

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 710 of 2018
**[arising out of Order dated 5th October, 2018 by NCLT, Kolkata Bench,
in CP (IB) – 308/KB/2019]**

IN THE MATTER OF:

A.J. Agrochem

...Appellant

Versus

Duncans Industries Ltd.

...Respondent

Present:

For Appellant : **Ms. Sonal Shah, Mr. Anirudh Sanganeria, Mr. Amar Dave and Ms. Shruti Agarwal, Advocates**

For Respondent : **Mr. Ratnanko Banerjee, Senior Advocate with Mr. Rishav Banerjee and Mr. Sarthak Guru, Advocates**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Appellant filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short, ‘the **I&B Code**’) against ‘Duncans Industries Limited’ (Corporate Debtor). The Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata by impugned order dated 5th October, 2018 rejected the application on the ground that the provisions of the I&B Code are not applicable unless the ‘Operational Creditor’ seeks consent of the Central Government to start the ‘Corporate Insolvency Resolution Process’ of the ‘Corporate Debtor’ in view of Section 16G(1)(c) of the ‘Tea Act, 1953’. According to the learned counsel for the Appellant the

aforesaid provision of 'Tea Act, 1953' cannot be made applicable and Section 9 of the I&B Code will have an over-riding effect in view of Section 238 of the 'I&B Code'.

2. Further according to the learned counsel for the Appellant initiation of 'Corporate Insolvency Resolution Process' cannot be equated with winding up proceedings under the Companies Act, 2013.

3. Learned counsel appearing on behalf of the Respondent (Corporate Debtor) submitted that the application u/s 9 of the I&B Code will not lie nor can proceed without the leave of Central Government in view of the provisions of the Tea Act, 1953. It is further submitted that the claim is barred by limitation as the cause of action having arisen on 14th November, 2014 and the petition has been filed on 12th February, 2018. It was further submitted that Tea Act, 1953 is a special Act for the purpose of providing the control by Union of India on the Tea industry. The 'statement and objects' of the Tea Act, 1953 will make it clear that it is expedient in the public interest that the Union should take under its control the Tea industry. The Central Government has taken over the control of the Tea Industry. Reliance has been placed on the Notification issued by the Central Government on 28th January, 2016 authorising the Tea Board to take over the management and control of 7 tea estates of the Respondent (Corporate Debtor).

4. It is submitted that the said Notification has been challenged before the Hon'ble High Court of Calcutta and the Division Bench by order dated 16th September, 2016 though issued notice but has not passed order of stay.

5. Reliance has also been placed on the decision of the Hon'ble Supreme Court in "**Macquarie Bank Limited vs. Shilpi Cable Technologies Limited**" – (2018) 2 SCC 674 to suggest that Section 9 of the I&B Code will have no over-riding effect on the previous Tea Act, 1953.

6. The Tea Act, 1953 was enacted to provide for the control by Union of the tea industry, including the control, in pursuance of the International Agreement of the cultivation of tea in and of the export of the tea from India and for that purpose to establish a Tea Board and levy a duty of excise on the tea produced in India. It is applicable to whole of India except the State of Jammu & Kashmir.

7. While constituting the Tea Board, the control of the export of tea from cultivation was laid down therein. Chapter III A relates to the Management or Control of Tea Undertaking or different Tea Units by the Central Government in certain circumstances. Section 16G relates to the management or a tea undertaking or tea unit owned by a company taken over by any person or body or persons authorised by the Central Government, Clause (c) therein provides that 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, relevant of which reads as under:

"16G. (1) Where the management or a tea undertaking or tea unit owned by a company has been taken over by any person or body of persons authorised

by the Central Government under this Act, then notwithstanding anything contained in the said Act or in the memorandum or articles of association of such company-

- (a) It shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;*
 - (b) No resolution passed in a meeting of the shareholders of such company shall be given effect to unless approved by the Central Government;*
 - (c) No proceeding for the 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.*
- (2) Subject to the provisions contained in sub-section (1), and to the other provisions contained in this Act and subject to such other exceptions,*

restrictions and limitations, if any, as the Central Government may, by notification in the Official Gazette, specify in this behalf, the Companies Act, 1956, shall continue to apply to such company in the same manner as it applied thereto before the issue of the notified order. 16H. If, at any time, it appears to the Central Government on the application of the owner of a tea undertaking or tea unit or otherwise that the purpose of the order made under section 16D or section 16E, has been fulfilled or that for any other reason it is not necessary that the order should remain in force, the Central Government may by notified order, cancel such order and, on cancellation of any such order the management or control as the case may be, of the tea undertaking or tea unit, shall vest in the owner of that undertaking or unit, 16-I. (1) If the Central Government is of opinion that there are possibilities of running or

restarting a tea undertaking or tea unit in relation to which an investigation has been made under subsection (2) of section 16B, and that such tea undertaking or tea unit should be run or restarted for maintaining or increasing the production supply or distribution of tea that Government may make an application to the court by which the company owing such tea undertaking or tea unit has been ordered to be wound up, praying for permission to appoint any person or body of persons to take over the management of the tea undertaking or, as the case may be, 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 application.”

