner that subsequent to the taking over of the new management by Tata Steel Limited, for the period between May 18, 2018 to February 29, 2020, i.e., for the period of 21 months, there has not been any default in the payment of (a) lease rentals and (b) goods and services tax.

15. It is stated by the petitioner that since December, 2019 the

respondent started raising certain non-maintainable and illegal issues with the petitioner and subsequently from March, 2020 stopped complying with its legal and contractual obligations of timely rental payments, thereby committing fundamental breach of the Lease Agreement and crippling the petitioner from timely servicing its loans. It is also stated that the respondent has forced the petitioner to opt for moratorium on its bank dues, thereby increasing its liability.

16. Further, it is stated by the petitioner that the respondent vide its letter dated April 27, 2020 informed the petitioner to claim moratorium from Lender Banks, re-visit the terms of the Lease Agreement and accept unilaterally decided lease rentals pending negotiations.

17. As per the petitioner, the respondent for the first time demanded, (i) a payment of Rs. 41,79,48,852/- towards repair and maintenance of the leased equipment vide letter dated June 23, 2020; (ii) a payment of Rs. 10,19,91,600/- towards alleged outstanding for a period prior to CIRP vide its letter dated July 5, 2020. That apart, it is stated by the petitioner that it is on the basis of these assertions that the respondent started excusing its

defaults in payments of rent under the Lease Agreement.

18. It is stated by the petitioner that it duly intimated the respondent on June 25, 2020 *inter-alia* that the payment of lease rentals under the Lease Agreement is an unconditional and strict obligation on the respondent and since the respondent is in possession and usage of the plants, it is liable to pay the rent without any delay. On the alleged claim of the respondent on the maintenance and repair unilaterally carried out by the respondent without any prior intimation or consent, it is stated by the petitioner that the said demand is nothing but an after-thought to illegally set-off the outstanding rentals. Further, on the non-functionality of the machinery of the last five years, it stated by the petitioner that the Oxygen Plants were run and exclusively operated by the respondent and since Steel Plants cannot function without proper functioning of Oxygen Plants, respondents have failed to show any instance where Plant had stopped due to malfunctioning of the Oxygen Plants.

19. Various correspondence and meetings between the petitioner and the respondent ensued without any finality and all negotiations regarding the terms of the Lease Agreement stood

exhausted by the petitioner's letter dated July 20, 2020 wherein refusal for any reduction during the term of the Lease Agreement was intimated to the respondent. It is stated by the petitioner that the respondent even made a proposal to buy-back the Leased Equipment.

20. It is averred by the petitioner that by August 31, 2020, the respondent (i) defaulted in making payment of Rs.49,54,00,000/- as a part of the lease rentals committing breach of the Agreement; (ii) the respondent defaulted in paying the GST on the above amounts; (iii) thereafter in the month of September, 2020, i.e., during the pendency of the instant petition, the respondent further defaulted to the tune of Rs. 10,74,00,000/-. And further as on September 30, 2020, the total defaulted amount towards unpaid rent and GST under the Lease Agreement amounts to Rs.60,28,00,000/-.

21. It is also averred by the petitioner that since the Government of India has deferred filing of an application for financial default under IBC on September 24, 2020 till December 25, 2020 and also due to moratorium, the banks could not claim the default in payment of three EMIs totaling to

Rs.38,77,60,809/-. However, the petitioner would be bound to pay compound rate of interest on interest. It is at this juncture, that the petitioner has filed the present petition as the respondent could not be allowed to self-determine the claims to money due and payable as per existing obligation of admitted lease rentals.

22. Reply to this petition has been duly filed by the respondent. A preliminary objection has been taken against the relief sought by the petitioner as it is stated by the respondent that a final relief is sought in the garb of an interim relief.

23. It is stated by the respondent that the petitioner is attempting to virtually seek the final relief in the garb of interim relief, which is not permissible in law. There would be nothing left to arbitrate on the purported dispute between the parties, if the relief of immediate payment of Rs. 49,54,00,000/- along with interest on delayed payment amounting to Rs.78,74,446/- totaling to Rs.50,32,74,446/- in the TRA account maintained by the lead Lender bank is granted by this Court.

24. It is stated by the respondent that the present petition has been filed while negotiation/talks were ongoing between the parties and the payments were being made in good faith to the

petitioner and that the power of the Court under Section 9 of the Act is not unbridled to militate the power which is ultimately vested in the Arbitral Tribunal to grant reliefs in the nature of final reliefs.

25. Further, it is also stated that the present petition is pre-mature as the mandatory pre-arbitration steps contemplated in Clause 11.1 of the Lease Agreement was not resorted to.

26. It is averred by the respondent that after taking over control of business by the new management after the completion of the CIRP, it was during the process of regularizing the affairs of the respondent, comprising *inter-alia* the review of contracts entered into by the erstwhile Bhushan Steel Limited that it had realized the payment obligations under the Lease Agreement are not in line with market standard and hence required revision, that the petitioner had failed to carry out the maintenance, and there are amounts receivable from the petitioner. The respondent, thereafter, pursued active communication with the representatives of the petitioner beginning with the takeover by the new management until September 2020 when to the surprise and dismay of the respondent, the petitioner filed the present petition.

27. It is also stated by the respondent that it has time and again asserted (a) the lapses of the petitioner in the maintenance of the Oxygen Plants; (b) the cost incurred on repair and maintenance by the respondent since the inception of the contract; (c) failure to appoint a plant manager by the petitioner since 2015; (d) Operating rentals not in line with the market standard; and (e) outstanding receivables from the petitioner discovered pursuant to the review of the past ledger maintained for the period prior to CIRP reflecting a receivable of Rs. 10,19,91,600/- pertaining to the sale and lease back transaction remained outstanding and had been duly acknowledged by the petitioner.

28. On grounds entitling the petitioner to any interim relief, it is stated by the respondent that no *prima facie* case / balance of convenience or irreparable harm is caused to the petitioner as negotiation / discussions were ongoing till September 7, 2020 and pending discussions on outstanding amounts and other obligations, the respondent was releasing part payment of lease rentals w.e.f April, 2020 under protest but on good faith basis, every month. A table to that effect has been relied upon and

same is reproduced as under:

S. No.	Bill Month	Amount released by the Respondent. (including TDS in the tranches)
1.	March, 2020	INR 17,70,00,000
2.	April, 2020	INR 11,82,41,667
3.	May, 2020	INR 11,93,66,667
4.	June, 2020	INR 11,93,66,667
5.	July, 2020	INR 10,77,00,000
6.	August, 2020	INR 10,77,00,000
7.	Total Amount	INR 74,93,75,000

29. It is stated that the petitioner has conveniently kept aside the claims of the respondent which exceeds the amount claimed by the petitioner and that if an interim order in the nature of restraining the respondent is granted, it would cause irreparable damage to the respondent.

