

ORDER

Per: Rajasekhar V.K, Member (Judicial)

1. Preamble

1.1. This court convened *via* video conference today.

1.2. The present application has been filed sections 19(2), 25(2) and 70(1) of the Insolvency and Bankruptcy Code, 2016 (*'the Code' or 'IBC'*) by Mr Ram Ratan Modi, Resolution Professional (RP) of Duncans Industries Limited (*"Corporate Debtor" or "Duncans"*), against Merico Agro Industries Private Limited (*"Respondent" or "Merico"*) under praying to: -

- a. To pass an order under section 19(3) read with section 25(2) of the Insolvency and Bankruptcy Code, 2016 directing the Respondent to comply with the directions of the Applicant and to extend all assistance and co-operation to the Applicant as required by him for taking over possession of Hantapara, Garganda, Tulsipara and Dumchipara tea estates and for carrying out the evaluation of the tea estates;*
- b. To pass an order under section 19(3) of the Insolvency and Bankruptcy Code, 2016 directing the Respondent to comply with the directions of the Applicant in collection of information and managing the affairs of the Corporate Debtor and also to deliver all the records/statutory records/registers/financial records etc. with respect to the four tea gardens to the Applicant regarding facilitation of the Corporate Insolvency Resolution Process within a stipulated time period;*
- c. To pass an order under section 19(3) the Insolvency and Bankruptcy Code, 2016 directing the Respondent to provide a comprehensive hierarchy of the management of the tea estates in order to have a better understanding of the management of the daily affairs of the tea estates;*
- d. To pass an order under section 19(3) the Insolvency and Bankruptcy Code, 2016 directing the Respondent to provide daily updates of the activities in the tea estates, including the details of the transactions during the past two years, to provide details of operational information, production, sales and statement of accounts of the transaction during the past two years and to provide details of the bank accounts which are being operated by the Respondent in respect of the four tea gardens;*

e. To keep the instant application pending after issuance of directions as may be passed by this Hon'ble Tribunal in terms of prayer (a), (b), (c) and (d) hereinabove for the purpose of ensuring compliance of the same;

f. In the event of non-compliance of the directions as may be passed by this Hon'ble Tribunal in terms of prayer (a), (b), (c) and (d) hereinabove, to pass an order under section 70(1) of the Insolvency and Bankruptcy Code, 2016 against the guilty parties subjecting such parties to imprisonment for a minimum amount of Rupees one lakh and a maximum amount of Rupees one crore.

2. Submissions of Mr. Joy Saha, learned Sr Counsel for the Applicant/RP

2.1. Mr. Joy Saha, learned senior counsel for the Applicant/RP submits that the corporate debtor had obtained legal rights from the State of West Bengal over a number of tea gardens. However, *vide* Notification being S.O. 260(E) dated 28.01.2016,¹ Ministry of Commerce & Industry directed the Tea Board to take over the control and management of seven tea gardens leased in favour of Duncans Industries Limited, the corporate debtor herein, as mentioned below: -

- (1) Birpara Tea Estate
- (2) Garganda Tea Estate
- (3) Lankapara Tea Estate
- (4) Tulsipara Tea Estate
- (5) Huntapara Tea Estate
- (6) Dhumchipara Tea Estate, and
- (7) Demdina Tea Estate

2.2. The corporate debtor filed a writ petition bearing WP No.1897(W)/2016 before the Hon'ble Calcutta High Court, challenging the validity of the said notification dated 28.01.2016. On 15.03.2016, the Hon'ble Calcutta High Court passed orders in WP No.1897(W)/2016 upholding the validity of the said notification and dismissing the writ petition.

¹ Page 23 of the application

2.3. The dismissal order was impugned before the Division Bench of the Hon'ble Calcutta High Court in MAT No.562/2016. On 20.09.2016,² the Division Bench passed interim orders, as follows:

- (a) The appellants/writ petitioners shall take over the management of all seven tea gardens;
- (b) The appellants/writ petitioners shall pay both the current and arrear dues of the workers;
- (c) The appellants-writ petitioners shall run the gardens in a prudent businessman-like manner; and
- (d) The appellants-writ petitioners shall keep the Tea Board informed by fortnightly returns as to the steps taken by them.

The caveats³ read as follows:-

“It is clarified that the interim order has been passed only for the purpose of improving lot of the workers as also that of the gardens. The appellants shall not be entitled to alienate or encumber any of the assets of the fixed assets except in usual course of business.”

There is no challenge to this order, nor has it been vacated or varied in any manner, Mr. Joy Saha submitted.

2.4. However, cocking a snook at the orders passed, the corporate debtor entered into three separate agreements with the Respondent herein, on 29.01.2018⁴ (for a period of five years in the case of Hantapara and Garganda Tea Gardens), 20.07.2018⁵ (for a period of five years in the case of Tulsipara Tea Garden) and 19.08.2019 (for a period of ten years in the case of Dumchipara Tea Garden),⁶ whereby the tea gardens were alienated possession in favour of the

² Page 24 of the Application

³ Page 27 of the Application

⁴ Page 25 of the Application

⁵ Page 31 of the Application

⁶ Page 36 of the Application

Respondent, “letting Merico walk into the property and violate the order of injunction.”

