NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Comp. App. (AT) (Ins.) No. 169 of 2022

In the matter of:

Vivek Prakash (Suspended Director & MD) ....Appellant

Vs.
Dinesh Kr. Gupta, ...Respondents
Liquidator of M/s Jarvis Infratech Pvt. Ltd. & Anr.

For Appellant:	**Dr. Farrukh Khan, Mr. Ateendra Singh, Mr. Prateek Gupta, Advocates.**
For Respondents:	**Mr. Govind Bhardwaj, Advocate for R1.**

ORDER

(Through Virtual Mode)

21.02.2022: Heard Learned Counsel for the Appellant and Learned Counsel for the Respondents. With the consent of the Learned Counsel for the parties, the Appeal is disposed of at the stage of admission itself.

2. This Appeal has been filed against the judgment dated 16.12.2021 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Court-V on I.A 4480/2020. By I.A 4480/2020 filed by the Resolution Professional direction was sought that suspended directors and management be directed to handover the complete books of accounts and other financial records and information to Resolution Professional and further all the fixed assets which belong to the Corporate Debtor and provide for clarification and explanation as to the financial transactions which have been reported in Provisional Transaction Audit Report. Further, direction was sought to the suspended directors to extend full assistance and cooperation in complete

harmony and peace to the Resolution Professional. On the Application filed by the Resolution Professional, the parties were heard and by impugned order, Learned Adjudicating Authority has come to the conclusion that the documents as claimed were not provided and suspended directors failed to cooperate. The cause shown by the Appellant was also examined and ultimately the Adjudicating Authority in last para of the impugned order observed following:-

> *"At this juncture, we would like to refer to the arguments advanced on behalf of respondent no.1. Ld. Counsel appearing for respondent no.1, in course of his arguments submits that all the information is under control of Respondent no.2, therefore, only respondent no.2 is responsible for furnishing information and hand over the documents. Since the respondent no.1 was also the Director of the Corporate Debtors before the initiation of the CIRP, therefore, in our considered view, the respondent no.1 cannot be escaped from its liability, by shifting the responsibility solely on the respondent no.2. Since, both the respondents were the directors of the Company prior to the initiation of the CIRP, therefore, they are supposed to hand over the documents and furnish the information as required by the RP. Since both of them have failed to furnish the information as required under the law, therefore the RP is directed to institute a criminal case against both the Suspended Board of Directors under Section 70 of the IBC along with the other relevant*

> *Sections of the law. With this the present application stands disposed of."*

3. Dr. Farrukh Khan, Learned Counsel for the Appellant submits that there was no occasion to issue any direction for initiating prosecution by Resolution Professional under Section 70. He further submits that all documents have been supplied by the Appellant and it was Respondent No.2 who could have been asked for any further document if required. He submits that a police complaint has been filed by the Resolution Professional before the Police Station, Kalkaji on which an F.I.R has not yet been registered and Police is making enquiry with regard to the said complaint.

4. Learned Counsel for the Respondent No.1 submits that there has been total non-cooperation by the Appellant and the Respondent No.2. Requisites documents were never provided which compelled the Resolution Professional to file an Application under Section 19(2) on which the impugned order has been passed. It is submitted that with regard to offences under Section 70, Resolution Professional has sent information to the IBBI and Resolution Professional has not initiated any prosecution on his own. He further submits that with regard to complaint which is said to be filed before the Police Station, Kalkaji that relates to other offences committed by the suspended directors and not the IBC offences.

5. We have considered the submissions of the parties and perused the record.

6. The order impugned has been passed in exercise of power under Section 19(2) of the IBC. Section 19 of the IBC gives extensive power to the

Adjudicating Authority to issue direction to the personnel of the Corporate Debtor to cooperate. Section 19(3) provides:-

> *"**19. Personnel to extend co-operation to interim resolution professional. -** ……….(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."*

7. In event requisites, cooperation and information not supplied and any offence is committed within the meaning of Section 70 of the Code, it is true that neither the Adjudicating Authority nor Resolution Professional can initiate the prosecution under Section 70 and the prosecution under Section 70 can be initiated only in manner as provided under Section 236 which is to the following effect:-

> *"**236. Trial of offences by Special Court. -** (1) Notwithstanding anything in the Code of Criminal Procedure, 1973(2 of 1974), offences under of this Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013 (18 of 2013).*
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> *(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."

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.

9. We thus are of the view that subject to clarification as made above, there is no ground to entertain this Appeal. The Appeal is disposed of accordingly.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

Anjali/nn