IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. (IB) No. 801(ND)/2018

IN THE MATTER OF:

Vistrat Real Estates Private Limited

.....Operational Creditor/Petitioner

v.

Bhushan Steel Limited

.....Corporate Debtor/Respondent

SECTION: Under Section 9 of The Insolvency and Bankruptcy Code, 2016

Judgement delivered on 26.02.2019

CORAM:
CHIEF JUSTICE (RTD.) M.M. KUMAR
HON'BLE PRESIDENT

SHRI S.K. MOHAPATRA
HON'BLE MEMBER (T)

PRESENT:

For the Petitioner: Mr. U.K. Chaudhary, Senior Advocate with Mr. Parminder Singh, Mr. Himanshu Vij, Mr. Jayant K. Mehta & Ms. Drishti, Advocates

For the Respondent: Mr. Gopal Jain, Senior Advocate with Mr. V.P. Singh, Ms. Ruby Singh Ahuja, Ms. Anindita R. Chowdhury, Mr. Aditya Jalan, Mr. Aman Sharma & Mr. Navandeep Matta, Advocates

M.M. KUMAR, PRESIDENT

JUDGMENT

The petitioner-Vistrat Real Estates Private Limited has preferred an ambitious course by filing the instant petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for

brevity 'the Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against the Bhushan Steel Limited- respondent claiming that an amount of Rs. 17,97,91,875/- is in default and the default has occurred in June, 2018. A demand notice under Section 8 of the Code along with invoices was stated to have been issued.

2. Reply to the petition has been filed and it is disclosed that Bhushan Steel Limited (for brevity 'BSL') has already undergone a Corporate Insolvency Resolution Process (for brevity 'CIR Process') and the resolution plan submitted by Tata Steel Limited was accepted on 15.05.2018 in C.P. (IB) No. 201(PB)/2017. Accordingly, the Tata Steel Limited took over the management and business of the BSL-respondent and thereafter Bamnipal Steel Limited, a wholly owned subsidiary of Tata Steel Ltd., acquired majority shareholding and control of BSL in compliance with the provisions of the Code. The order of the Principal Bench dated 15.05.2018 has also been placed on record (Annexure R/2).

3. It has been pointed out that BSL had entered into a Memorandum of Lease with the petitioner for lease property (Annexure R/3) on 01.05.2015 before the CIR Process was

initiated on 26.07.2017. The terms of the memorandum of lease were as under:-

- "The Memorandum of Lease is effective for a period of 11 years;
- The lease rental under the Memorandum of Lease was Rs. 6,00,00,000/- per month, with an increase of 10% annually. A default rate of 9% p.a. is applicable for failure to pay rent;
- BSL deposited an interest free refundable deposit of Rs. 45,00,00,000/- with Vistrat, refundable on handing over of vacant possession by BSL to Vistrat upon termination of the Memorandum of Lease;
- The Memorandum of Lease does not expressly provide a right of termination to BSL;
- The Memorandum of Lease provides an option to termination to Vistrat, with prior consent of IndusInd Bank Ltd (**"IndusInd"**). The Memorandum of Lease operates as a lease discounting facility for a loan taken by Vistrat from IndusInd; and
- Disputes under the Memorandum of Lease are to be resolved by way of arbitration referred to a sole arbitrator with the seat of arbitration being at New Delhi."

4. During the CIR Process the Resolution Professional had appointed an independent valuer to assess the lease rental of the Lease Property and it was concluded that lease rental of the

Lease Property was much higher than the market value of the same. On the basis of the independent valuer's report the Resolution Professional has paid Rs. 5.61 crores to the petitioner instead of the exorbitant amount of Rs. 6 crores as claimed pursuant to the Memorandum of Lease. It has been pointed out that the commercial terms of the lease agreement were not in line with the market standards and the same was terminated on 11.06.2018. The premises were vacated on 10.09.2018 and the affidavit was filed. The reliance has been placed on clause 8.6.8 of the resolution plan submitted by Tata Steel Limited and it is claimed that C.A. No. 284/2018 was disposed of on 15.05.2018. However, learned counsel for the petitioner has claimed that this Tribunal in its order dated 15.05.2018 did not express any opinion on the claim concerning the reliefs and concession and that order was not to be understood in that spirit.

