

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (Insolvency) No. 966 of 2022

(Arising out of the Order dated 07.06.2022 passed by the National Company Law Tribunal, New Delhi (Court-III) in I.A. 1678 of 2021 in CP (IB) No. 921 (ND) of 2020.)

IN THE MATTER OF:

1. Mr. Rahul Gupta

I-6, 2nd Floor
Lajpat Nagar – III
New Delhi – 110024.

...Appellant No. 1.

2. Ms. Divya Gupta

I-6, 2nd Floor,
Lajpat Nagar-III
New Delhi – 110024.

...Appellant No. 2.

Versus

Chandra Prakash

(Erstwhile Resolution Professional)

Now Liquidator
Of M/s Gem Batteries Pvt. Ltd.
R/o 812, Indraprakash Building
Barakhamba Road
Delhi – 110001.

...Respondent

Present

For Appellants: **Mr. Abhishek Anand and Mr. Sajal Jain,
Advocates.**

For Respondent: **Mr. Shrey Patnaik and Mr. Riturik Batra,
Advocates.**

J U D G E M E N T

(19.10.2023)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present Appeal i.e., Company Appeal (AT) (Insolvency) No. 966 of 2022 has arisen from Impugned Order dated 07.06.2022 passed by the i.e.,

National Company Law Tribunal, New Delhi Bench, Court-III (in short '**Adjudicating Authority**').

2. The instant appeal has been preferred by Mr. Rahul Gupta & Ms. Divya Gupta in the capacity of Members of the Suspended Board of Directors of the Corporate Debtor being Gem Batteries Pvt Ltd against order dated 07.06.2022 ("**Impugned Order**") passed by the National Company Law Tribunal, New Delhi Bench - III in I.A. 1678 of 2021 in CP (IB) No. 921(ND) of 2020, thereby, allowing the Application under Section 19(2) read with Section 19(3) of the Code read with Rule 11 of the NCLT Rules, 2016. The Adjudicating Authority imposed a cost of Rs. 10,00,000/- each on the Appellants under Section 70 of the Code. It is the case of the Appellants that Adjudicating Authority while passing the Impugned Orders, failed to appreciate the fact that Section 70 of the Code comes within Part II Chapter VII of the Code which deals with offences and penalties and - appropriate order if any under Section 70 can only be passed by way of trial offences by a Special Court in terms of Section 236 of the Code.

3. The Respondent is Mr. Chandra Prakash, Liquidator (Erstwhile Resolution Professional) of the Corporate Debtor.

4. M/s Gem Batteries Pvt Ltd. ("Corporate Debtor") is a private limited Company, incorporated on 13.08.2003, engaged in the business of manufacturing of Electrical Equipment's.

5. Upon an Application under Section 7 of the Code by RBL Bank being a Financial Creditor, the Adjudicating Authority initiated Corporate Insolvency

Resolution Process (in short "**CIRP**") in respect of Corporate Debtor vide Order dated 01.12.2020 and the Respondent was appointed as the Interim Resolution Professional in respect of CIRP of Corporate Debtor.

6. It has been alleged that documents and information were not provided by the Appellants herein to the Respondent being the Erstwhile Resolution Professional. The Respondent alleged that the Appellants were not cooperating with the Respondent and they were not providing the documents and information in respect of the Corporate Debtor. In view thereof, the Respondent filed an Application being I.A. 1678 of 2021 under Section 19(2) read with Section 19(3) of the Code for seeking necessary directions against the Appellants herein.

7. The Adjudicating Authority vide Order dated 17.09.2021 allowed the I.A. 3697 of 2021 filed by the Respondent thereby, initiating Liquidation in respect of the Corporate Debtor and appointing the Respondent as the Liquidator of the Corporate Debtor. Copy of Order dated 17.09.2021

8. The Application bearing I.A. 1678 of 2021 filed by Respondent for seeking directions against the Appellants under Section 19(2) of the Code came up before the Adjudicating Authority on 26.10.2021. The Adjudicating Authority on 25.11.2021 directed the Appellants herein to ensure that the information/documents as listed in the email dated 24.03.2021 be provided to the Respondent within 15 days from the date of the Order and also directed the Appellants to file compliance Affidavits.

9. The Adjudicating Authority vide Order dated 07.06.2022 allowed I.A. 1678 of 2021 whereby, the Adjudicating Authority held that the Appellants failed to extend cooperation to the Respondent and imposed, a fine of Rs. 10,00,000/- on both the Appellants. The Adjudicating Authority held as under: -

"14. The conduct of the respondents clearly shows that they no intention to provide their assistance to the liquidator in the liquidation process which falls within the purview of Section 70 of IBC, 2016, hence, we are inclined to take penal action against the respondents and hereby punish the respondent No. 1 and 2 with fine of Rs. 10,00,000/- (Rs. Ten Lakhs only) on each of the said respondents and same shall be deposited to the credit of Pay & Accounts Officer, Ministry of Corporate Affairs, New Delhi in two weeks from the date of this order. It is further directed to suspended board of directors to provide all the information as sought by the applicant in paragraph 8 within one months."

