

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

**I.A. (IB) No. 109/KB/2022**

**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. 109/KB/2022**

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 Adjudicating Authority Rules, 2016.

**In the matter of:**

**Ram Ratan Modi**

**... Applicant**

**Versus**

- 1. Merico Agro Industries Private Limited**
- 2. Mr. Joydeep Mukherjee**
- 3. Cha Bagan Trinamool Congress Mazdoor Union**
- 4. Himalayan Plantation Workers' Union**

**5. Additional Labour Commissioner, North Bengal Zone**

**6. Office of the Superintendent of Police, Darjeeling Pulbazar**

**... Respondents**

Date of Hearing: 19 May 2022

Date of pronouncing the order: 18 July 2022

**Coram:**

**Shri Rohit Kapoor, Member (Judicial)**

**Shri Harish Chander Suri, Member (Technical)**

**Appearances (via video conferencing):**

- |                                 |   |   |
|---------------------------------|---|---|
| For the Resolution Professional | : | 1. Mr. Dipankar Das, Advocate               |
|                                 |   | 2. Ms. Sanjana Nandi, Advocate              |
| For Applicant                   | : | 1. Mr. Rishav Banerjee, Advocate            |
|                                 |   | 2. Mr. Aishwarya Kumar Awasthi,<br>Advocate |
| For Respondent                  | : | 1. Mr. Jishnu Saha, Senior<br>Advocate      |
|                                 |   | 2. Mr. Usha Nath Banerjee,<br>Advocate      |
|                                 |   | 3. Mr. Avishek Guha, Advocate               |
|                                 |   | 4. Mr. Ishaan Saha, 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 Rungli Rungliot Tea Garden ("Tea Garden") to the Resolution Professional.
3. ***Submissions of the learned Counsel appearing for the Applicant***
  - 3.1. 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.

3.2. The learned Counsel submitted that the transfer of the Tea Garden was made after the commencement section 14 of the Code.

3.3. Merico Agro Industries Private Limited took possession of the said Tea Garden on 24<sup>th</sup> November 2021 that is after the insolvency commencement date and during the corporate insolvency resolution process of Corporate Debtor. The said possession by Meri Agro Industries Private Limited 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 Resolution Professional from possession.

3.4. The Applicant or the Corporate Debtor has never claimed that the Runglee Rungliot Tea Garden is an ownership asset of the Corporate Debtor. The Tea Garden is owned by the State of West Bengal and that the Corporate Debtor has leasehold rights over the same. The State has never terminated the lease nor expressly refused to renew the same.

3.5. The “Explanation” of section 18 of the Code, Merico Agro Industries Private Limited has attempted to showcase that the Tea Garden is an asset owned by a third party, in possession of the Corporate Debtor, and by virtue of the same, the Tea Garden in question cannot form a part of the asset of the Corporate Debtor. The Applicant submits that the Tea garden is owned by the State of West Bengal and leased out to the Corporate Debtor vide a legitimate Deed of Lease. The only third party in the picture presently is Merico Agro Industries Private Limited who has illegally taken possession of the Tea Garden in clear violation of the law.

3.6. Upon expiration of the lease, the Corporate Debtor is a tenant by holding over in terms of section 116 of the Transfer of Property Act, 1882.

- 3.7. Merico Agro Industries Private Limited has not only taken over the leasehold lands of the said Tea Garden being Runglee Rungliot Tea Garden 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.
- 3.8. The erstwhile management of the Corporate Debtor had mortgaged the leasehold rights and movable and immovable assets of the Corporate Debtor to various Banks/Financial Institutions while availing several loan facilities. These banks/Financial Institutions have the first charge over these assets (leasehold rights and movable and immovable assets) of the Corporate Debtor.
- 3.9. After the commencement of the CIRP of the Corporate Debtor, the Financial Creditors hold an exclusive and first charge over the assets (leasehold rights and movable and immovable assets) of the Corporate Debtor.
- 3.10. Therefore, the assets (Leasehold Rights and Movable and Immovable assets thereon) being mortgaged to Banks/Financial Institutions, Financial Creditors herein, cannot be alienated without their consent. And the Respondents have no right to alienate the assets of the Corporate Debtor without any agreement with the Financial Creditors.
- 3.11. In the affidavit filed by Merico Agro Industries Private Limited, not a single document could be produced by them such as Deed of Lease, Deed of Tenancy, Deed of Conveyance, etc, to demonstrate that it had any right to occupy, possess, and control the said Tea Garden.
- 3.12. Neither the workers nor the State Government had any right to make over the said Tea Garden to Merico Agro. The workers are merely operational creditors under the Code.
- 3.13. The lease granted by the State Government has not been terminated. The Resolution Professional (RP) was in possession of the said Tea Garden when Merico Agro Industries Private Limited took possession and control thereof.