5. We have heard learned counsel for the parties at length. A question of law raised is with regard to the maintainability of the petition under Section 9 of the Code because BSL has already undergone CIR Process which has culminated in the order dated 15.05.2018 and the same has been upheld by the Hon'ble Appellate Tribunal in its order dated 10.08.2018. Moreover, the

petitioner has been paid by the Resolution Professional rent of Rs. 5.61 crores and in Section 3.2.3 of the resolution plan, as approved by this Tribunal in its order dated 15.05.2018, the transaction was regarded as Value leakage and onerous transaction. Section 3.2.3 of the resolution plan reads as under:-

> **"3.2.3 Value leakage from high value related party arrangement:**
>
> The Company has entered into several arrangements with related parties and other entities which are related to the Company and the Existing Promoter Group, which have imposed unreasonable costs on the Company thereby impacting its profitability and health of its balance sheet. Based on the information shared in the Data Room, an illustrative list of such onerous contracts is set out below:
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> (i) Bhushan Energy Power Purchase Agreements: The Company has entered into 2 agreements with Bhushan Energy Limited, an associate of the Company for an aggregate purchase of 485 MW of power. .....;
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> (ii) The Company has entered into an agreement dated May 1, 2015 with Vistrat Real Estates Private Limited in respect of the Company's Registered and Corporate Office Premises. This agreement is valid until April 30, 2026 and an amount of INR 6 crore (plus additional annul interest of 10% starting from the date of the agreement i.e. May 01, 2015) per month. Further, an amount of INR 67.5 crore has been paid as security deposit. The

Resolution Applicant believes that the terms are significantly higher than the prevailing market rates."

6. The amount of rent of Rs. 5.61 crores was identified by the Resolution Professional to be paid for the lease property and the said amount was paid by the Management Agency to the petitioner which has been duly accepted as consideration for the lease. On 11.06.2018 a letter of termination of lease was issued. It has also come on record that the petitioner is a related party to BSL (see detail discussion infra para 7). The possession has already been delivered on 10.09.2018 to the petitioner. In any case the claim made by the petitioner that there is a default, is subject matter of serious dispute. It is also pertinent to notice that Section 8.6.8 provide for no liabilities to related parties/joint ventures and the aforesaid clause in the duly approved resolution plan reads as under:-

"**8.6.8 No Liabilities to Related Parties, associates, joint ventures etc.**

The Company shall have no Liabilities towards the persons currently classified as promoter or promoter group (including the Existing Promoter Group), persons acting in concert with promoters, holding companies, subsidiary companies,

associate companies, Group Companies and/or their respective Affiliates/ associates). However, it is clarified that all claims of the Company against such related parties (and all Liabilities of such related parties towards the Company) shall remain outstanding, due and payable in accordance with their terms.

Any Liabilities, claims, demands, capital contributions, or any other form of financial commitment, including but not limited to pledge of shares or any security interest created or provided, whether guaranteed or contractually agreed in writing or otherwise, by the Company on behalf of or for its subsidiary companies, associate companies, Group Companies and/ or their respective Affiliates, shareholders/ associates, as the case may be, which are in existence prior to the Closing Date and which may be invoked prior to the Closing Date or at any time thereafter, shall stand irrevocably and unconditionally waived and extinguished."