Under sub-section (2) of Section 16G, the Central Government may by notification in the Official Gazette, specify exceptions, restrictions and limitations subject to which the Companies Act, 1956, (now Companies Act,

2013) shall continue to apply to such company in the same manner as it applied thereto before the issuance of the notification.

8. It is not in dispute that the Central Government issued Notification on 28th January, 2016, under Section 16 E(1) of the Tea Act, 1953 authorising Tea Board to take over the management of 7 Tea gardens owned by the Respondent (Corporate Debtor).

9. The case of the Appellant is that out of these 7 gardens, the ‘Operational Creditor’ supplied from the garden ‘Birpara Tea Estate’ and therefore it is not in dispute that the supplies made to the ‘Corporate Debtor’ is under the management and control of the Tea Board.

10. From plain reading of Section 16(1)(c) of the Tea Act it is clear that where the management or a tea undertaking or tea unit owned by the company has been taken over by the Tea Board “no proceeding for the winding up of such company shall lie in any court except with the consent of the Central Government.”

11. Section 9 of the I&B Code empowers the ‘Operational Creditor’ to trigger the ‘Corporate Insolvency Resolution Process’ against the ‘Corporate Debtor’ if there is a ‘debt’ and ‘default’ in payment.

12. Section 238 of the I&B Code provides that provision shall have an over-riding effect if other laws is inconsistent with any of the provisions of I&B Code, which reads as follows :

“238. The provisions of this Code shall have effect,

notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

13. If the interpretation as given by the Respondent is accepted then it is to be held that Section 16G(1)(c) of the Tea Act, 1953 is not conflicting with Section 9 of the I&B Code and thereby Section 9 will have an over-riding effect on Section 16G(1)(c) of the Tea Act, 1953.

14. However, according to us there is no conflict between Section 16G(1)(c) of the Tea Act, 1953 and Section 9 of the I&B Code. The preamble of the I&B Code states as follows:

“An act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.

15. The Hon'ble Supreme Court in '**Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.**' – (2019 SCC OnLine SC 73) observed :

“27. *As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme—workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a*

corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. (See ArcelorMittal [ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1] at para 83, fn 3).”

16. From the aforesaid finding of the Hon’ble Supreme Court decision in ‘**Swiss Ribbons** (Supra,) it is clear that the ‘Corporate Insolvency Resolution Process’ while allows a resolution process but liquidation is not desirable under the I&B Code. Section 16G(1)(c) relates to winding up and on the other hand Section 9 of the I&B Code application filed is not a proceeding for winding up but for initiation of ‘Corporate Insolvency Resolution Process’ to ensure revival and continuation of the ‘Corporate Debtor’ by protecting the ‘Corporate Debtor’ from its own management and from corporate debt by liquidation.

17. Therefore, it is clear that Section 9 of Insolvency and Bankruptcy Code occupies different field than Section 16G(1) of the Tea Act, 1953.

18. For the reasons aforesaid, we hold that for filing an application under Section 9 against Tea Company under the management of the different board, no permission of the Central Government is required in terms of Section 16G(1) of the Tea Act, 1953. The Adjudicating Authority have erred in noting the aforesaid fact. We have no other option but to set aside the order. So far as the question of limitation is concerned, as that was not raised before the Adjudicating Authority, we are not deciding this issue as it is a mixed question of facts and law.

19. This apart, we may mention that for filing an application under Section 9 of the I&B Code, Article 137 of Part II of the Third Division of the Schedule of Limitation Act, 1963, is applicable which is as follows :

“PART II – OTHER APPLICATIONS

Description of application	Period of limitation	Time for which period being to run
137. Any other application for which no period of limitation is provided elsewhere in this division.	Three years	Where the right to apply accrues

20. As the Act has come into force on 1st December, 2016, the application under Section 9 is maintainable.

21. Whether the claim is barred by limitation is a mixed question of fact and law. It will be open to the respondent to raise this question before the

Adjudicating Authority and in such case 'Operational Creditor' may show that there is a continuing cause of action and claim is not barred by limitation and thereby there is an 'existence of debt' and 'default'.

22. In view of the finding aforesaid, we set aside the impugned order dated 5th October, 2018 and remit the case to the Adjudicating Authority, Kolkata Bench, Kolkata to pass appropriate order under Section 9 of the I&B Code after notice and hearing the parties.

The appeal is allowed with aforesaid observations and directions. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

New Delhi

20th June, 2019

/ns/