

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No.1547 of 2022

&

I.A. No.4948 of 2022

IN THE MATTER OF:

HTC Impex Pvt. Ltd.

....Appellant

Vs.

Santipara Tea Company Ltd.

....Respondent

Present:

For Appellant: Ms. Sonal Shah, Advocate

For Respondent: Mr. Manish Paliwal and Ms. Megha Yadav, Advocates

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is directed against the order dated 21.09.2022 by which an application bearing C.P. No. 166/KB/2020 filed by the Appellant as Operational Creditor under Section 9 of the IBC, 2016 (In short 'Code') to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor (M/s Santipara Tea Company Limited) has been dismissed on the ground of limitation.

2. The case set up by the Appellant is that it was engaged in the business of Agrochemicals, Insecticides, Herbicides and Pesticides etc.

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3. Pursuant to various purchase orders placed in the year 2012 by the Corporate Debtor, the Appellant supplied the goods and raised invoices upon each delivery.

4. It is alleged that the Corporate Debtor received the goods without any protest about its quality, quantity or branding and against the goods supplied, the Corporate Debtor used to make on account payment, making the account of the Corporate Debtor a running and continuous one.

5. It is alleged that the first default occurred 90 days after the date of the first bill raised by the Appellant on 31.01.2012 whereas the last supply was made on 15.05.2012. It is further alleged that the last on account payment was made against the supplies made was on 05.08.2014 for a sum of Rs. 20,000/-.

6. The Appellant has claimed a sum of Rs. 7,24,530/- with interest @ 14% p.a. and has alleged that this amount has been confirmed by the Corporate Debtor vide its letter dated 09.03.2015.

7. It is further alleged that the Appellant filed a winding up proceeding under Section 433 and 434 of the Companies Act, 1956 (in short 'Act') before the Hon'ble High Court at Calcutta bearing

C.P. No. 161 of 2016 but the said petition was disposed of on 29.03.2016 by the Hon'ble High Court in view of Tea Act, 1953 and notification dated 28.01.2016 with liberty to the Appellant to take necessary steps in accordance with law. The order dated 29.03.2016 passed by the Hon'ble High Court is reproduced as under:-

“The Court: This winding up application arises out of certain claims of the petitioning creditor relating to supplies made on diverse dates to Demdima Tea Estate/ Garden, which, admittedly, is owned by the company. At the time of hearing of the matter, learned advocate representing the company refers to a notification issued by the Central Government on 28th January, 2016, in exercise of powers conferred by sub-section (1) of section 16E of the Tea Act, 1953 whereby the Central Government has authorised the Tea Board to take immediate steps to take over the management or the control of Demdima Tea Estate and six other tea gardens as per the provisions of Chapter IIIA of the Tea Act, 1953. He submits that in view of the embargo under sub-section (1)(c) of section 16G of the Tea Act, 1953, no proceeding for winding up of the company, being the owner of the tea garden, shall lie before this Court except with the consent of the Central Government.

Upon perusing the relevant provision of law, as cited by the learned advocate representing the company, and upon taking into consideration the notification dated 28th January, 2016, it is clear that a proceeding for winding up of the company cannot lie before this Court in the facts and circumstances of the instant case except with the consent of the Central Government, particularly,

because of the reason that the instant winding up petition has been filed on 19th February, 2016,i.e., after the relevant notification dated 28th January, 2016 has come into effect.

The winding up application is, therefore, disposed of with liberty to the petitioning creditor to take necessary steps in accordance with law.

Urgent photostat certified copies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.”

8. The notification dated 28.01.2016 is also reproduced as under:-

“MINISTRY OF COMMERCE AND INDUSTRY

(Department of Commerce)

NOTIFICATION

New Delhi, the 28th January,2016

S.O. 260(E).-Whereas attention of the Central Government has been drawn through various representations to the deteriorating condition of the tea gardens of West Bengal, in particular the tea gardens owned and managed by M/s Duncan Industries Ltd. And whereas, the Tea Board under direction of the Central Government caused inspection of all the fourteen gardens owned by M/s Dunca Industries Ltd. and submitted a report; And whereas, a report on the status of stressed tea gardens in West Bengal was also received from the State Government of West Bengal; And whereas, the situation of the said tea gardens has been assessed by the Central Government on the basis of the report of the Tea Board and the State Government of West Bengal and consultations with the stakeholders of

tea sector; And whereas, the Central Government is of the considered opinion that the tea gardens as listed below are being managed in a manner highly detrimental to the tea industry and to public interest:

- (i) Birpara Tea Estate
- (ii) Garganda Tea Estate
- (iii) Lankapara Tea Estate
- (iv) Tulsipara Tea Estate
- (v) Huntapara Tea Estate
- (vi) Dhumchipara Tea Estate
- (vii) Demadima Tea Estate

Now, therefore, in exercise of powers conferred by sub-section(1) of section 16E of the Tea Act, 1953 (29 of 1953), the Central Government hereby authorises the Tea Board to take immediate steps to take over the management or the control of the above seven tea estates as per the provisions of Chapter IIIA of the Tea Act, 1953 (29 of 1953).

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RAJANI RANJAN RASHMI, Addl. Secy.”

9. It is the case of the Appellant that limitation would start to run from August, 2014 when last payment was made and stopped whereas the winding up proceedings were continued till 04.10.2019 when the decision of the Hon’ble Supreme Court came in the case of Duncans Industries Limited Vs. A.J. Agrochem, (2019) 4 SCC 17.

