

DIGEST OF FINAL ORDERS PASSED BY THE APPELLATE AUTHORITY

VOLUME-II

CONTAINING

ORDERS PASSED IN THE APPEALS RECEIVED AGAINST THE ORDERS OF BOARD OF DISCIPLINE AND/OR DISCIPLINARY COMMITTEES OF THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA, THE INSTITUTE OF COMPANY SECRETARIES OF INDIA, THE INSTITUTE OF COST ACCOUNTANTS OF INDIA AND THE INSTITUTE OF ACTUARIES OF INDIA DECIDED BY THE APPELLATE AUTHORITY FROM 26th JANUARY, 2018 TO 2nd NOVEMBER, 2018



Issued under the Authority of the

APPELLATE AUTHORITY

(Constituted by the Central Government under the Chartered Accountants Act, 1949, the Company Secretaries Act, 1980 and the Cost Accountants Act, 1959)

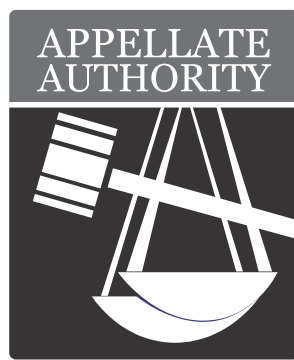
DECEMBER, 2018

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DECEMBER, 2018

Published by Mr. Ravindra Singh Pundhir, Registrar, Appellate Authority, the Institute of Chartered Accountants of India, ICAI Bhawan, Research Block, 2nd Floor, A-29, Sector-62, Noida-201301

ABOUT APPELLATE AUTHORITY

This Appellate Authority has been constituted by the Central Government vide its notification in the official Gazette, dated March 20, 2009, in terms of Section 22A (1) of the Chartered Accountants Act, 1949, Section 22A of the Cost and Work Accountants Act, 1959 and Section 22A of the Company Secretaries Act, 1980.

The professionals engaged in the professions of Chartered Accountants, Cost Accountants and Company Secretaries have been constituted into various body corporate by their respective establishing Acts.

The Institute of Chartered Accountants of India was setup by the Chartered Accountants Act in 1949 to regulate the profession of Chartered Accountants and with a similar objective; the Institute of Cost Accountants was setup by the Cost and works Accountants Act in 1959 and the Institute of Company Secretaries was setup by The Company Secretaries Act in 1980 to regulate the professions of Cost Accountants and Company Secretaries respectively. Each Institute acts as a licensing, regulating, certifying and educational body for the respective profession.

By amendments to the establishing Acts of the three professional institutes, through the Chartered Accountants (Amendment) Act, 2006, The Company Secretaries (Amendment) Act, 2006, and the Cost and Works Accountants (Amendment) Act, 2006, a provision was made for appeal to the Appellate Authority, which previously could be made only to the High Court.

These amendments were necessitated by the need to bring about systemic changes in the institutions governed by the Act, particularly provision for an institutionalized Disciplinary Mechanism within the framework of the Institutes, which would ensure well considered yet expeditious disposal of complaints against members of the Institute, on professional or other misconduct, ensuring faster delivery of justice and to deal with appeals arising from decisions of disciplinary authorities.

A profession, unlike a business, is engaged in not for the sole or primary motive of profit but to render service to society. A large section of the public relies on the integrity and competence of these professionals, holding them and their professional acts, opinions and statements in high esteem and trust, enabling the wheels of commerce to turn smoothly with unflinching regularity and reliability. In fact even various arms of the Government pose immense trust in these professionals as they undertake various statutory functions. The objective of these Acts and professional bodies is to maintain the standards of the respective professions at a high level and consequently prescribe a code of conduct.

To ensure high professional standards and maintain the trust reposed in these professionals by the public, a Disciplinary Directorate is established by each Institute to investigate and punish cases of professional misconduct and even the conduct of a member in other matters that may bring disrepute to the profession. The disciplinary bodies have the power to take cognizance of all such matters on their own even without receiving a complaint.

The importance of the Appellate Authority as well as the Board of Discipline and the Disciplinary Committee can be gauged from the fact that they are vested with the powers of a Civil Court in respect of summoning and examining persons on oath, enforcing their

attendance, discovery and production of documents and receiving evidence on affidavit. They can award punishment in cases of professional or other misconduct which may include a reprimand, temporary or permanent cancellation of license to practice (removal of name of member from the register) and monetary fine.

Any member of these Institutes (professional) who is aggrieved by an order of the Board of Discipline or the Disciplinary Committee imposing a penalty on him, may appeal against the order to the Appellate Authority. The Director (Discipline) can also appeal against the decision of the Board of Discipline or the Disciplinary Committee to the Appellate Authority.

The Appellate Authority is located in NCR, headed by a Chairperson, who is or has been a judge of a High Court, two former members of the Council of each of the three Institutes and two nominees of the Central government having knowledge and practical experience in the field of law, economics, business, finance or accountancy.