30. It is also stated, even the petitioner has categorically admitted that the respondent Plant cannot function without Oxygen Plants, which are being supplied by the petitioner. Despite having been successfully emerged from CIRP if the Plant

is made to shut down for want of oxygen by restraining respondent, this would set at naught the very resolution of the respondent as approved the National Company Law Tribunal, Principal Bench vide its Order dated May 15, 2018. Moreover, it is stated if the petitioners stand that it is going through precarious financial situation and is on the verge of insolvency is taken on its face value, then the respondent's rights / interests need to be also protected.

31. It is stated by the respondent that the petitioner has failed to undertake any maintenance obligations as contractually envisaged in terms of Clause 6.1.(vii) of the Lease Agreement as an express obligation had been cast on the petitioner to maintain the Oxygen Plants in good working condition in accordance with best industry practice and also to undertake routine maintenance of damage caused to the equipment. Similar obligation was also stipulated as per Clause 6.1.7 of the Common Loan Agreement dated February 26, 2015 entered into between petitioner, State Bank of India, Federal Bank and State Bank of India (as Lenders' Agent), ('Common Loan Agreement', for short). Despite these specific obligations, the respondent has failed to demonstrate its

plan to adhere to the maintenance of such an integral part of the Steel Plant and had even failed to appoint a single technical person to oversee the operations of the respondent since the inception of the Lease Agreement until a technical appointee was provided in July, 2020.

32. It is stated by the respondent that it had demanded certain critical spare parts in terms of the letter dated March 27, 2020 and despite repeated reminders, this requirement has not been fulfilled till date which has left the respondent with no option but to consistently spend monies at their own accord for maintenance purpose.

33. In this regard, it is stated that the respondent has evaluated the expense incurred on the repair and maintenance of Oxygen Plants including on spares and services till date minimum at INR 41,79,48,852 (approx.).

34. On reliance placed by the petitioner upon Lender's Unit Inspection Report of November 20, 2019 during the course of discussions / communications, it is stated by the respondent that this report was does not have within its scope review of all technical and mechanical aspects of the continuous operation of

the Oxygen Plants. It is also stated that at the relevant time period, the upkeep and repair was completely been undertaken by the respondent themselves and no credit can go to the petitioner for the upkeep.

35. It is also stated that the maintenance costs amounting to INR 41 Crore (approx.) and the outstanding amount of INR 10 Crores (approx.) (admittedly pending due) is merely in the nature of an 'adjustment' and therefore it cannot be deemed as an 'unliquidated claim', as alleged by the petitioner, thereby curtailing the respondent from adjudicating the same against the outstanding rentals. In this regard, the respondent stated that it is trite law that where two parties have certain amounts and monies payable to each other, they are both entitled to mutual adjustments of the said amounts.

36. Rejoinder has been filed by the petitioner.

37. Mr. Kapil Sibal, learned Sr. Counsel, appearing on behalf of the petitioner, stated that strong *prima facie* case is made out by the petitioner, against the respondent as the Lease Agreement with all its Clauses is admitted between parties, and therefore, quantum of rental obligations of the respondent is also settled and

admitted. It is also submitted by Mr. Sibal that respondent has admittedly defaulted in its obligations towards payment of rent and therefore is in material breach of the Agreement as Clause 5.2 mandates the respondent to make timely and full payment of rent notwithstanding any other terms of the Agreement.

38. On the aspect of balance of convenience, it submitted by Mr. Sibal that the same lies in favour of the petitioner as, (i) the Lease Agreement is the sole asset of the petitioner; (ii) as per Clause 5.1 read with Schedule 2 of the Lease Agreement, the monthly rent amount is admitted and undisputed; (iii) the rents received from the respondent are utilized for servicing the loans taken from banks and other financial institutions, the cost of financing for acquisition of the Leased Equipment; (iv) the respondent is in continued possession and in commercial usage of the Leased Equipment worth over Rs. 1000 Crores; (v) the respondent is in continued commercial usage of the Leased Equipment while depreciating the same, no prejudice whatsoever is being cause to it; (vi) the respondent has been operating at 100% capacity by its own account and unjustly enriching itself at cost of the petitioner; (vii) the respondent has recently reported

an EBIDTA of Rs.1,140 Crores and net profit of Rs. 328 Crores as per a document titled 'Financial Performance for Quarter and Half Year Ended September 30,2020' while utilizing the Leased Equipment of the petitioner and avoiding its contractual obligation; (viii) non-payment of rentals by the respondent adversely affects the petitioner's capability to service its loans thereby causing grave prejudice to the assets and credibility of the petitioner; (ix) whilst the respondent has security in form of possession of the Leased Equipment, the petitioner has no such security for ensuring payments of lease rentals.

39. Similarly, on irreparable injury likely to be caused to the petitioner, if relief is denied to the petitioner, it is stated by Mr. Sibal that (i) due to non-payment of rent by the respondent, the petitioner will be rendered unable to pay back its monthly instalments to the banks and other financial institutions; (ii) the petitioner is also liable to pay Goods and Service Tax @ Rs. 3.24 Crores per month on the full invoiced amount despite the default of the respondent; (iii) being the only source of revenue for the petitioner, the wilful non-payment by the respondent has resulted in resulting in forced liquidity crunch; (iv) this may lead to

default by the petitioner, which may in turn lead to legal proceedings in addition to damaging the credit rating and reputation to the petitioner; (v) the petitioner is already saddled with penal interest on account of moratorium opted due to non-payment by the respondent.

40. In support of his submissions that the relief sought by the petitioner is within the ambit of Section 9, Mr. Sibal has relied upon the following Judgments:

1. ***Value Source Merchantile v. M/s. Span Mechnotronix, (2014) 143 DRJ 505***

2. ***Friends Motels Pvt. Ltd. v. Supertrack Hotels Pvt. Ltd., 2016 SCC OnLine Del 2547***

3. ***Supertrack Hotels Pvt. Ltd. v. Friends Motels Pvt. Ltd., 2017 SCC OnLine Del 11662***

4. ***Sona Corporation India Pvt. Ltd. v. Ingram Micro India, 2018 SCC OnLine Del 10238***

41. It is also submitted by Mr. Sibal that the relief sought by the petitioner in this petition is not final in nature, as contended by the respondent, and the dispute that have to be settled by Arbitration are exclusive of the predetermined rent which is necessary for the petitioner to survive. It is also submitted that

the petitioner has a further claim of damages and interest on account of non-payment by respondent.

