

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH- I  
KOLKATA**

**IA (IBC) 17/KB/2022  
And  
CP(IB) No.2185/KB/2019**

***In the matter of***

*A petition under section 9 of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.*

**And**

*An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016, for exclusion of time in computation of period of limitation in filing the application under section 9 of the Insolvency and Bankruptcy Code, 2016*

***In the matter of***

**Kayencee Cereals Private Limited**, a company incorporated under the Companies Act, 1956 and being a company within the meaning of Companies Act, 2013 and having Corporate Identification No-U63090WB1987PTC043480 and its registered office at Nehru Road, P.O. Siliguri, Siliguri- 5, District – Darjeeling, in the State of West Bengal.

...Operational Creditor/ Applicant

Versus

**Santi Para Tea Company Limited**, a company incorporated under the Companies Act, 1956 and being a company within the meaning of Companies Act, 2013 and having Corporate Identification No-U01132WB1995PLC071277 and its registered office at 31, Netaji Subhas Road, P.S. Hare Street, Kolkata-700001, in the State of West Bengal.

... Corporate Debtor/ Respondent

**Date of hearing: 06 May 2022**

**Date of pronouncement: 29 June 2022**

***Coram:***

Shri Rajasekhar V.K.

: Member (Judicial)

Shri Balraj Joshi

: Member (Technical)

***Appearances:***

For Operational Creditor : Ms. Madhu Sudan Sarkar,  
Advocate

For Corporate Debtor : Mr. Rishav Banerjee, Advocate  
Mr. A.K. Awasthi, Advocate

**ORDER**

*Balraj Joshi, Member (Technical):*

1. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (**the Code**) by **Mr. Shibendu Bikash Guha**, on behalf of **Kayencee Cereals Private Limited (Operational Creditor)**, seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **Santi Para Tea Company Limited (“Corporate Debtor”)**.
2. The Operational Creditor was a supplier of food grains like wheat and rice as ration commodity as essential supply for the workers of the Corporate Debtor's Tea Estate namely Demdima Tea Estate at Birpara, Dist. Jalpaiguri. Pursuant to the purchase orders issued by the Corporate Debtor, supplies of ration commodities of such food grains were made. The said supply was made pursuant to the allotment made by the District controller (food & supplies), Govt. of West Bengal for smooth distribution among the workers of the Corporate Debtor. The Operational Creditor made the said supplies for long years on continuous account at the request of the Corporate Debtor.

***Submissions on behalf of the Operational Creditor in CP (IB) 2185/KB/2019:***

3. The case of the Operational Creditor is that the total amount of debt due on unpaid bills is ₹74,26,732/- (Rupees Seventy Four Lakh Twenty Six Thousand Seven Hundred Thirty Two Only) consisting of a principal amount of ₹48,33,539/- (Rupees Forty Eight Lakh Thirty Three thousand Five Hundred Thirty Nine Only) and interest @ 18% per annum calculated from 31 December 2015, amounting to ₹25,93,193.67 (Rupees Twenty Five Lakh Ninety Three Thousand One Hundred Ninety Three and Paise

Sixty Seven) as on 05 December 2018 plus further interest in accordance with law. The date of default is 31 December 2015.

***Submissions on behalf of the Corporate Debtor in CP(IB) 2185/KB/2019:***

4. The Corporate Debtor submits that the said application has been affirmed by an alleged constituted attorney of the Operational Creditor. The law as settled by the Hon'ble NCLAT on the subject provides that a power of attorney holder is not a proper authority to initiate insolvency proceedings. Moreover, the purported power of attorney has also not been annexed to the said application making it liable to be dismissed on this ground alone.
5. It is submitted by the Corporate Debtor that the instant petition is barred by laws of limitation. The Operational Creditor has admitted that the purported claims made by him are due from 31 December 2015. The instant petition ought to have been filed within 30 December 2018. Further, it has been admitted by the Operational Creditor that the date of last payment by the Corporate Debtor is 07 May 2015, indicating that the instant proceedings ought to have been filed on or before 07 May 2018.
6. The Operational Creditor has also sought to allege that it was prevented from filing the instant petition due to the embargo imposed in the wake of the Notification dated 28 December 2016 of the Ministry of Commerce and Industries, Department of Commerce, Central Government till the decision of the Hon'ble Supreme Court dated 04 October 2019. The Operational Creditor has sought condonation of the period between 28 December 2016 being the date of issuance of the said Notification of the Ministry of Commerce and Industries, Department of Commerce, Central Government till 04 October 2019 being the date of passing of the order dated 04 October 2019 by the Hon'ble Supreme Court in the matter of Duncans Industries Limited vs. A.J. Agrochem.
7. In this regard, the Corporate Debtor submits that the Operational Creditor had not filed any proceeding before any court of law to take advantage of