- 2.5. Mr. Joy Saha asserts that an act done in violation of court is void *ab initio*. To buttress his submission, he placed reliance on para 25 of *Ghanshyam Sarda v. Sashikant Jha*,⁷ for the principle that one cannot violate an order of court, and then seek a right on the basis of that violation. The agreements on the basis of which Merico contends that it is entitled to remain in possession will be in the teeth of the order, and therefore void *ab initio*.
- 2.6. Mr. Joy Saha submits that the Corporate Insolvency Resolution Process (CIRP) was initiated against the corporate debtor *vide* an order of this Adjudicating Authority dated 05.03.2020 and the Applicant herein was appointed as Interim Resolution Professional (IRP) and later confirmed as the RP by the Committee of Creditors (CoC) of the corporate debtor.
- 2.7. On 06.07.2020⁸ and 07.07.2020,⁹ the Applicant wrote to the Respondents seeking details of the four tea estates which were under the management of Merico.
- 2.8. Merico wrote back to the Applicant on 10.07.2020,¹⁰ stating that the four tea estates do not belong to the corporate debtor hence, those cannot form part of the CIRP. The Respondent also mentioned that the four tea gardens do not belong to the corporate debtor and that they are in exclusive possession, control and management of Merico “since long.” The ownership rights of the aforesaid tea estates belong to the State of West Bengal and that Duncan Industries Limited was provided with mere leasehold user right for identified periods, which cumulatively expired way

⁷ (2017) 1 SCC 599 dated 18.11.2016

⁸ Page 46 of the Application

⁹ Page 45 of the Application

¹⁰ Page 49 of the Application

back in 2004.¹¹ Mr. Joy Saha submitted that this stand was not taken when the agreements were entered into in 2018, and that the Respondents woke up to this only when the Applicant wrote to them.

2.9. The RP wrote another letter dated 04.08.2020, requesting the respondent to disclose copies of all agreements, etc.

2.10. The right that the Respondent seeks to exercise is on the following grounds:

- (1) Duncans is not the owner, it is the State of West Bengal;
- (2) Duncans' lease expired a long time ago.
- (3) Merico has since applied to the State of West Bengal for permission to take over the lease.

2.11. Mr. Joy Saha then took us through the affidavit in reply filed by the Respondent. Merico explicitly denies the right of the corporate debtor to take possession.¹² The Respondent has stated that the leases of the four tea gardens expired by efflux of time.¹³ The lease of Hantapara tea estate expired on 02.12.2004, Garganda's on 19.09.1995, Tulsipara's on 17.04.2004 and Dumchipara's on 12.09.2004. Merico has stated the corporate debtor did not apply for renewal of the lease from the State of West Bengal.¹⁴ Mr Joy Saha submitted that this is a factually incorrect statement. Merico has stated that the state govt has agreed in principle to grant leases of the said tea estates.¹⁵ Mr Joy Saha submitted that this is unsupported by any document which would prove this statement.

¹¹ Page 50 of the Application

¹² Para 3 at page 2 of the Reply

¹³ Second numbered para 5 at page 3 of the Reply

¹⁴ Para 6 at page 4 of the Reply

¹⁵ Last line of para 6 at page 4 of the Reply

- 2.12. Drawing reference to the Division Bench's order dated 20.09.2016,¹⁶ Merico has averred that the interim orders were passed only for the purpose of improving the lot of the workers as also that of the gardens, while recording that the corporate debtor is no longer in possession of the said tea gardens. Merico has also submitted in that it has made a very significant investment of ₹100 crore.¹⁷ Merico has further indicated that actual physical possession of the tea estates was handed over to the respondent under the same with the clear intention that the respondent (Merico) should continue in physical possession of the tea estates for the entirety of the term of their respective agreements.¹⁸
- 2.13. Mr. Joy Saha submits that in the affidavit in rejoinder, the Applicant has disclosed that the corporate debtor had indeed applied for renewal of lease deeds *vide* applications dated 09.03.2004 (*in the case of Tulsipara*),¹⁹ 26.07.2004 (*in the case of Dumchipara*)²⁰ and 16.11.2004 (*in the case of Hantapara*)²¹ which are pending.
- 2.14. The lease with respect to the Garganda Tea Garden was renewed *vide* deed of lease dated 08.11.1996,²² and the same is valid till 18.09.2026. Copies of original lease deed dated 19.07.1974,²³ and a copy of the renewed registered deed dated 08.11.1996²⁴ are placed on record.