42. Dr. Abhishek Manu Singhvi and Mr. Arivind Nigam learned Sr. Counsels ('Counsels', for short) appearing for the respondent, submitted that the prayers as sought by the petitioner cannot be granted within the scope of Section 9. In this regard, it is stated by the Counsels that the prayer seeking injunction is wholly misconceived, bad in spirit of law and against the statutory regime of IBC as the respondent bona fidely took over a sick asset to revive it into an operational unit by investing thousands of Crores by means of resolution plan. Further, it is submitted by them that the respondent facility has been deemed to be a Public Utility Service vide a Government of Odisha Notification dated July 16, 2020. As per this notification, the respondent facility is deemed to be a public utility service in the times of COVID-19 and therefore, no injunction or restraint from using the Oxygen Plants can be granted considering the fact that the Steel Facility cannot be run without its Oxygen Plant.

43. It is also submitted by the Counsels that the prayers sought by petitioner tantamount to a decree that the respondent

must pay INR 18 Crores monthly, before these disputed facts are even decided by the Ld. Arbitrator.

44. It is submitted by the Counsels that for grant of relief under Section 9 it is to be shown that not only is there a *prima facie* case and balance of convenience in favour of the petitioner, but also the respondent is acting in a manner to defeat the realization of future award. In this regard, they have placed his reliance upon a Judgment of this Court in the case of ***Goodwill Non-Woven Ltd. v. X Coal Energy & Resourced LLC in OMP (I) (COMM) 120 of 2020,*** wherein it was *inter-alia* held that disputed factual positions cannot be decided in a Section 9 petition, more so when there is no threat of frittering away of the properties either or before during the pendency of the Arbitration proceedings.

45. It is also submitted by the Counsels that the petitioner in the present case has failed to even establish how the denial of interim relief would be likely to frustrate the arbitration proceedings (***Ref: Nirbhay Pratap Singh v. Sumitomo Electric Industries and Anr., OMP (I) (COMM) 275/2020.***

46. That apart, it is submitted by the Counsels that in the

present case the scope of Section 9 petition is being misused as there exist no immediate threat of any nature to the subject matter and further highlighted the disputed facts during the course of the submissions which cannot be decided in a petition filed under the said Section. They also contended that the petitioner is seeking to circumvent judicial dicta and established principles surrounding Section 9 as the said provision cannot be used to secure a decree to the tune of a final relief, nor can it be misused to nullify the arbitration proceedings by seeking a final relief. On the scope and applicability of Section 9, the Counsels have placed reliance on the Judgment of this Court in the case of ***Avantha Holdings Limited v. Vistra ITCL India Limited, OMP (I) (COMM) 177/2020.***

47. On the merits, it is submitted by the Counsels that this entire transaction was clearly not at an arm's length but rather a friendly one which has led to payments of exaggerated amounts as lease rentals that were artificially fixed to meet the requirement of INR 1000 Crore (sale price), making it further into the nature of a financial lease. In this regard, they stated that prior to February 13, 2015, erstwhile Bhushan Steel Limited

had the ownership of Oxygen Plants and in order to provide funds to erstwhile Promoters of Bhushan Steel Limited, the Joint Lender Forum ('JLF', for short) gave NOC for the sale and lease back of Oxygen Plants. JLF approved that funds to the tune of INR 1000 Crore would be infused from sale of this Oxygen Plants. Since the erstwhile promoters did not want to sell the Oxygen Plants to any outside entity as it would adversely affect the running of the steel plant, they identified one of their controlled entities, i.e., Brace Iron and Steel Private Limited (current petitioner). It is submitted that the four Oxygen Plants were purchased by 'SREI Infrastructure Limited' through the Petitioner at a consideration amount of INR 1000 Crore and given back on lease to erstwhile Bhushan Steel Limited (current Respondent) against the payment of monthly lease rent. Lease Agreement under Clause 5.1 read with Schedule 2 provides for a monthly lease rental of INR 15 Crores till march 31, 2020 and subsequently INR 18 Crores excluding the appliable taxes. The transaction, when entered into by the erstwhile Bhushan Steel Limited, was not as per the market value of leased equipment and that it was primarily entered into for the reason that an amount of

INR 1000 Crore was needed, lest erstwhile Bhushan Steel Limited would have turned into a Non-Performing Asset. It is submitted that keeping these considerations in mind, rentals were pegged to the loan amount / finance cost, and hence do not represent the true and correct lease rental amount as per the prevailing market standard.

48. It is also submitted by the Counsels that the entire transaction of sale and lease back of Oxygen Plants is itself questionable, being mentioned in a SFIO Complaint and Investigation Report.

49. It is further contended by the Counsels that Annual Reports of a Company are public documents as per the statutory position and judicial precedence under Indian Evidence Act, 1972 and as per the same, it is a matter of public knowledge that the respondent in its new Avtar was reviewing and analyzing all existing agreements in its domain. It was during this exercise that the Lease Agreement was reviewed and later realized by the respondent that Rs.18 Crore per month lease rental was not in accordance with the prevalent market standard but far in excess of it. Consequently, the respondent had approached the petitioner

to streamline the rentals with current market standards. In this regard, it is stated by the Counsels that communications between the petitioner and the respondent started in formally way back in December, 2018 and subsequently, took shape in the form of formal communications. They has also relied upon extracts from Annual Reports of the respondent for the years 2017-18 and 2018-19.

50. On terms of payment of lease rental under the Lease Agreement, it is submitted by the Counsels that Clause 5.2, which imposes an unconditional obligation on the petitioner to pay the lease rentals cannot be read in an isolation. More so, the said clause must be read along with Clause 5.1 of the Lease Agreement, which states that *"Lessor and Lessee may mutually decide to increase or decrease the prevalent rent (and / or other payables) at any time during the subsistence of this Lease Deed"*.

51. Thus, it is contended by the Counsels that Clause 5.1 read with Schedule 2 provides that lease rental can be increased or decreased mutually and Clause 5.2 in no way dilute clause 5.1and this Clause is absolute in nature which can be invoked by either party to the Lease Agreement. It is their submission that the

respondent's parent company is also operating integrated steel plants in two other places viz. Jamshedpur and Kalinganagar and it was during the review and regularizing of affairs (as disclosed in the annual reports) that the respondent realized that the lease rentals are not in accordance with the prevalent market standards. It was subsequent thereto that the respondent wrote to the petitioner on April 27, 2020 stating the need to immediately engage and discuss about the payment obligations not being in line with market standards. Petitioner also agreed to mutually engage in discussions in its own accord vide response dated April 30, 2020. It is submitted that these negotiations / discussions regarding existing lease rentals were ongoing till September 7, 2020, after which the present petition was filed to the complete surprise of the respondent.