- 3.14. There is no power vested either in the workers or in the State to make over possession of the said Tea Garden to Merico Agro Industries Private Limited.
- 3.15. The handing over of the said Tea Garden is in the teeth of section 14 of the Code and tantamount to taking possession from the custody of an officer of Court being the Resolution Professional.
- 3.16. Merico Agro Industries Private Limited, at page 80 of the Affidavit filed by it, has annexed minutes of the Meeting held on 23.11.2021 by which possession of the said Tea Garden was taken over by Merico Agro Industries Private Limited. It is relevant that the said minutes are only signed by the workers and not even by the Additional Labor Commissioner.
- 3.17. The Resolution Professional had been making regular payment of the wages and other requisite dues to the workers, as evident from the accounts furnished by the Tea Manager i.e. the Respondent No. 2.
- 3.18. By an email dated 31.12.2021, the RP wrote to the Officer in Charge of the Police Station informing them about the order of this Adjudicating Authority dated 05.03.2020 and the subsequent development with regards to the illegal take over of the tea garden which was in possession and management of the Applicant.
- 3.19. No action taken by the authorities in order to restore the possession of the tea garden to the Applicant.
- 3.20. Further, *vide* email dated 04.01.2022, the applicant has drawn the attention of the District Magistrate, Darjeeling to the facts of the case and requested immediate intervention in the matter. To the utter surprise of the applicant however the District Magistrate, Darjeeling has taken no steps in the matter
- 3.21. The aforesaid email demonstrates that the Officer in Charge acted in violation and defiance of the order dated 05.03.2020 and of the provisions of the Code.
- 3.22. On 27.01.2016, Joydeep Mukherjee i.e. the Respondent No. 2, was appointed as manager of the said Tea Garden. The Respondent No.

2 was thus in possession of the said Tea Garden as on the insolvency commencement date of Duncan's being 5<sup>th</sup> March 2020.

3.23. On 29.10.2021 the Respondent No. 2 resigned as Manager of Runglee Rungliot Tea Garden with effect from 10.11.2021.

3.24. On 10.11.2021 the RP wrote to Respondent No. 2 calling upon him to hand over affairs of the said Tea Garden to him and to serve the notice period of 3 months.

3.25. Immediately after the resignation of the Respondent No. 2, on 24.11.2021 Merico Agro Industries Private Limited took possession, operation, and management of the Runglee Rungliot Tea Garden.

3.26. The timelines and the sequence of events demonstrate the apparent collusion and conspiracy between the Respondent Nos 1 and 2 who, by acting fraudulently in the manner aforesaid divested the RP of his possession of the said two Tea Garden and wrongfully and illegally grabbed control of the same.

3.27. The respondent has no connection with the workers of the corporate debtor. The respondent is not a shareholder, or creditor, or a stakeholder of the corporate debtor.

3.28. The respondent is commercially exploiting, earning handsome profits and enriching itself unlawfully without having any legal right to be in possession of the said Runglee Rungliot Tea Garden.

3.29. The fundamental difference in facts between the said case and the present case is that in the said case the alienation of the Tea Garden was 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 i.e. 05.03.2020.

3.30. In the present case the alienation of the said Tea Garden has taken place on 24<sup>th</sup> November 2021 which is subsequent to the insolvency commencement date i.e. 05.03.2020.

#### **4. Submission of the learned Counsel for the Respondents**

4.1. The issue arising for consideration of this Adjudicating Authority in the instant Application is whether the Runglee Rungliot Tea Garden' is an asset of the Corporate Debtor over which the RP can seek to exercise any control under section 18(f) of the Code.

4.2. 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 of the Code, 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 IRP 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.

4.3. Similarly, Section 25 of the Code providing for the Duties of the Resolution Professional, 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*"

