

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

**I.A. (IB) No. 1111/KB/2021
in
C.P. (IB) No. 184/KB/2018**

In the matter of:

Under section 7 of the Insolvency and Bankruptcy Code, 2016.

In the matter of:

Sangita Fiscal Services Private Limited and Others

... Financial Creditor

-Versus-

Duncans Industries Limited

... Corporate Debtor

I.A. (IB) No. 1111/KB/2021

An application under section 18(1)(f), section 25(1), section 25(2)(a) and
section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with rule 11
of the National Company Law Tribunal Rules, 2016.

In the matter of:

Ram Ratan Modi

... Applicant

Versus

- 1. Sammelan Tea and Beverages Private Limited**
- 2. Mr. Subhankar Bhujel**
- 3. Cha Bagan Trinamool Congress Mazdoor Union**
- 4. District Magistrate, Jalpaiguri Collectorate Avenue**
- 5. Additional Labour Commissioner, North Bengal Zone**
- 6. Superintendent of Police, Jalpaiguri**

... Respondents

Date of Hearing: 22.03.2022

Date of pronouncing the order: 21.04.2022

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**Ram Ratan Modi v. Sammelan Tea and Beverages Pvt. Ltd.
I.A. (IB) No. 1111/KB/2021 in C.P. (IB) No. 184/KB/2018**

Coram:

Shri Rohit Kapoor, Member (Judicial)

Shri Harish Chander Suri, Member (Technical)

Appearances (via video conferencing):

- | | | |
|---------------------------------|---|--|
| For the Resolution Professional | : | <ol style="list-style-type: none">1. Mr. Joy Saha, Senior Advocate2. Mr. Dipankar Das, Advocate3. Mr. Sajan Nandi, Advocate4. Ms. Urmila Chakraborty,
Advocate |
| For Respondent No. 1 | : | <ol style="list-style-type: none">1. Mr. Jishnu Saha, Senior
Advocate2. Mr. Usha Nath Banerjee,
Advocate3. Mr. Avishek Guha, Advocate4. Mr. Ishaan Saha, Advocate5. Ms. Neha Dutta, Advocate |
| For Respondent No. 2 | : | <ol style="list-style-type: none">1. Mr. Rishav Banerjee, Advocate2. Mr. Aishwarya Kumar Awasthi,
Advocate |

ORDER

Per : Rohit Kapoor, Member (Judicial):

1. This Court convened through video conferencing.
2. The present I.A. has been filed by the Resolution Professional seeking direction upon Respondent No. 1 to hand over the possession of Nagaisuree and Kilcotton Tea Gardens (“two Tea Estates”) to the Resolution Professional.

Submissions of the Learned Senior Counsel appearing for the Applicant

3. 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 Resolution Professional (RP) by the Committee of Creditors (CoC) of the Corporate Debtor.
4. Respondent No. 1 took possession of the said Tea Estates on 02.11.2021, which is after the insolvency commencement date and during the CIRP of Duncans. The said possession by the Respondent No. 1 is thus:-
 - a. Wholly illegal and in complete violation of the provisions of Section 14 of the IBC; and
 - b. Taken by divesting the officer of this Adjudicating Authority being the RP from possession.
5. The Lease with respect to Kilcott Tea Estate was executed on 22.01.1973 for a period of thirty years commencing from 04.08.1963 and an indenture of lease was executed on 15.11.1995 for a term of thirty years on and from 24.08.1995. Hence, the transfer was done while the lease for the Tea Estate was still subsisting.
6. Respondent No. 1 has not only taken over the leasehold lands of the two Tea Estates being Kilcott Tea Co. Ltd. and Nagaisuree Tea Estate, but has also taken possession and control of the other assets and properties of the Corporate Debtor such as building, plant, machinery, equipment, office premises, living quarters etc.
7. Respondent No. 1 has no legal right title or entitlement to take possession or occupy the tea estates. Respondent No. 1 has failed to file any document such as Deed of Lease, Deed of Tenancy, Deed of Conveyance etc, to demonstrate that it had any right to occupy, possess

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and control the two Tea Estates. Neither the workers nor the State Government had any right to make over the said two Tea Estates.