¹⁶ Page 24 of the Application

¹⁷ Para 8 at page 5 of the Reply

¹⁸ Para 9 at page 6 of the Reply

¹⁹ Page 41 of the Rejoinder

²⁰ Page 42 of the Rejoinder

²¹ Page 43 of the Rejoinder

²² Para 6 at page 5 of the Rejoinder

²³ Page 44 of the Rejoinder

²⁴ Page 61 of the Rejoinder

- 2.15. Mr. Joy Saha submits that the lease deed with respect to the other three gardens were could not be renewed due to the demand of *salami* imposed by the state for renewal of lease agreements. This demand of *salami* was challenged before the Hon'ble Calcutta High Court in WP (LRT) No.288/2005, which held in favour of the tea garden owners, holding that *salami* cannot be imposed for the purpose of renewal of a lease which had been executed prior to the coming into effect of the amendment to Schedule 'F'-Form I under rule 4 of the West Bengal Estates Acquisition Rules, 1954 (WBEA Rules), since the amendment does not have retrospective effect. Based on this decision, the corporate debtor filed CA No.2569/2006 before the West Bengal Land Reforms & Tenancy Tribunal opposing the demand of *salami*. In the meantime, upon the appeal filed by the State Government before the Hon'ble Supreme Court, the decision of the Hon'ble Calcutta High Court was reversed. CA No.2569/2006 filed before the West Bengal Land Reforms & Tenancy Tribunal came to be dismissed for default in October 2019.²⁵
- 2.16. Mr Joy Saha drew attention to the agreements entered into between the corporate debtor and Merico in respect of the Hantapara and Garganda Tea Estate dated 29.01.2018,²⁶ Tulsipara Tea Estate dated 20.07.2018,²⁷ and Dumchipara Tea Estate dated 19.08.2019.²⁸ Clause 7²⁹ in each of the Agreements are in *pari materia*. It stipulates that the lessee shall be entitled to the entire sum realised from the sale of tea produced and manufactured in the gardens and shall be paid a sum of ₹1/- per kg of made tea so produced. In other words, the corporate debtor shall pay to the Respondent, and not the other way round. He submits that the lessee has exclusive rights

²⁵ (Para 8 at) Page 7 of the Rejoinder

²⁶ Page 25 of the Application

²⁷ Page 31 of the Application

²⁸ Page 36 of the Application

²⁹ Pages 29, 34 & 40 of the Application

to market and sell all the made tea and/or the green leaf produced or manufactured at the said tea gardens during the validity of the agreement. This agreement, therefore, does not envisage any lease or transfer of land or conveyance of any right in the tea gardens to the Respondent, Mr. Joy Saha submitted.

- 2.17. It is trite law that once a lease expires, the title reverts to the lessor. In any case, the agreements state clearly that the lessees shall run the tea gardens under the supervision of Duncans Industries Limited, Mr Joy Saha submitted.
- 2.18. Mr. Saha submitted that under section 116 of the Indian Evidence Act, 1872,³⁰ a lessee cannot challenge the title of the lessor, corporate debtor, in respect of the said four tea estates inasmuch as the Respondent was inducted by the corporate debtor itself. The principal ground being taken is that the corporate debtor was no longer the owner, and therefore, the Applicant as RP of the corporate debtor cannot take over possession. However, the contention is wrong. The only person who can state that the corporate debtor is not the owner is the State of West Bengal. Further, the order in the Writ Appeal states *inter alia* that the appellants/writ petitioners shall run the gardens in a prudent businessman-like manner.
- 2.19. Mr. Joy Saha then cited the case of *Bajarang Shyamsunder Agarwal v Central Bank of India & Another*,³¹ he submits that if a valid tenancy under law is in existence even prior to creation of mortgage, tenant's possession cannot be disturbed by secured creditor by taking possession of property and lease has to be determined in accordance with section 111 of Transfer of Property

³⁰ **Estoppel of tenant; and of licensee of person in possession.**— No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

³¹ (2019) 9 SCC 94 decided on 11.09.2019

Act, 1882 (“*TP Act*”) for determination of leases (*para 24.1 @ p.107 of the judgment*). If a tenancy under law comes into existence after creation of a mortgage, but prior to the issuance of notice under section 13(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), it has to satisfy the conditions of section 65A of the TP Act (*para 24.2 @ p.107 of the judgment*).

2.20. Mr. Joy Saha submitted that the rationale behind citing the case is that the respondent is trying to exercise a right of possession. Under section 14 of the SARFAESI Act the magistrate can be approached to summarily evict a tenant. This judgment overrules the decision in *Vishal N Kalsaria v. Bank of India & Ors.*³²

2.21. In these circumstances, Mr Joy Saha urges the Adjudicating Authority to direct Merico to hand over possession of the tea gardens and the accounts to enable the RP to carry out his duties.

3. Arguments of Mr. Jishnu Saha, learned Sr Counsel for the Respondent/Merico

3.1. Mr. Jishnu Saha, learned Senior Counsel appearing for the respondent, stated that the arguments advanced by the learned Sr Counsel for the RP has everything to do from the aspect of possession, but not ownership. When the RP is seeking to assert a legal right, he must show the source. He must show that this is an asset of the corporate debtor. Mr. Jishnu Saha submits.

3.2. Mr. Jishnu Saha set the tone for his arguments by referring to the definition of “*property*” under section 3(27)³³ of the Code, and stating that possession is different from ownership. The width and ambit of the expression, “*property*” is very wide. The expression does not figure in the scheme of

³² (2016) 3 SCC 762 : AIR 2016 SC 530, decided on 20.01.2016

³³ “**property**” includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property.

things under section 18(f)³⁴ of the Code, which states that the Interim Resolution Professional (IRP) is to take control and custody of any **asset** over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor. Only those assets over which the corporate debtor has ownership rights can be taken possession of. Ownership rights are beyond the right of possession. Mr. Jishnu Saha then referred to section 25(2)³⁵ of the Code and stated that the Resolution Professional is enjoined to preserve and protect the **assets** including business of the corporate debtor. In both sections, the emphasis is on the **assets**, and not the **ownership**, Mr Jishnu Saha submitted.