The Appellate Authority holds its proceedings which are quasi-judicial in nature in NCR or on the request of parties, if feasible, at the place of alleged misconduct, giving reasonable opportunity of hearing to the parties and may confirm, modify or set aside the order of the Board of Discipline or the Disciplinary Committee, impose a penalty or set aside, reduce or enhance the penalty already imposed upon the member, refer the case back for further investigation or pass any such other order as the Authority thinks fit.

Constitution and Composition of the Appellate Authority

Chairperson:

Hon'ble Mr. Justice M. C. Garg, Former Judge of Delhi & M.P. High Courts

Members¹:

1. Shri Praveen Garg, Joint Secretary, Ministry of Finance, Government of India
2. Dr. Navrang Saini, Former Director General of Serious Fraud Investigation Office, Ministry of Corporate Affairs and presently a Whole Time Member of the Insolvency and Bankruptcy Board of India
3. CA. Sunil Goyal, Past President of the Institute of Chartered Accountants of India
4. CA. Kamlesh S. Vikamsey, Past President of the Institute of Chartered Accountants of India
5. CS. Preeti Malhotra, Past President of the Institute of Company Secretaries of India
6. CS. Sanjay Grover, Former Central Council Member of the Institute of Company Secretaries of India
7. CMA Brij Mohan Sharma, Past President of the Institute of Cost Accountants of India
8. CMA Pravakar Mohanty, Past President of the Institute of Cost Accountants of India
9. Shri Heerak Basu, Former Council Member of the Institute of Actuaries of India
10. Ms. Vibha Bagaria, Former Council Member of the Institute of Actuaries of India

Registrar:

Mr. Ravindra Singh Pundhir, Assistant Secretary (Legal), the Institute of Chartered Accountants of India, New Delhi

¹ The Tenure of all the above named members mentioned from Sr. 1 to 8 above was completed on 2nd November, 2018.

FOREWORD

With so much faith being reposed by large section of public as well as by the Government on the integrity and competence of the professionals like Chartered Accountants, Company Secretaries, Cost Accountants and members of Actuaries, holding them and their professional acts, opinions and statements in high esteem and trust place these professionals under increased responsibilities in recent times.

The objective of these respective professional bodies is certainly to maintain the standards of the respective professions at a high level and consequently in addition to observing the provisions of the respective Acts, Regulations and applicable Rules, these professionals are expected to adhere with the Code of Ethics, as formulated and approved by the respective Institute. That is why to ensure high professional standards and maintain the trust reposed in these professionals by the public, a Disciplinary Directorate is established by each Institute to investigate and punish cases of professional and other misconducts and thus the errant members are prosecuted and punished by the Director (Discipline) either through the Board of Discipline or through the Disciplinary Committee, as the case may be.

I am happy to note that with a view to further aware the members of these professional bodies, this second volume of the Digest of final orders passed by this Authority is being published covering the period from 26th January, 2018 to 2nd November, 2018 for reference and use by these professionals so as to undertake their statutory duties effectively and to avoid any mistake at their end.

I am confident that this Digest of final orders containing observations of this Authority in certain Appeals will also be helpful for the members of the Board of Discipline and Disciplinary Committees of these Institutions in exercise of their statutory duties.

I would like to take this opportunity to place on record my appreciations of the efforts put in by Shri Ravindra Singh Pundhir, Registrar of this Authority and all others involved in preparing, completing and bringing out this second volume of the digest.

(Justice M.C. Garg)
Chairperson

Place: New Delhi

Date: 20th December, 2018

PREFACE

It is really a matter of pride that since the constitution of this Appellate Authority by the Central Government through notification in the Official Gazette of India dated 20th March, 2009; this Authority is performing its duties effectively and providing timely justice to the aggrieved members of respective Professional Institutes.

The first volume of the Digest of final orders passed by this Authority in respect of all the professional institutes over which it exercises jurisdiction was published covering the period of its' inception to 25th January, 2018 with a clear objective to make aware the respective members of these Institutions as to what constitute Professional or Other Misconducts in terms of the Schedules of the respective Acts or even otherwise. Certainly, this will help the members of these Institutions to adhere to the provisions of the respective Acts, Regulations and the Rules framed thereunder in addition to the provisions of the Code of Ethics governing the professions, while performing their duties.

The present second volume of this Digest is also being published for the same purpose covering the period of 26th January, 2018 to 2nd November, 2018. I hope that this volume too will prove useful to the members of the profession in guiding them on ethical issues as well as disciplinary matters for improving their understanding of the provisions involved or interpreted through these Orders by this Authority and in so doing prevent them from committing any such act during the performance of their duties on day to day work.