8. The lease granted by the State Government has not been terminated. The Resolution Professional was in possession of the two Tea Estates when Respondent No. 1 took possession and control of the Tea Estates.
9. Respondent No. 3 is acting in collusion with Respondent No. 1. There is no power vested either in Respondent No. 3 or in the State to make over possession of the two Tea Estates to Respondent No. 1.
10. The handing over of the two Tea Estates is in the teeth of section 14 of the Code and would tantamount to taking possession from the custody of an officer of Court being the Resolution Professional.
11. Respondent No. 1 has filed a Board Resolution dated 22.11.2021 by which the possession of the said two Tea Estates was taken over by Respondent No. 1. The said minutes are only signed by the workers and not even by the Additional Labour Commissioner.
12. The Respondent No. 1 has filed a letter dated 08.03.2022 allegedly written by the Principal Secretary Labour Department confirming that based on the representations of the Trade Unions, The Respondent No 1 had been entrusted to manage the two Tea Estates.
13. Mr. Joy Saha submitted that it is clear that the said letter dated 08.03.2022 has obviously been obtained by Respondent No 1 after the commencement of CIRP on 05.03.2020.
14. The said letter records that “the previous managements of these two tea gardens with dubious ownership had abandoned the tea gardens on 17.10.2021 throwing the workers into unemployment . . .”. These observations are baseless in that the ownership of Duncan’s has been described to be ‘dubious’ and the same are also factually incorrect as the two Tea Estates were being managed by e Respondent No. 2 till 02.11.2021, Respondent No. 2 tendered his resignation on 23.10.2021.
15. Hence, Respondent No. 1 had no right to take over possession of the two tea estates. The Resolution Professional had been making regular

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payment of the wages and other requisite dues to the workers as is evident from the accounts furnished by Respondent No. 2.

16. The Resolution Professional sent an email dated 04.03.2021 to the concerned State Government Authorities to inform the concerned Authorities with respect to the admission of the Corporate Debtor into CIRP and called upon the Additional Labour Commissioner to withdraw and cancel meetings to be held in respect of the operation and running of the two Tea Estates.
17. By its letter dated 06.04.2021 the Additional Labour Commissioner while taking note of the order dated 05.03.2020 contended that the Code does restrain amicable conciliation process with the labour union as an alternative mechanism.
18. The aforesaid letter demonstrates that the Additional Labour Commissioner acted in violation and defiance of the order dated 05.03.2020 and of the provisions of the Code.
19. Mr. Joy Saha asserted that the Additional Labour Commissioner has no authority or jurisdiction to make over possession of the said Tea Estates to Respondent No. 1.
20. Respondent No. 2 was appointed as manager of the two Tea Estates on 27.01.2016. Respondent No. 2 was thus in possession of the two Tea Estates as on the insolvency commencement date of the Corporate Debtor being 05.03.2020.
21. On 23.10.2021, Respondent No. 2 resigned as Manager of Nagaisuree and Kilcott Tea Gardens with effect from 30.10.2021. On 27.10.2021 the Resolution Professional wrote to Respondent No. 2, calling upon him to hand over affairs of the two Tea Estates to Mr. Mridul Majumdar and to serve the notice period of three months.
22. On 30.10.2021, Respondent No. 2 wrote to the Resolution Professional stating that his resignation takes effect from 02.11.2021.

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23. Respondent No. 1 took possession, operation and management of the Nagaisuree and Kilcott Tea Estates only two days after the resignation of Respondent No. 2, i.e. on 02.11.2021.
24. The timelines and the sequence of events demonstrates that there is collusion and conspiracy between Respondent Nos. 1 and 2 who, by acting fraudulently in the manner aforesaid divested the Resolution Professional of his possession of the two Tea Estates and wrongfully and illegally grabbed control of the same.
25. The fundamental difference in facts between the order passed in I.A. (IB) No. 1256/KB/2020 on 28.05.2021 and the present case is that in I.A. (IB) No. 1256/KB/2020, the alienation of the Tea Estates were on the basis of agreements:-
- i. Dated 29.01.2018 (*for a period of five years in the case of Hantapara and Garganda Tea Gardens*);
 - ii. Dated 20.07.2018 (*for a period of five years in the case of Tulsipara Tea Garden*); and
 - iii. Dated 19.08.2019 (*for a period of ten years in the case of Dumchipara Tea Garden*)

which were prior to the insolvency commencement date of the Corporate Debtor being 05.03.2020.

26. In the present case the alienation of the said two Tea Estates has taken place on 2nd November 2021 that is subsequent to the insolvency commencement date of the Corporate Debtor being 05.03.2020.

Submission of the learned Senior Counsel for the Respondent No. 1

27. Mr. Jishnu Saha, learned Senior Counsel submitted that the two Tea Estates were not owned by the Corporate Debtor. Both the Tea Estates are owned and are the assets of the Government of West Bengal.