- 3.3. Mr. Jishnu Saha submits that section 116 (*footnote 30 above*) of the Indian Evidence Act, 1872, talks about landlord and tenant and does not apply in the present context. Even the second limb of section 116 *ibid* does not talk

³⁴ **18.** The interim resolution professional shall perform the following duties, namely:— (a) to (e) * * *; (f) take control and custody of any asset over which the corporate debtor has ownership – depository of securities or any other registry that records the ownership of assets including - (i) assets over which the corporate debtor has ownership rights which may be located in a foreign country; (ii) assets that may or may not be in possession of the corporate debtor; (iii) tangible assets, whether movable or immovable; (iv) intangible assets including intellectual property; (v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies; (vi) assets subject to the determination of ownership by a court or authority;

³⁵ **25. Duties of resolution professional.**— (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely,— (a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor; (b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings; (c) raise interim finances subject to the approval of the committee of creditors under section 28; (d) appoint accountants, legal or other professionals in the manner as specified by Board; (e) maintain an updated list of claims; (f) convene and attend all meetings of the committee of creditors; (g) prepare the information memorandum in accordance with section 29; [(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans. (i) present all resolution plans at the meetings of the committee of creditors; (j) file application for avoidance of transactions in accordance with Chapter III, if any; and (k) such other actions as may be specified by the Board.

about ownership, it talks about possession. The different facets that have been argued on behalf of the Applicant does not talk about the tea gardens being an “asset” of the corporate debtor. Title is different from possession. The Division Bench has not set aside the notification. Possession is not ownership. Section 3(27) of the Code is consciously applied only to ownership and not to those in possession.

- 3.4. Mr. Jishnu Saha then submits that the information memorandum does not disclose ownership, what right is the Applicant asserting here? What has the Applicant done since the time he has taken over, for renewal of the leases? The answer, according to Mr Jishnu Saha is - nothing at all. In the absence of any assertion of ownership, or these being assets of the corporate debtor, nor a mention in the information memorandum, therefore, the application is completely without basis and hence should be dismissed, especially when the information memorandum does not contain details of the said four tea gardens.
- 3.5. Mr. Jishnu Saha next referred to the notification dated 28.01.2016³⁶ for taking over the management of the Tea Gardens (ref para 2.1 *supra*) is determinative of possession, not of ownership. Upon finding that Duncans was not in a possession to manage, these tea gardens were taken over. There is not one whisper regarding the ownership. This is because admittedly the leases had expired. At least in respect of three tea gardens, the leases have not been renewed. Further, the fact of renewal of lease for Garganda tea garden has been revealed for the first time in the Rejoinder. However, the lease granted in favour of Garganda tea garden was revoked by the state of West Bengal since the lease was not granted in accordance with statute. This does not apply here since Merico is not a tenant under Duncans. There is no obligation either to receive or pay rent. A tenant holding over will not be a lessee and it will be tenancy on month to month. If one is in possession

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without the consent of the owner, one is a tenant at sufferance, or a trespasser.

- 3.6. Mr. Jishnu Saha then submitted that under section 111(a) of the TP Act,³⁷ a lease is determined by efflux of time. Any renewal should be accompanied by a document with the requisite stamp duty. The law is very well settled. In the case of a lessee holding over, the lessor must acknowledge that he has a right to remain in the property. At best, even if, for arguments' sake, it is conceded that the corporate debtor is the lessee, then after determination of the lease, it is only a tenant at sufferance. It is not the same as a tenant continuing in possession after the determination of the term with the consent of the lessor, in which case it is tenancy by holding over. A tenant at sufferance is nothing more than a trespasser. The Applicant cannot maintain the present application, only the state of West Bengal can. And, therefore, the prefatory remarks that when the RP is asserting a legal right, the basis of that right should be shown to the court, Mr Jishnu Saha submitted.
- 3.7. The object of the interim order dated 20.09.2016³⁸ of the Division Bench to enable the gardens to be run. Duncans was in caretaker possession, it was under no position to run the gardens either before or after the order of the Division Bench. Before the Division Bench, there are applications galore which have been filed, in which it has been recorded that the Respondent herein is in possession. Duncans was not the owner, it was a person in possession. It was deprived of its possession under the aforesaid Notification. The Division Bench of the Hon'ble Calcutta High Court did not restore the possession to the corporate debtor. It permitted Duncans to take over the management of the tea gardens and operate the same in a

³⁷ **111. Determination of lease.**— A lease of immovable property determines— (a) by efflux of the time limited thereby; (b) to (h) * * *.

³⁸ Page 24 of the Application

prudent, business-like manner, to pay the present dues and arrears of workers and to keep the Tea Board informed by fortnightly returns as to how the aforesaid objections are being ensured, that is all.