section 14 of the Limitation Act , 1963 and therefore it is palpably clear that the purported claims of the Operational Creditor have become barred by the laws of limitation. It is further submitted that section 5 of the Limitation Act, 1963 cannot be used to resurrect a dead claim. The Code is complete in itself and provides for definite timelines which have to be adhered to while filing applications under section 7, 9 and 10 of the Code.

8. Further, the contents of the said notice dated 9 December 2019 being Annexure I to the said petition are denied by the Corporate Debtor. According to the Corporate Debtor, Operational Creditor could not have issued the said notice dated 9 December 2019 having regard to the fact that the purported claim of the Operational Creditor is ex-facie barred by laws of limitation.
9. Further, the claim of the Operational Creditor being ₹74,26,732/- is based on several separate and distinct purchase orders which have been deliberately not been annexed to the instant application. It is a settled proposition of law that separate purchase orders cannot be clubbed together in one petition under section 9 of the Code as the cause of action arising out of the said purchase orders is separate and distinct in each case.
10. Further, there is pre-existence of disputes between the parties. The Corporate Debtor has raised disputes much prior to the issue of the purported demand notice. Suh disputes were raised by the Corporate Debtor in various forums. The Operational Creditor is therefore guilty of misleading the Adjudicating Authority by making false statement on oath.
11. Furthermore, no affidavit under sections 9(3)(b) and 9(3)(c) of the Code has been filed by the Operational Creditor. The said affidavit is mandatory in nature and thus the present petition is liable to be dismissed on such ground. The affidavit annexed to the petition as Annexure IV is in respect of one Bengal Water proof Ltd. and not the Corporate Debtor. Although the purported certificate from the bank proceeds to certify that not payment has

been received after 31 December 2015, the bank statements annexed to the instant petition are not contemporaneous period. Further, according to the contents of the instant petition, the last payment has been made by the Corporate Debtor in May 2015. The Corporate Debtor has denied having made any cash payment in December 2015.

12. Further, there was no stipulation for charging interest in between the parties and the claim of the Operational Creditor on account of interest is unsustainable.

***Submissions on behalf of the Operational Creditor in IA 17/KB/2022:***

13. There was an outstanding dues of ₹48,33,595/- as principle in respect of unpaid bills as on 31 December 2015 and due amount of interest of the sum of ₹25,93,193.67 calculated as on 31 December 2015 @ 18% per annum and in spite of several demand the said outstanding bills are not paid by the Corporate Debtor.
14. The last payment was made on 20 December 2015 by cash receipt for the sum of ₹19,500/- and last payment was made by cheque, on 07 May 2015, of United Bank of India of a sum of ₹4,99,969/-. (Rupees Four Lakhs Ninety Nine Thousand Nine Hundred Sixty Nine Only).
15. The above Corporate Debtor is a subsidiary company of Duncan Industries Limited which is now under corporate insolvency proceeding by another order but the above Corporate Debtor is a separate juristic entity under corporate law and it is not under any insolvency proceeding.
16. By Notification dated 28 January 2016 vide S.O.No.260(E) issued by Additional Secretary, Ministry of Commerce and Industries, Department of Commerce, New Delhi, the Central Government in exercise of their powers conferred by sub-section (1) of the Section 16(E) of the Tea Act 1953 (29 of 1953) has taken over the management or the control of the Demdima Tea Estates and six other tea gardens, as per provisions of the Chapter-III A of

the Tea Act 1953 (29 of 1953) and pursuant to the provisions of Chapter IIIA of the Tea. Act 1953, no winding up proceedings for appointment of receiver is maintainable and institution of any legal proceedings is maintainable. As such the Operational Creditor could not take any steps or file any suit or application for winding up or under Section 9 of the Insolvency and Bankruptcy Code, 2016 before the appropriate forum and the recovery of the said outstanding dues was stalled.