52. It is also submitted by the Counsels, the plea of the petitioner that the respondent is attempting to force the petitioner into being declared an NPA by the lender bank is ill-founded as the petitioner had undertaken the moratorium on debt repayment and has also received close to 70% of the rental amount from the respondent through part payment made every month. Moreover,

declaration of an NPA is a two-stage process done in accordance with RBI circulars and the petitioner has not crossed even the first stage. It is further submitted, the Supreme Court vide the order dated September 03, 2020 passed in ***Writ Petition (Civil) 825 of 2020*** in ***Gajendra Sharma v. Union of India*** has also indefinitely stayed declaration of loan facilities as NPA until further orders.

53. Clause 6.1.(vii) of the Lease Agreement and Clause 6.1.7 of the Common Loan Agreement casts obligation on the petitioner to maintain the Oxygen Plants in accordance with best industry practice and undertake routine repairs. Clause 6.1.5 of the Common Loan Agreement also mandates the petitioner to maintain a comprehensive insurance coverage of the Oxygen Plants. Relying upon these contractual obligations, it is contended by the Counsels that each representation, warranty, undertaking and covenant of the petitioner under Lease Agreement and Common Loan Agreement is an independent obligation of the petitioner. Therefore, meeting the insurance obligation under Clause 6.1.(viii) and 6.1.5 of the Lease Agreement and Common Loan Agreement respectively will not

discharge the petitioner's maintenance obligations under 6.1.(vii) of the Lease Agreement and 6.1.7 of the Common Loan Agreement. The insurance is primarily to mitigate the risk of the petitioner and preserve the underlying security for the loan of Rs.850 Crores given to the petitioner.

54. It is further contended by the Counsels that despite there being specific contractual obligations, the petitioner had failed to undertake any routine maintenance measures. Since the inception of the contract in February, 2015 till May 31, 2020, the respondent has evaluated an expense incurred at Rs. 41,79,48,852/- towards maintenance of the Oxygen Plants. The petitioner's plea that the respondent did not object to the question of maintenance is without merit as there can be no question of acquiescence or waiver since there is a direct contractual obligation in the Lease Agreement.

55. The Counsels have also relied upon various communications between the parties whereby the respondent informed the petitioner about required repairs, requirement of spares and maintenance cost due from petitioner since 2019. It is also submitted that till September, 2020, the petitioner did not

even provide a single technical person to oversee the functioning of the Oxygen Plants.

56. Based on past ledger / statement of accounts maintained with the Company as well as stand-alone financial statements of the petitioner for FY 2017-18 wherein an outstanding amount of Rs. 10,19,91,600/- is payable by the petitioner to the respondent in view of the sale and lease back transaction, it is submitted by the Counsels that vide communication dated July 3,2020, the respondent had in fact demanded that the outstanding sum of Rs. 10,19,91,600/- be paid by the petitioner. It is also submitted by them that the same has been acknowledged by one Mr. Ajay Gupta, Vice-President (Accounts and Operations) SREI Equipment Finance Limited vide e-mail dated July19, 2019 sent to Manager, Finance and Accounts of the respondent. The Counsels have relied upon Judgments of this Court in the cases of ***ESPN Software India Pvt. Ltd. v. Modi Entertainment Network Ltd., 2012 SCC Online 3836*** as well as ***Shahi Exports Pvt.Ltd. v. CMD Buildtech Pvt. Ltd., 2013 SCC Online Del 2535,*** wherein it is *inter-alia* held that admission in balance sheet is *per se* an admission of liability.

57. The Counsels also submitted that the allegation of the petitioner that the respondent is trying to take over the Oxygen Plants of the petitioner through CIRP is also ill-founded. Moreover, the lack of clarity on the accounts that are payable to the Lenders, intention to not arbitrate the present dispute by seeking final relief, it is submitted by them, are all illustrative of the fact that the petitioner has approached the Court with unclean hands.

58. Rebutting the pleas raised by the Counsels, Mr. Sibal contested that the respondent has paid the lease rentals at the documented rate until February, 2020 and even thereafter. The respondent claimed a discount based only on the stress on its liquidity due to COVID-19. It is also stated by Mr. Sibal that the respondent has even deducted tax at source under the Income Tax Act and has paid to the Government of India based on the documented lease rentals while paying to the petitioner a reduced amount. Moreover, the entire transaction was appraised by seventeen banks led by SBI, subsequent to which Rs.10,00,12,50,000/- was paid by the petitioner to the respondent to reduce its liability and no dispute was raised by the committee

of creditors, respondent RP on the petitioner's Lease Agreement during the CIRP process. In this regard, anchorage has been made on the Apex Court Judgment in ***Alopi Parshad and Sons Ltd. v. Union of India, (1960) 2 SCR 793,*** wherein it was *inter-alia* held that the Indian Contract Act, 1872 ('Indian Contract Act', for short) does not enable a party to a contract to ignore the express covenants thereof.

59. Mr. Sibal on the plea of the Counsels that by way of an interim order a final relief of payment of lease rentals is sought, submitted that the respondent has defaulted in making the payment of these lease rentals by taking umbrage under its own unadjudicated disputes and claims and if such a plea is allowed, it would lead to anomalous situation where a party will be able to default in making payment of its contractual dues and claim that the other party cannot receive its contractual dues by way of interim order. In the facts of the present case, Mr. Sibal states it results in the respondent getting an unjust gain out of breaching Clause 5.2 and 6.3(a) of the Lease Agreement.

60. On the allegation of SFIO proceedings and charge sheet being filed, it is submitted by Mr. Sibal that the petitioner has no

concern or connection with the erstwhile Bhushan Steel Group and the petitioner's entire shareholding is owned by SREI Alternate Investment Trust and that the petitioner is not even named in the charge sheet filed by SFIO to the relevant court.

61. Mr. Sibal has also distinguished the Judgements relied upon by the Counsels namely ***Goodwill Non-Woven Ltd. (supra),*** and ***Nirbhay Pratap Singh (supra)*** in the facts of the present case.

62. On the counter-claims of the respondent towards maintenance and admitted claim it is submitted by him that the claim of maintenance is unadjudicated and not an actionable claim which cannot be adjusted / set off against existing liability of rent payment ***(Ref: NHAI v. Jetpur Somnath Tollways Ltd., FAO (OS) (COMM) 166/2017).*** On the cost of alleged repairs, it is submitted by Mr. Sibal that the same is inflated and it should have been claimed under the comprehensive insurance policy covering the leased equipment. On the prior intimation by either party the Insurance Company would have assessed the amount to be spent on maintenance and repair after survey.