(Emphasis Supplied)

10. The Appellants submitted that the present Appeal be allowed on the grounds that the Impugned Order passed by the Adjudicating Authority is without jurisdiction and is in violation of the principles of natural justice.

11. It is the case of the Appellants that the Impugned Order is unreasoned order as the Adjudicating Authority erred in passing Impugned Order thereby, imposing a penalty of Rs. 10,00,000/- each upon the

Appellants herein under the provisions of the Code cannot pass an Order under Section 70 of the Code which deals with "offences and penalties."

12. It is further case of the Appellants that the Adjudicating Authority erred in exercising powers under Section 236 of the Code which has only been vested upon Special Court under and the Adjudicating Authority erred in considering the true scope, effect purported of Section 70 and Section 236 of the Code and failed to consider that Section 236(2) of the Code stipulates that no Court shall take cognizance of any offences punishable under this Act, save on a complaint made by the Board or the Central Government or any person authorised by the Central Government in this behalf. The Appellants stated that the offences under this Code can be tried only by the Special Court established under Chapter XXVIII of the Companies Act, 2013 and therefore the Adjudicating Authority failed to consider that Section 236(2) of the Code stipulates that no Court shall take cognizance of any offences punishable under this Act.

13. The Appellants pleaded that the Impugned Order is contrary to the judgment passed by this Appellate Tribunal in ***Vivek Prakash (Suspended Director & MD) v. Dinesh Kr. Gupta, Liquidator of M/s Jarvis Infratech Pvt Ltd & Anr.*** Company Appeal (AT) (Ins.) No. 169 of 2022 whereby, whilst dismissing the Appeal, this Appellate Tribunal clarified that any prosecution under Section 70 can be initiated only in accordance with the procedure as provided under Section 236(2) of Code.

14. It is allegation of the Appellants that the Adjudicating Authority failed to consider that this Appellate Tribunal, in another case of **Lagadapati Ramesh v. Mrs. Ramanathan Bhuvaneshwari**, Company Appeal (AT) (Ins.) No. 574 2019 which was further followed in **Union of India v. Maharashtra Development Corporation**, Company Appeal (AT) (Ins.) No. 964-965 of 2019 wherein, this Appellate Tribunal specifically held that "The offences and penalties" as prescribed and dealt with in Chapter VII and appropriate Order of punishment can be passed only by way of trial of offences by a Special Court in terms of Section 236 of the Code.

15. Concluding their arguments, the Appellants urged to set aside the Impugned Order and allow their Appeal.

16. At the outset, the Respondent denied all the averment and submissions made in the Appeal. The Respondent stated that the instant Appeal filed by Appellants is gross abuse of process of law, mala-fide and devoid of any merit whatsoever and deserves to be dismissed with exemplary costs.

17. The Respondent submitted that the Impugned Order dated 07.06.2022 has been passed by the Adjudicating Authority due to repeated non-compliance and non- cooperation in CIRP by the Appellants despite repeated opportunities to the Appellants. It is the case of the Respondent that the Adjudicating Authority, while passing the Impugned Order, has not assumed the jurisdiction/power which was not available to the Adjudicating Authority.

18. The Respondent reiterated that the Appellants were given opportunity to explain the non-compliance but the Appellants kept changing their stand for non-compliance, therefore, the Adjudicating Authority was left with no other choice but to levy penalty on the Appellants in the interest of justice.

19. The Respondent submitted that this Appellate Tribunal, in the matter of ***Vikram Puri and Anr. vs Universal Buildwell Pvt. Ltd.*** held, while holding that issuing of non-bailable warrant by the National Company Law Tribunal against the erstwhile directors for ensuring the compliance of the provisions of the Code fell within the ambit of Section 19 of the Code.

20. The Respondent submitted that the instant Appeal is mala-fide and the Appellants have not approached this Appellate Tribunal with clean hands as the Appellants have been non-cooperative with the Resolution Professional/Liquidator since the commencement of the CIRP and used all tactics to delay the CIRP and to deny the Financial Creditors of the Corporate Debtor their legitimate claims. The present Appeal is also one of such tactics of the Appellants and therefore liable to be dismissed.