(Ravindra Singh Pundhir)
Registrar, Appellate Authority

Place: New Delhi

Date: 20th December, 2018

INDEX

1. Appeals in respect of the Institute of Chartered Accountants of India

S. No	Appeal No & Parties	Date of Final order	Provisions of Law Involved	Page No
1.	06/ICAI/2017 Parag Vinod Mehta Vs. ICAI & Others	03.02.2018	Clause (2) of Part-IV of First Schedule of CA Act, 1949	01-09
2.	01/ICAI/2018 Shankar Pirmal Yadav Vs. ICAI & Others	23.04.2018	Section 22G of CA Act, 1949 (Complainant has no right to file appeal)	10-12
3.	05/ICAI/2018 Hasmukhlal Rangildas Ghael Vs. ICAI & Others	23.04.2018	Section 22G of CA Act, 1949 (Complainant has no right to file appeal)	13-15
4.	01 & 02/ICAI/2017 V. Ajay Vs. ICAI & Others	03.07.2018	Clauses (7) & (8) of Part-I of the Second Schedule of CA Act, 1949	16-29
5.	07/ICAI/2018 Ramchandra Y. Kulkarni Vs. Others	04.08.2018	Clauses (7) & (8) of Part-I of the Second Schedule of CA Act, 1949	30-40
6.	08/ICAI/2018 Durga Prasad Sarada Vs. ICAI & Others	04.08.2018	Clause (10) of Part-I of Second Schedule and Clause (2) of Part-IV of First Schedule of CA Act, 1949	41-49
7.	10/ICAI/2018 Ishaq Esmail Lakkadghat Vs. Others	27.08.2018	Clauses (7) of Part-I of Second Schedule of CA Act, 1949	50-56
8.	09/ICAI/2018 Mahavir Jain Vs. Others	05.10.2018	Clauses (7) & (8) of Part-I of the Second Schedule of CA Act, 1949	57-64
9.	12/ICAI/2017 Anil Kumar Aggarwal Vs. ICAI & Others	18.10.2018	Clause (2) of Part-IV of First Schedule of CA Act, 1949	65-78
10.	14/ICAI/2017 Radhey Shyam Bansal Vs. ICAI & Others	18.10.2018	Clause (2) of Part-IV of First Schedule of CA Act, 1949	79-92
11.	02/ICAI/2018 Devendraa P. Kapur Vs. ICAI & Others	01.11.2018	Clause (2) of Part-IV of First Schedule and Clauses (5), (6), (7) & (9) of Part-I of the Second Schedule of CA Act, 1949	93-106

2. Appeals in respect of the Institute of Company Secretaries of India

S. No	Appeal No & Parties	Date of Final order	Provisions of Law Involved	Page No
1.	10/ICSI/2015 Benny Methew Vs. ICSI & Others	03.02.2018	Clause (1) of Part-II of Second Schedule of CS Act, 1980	107-112
2.	15/ICSI/2017 Praveen Kumar Kanungo Vs. ICSI & Others	26.03.2018	Clause (7) of Part-I of Second Schedule of CS Act, 1980	113-118
3.	07/ICSI/2017 Sital Prasad Swain & Others	04.08.2018	Clause (7) of Part-I of Second Schedule of CS Act, 1980	119-128
4.	08/ICSI/2017 Ashwani Khanna & Others	17.07.2018	Clause (7) of Part-I of Second Schedule of CS Act, 1980	129-134
5.	11/ICSI/2018 Shaleen V. Vaid & Others	07.08.2018	Section 22E of CS Act, 1980 (Complainant has no right to file appeal)	135-137
6.	08/ICSI/2017 Ashwani Khanna & Others	23.10.2018	Clause (7) of Part-I of Second Schedule of CS Act, 1980	138-140

3. Appeals in respect of the Institute of Cost Accountants of India

S. No	Appeal No & Parties	Date of Final order	Provisions of Law Involved	Page No
1.	04/ICWAI/2017 Ashok B. Nawal Vs. ICWAI & Others	20.04.2018	Clause (10) of Part-I of First Schedule and Clause (1) of Part-II of Second Schedule of CWA Act, 1959	141-143
2.	11/ICWAI/2017 Ashish P. Thatte Vs. ICWAI & Others	20.04.2018	Section 22E of CWA Act, 1959 along-with Clause (6) and Clause (7) of Part-I of the First Schedule	144-146
3.	08/ICWAI/2015 Sanjiban Bandyopadhyaya Vs. ICWAI & Others	09.04.2018	First Schedule and the Second Schedule to the Cost and Works Accountants Act, 1959	147-151
4.	12/ICWAI/2018 Ashok B. Nawal Vs. ICWAI & Others	17.09.2018	Clause (10) of Part-I of First Schedule and Clause (1) of Part-II of Second Schedule of CWA Act, 1959	152-166
5.	08/ICWAI/2015 Sanjiban Bandyopadhyaya Vs. ICWAI & Others	31.10.2018	First Schedule and the Second Schedule to the Cost and Works Accountants Act, 1959	167-168