63. By relying upon the Division Bench Judgement of this

Court in ***Durga Builders Pvt. Ltd. v. Motor and General Finance Ltd. and Anr., (2014) 140 DRJ 575,*** Mr. Sibal contended that the petitioner has not admitted any claim of the respondent even in its balance sheet, as the law requires the same to be put to trial. He further stated that the statement in the standalone financial statement, which reads as '*Balance receivable of Rs. 21,94,96,885 and payable of Rs. 10,19,91,600 from Bhushan Steel Limited is subject to confirmation',* is neither unequivocal, nor clear or categorical for it to be an admission. Rather, it is qualified by two factors, i.e., '*Balance receivable of Rs. 21,94,96,885'* and '*subject to confirmation*'. The alleged claim for Rs.10,19,91,600/-, it is also contested by Mr. Sibal on the ground that the same does not arise under the Lease Agreement and accordingly, not covered within the ambit of arbitral proceedings.

64. On non-invocation of Clause 11.1 which mandated pre-arbitration negotiations, Mr. Sibal submitted that the said plea is not sustainable in view of the Apex Court Judgement in ***Visa International Ltd. v. Continental Resources (USA) Ltd., (2009) 2 SCC 55***.

65. Having heard learned counsels appearing for the parties, I shall encapsulate their submissions in brief. The submissions of Mr. Sibal are as follows:

1. There is an admitted obligation to pay rent on part of the respondent as per the Lease Agreement. (Reference to Clause 5.1 and 5.2).

2. Being an undisputed fact, *prima-facie* case is made out by the petitioner;

3. On the balance of convenience, it is stated that:

3.1. Rent collected is utilized towards servicing the loans taken for acquiring the leased equipment;

3.2. Respondent is in possession and continued commercial usage of the leased equipment worth over Rs. 1000 crores, without paying rent;

3.3. Owing to the non-payment respondent is unjustly enriching itself whereas the petitioner is suffering financially;

3.4. The respondent has security in form of possession of the Leased Equipment, the petitioner has no such security for ensuring payments of lease rentals;

4. On irreparable injury, it is stated that:

4.1. The non-payment has resulted in forced liquidity crunch for the petitioner;

4.2. This might lead to petitioner facing legal proceedings and damaged credit ratings;

4.3. In addition to the penal interest on account of moratorium opted due to non-payment by the respondent.

5. Relief sought is not final in nature and falls within the scope of Section 9 of the Act. Reliance is placed on ***Value Source Merchantile (supra), Friends Motels Pvt. Ltd. (supra), Supertrack Hotels Pvt. Ltd. (supra)*** and ***Sona Corporation India Pvt. Ltd. (supra).***

6. Lease Rentals have been paid at the documented rate till February 2020. If the relief sought is not allowed, it would lead to an anomalous situation where a party would default in making payment of contractual dues and claim the other party cannot receive its contractual due by way of interim order.

7. The entire transaction was appraised by over 17 Banks and no dispute was raised by CoC, RP on the Lease

Agreement and therefore the respondent cannot wriggle out of express covenants (***Ref: Alopi Parshad and Sons Ltd. (supra)***).

8. The relaxation in the payment of rent was sought due to COVID-19 liquidity stress and further the respondent even went ahead and deducted tax at source as per the actual lease rentals.

9. On the maintenance charges raised by the respondent, it is stated that being unadjudicated claims the same cannot be set-off against existing liability (***Ref: NHAI (supra)***).

10. On the admitted liability, it is stated that even entries in the balance sheet requires to be put to trial and even otherwise the petitioner's liability as per the standalone financial statement is neither unequivocal nor covered within the ambit of arbitral proceedings.

66. On the other hand, the submissions of Dr. Singhvi and Mr. Nigam (Counsels) are as follows:

1. Petitioner is trying to circumvent judicial dicta and established principles surrounding Section 9 as the said

provision cannot be used to secure a decree to the tune of a final relief, nor can it be misused to nullify the arbitration proceedings by seeking a final relief. Reliance placed on ***Avantha Holdings Limited (supra).***

2. The payment for Rs. 18 crores per month is disputed fact to be decided by the Arbitrator.

3. Granting of the reliefs under this petition would amount to negating the entire insolvency proceedings through which the respondent revived a sick unit;

4. Respondent facility has been deemed to be a Public Utility Service *vide* a Government of Odisha Notification dated July 16, 2020 in the times of COVID-19 and therefore, no injunction or restraint from using the Oxygen Plants can be granted considering the fact that the Steel Facility cannot be run without its Oxygen Plant.

5. No case made out by the petitioner that non-grant of interim-relief would frustrate the arbitration proceedings. (***Ref: Nirbhay Pratap Singh (supra)).***

6. Relied upon ***Goodwill Non-Woven Ltd. (supra),*** wherein it was *inter-alia* held that disputed factual

positions cannot be decided in a Section 9 petition, more so when there is no threat of frittering away of the properties either before during the pendency of the Arbitration proceedings.

7. On merits, it is stated that:

7.1. The entire transaction was clearly not an arm's length but rather a friendly transaction which has led to payments of exaggerated amounts as lease rentals that were artificially fixed to meet the requirement of INR 1000 Crore (sale price), making it further into nature of a financial lease;

7.2. The same is mentioned in a SFIO Complaint and Investigation Report;

7.3. The fact that the Lease Agreement and Common Loan Agreement records existence of four Oxygen Plants and the admitted stand that the 340 TPD plant was always non-functional is further indicative that the transaction was not at arm's length;

7.4. It was while reviewing various contracts/transactions as per the Annual Reports of the Company after reviving

the respondent that it was realized by the respondent that Rs.18 Crore per month lease rental was not in accordance with the prevalent market standards but far in excess of it and negotiations were going on between the parties;

7.5. Clause 5.2, which imposes an unconditional obligation must be read along with Clause 5.1 of the Lease Agreement, which states that *"Lessor and Lessee may mutually decide to increase or decrease the prevalent rent (and / or other payables) at any time during the subsistence of this Lease Deed"*;

7.6. The petitioner failed to comply with Clause 6.1(vii) of the Lease Agreement and Clause 6.1.7 of the Common Loan Agreement which casts an obligation on the petitioner to maintain the Oxygen Plants in accordance with best industry practice and undertake routine repairs;

7.7. Since February, 2015 till May 31, 2020, the respondent has evaluated an expense incurred at Rs. 41, 79, 48,852/- towards maintenance of the Oxygen Plants;

7.8. Meeting the insurance obligations as per the Clauses under the Loan Agreement and Common Loan

Agreement will not discharge the petitioner of its maintenance obligations;

7.9. No technical person appointed to oversee the functioning of the Oxygen plants until September, 2020;

7.10. Various communications between the parties whereby petitioner is informed about required repairs, requirement of spares, maintenance cost since 2019;

7.11. As per the ledger/statement of accounts of the Company, as well as stand-alone financial statement of petitioner for FY-2017-18 an outstanding amount of Rs. 10,19,91,600/- is payable by the petitioner to the respondent. Demand for its payment was made by respond on July 03, 2020 and the liability was acknowledged by one of the official of petitioner's Lenders. Reliance place on ***ESPN Software India Pvt. Ltd. (supra)*** and ***Shahi Exports Pvt. Ltd. (supra)*** to contend that admission in balance sheet is per se an admission of liability.