21. Concluding his argument, the Respondent submitted that the Adjudicating Authority was well versed with the provisions of the Code and has passed the Impugned Order after providing opportunity of hearing to the Appellant to explain non-compliance and also that there were no requirements of investigation which would have necessitated reference to

another forum, the Code, being self contained law. The Respondent submitted to dismiss the appeal with exemplary costs.

22. After hearing all the averments and cited judgments, we will like to refer to relevant sections of the Code, which have been cited by both the Appellants and the Respondent, which reads as under :-

"19. Personnel to extend cooperation to interim resolution professional

(1) The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the corporate debtor.

(2) Where any personnel of the corporate debtor, its promoter or any other person required to assist or cooperate with the interim resolution professional does not assist or cooperate, the interim resolution professional may make an application to the Adjudicating Authority for necessary directions.

(3) The Adjudicating Authority, on receiving an application under sub-section (2), shall by an order, direct such personnel or other person to comply with the instructions of the resolution professional and to cooperate with him in collection of information and management of the corporate debtor.

"Section 70: Punishment for misconduct in course of corporate insolvency resolution process.

70. (1) On or after the insolvency commencement date, where an officer of the corporate debtor—

(a) does not disclose to the resolution professional all the details of property of the corporate debtor, and details of transactions thereof, or any such other information as the resolution professional may require; or

(b) does not deliver to the resolution professional all or part of the property of the corporate debtor in his control or custody and which he is required to deliver; or

(c) does not deliver to the resolution professional all books and papers in his control or custody belonging to the corporate debtor and which he is required to deliver; or

(d) fails to inform the resolution professional the information in his knowledge that a debt has been falsely proved by any person during the corporate insolvency resolution process; or

(e) prevents the production of any book or paper affecting or relating to the property or affairs of the corporate debtor; or

(f) accounts for any part of the property of the corporate debtor by fictitious losses or expenses, or if he has so attempted at any meeting of the creditors of the corporate debtor within the twelve months immediately preceding the insolvency commencement date, he shall be punishable with imprisonment for a term which shall not be less than three years, but which may extend to five years, or with fine, which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both:

Provided that nothing in this section shall render a person liable to any punishment under this section if he proves that he had no intent to do so in relation to the state of affairs of the corporate debtor.

(2) If an insolvency professional deliberately contravenes the provisions of this Part he shall be punishable with imprisonment for a term which may extend to six months, or with fine which shall not be less than one lakh rupees, but may extend to five lakhs rupees, or with both.

Section 236: Trial of offences by Special Court.

236. (1) Notwithstanding anything in the Code of Criminal Procedure, 1973, offences under this Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013.

(2) No Court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Board or the Central Government or any person authorised by the Central Government in this behalf.

(3) The provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, in case of a complaint under sub-section (2), the presence of the person authorised by the Central Government or the Board before the Court trying the offences shall not be necessary unless the Court requires his personal attendance at the trial.

(Emphasis Supplied)

23. We will also like to refer to Rule 11 of the NCLT Rules, 2016 which describes the inherent powers of the Tribunal and clearly states that:

"11. Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of Justice or to prevent abuse of the process of the Tribunal."

(Emphasis Supplied)

24. At first, we will like to go into the judgment referred by the Respondent delivered earlier by this Appellate Tribunal, in the matter of

Vikram Puri and Anr. vs Universal Buildwell Pvt. Ltd. bearing Company Appeal (AT) (Insolvency) No.1018 of 2021, where, while holding that issuing of non- bailable warrant by the National Company Law Tribunal against the erstwhile directors for ensuring the compliance of the provisions of the Code fell within the ambit of Section 19 of the Code, observed that:-

"The Code empowers the Adjudicating Authority to take appropriate measures for ensuring compliance of the provisions of the Code and for ensuring that all personnel extend co-operation to IRP/ RP. Section 19 specifically empowers the Adjudicating Authority to issue appropriate direction for compliance."

The facts and the ratio of the quoted judgment is different from the facts and the basis of the prayer of the present Appeal and therefore, the submissions of the Respondent on this account are not appreciable.

25. Now, we will examine the judgment quoted by the Appellants. The first case cited case in the matter of **Vivek Prakash(Suspended Director & MD) v. Dinesh Kr. Gupta, Liquidator of M/s Jarvis Infratch Pvt. Ltd. C.A.(AT)(Ins.) No. 169 of 2022** , wherein it was held :-

"8. Thus, prosecution under Section 70 has to be on complaint filed by the Board or Central Government or person authorized by the Central Government. The submission of the Learned Counsel for the Appellant that Resolution Professional is not empowered to initiate the prosecution is correct. Learned Counsel for the Resolution-Resolution Professional has however, explained that no prosecution has been initiated under Section 70 by the

Resolution Professional and he has only sent the information to the Board and it is for the Board to take appropriate action. We, thus, clarify that any prosecution under Section 70 can be initiated only in accordance with the procedure as provided under Section 236(2) and not by the Resolution Professional. However, with regard to any other offences including the offences under Indian Penal Code, if any complaint is filed by the Resolution Professional before a Police Station that is separate issue and has no concern with the offences under Section 70 and the order impugned shall have no bearing on such proceedings by a Police Station and they are independent proceedings which has to be considered and decided in accordance with law.