4. Appeals in respect of the Institute of Actuaries of India

S. No	Appeal No & Parties	Date of Final order	Provisions of Law Involved	Page No
1.	06/IAI/2015 R. Kannan Vs. IAI & Others	07.07.2018	Section 31, Part-III (1) & (3) and Part-IV (A) (2) of the Actuaries Act, 2006	169-177

BEFORE THE APPELLATE AUTHORITY
(Constituted Under The Chartered Accountants Act, 1949)

APPEAL NO. 06/ICAI/2017

IN THE MATTER OF:

Parag Vinod Mehta

....Appellant

Versus

**Board of Discipline of the Institute
of Chartered Accountants of India**

....Respondent No. 1

Mr. V.K. Pandey, Director of Income Tax

....Respondent No. 2

CORAM:

Hon'ble Mr. Justice M.C. Garg
Hon'ble Mr. Sunil Goyal
Hon'ble Mr. Praveen Garg
Hon'ble Dr. Navrang Saini

Chairperson
Member
Member
Member

PRESENT:

For the Appellant:

Mr. S.G. Gokhale, Advocate appearing on behalf of the Appellant

For the Respondents:

1. Mr. Amit Sharma, Advocate appearing on behalf of ICAI
2. Ms. A. Aruna Sarma, Senior Executive Officer, Disciplinary Directorate appearing on behalf of ICAI
3. CA. Anuj Dang, Disciplinary Directorate appearing on behalf of ICAI

ORDER

1. Being aggrieved of the Order dated 10th December, 2016 (Impugned Order) passed by the Board of Discipline of the Institute of Chartered Accountants of India (ICAI) in case No. PR-34/12-DD/53/12/BOD/177/2014 under Section 21A (3) of the Chartered Accountants Act, 1949 as amended by the Chartered Accountants (Amendment) Act, 2006, CA. Parag Vinod Mehta (M. No. 036867), a practicing Chartered Accountant, Appellant herein, has filed this appeal against the Institute of Chartered Accountants of India and others challenging the Impugned Order, whereby, the Board of Discipline awarded him punishment of '**removal of his name from the Register of Members for a period of three months and also imposed a fine of Rs.1,00,000/- (Rupees one lakh) upon him, payable by him within a period of 60 days from the receipt of the aforesaid Order**' for violation of clause (2) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949. The said clause reads as under:

"PART IV: - Other misconduct in relation to members of the Institute generally

A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if –

1. x x x
2. ***in the opinion of the Council, he brings disrepute to the profession or the institute as a result of his action whether or not related to his professional work".***

2. For the purpose of deciding the present Appeal, the brief facts of the matter are as under:-

2.1 Shri V. K. Pandey, Director of Income Tax (Inv.-II), Mumbai (complainant) has filed a complaint in Form No. 'Y' dated 10th February, 2012 against CA. Parag V. Mehta (the Appellant herein), before the Institute, *inter-alia* alleging that the Investigation unit, Mumbai had conducted a Search and Seizure action u/s 132 of the Income Tax Act, 1961 at the office and residential premises of the Respondent. During the course of Investigation, it was detected that the Respondent was the master mind in the racket of issuing bogus bills to interested parties in Mumbai and outside. Such bills were being issued in the name of M/s Washington Software Limited, whose Chairman is Shri Sanjay Sonawani. Shri Sanjay Sonawani has categorically stated in his statement u/s 131 of the I.T. Act, recorded under oath, on 16th March, 2011, before DDIT (Inv.), Unit 1(1), Pune that he was giving such bogus bills to the tune of Rs.52 Crores through his non existing company at the behest of the Respondent.

2.2 During the course of search proceedings on the Respondent, he has admitted before DDIT (Inv.), unit-VII(4), Mumbai, that he has been providing "table space" to Shri Sonawani, at his office located at Jolly Bhawan, 10 Marine Lines, Mumbai. Also several blank cheque books of M/s Washington Software Ltd., some of them duly signed by Shri Sonawani, were seized from the above office of the Respondent on the day of the search.

2.3 Later on, however, Shri Sonawani has retracted from the earlier statement, allegedly under tutoring of the Respondent that he did provide the table space but did not mastermind the transactions.

2.4 On the basis of the information gathered by the Mumbai Directorate, a survey action on M/s Apeejay Education Society and Rajeshwari Sangeet Academy Trust, Jalandhar was carried out by Director of Income Tax (Inv).-II, New Delhi which further established the fact of such accommodation bills issued by M/s Washington Software Ltd.

2.5 The complainant further stated that from the above, it is clear that the Respondent has deliberately and consciously indulged in malpractice of issuing bogus bills.