8. The plea that the respondent is attempting to force the petitioner into being declared an NPA by the lender

bank is ill-founded as the petitioner had undertaken the moratorium on debt repayment and has also received close to 70% of the renal amount from the respondent through part payment made every month. Moreover, Supreme Court has currently stayed declaring loan facilities NPA.

67. Having noted the broad submissions of the learned counsels for the parties and perused the record, it is the case of the petitioner that the Oxygen Plants were leased out to the respondent at the monthly consideration of Rs.15 Crores (net of all taxes and TDS) for the period ending March 31, 2020 and Rs.18 Crores (net of all taxes and TDS) w.e.f. April 01, 2020, as per Clause 5.1 read with Schedule 2 of the Lease Agreement. Therefore, I find it apposite to reproduce Clauses 5.1, 5.2 and Schedule 2 of the Lease Agreement herein under:

"5. RENT

5.1 In consideration of the Lease being granted, the Lessee shall pay to the Lessor a monthly rent (net of all taxes and tax deduction at source), details of which are set out at Schedule 2 hereof, in arrears on or before 2 (two) business days prior to the last date of each month (Rent).

The Lessor and the Lessee may mutually decide to increase or decrease the prevalent Rent (and/or other payables) at any time during the subsistence of this Lease Deed. Further, the

Parties acknowledge that the above Rent is based on, among others, a benchmark rate (based on the cost of financing the purchase of the Equipments by the Lessor) that has been agreed between the Parties prior to the date of execution of this Lease Agreement. In the event the benchmark rate changes or the Parties agree to change the benchmark rate/apply some other benchmark, the Rent payable may increase or decrease accordingly.

For any revision of the Rent in accordance with the above, the Party proposing to revise the Rent shall provide a notice to the other Party. Within 5 business days of such other Party receiving the notice, the Parties shall meet and decide on the revised Rent if acceptable to both the Parties.
It is clarified that in the event the Lessor claims credit from the tax authorities for the tax deducted at source and deposited by the Lessee on the Rent, the amount representing such credit will be refunded by the Lessor to the Lessee. The Lessee may choose to set-off such amounts against future Rent payments to the Lessor.

5.2 Notwithstanding anything contained in this Lease Agreement, the Lessee shall be liable to pay the Rent to the Lessor in accordance with the terms hereof with effect from the Handover Date ***(Rent Commencement Date),*** *and the Rent and other amounts payable by the Lessee in accordance with the terms hereof shall always be paid in/ to the credit of the Lessor's Designated Bank Account.*
XXX XXX XXX

SCHEDULE 2
RENT PAYMENT DETAILS

The monthly Rent to be paid by the Lessee shall be as follows:
(a) Rs. 150,000,000 (Rupees Fifteen Crores only) (net of all taxes and tax deduction at source) for the period commencing on the Rent Commencement Date and ending on 31 March 2020; and
(b) Rs. 180,000,000 (Rupees Eighteen Crores only) (net of all

taxes and tax deduction at source) for the remaining duration of the Lease Term,
provided that the Parties may revise the monthly Rent as agreed between them from time to time.
Notwithstanding the foregoing: (i) for the first month of the Lease Term, in addition to the Rent payable for that month, the Lessee shall also pay an amount of Rs. 15,00,00,000/= (Rupees Fifteen Crore only) as one month's advance Rent. This shall be adjusted by the Lessor only against the Rent payable for the last month of the Lease Term or against any other amounts as may be agreed in writing by the Lessee, and (ii) if the Lease Commencement Date is a day other than the first date of the month, then the Rent payable for that month shall be pro-rata to the number of remaining days of that month."

68. Mr. Sibal is right in relying upon the Clauses 5.1 and 5.2 of the Lease Agreement to contend that there is an admitted obligation to pay lease rent on the part of the respondent. In fact I note, the respondent on taking over the management of the BSL for the period between May 18, 2018 to February 29, 2020, had paid the lease rent to the petitioner and also deposited the GST with the public authority.

69. The dispute has arisen thereafter. According to Dr. Singhvi and Mr. Nigam (Counsels) the entire transaction leading to the lease agreement is not at arm's length. It was while reviewing various contracts / transactions as per an Annual Report of the company it was realised by the respondent that

Rs.18 Crores per month leased rental is not in accordance with prevalent market standard, but is far excess of it.

70. The submission of the Counsels was that Clause 5.2 of the Lease agreement read with clause 5.1 imposes an obligation on the parties to decide increase or decrease, the prevalent rent at any time during the subsistence of the Lease Agreement. In other words, they stated that the lease rent being at a higher side is required to be reduced. In fact, during their submissions, the Counsels had indicated that the respondent is ready to pay a lower amount including the GST to the authorities.

71. The plea of Mr. Sibal, as noted above, is that as per the Lease Agreement, the respondent is required to pay Rs.18 Crores per month w.e.f. April 01, 2020. So it follows, whether the lease rent is required to be reduced or not is a dispute, which exists between the parties and needs to be decided/adjudicated. Surely, such a dispute cannot be decided in these proceedings as that shall be the final adjudication of the dispute. There being an arbitration clause, such a dispute needs to be decided in the prospective arbitration proceedings. But the question that arises is, pending arbitration proceedings, whether the petitioner is

entitled to the reliefs as prayed for in the petition.

72. As stated above, there is a clear stipulation in the Lease Agreement for payment of lease rent at Rs. 15 Crores till March 31, 2020 and Rs.18 Crores w.e.f. April 01, 2020, the said agreement is an admitted document of the parties. It is also an accepted position that the respondent is using the Oxygen Plants. The lease rentals received from the respondent are utilised for servicing the loans taken by petitioner from the Lenders and there is obligation to pay the GST/TDS to the concerned authorities as well. If that be so, there is a *prima facie* liability on the respondent to pay to the petitioner/Lenders for the usage of the Oxygen Plants in the manner stipulated in the Lease Agreement i.e., Clause 5.1 read with Schedule 2.

73. At this stage, I may also refer to the plea of the Counsels that despite specific obligation, the petitioner has failed to undertake routine maintenance measures of the Oxygen Plants and keep the same in good working condition in accordance with best industry practice. In support of their submission, they had relied upon the Clause 6.1.(vii) of the Lease Agreement and Clause 6.1.7 of the Common Loan Agreement.