7. It is thus patent that the petitioner is a related party to BSL and liabilities of the Resolution Plan Applicant for the BSL stand excluded. In order to show that the petitioner is a related party it has been asserted that BSL has various cross-holdings in the petitioner company. Mr. Neeraj Singal and Mr. Brijbhushan Singal, the erstwhile promoters of BSL, were also the signatories

to the Memorandum of Association of the petitioner company when it was incorporated on 28.02.2008. Initially, the shareholding of the petitioner was held by Mr. Neeraj Singal and Mr. Brijbhushan Singal (Annexure R/12). On 31.03.2016 less then two years prior to the commencement of CIR Process i.e. on 26.07.2017 the equity shares of the petitioner company were transferred to seven companies (see S. 43 (4) (a) of the Code) and one Mrs. Ritu Singal W/o Mr. Neeraj Singal. Mr. Neeraj Singal was the erstwhile promoter of group of BSL. It has further been highlighted that Mr. Neeraj Singal and Mr. Brijbhushan Singal have been time and again authorized to act on behalf of the petitioner including in connection with the Rs. 250 Crores loan from IndusInd Bank in 2014, although they were not a part of the Board of Directors of the petitioner. In fact, the board resolution of the petitioner dated May 15, 2014 *inter alia* authorized Mr. B. Singal and Mr. N. Singal to operate the facility although they are not directors on the Board of the petitioner. The definition of 'Related Party' is available in S. 5 (24) of the Code. It means in relation to a Corporate Debtor a director of the Corporate Debtor or a relative of the Corporate Debtor. Even the key managerial personnel of the Corporate Debtor would be

covered by the expression 'Related Party'. The provision is set out below in verbatim:-

> **"Section 5 (24) of the Code** - "related party", in relation to a corporate debtor, means—
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> (a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;
>
> (b) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;
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> (c) .....
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> (d) .....
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> (e) .....
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> (f) .....
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> (g) .....
>
> (h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act"

It is further evident that any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act. The equity shares were transferred to Ms. Ritu Singal W/o promoter of the petitioner company and a director of Corporate Debtor. Then huge equity shares were transferred to seven companies where directors of the Corporate Debtor hold substantive shareholding. Therefore, it can be safely concluded that the Corporate Debtor has substantive control in the petitioner's company. In any case it is

far more than 20% shareholding within the meaning of S. 24 (j) of the Code. Therefore, under Section 43 (4) (a) of the Code such transaction are liable to be gone into during the CIR Process and deemed to be a preferential transaction.

8. Dr. Chaudhary, learned Senior counsel for the petitioner has argued that there is no bar created by Section 11 of the Code to file such a petition and the petition cannot be dismissed on the ground that it is not maintainable.

9. It may be true that there is no bar created by Section 11 of the Code but when the petition was filed by the State Bank of India being C.P. (IB) No. 201(PB)/2017 the only course open to the petitioner was to file its claim before the Interim Resolution Professional or the Resolution Professional. The remedy of filing claim has been exhausted which has resulted in acceptance of its claim partially. On principle it cannot be concluded that rejection of a claim could constitute a basis for filing a petition for initiation of another CIR Process. Once again particularly when Clause 8.6.8 of the Resolution Plan has even excluded the claim of the related party transaction. In fact, a fair amount has been assessed and paid. In so far as the resolution plan is concerned it comprehensively has terminated the memorandum of lease being

exorbitant and even the possession has been delivered after the approval of the resolution plan. In these circumstances we are unable to conclude that the petition under Section 9 of the Code could be maintained specially when the claim has been made by a related party. The pendency of application being C.A. No. 284(PB)/2018 is deemed to be disposed of. We also express our displeasure as the petitioner has failed to disclose that the Resolution Professional had already paid Rs. 5.61 crores to the petitioner.

10. As a sequel to the above discussion this petition fails and the same is dismissed with cost of Rs. 50,000/-. The cost shall be paid by petitioner to the respondent.

Sd/-

(M.M.KUMAR) 26.02.20
PRESIDENT

Sd/-

(S.K. MOHAPATRA)
MEMBER(TECHNICAL)

26.02.2019
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