3. The aforementioned complaint was considered by the Director (Discipline) of the Institute of Chartered Accountants of India in terms of Rules 8 (5) of the Chartered Accountants (Procedure of Investigations of Professional and other Misconduct and Conduct of Cases) Rules 2007 and on consideration, the Director (Discipline) formed his '*Prima Facie-Opinion*' (PFO) dated 21st July, 2014 that CA. Parag V. Mehta is guilty of other misconduct falling within the meaning of aforesaid Clause (2) of Part-IV of the First Scheduled to the Chartered Accountants Act, 1949 and

placed the matter before the Board of Discipline for its further examination and consideration in terms of the applicable rules.

4. Pursuantly, the said matter was taken up for further investigation by the Board of Discipline of the Institute of Chartered Accountants of India, wherein, the Board concurred with the '*Prima Facie-Opinion*' (PFO) of the Director (Discipline) and proceeded with the case. The Appellant submitted his written statement and the hearing of the matter took place on various dates. In the course of proceedings, Mr. Parag Vinod Mehta admitted that he had provided only table space to Mr. Sonawani in his office located at Jolly Bhawan, 10, Marine Lines, Mumbai. Mr. Mehta also admitted that the Books of Accounts, Cheque books and other records related to the company (i.e., M/s Washington Software Limited) were available in his office.
5. Mr. Mehta further stated that Mr. Sonawani had no employee of his own nor was any employee of his was working for him as per his directions like, withdrawal of cash, writing of Cheque (s) and other works related to the aforesaid company and there was no involvement of him in respect of any activity carried out by the said company. Furthermore, in response to the query of the Board, Mr. Mehta admitted that he did not charge any rent from Mr. Sonawani for the table space provided to him in his office.
6. However, the Complainant in his submissions before the Board stated that Mr. Sonawani in his statement dated 16th March, 2011 has admitted that he had passed certain amount of commission as consideration for arranging bogus bills to the Respondent. Further he submitted that only clinching evidences in this matter are that signed cheques and other record related to said Company were found in the office of the Respondent. Further, in respect of question of the Board, the Complainant submitted that he has no evidence which prove that cash is withdrawn by the employee of the Respondent and or any other business activity carried out on behalf of Mr. Sonawani by the employee of the Respondent. Moreover, the Complainant admitted that he has no knowledge as to whether those beneficiary entities have any relation/link with the Respondent.
7. Pursuant to the perusal of the documents on record and submissions made by the parties at the time of hearing and after examination of all the facts, evidences and the applicable law relating to the present matter, the Board of Discipline gave its findings under Para (12), (13), (14) and (15) in its Report dated 6th November, 2015, which are reproduced as hereunder:-

"12. The Board noted that the only one and main allegation against the Respondent is that he was deliberately and consciously indulging in malpractices of issuing bogus bills/accommodation entries to interested

parties located at Mumbai and outside on behest of one Mr. Sanjay Sonawani to whom he had provided table space in his office.

13. *The Board noted that these allegations are based upon the statement of Mr. Sonawani dated 16th March, 2011 recorded by the Complainant Department, in which said person has admitted that he used to issue bogus sales bills to various interested parties with the help of the Respondent for a consideration of 1% commission on such bills. The cheque books of the account through which such transactions used to take place were signed by him and kept in the custody of the Respondent. However, later on, the said statement has been retracted by Mr. Sonawani himself on 12th April, 2011 and 12th May, 2011 stating that one Mr. Rohidas Kumbarkar (the Director of the Company) came up to him with the proposal of issuing the bogus bills so as to bail out the Company from financial crisis. He submitted that the statement made by him on 16th March, 2011 before the IT authorities, was based on some misunderstanding and misinformation. As per the statement dated 16th March, 2011 of Mr. Sonawani, the Respondent out of friendship, had provided the table space to the Company without any rent in consideration; and the cheque-books & slip-books belonging to the Company, being found from the office of the Respondent during the search procedure carried out by the Income Tax Department were kept with the Respondent's employee Mr. Ramsunder (who was also involved in the matter) for the ease of transactions.*
 14. *The Board noted that during proceeding before it, the Respondent has admitted that he had friendly relations with Mr. Sonawani and has provided the 'table space' to carry on the business activities of the Company. The Board noted that major point against the Respondent is that he has not charged any rental for providing table space in his office to Mr. Sonawani. Moreover, he has failed to bring on record either in his oral submissions before it or through any clinching evidence (s) to show that he had not business association with Mr. Sonawani. Furthermore, based upon submission of the Respondent, the Board noted that Mr. Sonawani has no staff for running the business activities of the Company and rather it appeared that one of office staff of the respondent was working for Mr. Sonawani as per directions of the Respondent for withdrawal of cash, writing cheques.*
 15. *In view of said submission, the Board is of the opinion that there are certain established factors on record like (i) the Respondent has provided free table space to Mr. Sonawani; (ii) staff member of the Respondent was working for Mr. Sonawani and (iii) signed cheques were found in the office of the Respondent which are all evidences which go to prove that Mr. Sonawani was working as an associate for the Respondent. Hence, it is evident that the Respondent was the main person who was instrumental in issuing bogus invoice (s) / accommodation entries to certain entities in Mumbai and outside, an act which is unbecoming of a professional.*
8. Accordingly, based on the above findings, the Board reached to the conclusion that the Respondent, Appellant herein, is guilty under Clause (2) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949 and awarded the punishment as mentioned in Para (1) of this Order. Hence, being aggrieved, the Appellant has preferred this Appeal against the Impugned Order before this Authority.
 9. The Learned Counsel appearing on behalf of the Appellant vehemently contested that the Board has solely relied on the statement of Mr. Sanjay Sonanwani dated 16th March, 2011 without any corroboration and without affording an opportunity of