- 3.8. The Applicant has not satisfied the Adjudicating Authority that this is an asset of the corporate debtor. What we have right now is that the lease of the tea gardens had expired, the possession was taken over by the state government and the Division Bench order was intended only to run the gardens. Now, this Adjudicating Authority has been called upon to hold that Duncans is in violation of the orders. If there was any violation of the Division Bench's orders, then the proper thing to do for the Applicant was to have intervened in the Division Bench proceedings, Mr. Jishnu Saha asserted.
- 3.9. Mr. Jishnu Saha submitted that the agreement entered into was for bettering the lot of the workmen and to run the gardens. the Respondent took over the gardens with the object of infusing funds, bringing in machinery, paying the workers, maintaining the gardens and the Respondent has done it all. The Applicant has not made a single statement that the tea gardens is in a state of ruination. No prospective Resolution Applicant can get ownership or possession of the tea gardens. The object of the Code is to ensure that the company survives. If today the Applicant does not have the lease, what will it transfer to the Resolution Applicant? And if it cannot transfer anything to the Resolution Applicant, then why does the Applicant want to unsettle what is being run successfully? The workers are a very integral part of the stakeholders.
- 3.10. It is not in the fitness of things that the Applicant should come forward and raise this objection when he has not asserted any ownership rights. Mr Jishnu Saha wondered whether the Applicant had the funds or the ability to run the tea gardens. The Division Bench did not expect Duncans to have the wherewithal to run the gardens, and that is why it did not find contempt.

The Respondent's only recompense from the agreement is that it gets to keep the proceeds of whatever it sells after meeting all expenses.

- 3.11. Mr. Jishnu Saha urged us to look at it from another perspective: section 16E(1) of the Tea Act, 1953,³⁹ entitles the government to take over the tea gardens, and hand it over to someone else. The Tea Board is not in the business of running the tea gardens. The Hon'ble Division Bench observed that since the Tea Board was not in a position to run the tea gardens, Duncans may take over and run it. The Tea Board notification has not been set aside yet. The Division Bench has only appointed the corporate debtor as a caretaker to run the gardens.
- 3.12. Referring to the two cases cited by Mr. Joy Saha, Mr. Jishnu Saha submits that the first case is for the proposition that an act in violation of an order of court is *non est*. there is no quarrel with the proposition. If the Respondent were in violation of the Division Bench's order, the Applicant could very well have intervened in the appeal. Instead, relying on the judgment of the Hon'ble Supreme Court which lays down a general principle of law that an act which is in violation of order of court is void *ab initio*, a right is sought to be enforced just for the sake of it. As far as *Bajarang Shyamsunder Agarwal (supra)* is concerned, this concerns a case of valid tenancy and what

³⁹ **16E. Power to take over tea undertaking or tea unit without investigation under certain circumstances.**— (1) Without prejudice to any other provision of this Act if, from the documentary or other evidence in its possession, the Central Government is satisfied, in relation to a tea undertaking or tea unit, that— (a) the persons in charge of such tea undertaking or tea unit have, by reckless investment or 2 [by] creation of incumbrances on the assets of the tea undertaking or tea unit, or by diversion of funds, brought about a situation which is likely to affect the production of tea manufactured or produced by the tea undertaking or tea unit, and that immediate action is necessary to prevent such a situation; or (b) it has been closed for a period of not less than three months (whether by reason of the voluntary winding up of the company owning the tea undertaking or tea unit or for any other reason) and such closure is prejudicial to the concerned tea undertaking or tea, unit and that the financial condition of the company owning the tea undertaking or tea unit and the plant and machinery of such tea undertaking or tea unit are such that it is possible to restart the tea undertaking or tea unit and such restarting is necessary in the interests of the general public, it may, by notified order, authorise any person or body of persons to take over the management of the whole or any part of the tea undertaking or tea unit or to exercise in respect of the whole or any part of the tea undertaking or tea unit such functions of control as may be specified in the order..

is required to be done. Therefore, this has no application to the present case at all.

3.13. Mr. Jishnu Saha relied on following judgments:

- a. *Shila Roy Chowdhury & Ors v. Nimai Charan Rakshit*⁴⁰ (paras 10, 11 and 16) and *Firm Sardarilal Vishwanath & ors v. Pritam Singh*⁴¹ (para 3) for the proposition that holding over cannot be inferred. It is not established merely by acceptance of rent, the burden of proof is on lessee.
- b. *Bhawanji Lakhamshi and Ors. v. Himatlal Jamnadas Dani and Ors.*,⁴² (para 9) and *C. Albert Morris v. K. Chandrasekaran and Ors.*⁴³ (para 43) for the proposition that mere act of holding over after the determination of the term of the lease does not create a tenancy.
- c. *R.V. Bhupal Prasad vs. State of Andhra Pradesh and Ors.*⁴⁴ (paras 8 & 9) and *Raptakos Brett and Co. Ltd. vs. Ganesh Property*⁴⁵ (para 12) for the proposition of tenant at sufferance.