- 4.4. In self-same similar subject IA(IB) No. 1111/KB/2021 related to "Kilcotte & Nagasuree Tea Garden", this Adjudicating Authority by a reasoned solemn decision dated 21.04.2022 has been pleased to dismiss the Application filed by the RP, inter alia, on the primary ground that *'The lease given to the Corporate Debtor not being 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'*.
- 4.5. Even in respect of other identical subject situated four Tea Garden (namely Hantapara, Garganda, Tulsipara and Dumchipara Tea Gardens) held by the same Corporate Debtor, this Hon 'ble Adjudicating Authority on 28.05.2021 dismissed another. Application filed by the same Applicant herein being No. IA(IB) No. 1256/KB/2021 holding therein, amongst others, that *"Corporate Debtor or RP cannot claim any legal right over the Gardens whose leasehold tenures expired and not renewed and that none of them form part of 'assets' of the Corporate Debtor and further that neither the Corporate Debtor nor RP has any financial capability to run any Tea Gardens, even if given on a platter and that the Respondent No. 1 is doing fine job in running the Tea Garden and protecting the workers."*
- 4.6. In addition, in respect of two Tea Gardens (namely Birpara and Bagracotte Tea Gardens) held by the same Corporate Debtor, in two applications being I.A. (IB) 415/KB/2021 and I.A. 665/KB/2021 respectively, this Adjudicating Authority on 09.05. 2022 dismissed the Applications filed by the same RP reiterating *'The lease given to the Corporate Debtor not being 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'*.
- 4.7. Learned Counsel submitted that the above series of reasoned pronouncements of this Adjudicating Authority on self-same subjects are binding under the law and cannot be avoided. In as much

the material facts of the instant subject Application are identical, the instant Application of the Applicant is not maintainable and requires to be dismissed under the law. The Resolution Professional has sought to assert that the Resolution Professional was in possession of the 'Runglee Rungliot Tea Garden' through the Manager of the Corporate Debtor and that subsequent to the admission of CIRP and during the subsistence of the moratorium, the Respondent No.1 could not have dispossessed the Resolution Professional. Such argument is fallacious and without any basis and contrary to law as the Resolution Professional could, in the first place, only have taken possession of 'assets' of the Corporate Debtor. If the Resolution Professional wrongly possessed or occupied a property of Third Party 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 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 Bombay and Delhi High Courts 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).

4.8. Admittedly the "Lease" of Runglee Rungliot Tea Garden' stood terminated due to efflux of time long back on 07.02.2000 and not renewed thereafter. Under Section 111(a) of the Transfer of Property Act, 1882. In such circumstances, the Resolution Professional could not have taken possession of the Gardens in question owned by the State of West Bengal. On the abandonment of the non-operational Runglee Rungliot Tea Garden' by the Manager on 09.11.2021 notifying all the Authorities, the Respondent No. 1 took possession of the same at the invitation of the State Government to run under it. It has since infused very substantial funds of Crores and turned the Gardens around, which has in turn saved the livelihood of more than

900 Tea workers employed there and their families. 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 would also result in the Tea workers being rendered jobless. What must be taken note of in this regard is that as the Runglee Rungliot Tea Garden' is not an asset of the Corporate Debtor, it can never be part of any plan for resolving the Corporate Debtor's insolvency. The question then is what purpose will the same ultimately serve.

4.9. In this context it may be noted that it is not the case of the RP that Runglee Rungliot Tea Garden' is owned by the Corporate Debtor. There is no pleading in the Application to such effect. Admittedly, the lease of Runglee Rungliot Tea Garden' expired on 7th February 2000. Also, admittedly the Corporate Debtor did not apply for renewal of the lease as per statutory provisions and no proper Application for renewal is pending (Paral1 & 13 of AR). The Respondent No. 1 on the other hand has applied for grant lease of the said Tea Garden in its favour and such Application is pending due consideration.

4.10. Upon termination of the lease by efflux of time on 07.02.2000 granted to the Corporate Debtor in respect of the Runglee Rungliot Tea Garden, the said Tea Garden reverted to the State.

4.11. As the lease of the said Tea Garden granted to the Corporate Debtor stood terminated by efflux of time much prior to the admission of CIRP against the Corporate Debtor, and as the termination of such lease bears no nexus whatsoever to the insolvency of the Corporate Debtor, this Hon "ble Adjudicating Authority does not have the jurisdiction to determine whether the Corporate Debtor has any residual right under the said lease agreement.

4.12. 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.

4.13. 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 Hon'ble Adjudicating Authority. Reliance in this regard is placed on the decisions of the Hon'ble Supreme Court in "*Embassy Properties Put. Ltd. v. State of Karnataka & Ors*", (2020) 13 SCC 308, as well as in "*Gujrat Urja Vikas Nigam Ltd. v. Amit Gupta & Ors*", (2021) 7 SCC 209.