cross examination of the same to the Appellant. He further argued that the Board of Discipline erred in not considering further statements dated 12th April, 2011 and 12th May, 2011 of Mr. Sanjay Sonanwani. The extracts of statements made on 16th March, 2011 and 12th April, 2011 of Mr. Sanjay Sonawani are respectively as under:

Statement recorded on 16th March, 2011:

"My company was in deep financial crisis in year 2003 due to legal and other personal problems. During that period Shri Parag Mehta who is a Chartered Accountant having his office at 115, Jolly Bhavan, 10, Marine Lines, Church gate Mumbai-20, approached me and made an offer of providing accommodation entries in the form of bogus sales as stated above for a consideration of 1% commission on such bills. He had asked me to open a current account at ICICI Bank, Nariman Point, Mumbai. I had only signed the documents in this regard and rest of the formalities was done by him. The cheque book of this account in which all the cheques were signed by me, was kept in his personal custody and accordingly he used to transact with this. Mr. Parag Mehta used to send me the soft copies / hard copies of such bogus sales bills which I after signing used to send to Mr. Parag Mehta. I would like to confirm that I did not know to whom or to which parties these cheques were given or issued by Mr. Parag Mehta. In 2005, this account was closed and a new account was opened at Axis Bank, Kothrud Branch, Pune and in this case also the cheque book of this account in which all the cheques were signed by me was kept in personal custody of Shri Parag Mehta and accordingly he used to transact with this. However during the period of 2004-05, I was in prison for some time, the bills and invoices issued in this period are not in my knowledge and nor the company has received any money for that."

Statement recorded on 12th April, 2011:

"I would like to state that up till financial year 2003-2004, the company was actually developing various softwares as stated in my answer to Q. No. 5 to Q. No. 11 in my statement recorded at Pune on 16th March, 2011. I would further like to state that the answer to Q. No. 7 in my statement recorded at Pune on 16th March, 2011 was based on a misunderstanding and misinformation. In fact Mr. Parag Mehta did not approach me as stated in my answer. It was Mr. Rohidas Kumbharkar, Director of the Company who was approached by a financial journalist Mr. Anil Roy who approached me with this proposal of bogus billing. Since I was in prison during this time, i.e. March 04 till June 2004 and my company was going through tough times as all our capital and reserves were locked-up for the long term investments, I had no option but to accept Mr. Anil Roy's and the other director's proposal to bail out the company from financial crisis.

We requested Mr. Parag Mehta who is a friend to let us use a table space in his office as we did not have an office in Mumbai. The relevant Bank accounts were opened by us. We have used his office for our company purposes. The Cheque books and slip books were kept with his office employees for ease of transaction as lot our parties were from Mumbai.

In respect of Q.No.6, I would like to make a slight correction to the answer. There are some sales which are genuine. The percentage of genuine sales would not be higher than 3% to 4%.

In respect of Q.No.9, I would like to state that the investments have been made from the Capital and Reserves of Washington Softwares Ltd. and are genuine in nature. All the investments were made directly by us. In some cases we have sought Mr. Parag Mehta's advice.

In respect of Q. No.11, I would like to state that it is true that the company has earned commission in cash from bogus billing, of Rs.32 lakhs from various parties but we have not received anything from Mr. Parag Mehta because of some internal dispute with Mr. Anil Roy and other directors, I was misinformed that Mr. Parag Mehta was involved. In fact Mr. Paraga Mehta was not involved in any of the bogus billing transactions of the company. Since he was not involved, the question of his duping us does not arise".