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28. It is not in dispute that the Nagaisuree Tea Garden was leased to Birpara Tea Company Limited which merged with the Corporate Debtor for thirty years which expired on 20.10.2002 and Killcott Tea Garden was leased to Killcott Tea Company Limited which was effective from 24.08.1965 to 21.08.1995. After the expiry of the lease, the Corporate Debtor did not take any steps to renew the same.
29. Mr. Saha contended that the assets of a third party are excluded from the assets of the Corporate Debtor. In support of his contention, reliance was placed on the judgment of the Hon'ble Supreme Court in *Embassy Property Developments Pvt. Ltd. v. State of Karnataka & Ors. 2020 (13) SCC 308*.
30. Further, in a similar case with regard to the same Corporate Debtor, this Adjudicating Authority in I.A. (IB) No. 1256/KB/2021 held that the Tea Gardens of which leasehold rights have expired do not form part of the assets of the Corporate Debtor and hence the I.A. was dismissed.
31. Hence, the Corporate Debtor has lost its right of the two Tea Estates after the expiry of the respective lease agreements. The Corporate Debtor and the Resolution Professional overlooked the payments to be made to the workers and employees of the two Tea Estates, therefore the employees and workmen made representation to the Labour Department for due redressal of the two Tea Estates.
32. Respondent No. 1 took over the Tea Estate with effect from 03.11.2021.
33. The issue arising for consideration of this Adjudicating Authority in the instant application is whether the Nagaisuree and Killcott Tea Estate are assets of the Corporate Debtor over which the RP can seek to exercise any control under section 18(f) of the Code.
34. Section 3(27) of the Code defines 'property' to include 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. Section 18, providing for the duties of Interim Resolution Professional, however consciously uses the expression 'asset' instead of the expression 'property' and in sub-section (1)(f). Section 18(1)f of the Code provides that the RP shall "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 ownership of assets". The Explanation to section 18 provides that for the purposes of the said section the term 'assets' shall not include, inter alia, assets owned by a third party in possession of the Corporate Debtor held under trust or under contractual arrangements including bailment.

35. Similarly, section 25 of the Code providing for the Duties of the RP, provides in subsection (1) 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 ". Sub-section (2) of the said section provides that for the purposes of sub-section (1) the resolution professional shall "take immediate control and custody of all the 'assets' of the Corporate Debtor, including the business records of the Corporate Debtor ".
36. The learned Senior Counsel has sought to argue from the bar that the RP was in possession of the Kilcote and Nagaisuree tea estates though the estate manager of the Corporate Debtor and that the subsequent to the admission of CIRP and during the subsistence of the moratorium, Respondent No.1 could not have dispossessed the RP. Such argument is without basis as the RP could, in the first place, only have taken possession of 'assets' of the Corporate Debtor. If the RP wrongly possessed or occupied a property which was not an 'asset' of the Corporate Debtor, such possession was akin to trespass and as such 'fugitive' in nature. It is now settled law that a trespasser in possession cannot seek injunction against the true owner. Reference in this regard

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may be made to the decision of the Hon'ble Supreme Court in the case of *Sopan Sukhdeo Sable vs Assistant Charity Commissioner* reported in (2004) 3 SCC 137 (paras 24, 25) and of the decisions of the Hon'ble High Court, Bombay and Hon'ble High Court, Delhi is reported in 2008 SCC OnLine Bom 476 (para 34); 2017 SCC OnLine Bom 8380 (paras 19 to 22); and 1996 SCC OnLine Del 247 (paras 16, 18).

37. Admittedly the leases of the gardens expired long back. Under section 111(a) of the Transfer of Property Act, 1882, "A lease of immovable property determines by efflux of the time limited thereby. In such circumstance the RP could not have taken possession of the gardens in question. On the abandonment of the garden the respondent took possession of the same at the invitation of the State Government. It has since infused very substantial funds and turned the gardens around, which has in turn saved the livelihood of the tea workers employed there. In such circumstance not only will the interference with the respondent's possession amount to interference with the right of the owner, but the same will also result in the tea workers being rendered jobless. What must be taken note of in this regard is that as these gardens are not assets of the CD, they can never be part of any plan for resolving the CD's insolvency. The question then is what purpose will the same ultimately serve.