10. On the other hand, the case set up by the Corporate Debtor is that the first supply was made on 31.01.2012 and the last supply was made on 15.05.2012. It is also the case of the Respondent that the last payment was made on 05.08.2014. The petition under Section 9, having been filed in January, 2020, is clearly barred by limitation and the limitation would not stop running on account of filing of CP No. 161 of 2016 before the High Court under Section 433 and 434 of the Act, 1956. It is also the case of the Respondent that the decision in the case of Duncans Industries Limited (Supra) has nothing to do with the extension of limitation in view of Section 9 of the Limitation Act, 1963.

11. Counsel for the Appellant has submitted that the last date of supply of goods to the Respondent was 15.05.2012, the last on account payment made by the Respondent was on 05.08.2014 and the confirmation of accounts was done on 09.03.2015. The period of limitation is three years in terms of Article 137 of the Act, 1963. Winding up petition under Sections 433 and 434 of the Act, 1956 was filed on 19.02.2016 within the period of limitation but before the said petition, a notification came on 28.01.2016 and vide order dated 29.03.2016 the Hon'ble High Court, while disposing of the petition, filed by the Appellant, held that because of the notification

dated 28.01.2016, which came prior to the filing of petition under Section 433 and 434 of the Act, 1956 on 19.02.2016, it was necessary for the Appellant to have taken the permission from the Central Government to file the application for winding up, therefore, said petition was disposed of with the liberty to take necessary steps in accordance with law. It is submitted that notification dated 28.01.2016 by which the Tea garden belonging to Duncans were taken over by the State Government was challenged by way of a Writ Petition before the Hon'ble High Court of Calcutta which was dismissed on 15.03.2016 and ultimately the matter was taken up to the Hon'ble Supreme Court which was decided on 04.10.2019 and is reported as such. It is therefore submitted that the limitation stopped from 2016 till 2019 and the application under Section 9 having been filed in December, 2019 and numbered in January, 2020 is within the period of limitation.

12. Counsel for the Respondent has vehemently opposed the argument raised by the Appellant and submitted that the cause of action to the Appellant as per its own showing started when the goods were last supplied on 15.05.2012 and then when the last payment was made on 05.08.2014 and then when the account was confirmed on 09.03.2015. If the limitation of period of 3 years is to

be counted from any of the dates mentioned hereinabove, the petition filed in Jan, 2020 under Section 9 is clearly barred by limitation. In so far as the case set up by the Appellant regarding the winding up petition filed on 19.02.2016 is concerned, it is argued that the said petition was not dismissed but disposed of on 29.03.2016 by the Hon'ble High Court in terms of the notification dated 28.01.2016 which came prior to the filing of petition by the Appellant in which the High Court has held that the petition for winding up is not maintainable without the consent of the Central Government and while disposing of winding up petition liberty was granted to the Appellant to take necessary steps in accordance with law.

13. It is argued that neither the consent was taken nor the application under Section 9 was filed though the IBC came into being from 2016 itself. It is submitted that the Appellant cannot take advantage of its own wrong for not taking the consent of the Government for the purpose of winding up petition filed under Section 433 and 434 of the Act, 1956 or for the purpose of filing an application under Section 9 of the Code. It is also submitted that the decision in the case of Duncans Industries Limited (Supra)

does not extend the time limit for filing the petition under Section 9 of the Code because it was not an intraparty proceeding.

14. We have heard Counsel for the parties and perused the record.

15. From the resume of the facts narrated hereinabove, it is clear that the application under Section 9 was filed in the year 2020 as it was registered as CP (IB) No. 166/KB/2020. The petition was filed for resolution of Rs. 7,24,530/- with interest @ 14%. Notice under Section 8 was issued on 03.12.2019. According to the Appellant, the last supply of goods was made by the Operational Creditor on 15.05.2012, the last on account payment was made by the Corporate Debtor on 05.08.2014 and the CD confirmed the accounts on 09.03.2015.

16. There is no dispute about the fact that the limitation for filing an application under Section 9 is three years in terms of Article 137 of the Act, 1963. If the limitation is to be counted from the above three dates then it had already expired even before the notice of demand was issued on 03.12.2019 and the petition was filed in the year 2020. The only aspect which requires to be considered is as to whether limitation would come to a hold on account of the order passed on 29.03.2016 by the Hon'ble High Court of Calcutta

in a petition under Section 433 and 434 of the Act, 1965 filed by the Appellant on 19.02.2016 and it would start to run again on account of order passed by the Hon'ble Supreme Court on 04.10.2019 in the case of Duncans Industries Limited (Supra).

17. As we have mentioned in the earlier part of this order, while referring to the facts of this case, that the petition for winding up was disposed of by the Hon'ble High Court vide its order dated 29.03.2016 only on the ground that by virtue of notification dated 28.01.2016 which came prior to the filing of petition under Section 433 and 434 of the Act, 1956 on 19.02.2016, it was required that in order to take any legal action against the Respondent, the consent of the central government was necessary. However, despite the order dated 29.03.2016 in which the liberty was granted to the Appellant to take recourse in accordance with law, no such application was filed by the Appellant to the Central Government for the purpose of taking its consent to pursue its remedy or recovery of the debt against the Respondent. The Respondent has solely relied upon a decision of the Hon'ble Supreme Court in the case of Duncans Industries Ltd. (Supra) in which the Appellant and the Respondent were not a party, therefore, it has no bearing at all.

18. Therefore, in the light of the aforesaid discussion, there is hardly any error in the impugned order for the purpose of interference because the Adjudicating Authority has also held that there was ample time with the Appellant to seek prior consent of the Central Government for the purpose of taking action against the Respondent in accordance with law.

19. Thus, in view of the facts and circumstances, we do not find any error in the impugned order which requires any interference. Hence, the present appeal is held to be without any merit and the same is hereby dismissed. No costs.

**[Justice Rakesh Kumar Jain]
Member (Judicial)**

**[Ajai Das Mehrotra]
Member (Technical)**

New Delhi

02nd July, 2024

Sheetal