3.14. Mr Jishnu Saha urged the Bench to dismiss the Application as without merit.

4. Submissions made by Mr. Joy Saha, learned senior Counsel for the Applicant/Resolution Professional, in reply to the arguments of the Respondent

4.1. Mr. Joy Saha submits that the abiding theme of Mr Jishnu Saha's arguments that the workers are being taken care of, etc., should be discarded since he is not representing the workers today. The bedrock of submissions of the Respondent is that there is no ownership.

⁴⁰ 2006 (4) CHN 7

⁴¹ (1978) 4 SCC 1

⁴² (1972) 1 SCC 388

⁴³ (2006) 1 SCC 228

⁴⁴ (1995) 5 SCC 698

⁴⁵ (1998) 7 SCC 184

- 4.2. Mr Joy Saha submitted that the word “asset” is not defined either in section 3 or in section 5 of the Code. He then draws our attention to the definition of property in section 3(27) of the Code and submitted that section 18(1)(f) that enjoins the Interim Resolution Professional to take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets, including, *inter alia*, assets that may or may not be in possession of the corporate debtor; and tangible assets, whether movable or immovable. Therefore, with the term ‘asset’ not being described, and the definition being so sweeping under section 3(27), Mr. Joy Saha argues, the estates would fall within s.18(f)(iii). The exclusions given in terms of the Explanation do not apply in the present case. The State Government has not come forward to seek eviction of the corporate debtor. Whether the lease will be continued or not will not be decided before this Adjudicating Authority. He asserts that the corporate debtor’s applications for extension have not been rejected.
- 4.3. Mr Joy Saha submitted that the basis on which the RP has applied is that all along these are properties recorded everywhere. If at all they are taken away, they will vest in the Central Government and not in the respondent. Possession was given to the corporate debtor by the Division Bench, Mr Joy Saha asserted.
- 4.4. Mr. Joy Saha submits that the basis on which the RP has applied is that if at all they have been taken away, they will vest in the Central Government and not the Respondent. Possession was given to the Corporate Debtor by the Division Bench. The principal point is the Respondent’s right to occupy. The corporate debtor is in court questioning the right of the Respondent to occupy. The Respondent is trying to ride piggy-back on the workers to deny the right of the Applicant to take possession. On the principle that an act of

court is void, the Respondent must vacate and hand over possession, Mr. Joy Saha re-emphasised.

- 4.5. As far as no pleading of ownership of garden is concerned, Mr. Joy Saha submits, that it is an issue that needs to be decided. That said, it does not mean that the Applicant has lost everything.
- 4.6. Mr. Joy Saha submits that as regards the argument that the Applicant is a tenant at sufferance and therefore, a trespasser, as per section 116 of the TP Act,⁴⁶ once a lease comes to an end with the efflux of time, there can be a twofold situation – one is if the continuation of possession is accepted by the landlord either by acceptance of rent or any other means, then it is tenancy by holding over. If the continuation of possession is not accepted by the landlord, then it is a tenancy by sufferance. Mr. Joy Saha relied on paragraph 6 of *Nellimarla Jute Mills Co. Ltd. v. Rampuria Industries & Investments Ltd.*⁴⁷ for the proposition that a person who had the original title but the same was lost due to efflux of time or operation of law is not a trespasser.
- 4.7. In so far as the arguments pertaining to section 111A of the TP Act is concerned, there is no doubt that the lease has expired. However, this does not mean that there is a right of the Respondent to enter into and retain possession.
- 4.8. In so far as the arguments pertaining to section 25(2) is concerned, its sweep is very wide. And, if we go by the arguments with respect to the object of

⁴⁶ If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.

⁴⁷ (2004) 13 SCC 448.

the Code, in that case, anyone can walk into any property and take it over on the ground that he will improve and run it, Mr. Joy Saha submits.

4.9. Mr. Joy Saha further submits that on the question of nothing being mentioned in the Information Memorandum so far as the four estates are concerned, these are mentioned in the Information Memorandum. It is written at page 28 of the Information Memorandum that although the lease has been renewed in respect of Garganda, it has not been done properly. The dispute whether *salami* would be paid or not, is still subsisting but the renewal itself has not been revoked.

4.10. Mr. Joy Saha submits that the manner in which the orders of the Division Bench have been circumvented, by bringing in alter egos and the workers into the mix, is completely to be depreciated. The CIRP having commenced a long time ago, *prima facie* the documents on which the Respondent seeks to exercise its right, is completely in violation of the orders of the Division Bench. Four tea gardens have been handed over to the Respondent without a single paisa in exchange. The Respondent is allowed to walk in and occupy four tea gardens, who now contends that since the leases have expired, the corporate debtor has no right to seek possession. This is in complete disregard to what the law seeks to achieve. Even the State acknowledges the fact that the corporate debtor is the lessor, Mr Joy Saha concluded.

5. *Analysis and findings: -*

5.1. We have heard the learned senior counsel appearing on both sides and perused the records.

5.2. The primary question that we are called upon to address is whether the four tea gardens in question can be called the asset of the corporate debtor in a situation where the State Government, as the lessor of the tea gardens, has not renewed the lease in favour of the corporate debtor, and Merico, chosen by the corporate debtor to run the gardens in question, continues to run the

same with the full knowledge of the State Govt. We should look at it both from the point of view of the law as well as the ground realities.