38. In this context it may be noted that it is not the case of the RP that either the Nagaisuree or Kilcott tea estate is owned by the CD. There is no pleading in the application to such effect. Admittedly the lease of the Kilcott and Nagaisuree Tea Estates expired on 21 August 1995 and 30 October, 2002 respectively. Also, admittedly the CD has not applied for renewal of the lease in respect of the Nagaisuree Tea Estate. Such fact will further appear from the report of the District Magistrate and Collector to the Land and Land Reforms Department and Department of Labour, West Bengal (pg. 71 of AR). From the said report as well as the letter dated 4 August, 2016 issued by the District

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Magistrate and Collector Jalpaiguri (pg. 115 of AR), it will be evident that the purported renewal of the lease of Kilcott Tea Estate in favour of the CD was cancelled owing to the CD's failure to pay 'Salami' in terms of Rule 4 of the West Bengal Estate Acquisition Rules, 1954. No further steps for renewal of the leases in respect of either the Nagaisuree or the Kilcott Tea Estates have been taken. The respondent No. 1 on the other hand has applied for grant leases of both the said Tea Estates in its favour and such application is under consideration, as will inter alia, appear from the letter of the Principal Secretary, Labour Department, Government of West Bengal, dated 8 March, 2022 (Pg. 114 of AR).

39. Upon expiry of the leases granted to the CD in respect of the Nagaisuree and Kilcott tea estates, the said estates reverted to the State, and the RP can only claim the right to dismantle and remove the machinery and sheds belonging to CD and situated at the said tea estates, which cannot be considered fixtures to the land.
40. As the leases of the said tea estates granted to the CD expired by efflux of time much prior to the admission of CIRP against the CD, and as the expiry of such leases bears no nexus whatsoever to the insolvency of the CD, this learned Tribunal does not have the jurisdiction to determine whether the CD has any residual right under the said lease agreements. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in *Tata Consultancy Services v. Vishal Ghisulal Jain*, MANU/SC/1118/2021.
41. It is also settled law that the Corporate Debtor cannot seek to exercise a right which falls out of the purview of the Code, and that for enforcement of such purported right the RP cannot attempt to bypass the CIRP process by approaching this learned Tribunal. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in *Embassy Properties Pvt. Ltd. v. State of Karnataka & Ors*, (2020)13

SCC 308, as well as *Gujrat Urja Vikas Nigam Ltd. v. Amit Gupta & Ors*, (2021) 7 SCC 209.

42. The issue as to whether tea gardens, the leases whereof have expired, constitute assets of a Corporate Debtor and can be possessed by the Resolution Professional was conclusively decided by this learned Tribunal in its order dated 28 May, 2021 passed in IA 1256 of 2020 concerning the Hantapara, Garganda, Tulsipara and Dumchipara tea estates. It has been held therein that upon expiry of the leases, the tea estates cannot by any stretch of imagination be considered to be assets of the Corporate Debtor, and accordingly the Resolution Professional cannot claim any right to exercise any control over the said tea estates. The instant application is as such barred by the principles of res judicata, constructive res judicata and by issue estoppel.

43. Reliance in this regard is placed on the following decisions: -

- a. *Bhanu Kumar Jain v. Archana Kumar and Another*, (2005) 1 SCC 787 (paras 29 to 32); *Ishwar Dutt v. Land Acquisition Collector and Anr.*, (2005) 7 SCC 190 (paras 18 to 24), with regard to the issue of estoppel and cause of action;
- b. *Shiromani Gurudwara Parbandhak Committee v. Mahant Harnam Singh and Others*, (2003) 11 SCC 377 (paras 17, 19); *K.S. Varghese and Others v. Saint Peter's and Saint Paul's Syrian Orthodox Church and Others*, (2017) 15 SCC 333, in respect to Constructive Res Judicata.

44. He also referred to the minutes of the tripartite meetings dated 2 November, 2021 convened by the Assistant Labour Commissioner, West Bengal (pg. 73, 81 of affidavit-in-reply), minutes of Review Meetings (pgs. 101 to 111 of affidavit-in-reply), letters dated 8 March, 2022 issued by the Principal Secretary, Labour Department, Government of West Bengal (pg. 114 of affidavit-in-reply), it is in order to allay the plight of the workmen and save the tea estates from ruination that the State of West Bengal, being the owner of the

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Nagaisuree and Kilcott Tea Estates invited Respondent No.1 to take over management of the said estates. From the letter dated 8 March, 2022, it will appear that Respondent No. 1 has made an application for grant of a lease of the said tea estates in its favour and that such application is under consideration. Pending the grant of a lease of the said estates to Respondent No.1, the respondent occupies the said tea estates as a licensee of the state of West Bengal.