10. In view of the above factual matrix and based on the records available, we have noted that while the Complainant and the Board of Discipline of the Institute of Chartered Accountants of India has relied on the statement dated 16th March, 2011 of Mr. Sanjay Sonawani, the Appellant has insisted that the statement of said Sanjay Sonwani recorded on 12th April, 2011 should be relied upon, wherein he has retracted from his earlier statement. When the statement dated 16th March, 2011 was relied upon by the Board of Discipline, no opportunity of cross examine the witness was given to Appellant. However, during the proceedings before us, when this Authority pointed out to the Appellant that when he himself was relying upon the statement dated 12th April, 2011, then he himself should have produced the said Mr. Sanjay Sonawani, no reply was given to us by the Appellant thereto. This Authority further noted that in the statement of the Appellant himself made before the Income Tax Authorities recorded on 25th March, 2011 he has stated as under:

*"You may summon him (Mr. Sanjay Sonawani-added by this Authority) and record his statement. He is in Mumbai today at my office 114/ 114-A, Jolly Bhavan No. 1, 10, New Marine Lines, Mumbai-400020.
.....I would just like to add that if Mr. Sanjay D. Sonawani does not agree to the above facts stated by me, I would request you to give an opportunity to cross examine him before you."*

11. Thus, it is relevant to note that while the Board of Discipline did not afforded an opportunity to the Appellant to cross examine Mr. Sanjay Sonawani, it is also clear that the Appellant himself was in close contact with him and he was in a position to produce him as his own witness before the Board, which he failed to do so. Further, when this Authority enquired from the Appellant that as per the statement of Appellant recorded by Income Tax on 22nd March, 2011 he himself has admitted vide answer to Question No 7 of the said statement that he was fully aware of the illegal activities of Mr. Sanjay Sonawani then why did he collaborate with him. The relevant extracts of the statement recorded on 22nd March, 2011 of the Appellant are as under:

".....Since he is a friend of mine, I have given him table space in this premise for working of the above companies. As far as I understood, Washington Softwares Ltd. does not have any proper office, manufacturing space, godowns, storage, etc., He is understood to be providing only accommodation bills to various companies as shown in the sales details from Financial Year 2003-04 to Financial Year 2010-11. This is more evident from the fact that there were no purchase parties, expenses accounts and other details in the Tally package maintained at our office. The company also does not have any proper office, manufacturing space, godown, storage, etc. at Pune. I only know that he gives accommodation bills from a place at 47/2-B, Govind Chambers, Opposite Telephone Exchange, Karve Road, Pune-4. Thus, you may find some signed and blank Cheque books in this office premise, and on his request some of my office staff issue the cheques already signed by him in favour of various parties as instructed by him. Thus, basically our office staffs are supporting him only for sending of his cheques to various parties, and maintaining his accounts in Tally. In light of the above facts, I wish to summarize that Mr. Sanjay Sonawani is providing accommodation bills primarily through M/s Washington Softwares Ltd."

Thus, despite having drawn the Appellants specific attention as to how he would like to explain that he was not participating in the activities being carried out by the said Company being fully aware about the same, we have not received any reply from the Appellant to this.

12. The Learned Counsel Shri S.G. Gokhale, Advocate appearing on behalf of the Appellant, during the proceedings of the matter before us, also submitted that the Board of Discipline erred in holding the Appellant guilty under Clause (2) Part-IV of the First Schedule of the Chartered Accountants Act, 1949 as there is no opinion formed by the Council on record in terms of the said provision of law, wherein only the Council is empowered to opine as to whether or not an act of the professional has brought disrepute to the Profession or the Institute. Further, the Learned Counsel also relied heavily on the Order of the Hon'ble Income Tax Appellate Tribunal (ITAT) dated 26th August, 2016 in the case of the Appellant. Accordingly, he pleaded that after considering all the facts the Hon'ble ITAT has deleted all allegations. However, this was vehemently objected by the Learned Counsel Mr. Amit Sharma, appearing on behalf of the Institute of Chartered Accountants of India (ICAI) by submitting that it is new evidence and was not available before the Board of Discipline (BOD) while deciding the present disciplinary matter against the Appellant, as the ITAT has passed this Order in the matter on a subsequent date. Further, it is also submitted by the Learned Counsel appearing on behalf of ICAI that the Order of the Hon'ble ITAT is on different matter and on different facts and hence is not applicable in this case. He further supported the Impugned Order passed by the BOD of the ICAI. The Learned Counsel Mr. Amit Sharma also submitted that the objection of the Appellant in respect of Clause (2) of Part-IV of the First Schedule to the Chartered Accountant Act, 1949, wherein no opinion of the Council has been given, is already decided by this Authority by an earlier Order, whereby such objections have been rejected by this Authority.