17. Pursuant to section 8 of the Insolvency and Bankruptcy Code, 2016 the Operational Creditor raised a demand notice to the Corporate Debtor *vide* its letter dated 18 December 2018 for payment of their outstanding dues of ₹74,26,732/- as on 05 December 2018 but the Corporate Debtor failed to make any payment. On the contrary, the Corporate Debtor through their Advocate Anit Kumar Bandapadhyay *vide* his letter dated 10.01.2019 issued a reply to the said Demand Notice and denied all these outstanding amount of dues in view of the said embargo issued pursuant to the Notification dated 28 January 2016 under Section 16(E) of the Tea Act 1953 in connection with the Tea Unit of the Company.
18. Thereafter the Learned Counsel for the Operational Creditor issued a counter reply to their reply dated 22 April 2019 denying all these allegations and replied that in view of the said Division Bench order and the Single Bench order there is no embargo for initiation of the Insolvency and Bankruptcy Code, 2016 and further requested them to pay the said amount to his client.
19. There is another case which was pending before the Hon'ble Supreme Court of India *vide* their judgment and order dated 4th October, 2019 passed in Civil Appeal No. 5120 of 2019 in re. Duncan Industries Ltd. vs. A.T. Agrochem. The Corporate Debtor has pronounced that the said Insolvency and Bankruptcy Code, 2016 overrides the Tea Act 1953 and the said Notification issued by the Central Government in taking over

management of the said Tea Gardens has created no embargo in filing of appropriate insolvency proceeding under the Insolvency and Bankruptcy Code, 2016.

20. Therefore, the period of imposition of embargo in filing any suit or application under section 9 of this IBC - 2016 in consequence of issuance of the said Notification dated 28 December 2016 till the decision of the Hon'ble Supreme Court dated 04 October 2019 be excluded in counting of the period of limitation for filing the above insolvency petition under section 9 of the Insolvency and Bankruptcy Code, 2016.
21. That under section 15(1) of The limitation act 1963 in computing the period of limitation for any suit or application for execution of degree, the institution or execution of which has been stayed by injunction or order the time of continuation of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn shall be excluded.
22. Under section 5 of the limitation act 1963 any appeal or any application other than an application under any of the provision of order XXI of the Code of Civil Procedure 1908 may be admitted after the prescribed period, if the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period. Thus, by the notification dated 28 January 2016 the applicant was restrained in filing the above application under section 9 of the IBC 2016 and there time for filing of the above application ought to be extended.
23. In the above matter the said notification was issued on 28 January 2016 and it was withdrawn on 04 October 2019 by pronouncement of the said Judgment passed by the Hon'ble supreme court of India, therefore there will be exclusion of 1345 days in computation of period of limitation, in the above matter last date of payment by cheque was made on 07 May 2015 and the above application was filed on 24 October 2019 as such the application is filed after expiry of 536 days from prescribed period of

limitation whereas The applicant is entitled to get 1345 days exclusion in computation of period of limitation in filing the above application under section 9 of IBC 2016 as such the above application is within the period of limitation.

24. The Operational Creditor has filed the above application under section 9 of the Insolvency and Bankruptcy Act, 2016 before the Adjudicating Authority, bearing 2185/K13/2019 with one another application for condonation of delay. Thereafter it is decided that it is field without proper appreciation of law, with many mistakes, as such the applicant humbly prays leave for not to press the said application. The applicant further praying leave to accept this application and to allow the prayer made herein for exclusion of time in computing period of limitation in filling this application under section 9 of IBC 2016.
25. The Operational Creditor therefore seeks for exclusion of the period of 536 days or any other days if any in filing of the petition bearing CP(IB) No. 2185/KB/2019 in computation of the period of limitation under the Limitation Act, 1963.