4.14. The issue as to whether the Tea Gardens, the leases whereof have expired, constitute assets of a Corporate Debtor and can be possessed by the Resolution Professional has been conclusively decided by this Adjudicating Authority through its five decisions dated 28.05.2021, 21.04.2022 and 09.05.2022 passed in IA(IB) No. 1256/KB/2020, IA(IB) No. 1111/KB/2021, IA(IB) No. 415/KB/2021 and IA(IB) No. 665/KB/2021 as submitted heretofore, explicitly holding therein that upon expiry of the Leases, the Tea Garden belonging to the State of West Bengal cannot by any stretch of imagination be considered to be "assets" of the Corporate Debtor, and accordingly the RP cannot claim and right, far less any legal right' to exercise any control over the said Tea Garden. The instant Application is, as such, barred by the principles of res judicata constructive res judicata and by issue estoppel. Reliance in this regard is placed on the following decisions:

- a. For issue estoppel and cause of action estoppel - (2005) 1 SCC 787 (paras 29 to 32); (2005) 7 SCC 190 (paras 18 to 24);
- b. For constructive Res judicata (2003) 11 SC 377 (paras 17, 19); (2017) 15 SCC 333;

4.15. Since 2015 Corporate Debtor mismanaged the Tea Garden. There was no electricity or water. Factory remained closed. Workers not paid legitimate wages, over time payments, Bonus, Rations, House Rents, Medical, etc, exceeding Cores of Rupees. Even RP did

not pay the same, except a meagre token intermittent amounts and even despite deducting Provident Fund therefrom, not deposited the same. From September 2021 no payment at all was made. Gratuity of a few Crores due, Provident Fund dues exceeds sum of Rs.78,65,495/=. The Garden and its infrastructures were in complete ruins.

4.16. As will appear from the minutes of the tripartite meeting dated 23rd November, 2021 convened by the Assistant Labour Commissioner, West Bengal and the Minutes of the Review Meetings, it is in order to allay the plight of the workmen and save the Tea Garden from complete ruination belonging to the State, that the State of West Bengal, being the owner of the Runglee Rungliot Tea Garden' invited the Respondent No. 1 to take over management of the said Garden and run under it pending the grant of a lease of the said Garden to the Respondent No. 1. The Respondent occupies the said Tea Garden as a licensee of the State of West Bengal.

4.17. In such circumstance there can be no question of the RP attempting to interfere with the management of the said Tea Garden by the Respondent. There can consequently be no question of the Resolution Professional seeking any directions against the Respondent No. 1, including for handing over possession or management of the Tea Garden 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 Garden 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.

- 4.18. As the Resolution Professional does not have the authority of law to seek to either possess or control the said Tea Garden or any part of it, the instant Application is clearly misconceived and consequently deserves to be and should be dismissed, inter alia, as in the facts, settled decisions of law and circumstances of the case this Adjudicating Authority does not have jurisdiction to receive and determine the Application.
- 4.19. The Corporate Debtor or Resolution Professional has no legal right over any Tea Garden of which lease not renewed and the same does not form part of 'assets' of the Corporate Debtor. Lease given to the Corporate Debtor not being renewed, it is out of question that the Resolution Professional can take possession of the Tea Gardens to which the Corporate Debtor has no ownership.
- 4.20. A trespasser in possession cannot seek injunction against the true owner (2004) 3 SCC 137 (paras 24, 25) 2008 SCC OnLine Bom 476 (para 34); 2017 SCC OnLine Bom 8380 (paras 19 to 22); 1996 SCC OnLine Del 247 (paras 16, 18).
- 4.21. An asset owned by a third party, but even if in the possession of the Corporate Debtor under contractual arrangements (Lease), is specifically kept out of the definition of the term "assets" under the Explanation to Section 18. (2020) 13 SCC 308 (para 39 - 40)
- 4.22. The Lease being terminated long before initiation of CIRP, the Adjudicating Authority has no jurisdiction to entertain any Proceeding and also does not have the jurisdiction to determine whether the Corporate Debtor has any residual right under the lease agreement. 2021 SCC OnLine SC 1113.
- 4.23. The Corporate Debtor cannot seek to exercise a right which falls out of the purview of the Code, and that for enforcement of such right the Resolution Professional cannot attempt to bypass the CIRP process by approaching the Adjudicating Authority (2020) 13 SCC 308 (2021) 7 SCC 209.

5. Similar applications have been filed by the Resolution Professional for possession of other Tea Gardens. This Adjudicating Authority in I.A. (IB) No. 1256/KB/2018 has given its view and had observed that the only concern is that the Corporate Debtor is in financial stress and whether the Resolution Professional would be able to run these Tea Garden.
6. 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.
7. Further, on perusal of the documents it is apparent that the Tea Garden is in a beneficial position in the hands of the Respondent No. 1.
8. In this view of the matter, the prayers asked for in the present IA cannot be granted. I.A. (IB) No. 109/KB/2022 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.
9. 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.
10. 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 18<sup>th</sup> day of July, 2022.