(Emphasis Supplied)

26. Another case cited by the Appellants i.e. **Lagadapati Ramesh v. Mrs. Ramanathan Bhuvaneshwari [(2019) SCC OnLine NCLAT 1153]** is also decision of this Appellate Tribunal, wherein it was held that :-

“37. In view of the aforesaid position of law, we hold that the Tribunal/ Adjudicating Authority, on receipt of application/complaint of alleged violation of the aforesaid provisions and on such consideration and being Company Appeal (AT) (Insolvency) Nos. 574 & 592 of 2019 satisfied that there are circumstances suggesting that defraud etc. has been committed, may refer the matter to the Central Government for investigation by an Inspector or Inspectors as may be appointed by the Central Government. On such investigation, if the investigating authority reports that a person has committed any offence punishable under

Section 213 read with Section 447 of the Companies Act, 2013 or Sections 68, 69, 70, 71, 72 and 73 of the 'I&B Code', in such case, the Central Government is competent to refer the matter to the Special Court itself or may ask the Insolvency and Bankruptcy Board of India or may authorise any person in terms of subsection (2) of Section 236 of the 'I&B Code' to file complaint.

(Emphasis Supplied)

27. The Appellants also brought to our notice yet another earlier decision of this Appellate Tribunal in the matter of in the matter of ***Union of India v. Maharashtra Tourism Development Corporation [(2019) SCC OnLine NCLAT 1414]***, wherein this Appellate Tribunal had referred the matter to Central Government for investigation through 'Inspector(s)' for finding out whether persons related to the company in question has violated the provisions of Section 70 of the Code, further directed that the procedures under Section 213 of the Companies Act, 2013 has to be followed.

28. Our attention has been drawn to the decision of this Appellate Tribunal in the matter of ***Vikram Puri v. Universal Buidwell (P.) Ltd. [(2022) SCC OnLine NCLAT 306]***, where this Appellate Tribunal has observed that the prosecution under Section 70 of the Code is a separate and independent proceedings, which in no manner fetter power upon the Tribunal to invoke the Section 70 of the Code.

29. We will also refer to the judgment passed by this Appellate Tribunal in the matter of ***Sapan Mohan Garg, Resolution Professional of Sort India Enviro Solution Ltd. v. Manish G Patel & Anr. C.A. (AT) (Ins.) No.***

837 of 2021, wherein it has been held that in order to initiate prosecution under Section 70 of the Code the complaint has to be filed by the Insolvency and Bankruptcy Board of India (IBBI) or Central Government or person authorized by the Central Government.

30. Finally, we find that in another decision of this Appellate Tribunal in the matter of **Writer Business Services (P.) Ltd. v. Ashutosh Agrawala, Resolution Professional for Cox & Kings Ltd. [(2022) SCC OnLine NCLAT 2234]**, where it was held that :-

“27. When the allegation of Resolution Professional was that Appellant has contravened the Moratorium there was allegation of commission of an offences on which punishment could have been awarded after following the procedure under Section 236. An act which is termed as offence within Comp. App. (AT) (Ins) No. 956 of 2021 specific provision of Chapter VII of Part-II could not have been indirectly dealt with by the Adjudicating Authority by imposing a fine.”

(Emphasis Supplied)

31. After careful perusal of all above discussed six judgments of this Appellate Tribunal on earlier occasions which are on similar facts, we without any hesitation, conclude that clearly the Adjudicating Authority erred in passing the Impugned Order overlooking the law of the land (the Code) and also ignoring the precedent cases settled by this Appellate Tribunal, as discussed in preceding paragraphs.

32. Based on above detailed analysis, we are unable to sustain the Impugned Order. In fine, the Appeal succeeds and the Impugned Order is set aside and remanded back to the National Company Law Tribunal, New Delhi Bench, Court - III to have a fresh look of the case and decide in accordance with the law and pass suitable order.

33. The Appellants and the Respondent are directed to appear before the NCLT, New Delhi Bench, Court- III on 8th November, 2023. No Costs. Interlocutory Application(s), if any, are Closed.

[Justice Anant Bijay Singh]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

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