***Submissions on behalf of the Corporate Debtor in IA 17/KB/2022:***

26. The pleadings in the main company petition are, therefore, complete and as such the instant application being I.A. (IB) No.17/KB/2022 filed on 11 January, 2022 for condonation of delay of 536 days in filing the instant application and/or exclusion of 1345 days does not deserve consideration from this Adjudicating Authority.
27. The Operational Creditor has through the instant application and the said Company Petition sought to allege that it was prevented from filing the instant application having regard to the embargo imposed in the wake of the Notification dated 28.12.2016 of the Ministry of Commerce and Industries, Department of Commerce, Central Government till the decision of the Hon'ble Supreme Court dated 04 October 2019. the Corporate Debtor

submits that save and except what will appear from the said Notification and the various orders of the Hon'ble High Court at Calcutta and the order of the Hon'ble Supreme Court of India dated 4th October 2019, all allegations and or contentions to the contrary contained in the company petition and in the said application are denied. The Operational Creditor had not filed any proceeding before any court of law to take advantage of Section 14 of the Limitation Act, 1963 and therefore it is palpably clear that the purported claims of the Operational Creditor for have become barred by the laws of limitation.

28. The provisions of Section 5 of the Limitation Act, 1963 cannot be used to resurrect a dead claim of the operational creditor. The Insolvency and Bankruptcy Code, 2016 is a complete code and provides for definite timelines which have to be adhered to while filing applications under section 7, 9 and 10 of the said Code. The Operational Creditor has sought condonation of the period between 28.12.2016 being the date of issuance of the said Notification of the Ministry of Commerce and Industries, Department of Commerce, Central Government till 04.10.2019 being the date of passing of the order dated 04.10.2019 by the Hon'ble Supreme Court in the matter of Duncans Industries Limited Vs. A.J. Agrochem. The Operational Creditor has failed to take any steps in accordance with law to pursue its claim within time and pendency of proceedings in the Hon'ble High Court at Calcutta or the Hon'ble Supreme Court of India will not stop the period of limitation to run against the operational creditor.
29. It is denied that the was an outstanding dues of Rs.48,33,595/- as principle in respect of alleged unpaid bills as on 31.12.2015 or due amount of interest of the sum of Rs.25,93,193.67 calculated as on 31.12.'2015 at 18% per annum or that in spite of several demand the said outstanding bills were not paid by the Corporate Debtor. It is denied that the petitioner could not take any steps or file any suit or application for winding up or under Section 9 of the Insolvency and Bankruptcy Code, 2016 before the appropriate forum

or that the recovery of the said alleged outstanding dues was stalled. The Operational Creditor has itself admitted that the last payment was made by the Corporate Debtor on 7th May 2015 and as such the alleged dues of the Operational Creditor as on the date of filing of the said company petition are barred by the laws of limitation.

30. The Hon'ble Apex Court in the said Civil Appeal No. 5120 of 2019 has held that the Insolvency and Bankruptcy Code, 2016 overrides the Tea Act, 1953. The Notification dated 28th January 2016 did not create any embargo in filing any application under the Insolvency and Bankruptcy Code, 2016. Under Section 16G of the Tea Act, 1953 where management or a tea undertaking or tea unit owned by a company is taken over by any person or body of persons authorised by the Central Government under the said Act, then, notwithstanding anything contained in the said Act or in the memorandum or articles of such company, no proceedings for winding up of such company or for the appointment of Receiver in respect thereof shall lie in any Court except with the consent of the Central Government. Furthermore, section 16M of the Tea Act, 1953 provides that no suit or other legal proceedings shall be instituted or continued against a tea undertaking or tea unit in respect of which an order has been made under Sections 16D or 16E, except with the previous permission of the Central Government or of any officer authorised by the Government in this purpose. On a conjoint reading of Section 16G as well as Section 16M of the Tea Act, 1953, it is evident that the Operational Creditor could have filed a suit against the Corporate Debtor upon taking prior consent of the Central Government and there was no embargo upon the Operational Creditor from proceeding against the Corporate Debtor and this position becomes further clear upon a proper reading of the said Judgement dated 4th October, 2019 referred to hereinabove. It is denied that the period between issuance of the Notification dated 28th December 2016 till the decision of the Hon'ble Supreme Court dated 4th October 2019 can be excluded in counting of the

period of limitation for filing the above insolvency petition under section 9 of the Insolvency and Bankruptcy Code

31. I say that the Operational Creditor is not entitled to exclusion of any period as alleged or at all. The reliance upon Section 5 and Section 15(1) of the Limitation Act, 1963 by the Operational Creditor is completely ill founded. It is denied that the Operational Creditor was restrained in filing the above application under section 9 of the IBC 2016 or time for filing of the above application ought to be extended.