From the statutory perspective

- 5.3. We start our inquiry with section 25 of the Code, dealing with the duties of the resolution professional, read with section 18 of the Code, which deals with the duties of the interim resolution professional. Section 25 is but an extension of section 18. Section 25(1) stipulates that it shall be the duty of the resolution professional to “*preserve and protect*” the assets of the corporate debtor, including the *continued business operations* of the corporate debtor. Section 18(1)(f) of the Code, relied on so heavily by Mr Joy Saha, learned senior counsel for the RP, emphasises on taking control and custody of any asset over which the corporate debtor has **ownership rights** as recorded in the balance sheet, including tangible assets, whether movable or immovable.
- 5.4. It is a fact admitted by both sides that the four tea gardens do not, in any sense of the term, *belong* to the corporate debtor, they belong to the State of West Bengal under the West Bengal Estates Acquisition Act, 1953. The RP’s case, at its highest, can only be taken to be that it was a lessee.
- 5.5. Therefore, at the outset, we note that it is not **every** asset that is required to be taken custody of, but only those assets over which the corporate debtor has **ownership rights as recorded in the balance sheet**.
- 5.6. Once the question of ownership is out of the way, we notice certain material facts concerning the lease, in the table below: -

Name of the Tea Garden	Lease Deed Date	Date of commencement	Date on which expired
Garganda	19.07.1974	20.09.1965	19.09.1995
Dumchipara	06.12.1975	13.09.1974	12.09.2004
Tulsipara	26.02.1980	18.04.1974	17.04.2004
Hantapara	25.11.1980	03.12.1974	02.12.2004

These leases have not yet been renewed, for reasons that are not really relevant for the present purposes. If they are not renewed, though there may be a provision for renewal of the leases, the gardens cannot really be said to “belong” to the corporate debtor.

5.7. Both sides took us through the Division Bench’s interim order dated 20.09.2016,⁴⁸ as to the arrangements being made pending disposal of the Appeal. Some interesting facets are revealed when we go through the entire order, as to what has been the thinking on the part of the Bench in passing the interim orders. The Bench noted the following: -⁴⁹

- (a) The power of taking over the management and control of the seven tea gardens was exercised under section 16E(1) of the Tea Act, 1953;
- (b) The allegation that the tea gardens were managed in a manner highly detrimental to the tea industry and to the public interest could have attracted an order under section 16B or under 16D of the Tea Act, 1953, but the Central Government was not justified in issuing an order under section 16E of the Act *ibid*;
- (c) By operation of section 16E(2) *ibid*, the provisions of sections 16A and 16B of the Industries (Development & Regulation) Act, 1951 became operative. Consequently, persons in management of the tea gardens were deemed to have vacated office. Learned Senior Counsel appearing for the Tea Board submitted that the Board does not have the requisite expertise to run the tea gardens. The Board invites entrepreneurs for this purpose by floating tenders. In the present case, tenders were floated four times.

5.8. The Division Bench also took judicial notice of the following, and the paragraph is worth quoting in its entirety: -⁵⁰

⁴⁸ Page 24 of the Application

⁴⁹ Page 26 of the Application

⁵⁰ Page 27 of the Application, first para

“The picture which emerges is that the appellants, in lawful possession of the gardens, were removed without any adequate arrangement for taking over the day-to-day management thereof either by Tea Board or any other independent agency. Consequence is that the situation is worse than what it was on the day when the notification January 28, 2016 was issued.”

- 5.9. The interim orders issued thereafter, extracted in para 2.3 *supra*, start with the phrase, *“In that view of the matter, ...,”* meaning thereby that what was given paramount consideration in passing the orders was not to protect any vested interest of the corporate debtor (Duncans), but to ensure that sufficient arrangements were made for running the tea gardens and for improving the lot of the workers.⁵¹ The Division Bench did observe that the appellants (Duncans) shall not be entitled to alienate or encumber any of the fixed assets, but added, *“except in the usual course of business.”* So, it was not a complete bar on alienation.
- 5.10. There is also merit in the contention of Mr Jishnu Saha, learned senior counsel for the Respondent, that if at all there is a violation of the order dated 20.09.2016,⁵² then it is for the Division Bench of the Hon'ble Calcutta High Court to consider, and not for us. Pertinently, the Division Bench is seized of the matter. Therefore, if the RP feels that there is a violation, then the right course for him would be to file an application before the Division Bench.
- 5.11. This discussion will not be complete without looking at certain documents which have been filed by Merico in its reply affidavit. These are noticed below:
- (1) Letter No.MAIPL/DM/2019-20/028 dated 02.07.2019⁵³ written by Merico to the District Magistrate & Collector, Alipurduar, stating that