74. According to them, the petitioner has failed to even appoint a single technical person to oversee the operation of the Oxygen Plants since inspection of the Lease Agreement in 2015. It is only after repeated requests made by the respondent that at a very belated stage in July 2020, the details of technical appointee were provided. That apart, it is also stated that the petitioner has failed to provide the spares for the plants. In substance, it was their plea that the respondent has incurred expenses to the tune of Rs. 41,79,48,852/- for the upkeep of the plants.

75. On the other hand, Mr. Sibal has contested the submission made by Dr. Singhvi and Mr. Nigam by stating that the respondent has been in effective possession, control and commercial usage of the oxygen plants and is responsible for the routine and operation costs of the Oxygen Plants and the Lenders in the appraisal memo have clearly noted that the routine maintenance and operation and maintenance charges are on the respondent.

76. Further, according to Mr. Sibal the entire bogey of alleged maintenance cost has been created as an afterthought pursuant to the joint inspection report dated November 20, 2019

conducted by the Lenders and the parties herein. The joint inspection report records that the respondent has admittedly not faced any issue regarding the usage of the Oxygen Plants as generation of oxygen was as per the requirements. That apart, the respondent has been deliberately causing obstacles for the petitioner to inspect the Oxygen Plants by providing information belatedly and that too operating the oxygen plants in deviation from the standard operation procedures.

77. And also, the plants are duly insured under the terms of the agreement and any major repair could be carried out under the Insurance Policy. This fact was clearly conveyed to the respondent vide communication dated January 14, 2020.

78. From the above, it is seen that there is a dispute between the parties as to who is responsible for the upkeep of the Oxygen Plants. *Prima facie*, Dr. Singhvi and Mr. Nigam are right in relying on Clause 6.1.(vii) of the Lease Agreement and Clause 6.1.7 of the Common Loan Agreement that the obligation in on the petitioner, but there is a dispute as to whether the Oxygen Plants actually required any maintenance. On the other hand, it is the case of the respondent that the 340 TPD plant was always

non-functional. That apart, the report on which reliance was placed by Mr. Sibal is disputed by the respondent stating that the same has been prepared during the course of the day on an inspection of merely a few hours which does not have within its scope review of any technical/mechanical operation of the Oxygen Plants. In other words, the conclusion in the report is not acceptable to the respondent.

79. So, it follows that there is a dispute between the parties as to whether the expenses of Rs.41,79,48,852/- said to be incurred on the plants by the respondent are payable and need to be adjusted against the lease rent payable by the respondent. The same has to be decided; not by this Court but by the Ld. Arbitrator, as decision on such dispute shall amount to a final determination. The Counsels have relied upon the judgments of this Court to contend that no *prima facie* case has been made out by the petitioner for grant of the reliefs as prayed for. I have perused the said judgments carefully viz., ***Goodwill Non-Woven Pvt. Ltd. (supra), Avantha Holdings Ltd. (supra)*** and ***Nirbhay Pratap Singh (supra)***. Suffice to state that this Court in the facts and circumstance of those cases refused to exercise its power

under Section 9 of the Act.

80. On the other hand, Mr. Sibal is justified in relying upon the judgement of this Court in ***Supertrack Hotels Pvt. Ltd. (supra)***, wherein the Division Bench upheld the judgment of the Single Bench, directing the appellant therein to pay a sum of Rs. 1,30,44,960/- which was the outstanding amount of agreed rent as per the lease deed from November 2015 till April 2016. The Division Bench in paragraph 19 of the said judgment has stated as under:

> *19. We are therefore of the opinion that while exercising the powers under Section 9 of the Act, the Court can certainly be guided by the principles of Order XV-A and Order XXXIX Rule 10 of CPC. The same view was expressed by another Division Bench of this Court in the case of Value Source Mercantile Ltd. (supra) . The relevant portion of the said judgment reads:*
>
> > *"13. Section 9 of the Arbitration Act uses the expression "interim measure of protection" as distinct from the expression "temporary injunction" used in Order XXXIX Rules 1&2 of the CPC. Rather, "interim injunction" in Section 9 (ii) (d) is only one of the matters prescribed in Section 9 (ii) (a) to (e) qua which a party to an Arbitration Agreement is entitled to apply for "interim measure of protection". Section 9(ii) (e) is a residuary power empowering the Court to issue/direct other interim measures of protection as may appear to the Court to be just*

& convenient. Section 9 further clarifies that the Court, when its jurisdiction is invoked thereunder "shall have the same power for making orders as it has for the purpose of and in relation to, any proceedings before it".

14. The question which thus arises is that if the dispute as aforesaid had been brought before this Court by way of a suit, whether this Court could have, during the pendency of the suit, granted the relief as has been granted in the impugned order. Order XXXIX Rule 10 of the CPC empowers the Court to direct deposit/payment of admitted amounts. The appellant, as aforesaid does not controvert that it continued to be the tenant of office unit B-1 and had not terminated the tenancy with respect thereto. There is thus an admission by the appellant of the liability for rent at least of office unit B-1. The appellant, if had been a defendant in a suit, could have thus been directed by an interim order in the suit to make such payment to the respondent. Order XV-A added to the CPC as applicable to Delhi and which was added, as held by us in judgment dated 15th May, 2014 in FAO(OS) 597/2013 titled Raghubir Rai Vs. Prem Lata, to empower the Court to direct payment during the pendency of the suit at a rate other than admitted rate also, empowers the Civil Court to direct payment which is apparently wrongfully disputed. The denial by the appellant of the entire rent as agreed, on the ground of having determined the tenancy of one of the two office units taken on rent, is clearly vexatious, as in law the appellant as a tenant could not determine tenancy of part of the premises taken on rent. It is not the case of the appellant that it was entitled to do so as part of terms of its tenancy. In that view of the matter, the appellant could under Order XV-A of the CPC have been directed to pay the rent of the entire premises notwithstanding having given notice of termination

of tenancy of part thereof We are therefore satisfied that the impugned order satisfies the test of being in exercise of the same power for making orders as the Court has for the purpose of a Civil Suit and is thus within the ambit of Section 9 of the Arbitration Act."

81. The aforesaid judgment was primarily pivoted on the settled position of Law as stated by the Supreme Court in its judgment of ***Alopi Prashad and Sons Ltd. (supra),*** wherein the Apex Court *inter-alia* held that the Indian Contract Act, does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration of performance of the contract at rates different from the stipulated rates on vague plea of equity. Similarly, in ***Sona Corporation India Pvt. Ltd. (supra)*** a coordinate Bench of this Court, guided by the Division Bench judgment in ***Supertrack Hotels Pvt. Ltd. (supra)***, has in paragraph 14 directed the respondents therein to pay the quarterly lease rent to the petitioner for the period commencing from March 01, 2018 till the date of occupation of the leased premises and the arears of rent within three weeks from the date of order.