***Analysis and Findings:***

32. Heard the Ld. Counsel for the Operational Creditor and the Ld. Counsel for the Corporate Debtor and perused the records.
33. The Operational Creditor has filed I.A. (I.B) 17/KB/2022 seeking exclusion of the period of 536 days in computation of the period of limitation under the Limitation Act, 1963, for the purpose of filing of the petition being CP(IB) No. 2185/KB/2019.
34. The Operational Creditor has based the instant interlocutory application on the Notification dated 28 January 2016 vide S.O.No.260(E) issued by Additional Secretary, Ministry of Commerce and Industries, Department of Commerce, New Delhi, whereby the Central Government has taken over the management or the control of the Demdima Tea Estates and six other tea gardens, in exercise of their powers conferred by sub-section (1) of the Section 16(E) of the Tea Act 1953 (29 of 1953) and under provisions of the Chapter-III A of the Tea Act 1953 (29 of 1953).
35. The Operational Creditor has claimed that pursuant to the provisions of Chapter IIIA of the Tea. Act 1953, no proceedings for winding up or for the appointment of receiver is maintainable. As such the Operational Creditor could not take any steps or file any suit or application for winding up or

under Section 9 of the Insolvency and Bankruptcy Code, 2016 before the appropriate forum and the recovery of the said outstanding dues was stalled.

36. In this regard, we refer to section 16M of the Tea Act, 1953 which provides that no suit or other legal proceedings shall be instituted or continued against a tea undertaking or tea unit in respect of which an order has been made under Sections 16D or 16E, except with the previous permission of the Central Government or of any officer authorised by the Government in this purpose.
37. Further, under section 16G of the Tea Act, 1953 where management or a tea undertaking or tea unit owned by a company is taken over by any person or body of persons authorised by the Central Government under the said Act, then, notwithstanding anything contained in the said Act or in the memorandum or articles of such company, no proceedings for winding up of such company or for the appointment of Receiver in respect thereof shall lie in any Court except with the consent of the Central Government.
38. It is therefore, evident from the aforementioned provisions that the Operational Creditor could have filed a suit against the Corporate Debtor upon taking prior consent of the Central Government.
39. Further, it is to be noted in this regard that while the above-mentioned notification dated 28<sup>th</sup> January 2016 places the tea estate owned by the Corporate Debtor under the control and management of the Tea Board authorized by the Central Government, the same cannot be said about the Corporate Debtor itself. The Corporate Debtor was very much under the control of its directors. As such, the Operational Creditor had ample opportunity to proceed against the Corporate Debtor for recovery of its dues or under section 9 of the Insolvency and Bankruptcy Code, 2016.
40. In light of the above facts and circumstances, this Adjudicating Authority is not satisfied that the Operational Creditor had sufficient cause for not

IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH- I

I.A (I.B) 17/KB/2022 and CP(IB) No. 1337/KB/2019  
*Kayencee Cereals Pvt. Ltd. v Santipara Tea Company Ltd*

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preferring CP(IB) No. 2185/KB/2019 within the prescribed limitation period. As such I.A (I.B) 17/KB/2022 is **rejected**. With the application for condonation of delay out of the way, the main petition is barred by limitation since the date of default is 31 December 2015.

41. Therefore, the instant petition being CP(IB) No. 2185/KB/2019 shall stand **dismissed**. However, the dismissal of the present petition shall not stand in the way of the petitioner/Operational Creditor pursuing its remedies under any other law.
42. The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
43. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.
44. File be consigned to the record.

BALRAJ  
JOSHI

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BALRAJ JOSHI  
Date: 2022.06.29  
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**Balraj Joshi**  
**Member (Technical)**

Rajasekhar  
V K

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**Rajasekhar V.K.**  
**Member (Judicial)**

Signed this the 29<sup>th</sup> day of June, 2022

SM[LRA]