⁵¹ Page 27 of the Application, last para

⁵² Page 24 of the Application

⁵³ Page 8 of the Reply

Merico has reopened the Hantapara & Garganda tea gardens on 01.08.2018 as per tripartite meeting held on 29.01.2018 and bipartite meeting held on 20.07.2018 at the Secretariat in the presence of Advisor to the Minister in Charge, Labour Department. It has also been specifically mentioned that at the said meetings of 29.01.2019 (*sic* 29.01.2018) and 20.07.2018, the Govt of West Bengal had assured Merico that it would consider renewal of the lease deed with six months so as to enable Merico to deposit the first instalment of *salami* without any interest or penal charges for the sick and distressed Hantapara, Garganda & Tulsipara tea gardens.⁵⁴

(2) Letter No.145/TZS dated 23.07.2019⁵⁵ written by the District Magistrate & Collector of Alipurduar District, to the Principal Secretary & Land Reforms Commissioner, Department of Land & Land Reforms & Refugee Relief & Rehabilitation, Govt of West Bengal. This is a letter written in respect of Hantapara tea gardens. It has been stated therein that Merico has taken over the management of Hantapara tea garden on the basis of a tripartite meeting held on 29.01.2018 between Duncans, Merico and the Labour Department. The proposal for renewal of lease in favour of Merico was being forwarded to the Government for considering the proposal for renewal of the lease.

(3) Letter No.MAIPL/TAC/2019-20/062 dated 25.09.2019⁵⁶ written by Merico to the Chairman, Tea Advisory Committee, stating that the gardens, which were closed for a long time, were reopened after many rounds of bilateral and trilateral meetings with the Government of West Bengal, Duncans and representatives of the workers of the tea gardens. The Hantapara, Garganda and Tulsipara tea gardens were reopened in

⁵⁴ Page of the Reply

⁵⁵ Page 10 of the Reply

⁵⁶ Page 11 of the Reply

the year 2018 while the Dumchipara tea garden was reopened in Aug 2019. Since then, all four tea gardens have seen timely payment of wages of all the workers and employees (6500 of them approx.), besides deposit of statutory dues such as provident funds, taxes, as well as electricity charges and other expenses in running the gardens. Merico has also stated that all these have been complied from own resources, since no bank or financial institution would grant loans in the absence of valid lease deeds.

- 5.12. There is no contest as far as these letters are concerned, in the rejoinder filed by the Applicant.
- 5.13. In the rejoinder, the RP states that it had become necessary for the corporate debtor to continue to run the tea gardens at Hantapara, Garganda, Dumchipara and Tulsipara even though the corporate debtor was not in a financial condition to do so. In these circumstances, the corporate debtor entered into an arrangement with Merico recorded in the three agreements dated 29.01.2018, 20.07.2018 and 19.08.2018.
- 5.14. The RP has stressed that the corporate debtor continued in possession of the tea gardens, but certain other functions were discharged by the Respondent under the corporate debtor. Therefore, Merico derived no rights in respect of any of the four tea gardens in question.⁵⁷
- 5.15. We see from the three agreements that except for one clause⁵⁸ – clause 1 of the operative portion of the agreements, where it has been stated that Merico will run the tea garden under the supervision of Duncans, all other rights to enter upon and run the tea gardens have been made over to Merico. The obligations that Merico was expected to discharge in respect of the tea gardens could not have been completed without Merico being in physical

⁵⁷ Page 6 of the Rejoinder, para 7

⁵⁸ Relevant portions are at pages 27, 33 & 38 of the Application

possession. Simply put, it was an arrangement by which Merico could manage the gardens, thus absolving Duncans of any responsibility, and admittedly so because Duncans was in no position financially to take care of the gardens, its workers and the payments required to be made towards taxes etc.

From the perspective of ground realities

- 5.16. Be that as it may, when it is the admitted case of the RP that the corporate debtor's financials are not too good - and there is nothing on record to indicate that the financials of the corporate debtor have suddenly been on the upswing - we do not see how the RP would be in a position to run the four tea gardens. The RP is not in any position to run the four tea gardens if it were handed over to him on a platter today.
- 5.17. A procrustean approach to the CIRP is to be eschewed in favour of a more level-headed one keeping in view natural variation and individuality of the CIRP itself. It has to take into account local circumstances and legitimate expectations. In the present case, until the lease is renewed in favour of Duncans, one cannot see how the RP can even stake a claim for taking over. Merico's occupation of the tea gardens is well within the knowledge of the eventual owner – the State of West Bengal, as borne out by the letters forming part of Merico's reply.
- 5.18. In these circumstances, a mechanical application of the letter of the law will inevitably result in deleterious consequences for the large labour workforce and for the production of tea from the gardens. It will throw into disarray a situation where Merico is apparently doing a fine job of running the four tea gardens and taking good care of the workers. In these times when the covid-19 pandemic and its second wave is wreaking havoc on the lives of ordinary citizens, such a move would be wholly unnecessary. We hasten to add that the principles enunciated here are not necessarily of universal

application, but one borne out of the facts and circumstances obtaining in the present case.

Orders

- 5.19. In this view of the matter, the prayers asked for in the present IA cannot be granted. **IA No.1256/KB/2020** is, therefore, dismissed, but in the facts of the case, without costs. Liberty to apply is granted if and when the Govt of West Bengal takes a decision on the renewal of the lease.
- 5.20. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Counsel for information and for taking necessary steps.
- 5.21. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

Harish Chander Suri
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

28.05.2021