82. Likewise, in ***Value Source Mercantile Ltd. (supra)*** as well a Division Bench of this Court, in paragraph 13 and 14 has

held as under:

13. Section 9 of the Arbitration Act uses the expression "interim measure of protection" as distinct from the expression "temporary injunction" used in Order XXXIX Rules 1 & 2 of the CPC. Rather, "interim injunction" in Section 9(ii)(d) is only one of the matters prescribed in Section 9(ii) (a) to (e) qua which a party to an Arbitration Agreement is entitled to apply for "interim measure of protection". Section 9(ii)(e) is a residuary power empowering the Court to issue/direct other interim measures of protection as may appear to the Court to be just & convenient. Section 9 further clarifies that the Court, when its jurisdiction is invoked thereunder "shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it".

14. The question which thus arises is that if the dispute as aforesaid had been brought before this Court by way of a suit, whether this Court could have, during the pendency of the suit, granted the relief as has been granted in the impugned order. Order XXXIX Rule 10 of the CPC empowers the Court to direct deposit/payment of admitted amounts. The appellant, as aforesaid does not controvert that it continued to be the tenant of office unit B-1 and had not terminated the tenancy with respect thereto. There is thus an admission by the appellant of the liability for rent at least of office unit B-1. The appellant, if had been a defendant in a suit, could have thus been directed by an interim order in the suit to make such payment to the respondent. Order XV-A added to the CPC as applicable to Delhi and which was added, as held by us in judgment dated 15th May, 2014 in FAO(OS)597/2013 titled Raghubir Rai Vs. Prem Lata, to empower the Court to direct payment during the pendency of the suit at a rate other than admitted rate also, empowers the Civil Court to direct payment which is

apparently wrongfully disputed. The denial by the appellant of the entire rent as agreed, on the ground of having determined the tenancy of one of the two office units taken on rent, is clearly vexatious, as in law the appellant as a tenant could not determine tenancy of part of the premises taken on rent. It is not the case of the appellant that it was entitled to do so as part of terms of its tenancy. In that view of the matter, the appellant could under Order XV-A of the CPC have been directed to pay the rent of the entire premises notwithstanding having given notice of termination of tenancy of part thereof. We are therefore satisfied that the impugned order satisfies the test of being in exercise of the same power for making orders as the Court has for the purpose of a Civil Suit and is thus within the ambit of Section 9 of the Arbitration Act.

83. That apart, a submission was made by the Counsels that as per the past ledger / statement of accounts maintained with the Company, an amount of Rs. 10,19,91,600 is outstanding/payable by the petitioner to the respondent in view of the 'Sale and Lease Back' transaction by relying upon an e-mail dated July 19, 2020 of the Vice-President of Accounts and Operation at SREI Equipment Finance Limited sent to the Manager, Finance Account of the respondent Company and also on the stand alone finance statement of the petitioner for the financial year 2017-18 wherein at page 73 note 23 shows "*balance convertible is of INR 21.94 Crores and payable in INR 10.19 Crores from Bhushan*

Steel Limited subject to confirmation".

84. On the other hand, Mr.Sibal had contested the plea of the Counsels by stating that the statement on which reliance has been placed is neither unequivocal nor clear or categorical for it to be an admission. Rather, it is qualified by two factors '*balance convertible of Rs.21,94,96,885/-'* and *'subject to confirmation'*. Further, the alleged claim of Rs.10,19,91,600/- does not arise under the Lease Agreement and as such is not covered under the ambit of the present arbitral procedure. Even otherwise, it was his submission that the claim of Rs.10,19,91,600/- is barred by limitation as it pertains to sale agreement 2015.

85. On this aspect of adjustment of Rs. 10,19,91,600 against the lease rent, it is noted that the said amount is disputed by the petitioner. Mr. Sibal is right in stating that there is no unequivocal or categorical admission by the petitioner of the said amount. Rather, the words '*subject to confirmation*' in the standalone financial statement does signify that the same do not denote unequivocal/clear admission. There is no dispute on the proposition of law advanced by Dr. Singhvi and Mr. Nigam by relying on the judgments of ***Shahi Exports Pvt. Ltd***. ***(supra)*** and

ESPN Software (supra) that acknowledgment of debt in the balance sheet is an admission. But the Division Bench of this Court in ***Durga Builders (supra)*** held as under:

> *"14. As the Court recognized in its judgment, the admission must be clear, unequivocal and categorical, whereas in this case, various questions still require consideration and the alleged admission of liability in the balance sheet can be explained away, and accordingly, these issues must be put to trial. The issue here is not whether Durga Builders has an unimpeachable case, but rather, whether there is some room to doubt that the liability is established. Since Durga Builders, in its written statement, reply to the application under Order XII, and in its reply to the present review petition, has contested the existence of the ICDs, and MGF's case is based on a debt arising from the ICDs, this Court does not find merit in the argument that debt is established, while only the nature of the security is dispute. Neither is Mr. Nanda's alleged admission categorical, in that he specifically avers wrongdoing on behalf of Mr. Mehra, a fact which, whether ultimately true or not, deserves to be tested during the ordinary course of trial. The fact that Mr. Nanda and his lawyers have allegations of forgery pending against them in unrelated trials, or that FIRs have been registered against them, does not allow this Court to reach the conclusion that its findings based on well-established jurisprudence surrounding decree on admissions are to be reviewed or set aside. Crucially, this Court, neither in its judgment of 10.04.2012 nor in the present review expresses any opinion on the merits of the claims advanced by either party, but only reiterates that these claims must be tested at trial…."*
>
> *(Emphasis supplied.)*

86. In view of the above, it is clear that Rs. 18 crores being the contractual amount w.e.f April 01, 2020, the said amount is *prima facie* payable by the respondent atleast till such time the parties seek adjudication of the disputes as per the contractual provisions.

87. So, it is directed that the respondent shall pay the arrears of lease rent (net of all taxes / TDS), after adjusting the amount already paid, to the lead Lender Bank with applicable interest within six weeks from today**.**

88. This payment shall be subject to the outcome of the prospective arbitration proceedings. The aforesaid is a tentative view. It is made clear; this Court has only adjudicated the issue which fell for determination in this petition in terms of the prayers made.

89. The petition is allowed to the aforesaid extent. No costs.

V. KAMESWAR RAO, J

DECEMBER 14, 2020*/jg*