45. In such circumstance there can be no question of the Resolution Professional attempting to interfere with the management of the said tea estates by the respondent. There can consequently be no question of the Resolution Professional seeking any directions against the respondent, including for handing over possession or management of the tea estates or for extending any assistance or cooperation to the Resolution Professional in managing the same. As the respondent was never handed over nor is in possession or control of any statutory financial records of the Corporate Debtor, the question of the respondent being required to make over the same to the Resolution Professional also does not and cannot arise. The books and records maintained by the respondent in the course of managing the said tea estates are books and records of the respondent and not of the Corporate Debtor. The respondent is as such under no obligation to make over the same to the Resolution Professional.

46. As the Resolution Professional does not have the authority of law to seek to either possess or control the said tea estates or any of them, the instant application is clearly misconceived and consequently deserves to be and should be dismissed, inter alia, as in the facts and circumstances of the case this Adjudicating Authority does not have jurisdiction to receive and determine the application.

Analysis and Findings

47. We have heard the learned Senior Counsel for the Applicant and the learned Senior Counsel for Respondent No. 1 and perused the record.

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48. It is an admitted fact that a similar application had been filed for possession of four tea gardens. The Corporate Debtor is in financial stress and it is of concern whether the Resolution Professional would be able to run these two Tea Estates.
49. The lease given to the Corporate Debtor has not been renewed in favour of the Corporate Debtor hence, it is out of question that the Resolution Professional can take possession of the Tea Gardens to which the Corporate Debtor has no ownership.
50. On perusal of the records it is apparent from the proceedings of the tripartite review meeting held on 20.12.2021 in respect of Killcott Tea Garden and Nagaisuree Tea Garden, in the presence of the Trade Unions, Additional Labour Commissioner, North Benchal Zone Government of West Bengal, Deputy Labour Commissioner, Assistant Labour Commissioner, Malbazaar, and the Managers of the respective Tea Garden, wherein it is stated that based on a bipartite agreement signed between Sammelan Tea and Beverages Pvt. Ltd. and the Trade Union of the two Tea Gardens, Sammelan Tea and Beverages Pvt. Ltd. is in possession of the two Tea Gardens and that the Tea Gardens started functioning from 03 November 2021 and has been in operation.
51. In a letter dated 08 March 2022, the Principal Secretary, Labour Department, Government of West Bengal that Sammelan Tea and Beverages Pvt. Ltd has been entrusted to run the two Tea Gardens under the supervision and guidance of the Labour Department, Government of West Bengal. The letter has been given hereunder for easy reference.

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Barun Kumar Ray, IAS
Principal Secretary
Labour Department
Govt. of West Bengal



বরুণ কুমার রায়, আই.এ.এস.
প্রধান সচিব
শ্রম দপ্তর
পশ্চিমবঙ্গ সরকার

D.O. No. 608-Pr.Secy(LAB)/2022

Date: 8th March, 2022

To
The Director,
Sammelán Tea & Beverages Private Limited
64A, Hemanta Basu Sarani (2nd Floor)
Kolkata-700001

Sub: Running of Killcott and Nagaisuree Tea Gardens.

Ref: ST&BPL/PSLD/K&N/2021-2022/008 dated 04.03.2022.

Sir,

With reference to above, it is confirmed that based on local reports, examination and consideration of the representations of the operating trade unions and necessary reviews made in this regard, M/s Sammelán Tea & Beverages Pvt. Ltd. has been entrusted to run and manage the Killcott and Nagaisuree Tea Gardens situated in the District of Jalpaiguri under the supervision and guidance of the Labour Department, Government of West Bengal to mitigate the untold sufferings of thousands of workers engaged therein and in the best interest of the tea gardens.

It may here be noted that the previous managements of these two tea gardens with dubious ownership had abandoned the tea gardens on 17.10.2021 throwing the workers into unemployment and putting them to severe hardship.

It may further be noted that M/s Sammelán Tea & Beverages Pvt. Ltd. has earned the confidence of the workers of these tea gardens, apparently performing well and is taking good care of the workers. The NCLT in its Order dated 28.05.2021 in I.A. No. 1256/KB/2020 in CP (IB) No. 184/KB/2018 has also made a complimentary observation in this regard.

Yours sincerely,

(Barun Kumar Ray)
Principal Secretary

52. In this view of the matter, the prayers asked for in the present IA cannot be granted. I.A. (IB) No.1111/KB/2021 is, therefore, dismissed, but in the facts of the case, without costs. Liberty to apply is granted if and when the Government of West Bengal takes a decision on the renewal of the lease.
53. 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.

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54. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

Harish Chander Suri
Member (Technical)

Rohit Kapoor
Member (Judicial)

The order is pronounced on the 21st day of April, 2022.