13. Having considered the complaint, written statements, Prima Facie Opinion formed by the Director (Discipline), the Report and findings of the Board of Discipline and perusing all materials on records in this Appeal besides the arguments advanced on behalf of both the parties and evidences produced by them, our findings are as below:-

13.1 As regards the first argument made by the Learned Counsel appearing on behalf of the Appellant that the BOD erred in holding the Appellant guilty in absence of the opinion of the Council in terms of Clause (2) Part-IV of the First Schedule of the Chartered Accountants Act, 1949, at the outset, it is relevant to record here that the Appellate Authority has already decided the issue regarding the interpretation of Clause (2) of Part-IV of the First Schedule of the Chartered Accountants Act, 1949 as raised by the Appellant herein above, vide its Order dated 13th May, 2017 in Appeal No. 05/ICAI/2014 namely Rajeev Maheshwari Vs. ICAI; Appeal No. 08/ICAI/2014 namely Gyan Prakash Agarwal Vs. ICAI and Appeal

No. 07/ICAI/2014. The relevant paragraph No. 15 of the aforesaid Order of the Authority is reproduced for ready reference as hereunder:-

*"15. Based on the above and by taking note of the written submissions made on behalf of the Institute of Company Secretaries of India, the Institute of Cost Accountants of India and the Institute of Chartered Accountants of India containing the detailed analysis of the issue in question, we are of the considered view that the proper and correct interpretation which can be given to Clause (2) of Part-IV of the First Schedule to the respective Acts, in the light of the principles laid down and having regard to the case laws of various courts and further considering the basic objects, reasons and purpose of the amendment brought in the statutes as quoted above is that, '**Prima facie Opinion (PFO)**' formed by the Director (Discipline) in all such complaints / information cases serves the purpose for proceeding further for taking disciplinary action against the errant members as in terms of the amended mechanism for conduct of cases, it is the Director (Discipline) who has to form the first Prima Facie Opinion for the disciplinary proceedings to be initiated. Therefore, the opinion of council as is mentioned in the clause (2) of Part-IV of the First Schedule to the Act has to be given a purposive meaning and has to be read in consonance with the letter and scheme of the enactment".*

13.2 Further, we have observed that while relying on the statement of said Mr. Sanjay Sonawani, the BOD has not given any opportunity to the Appellant to cross examine him. Needless to mention that it is a fundamental rule of law that if any party of litigation wants to rely on any evidence, the other party should be given an adequate and fair opportunity to cross examine and rebut the same. On the other hand the Authority also noted that the Appellant himself has also relied on the subsequent statement of said Mr. Sanjay Sonawani and has conveniently decided not to produce him. Additionally, we have also further observed that the Order of the Hon'ble ITAT in the case of Appellant was delivered on a subsequent date i.e., on 26th August, 2016 as against the date of the Report of the BOD i.e., on 6th November, 2015. Hence, it is obvious that the same was not available with and resultantly could not be examined by the BOD of ICAI.

14. Be that as it may, in the aforesaid circumstances, we are of the considered view that the ends of justice will be met out if the matter is set aside and remanded back to the BOD of the Institute of Chartered Accountants of India for its reconsideration and examination of all the relevant evidences and examining the relevant persons / witnesses, in the light of the observations made by us as above, for taking afresh decision thereon within a period of six months from the date of receipt of this Order. However, it is clarified that whosoever wants to rely upon the statement of any person, he shall be responsible to produce him on his own cost and shall provide an adequate opportunity to the other party to cross examine him before the BOD.

15. Needless to say anything to be done by the Institute will be subject to giving an opportunity of being heard and participation of the Appellant herein. Further, in case the Appellant needs to lead any evidence in his defense or wants to cross examine any persons/witnesses, the same shall be allowed to him by the Institute.

16. Accordingly, the Impugned Report and the Order of the BOD of the ICAI is set aside and remanded back as above. Since the Impugned Order is set aside, therefore, Interim Orders, if any are also vacated.

17. A copy of this Order be sent to the Institute of Chartered Accountants of India to place it before the Board of Discipline for doing the needful in the matter.

18. With this, the present Appeal is disposed of.

Justice M. C Garg
Chairperson

Sunil Goyal
Member

Praveen Garg
Member

Dr. Navrang Saini
Member

Pronounced on 3rd February, 2018 at New Delhi

BEFORE THE APPELLATE AUTHORITY
(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 01/ICAI/2018

IN THE MATTER OF:

Shankar Pirmal Yadav

....Appellant

Versus

CA. Tejprakash Dangi

....Respondent No. 1

**Board of Discipline (Institute of
Chartered Accountants of India)**

....Respondent No. 2

CORAM

Hon'ble Mr. Justice M.C. Garg

Hon'ble Mr. Praveen Garg

Hon'ble Dr. Navrang Saini

Chairperson

Member

Member

PRESENT:

For the Appellant:

Mr. Shankar Pirmal Yadav, Appellant in person

For the Respondents:

1. Dr. Rakesh Sharma, Assistant Secretary, Legal, ICAI
2. Mr. Akshay Chandan, Executive Officer, Disciplinary Directorate, ICAI

ORDER

Date: 23.04.2018

1. It has been informed by the Registrar of the Appellate Authority that CA. Sunil Goyal, one of the members of the Authority is not available for hearing this appeal today on the ground of some medical exigency in his family. Another member namely CA. Kamlesh S. Vikamsey, is also not available for hearing of this appeal.
2. This Appeal has been filed by Mr. Shankar Pirmal Yadav, who was a complainant before the Board of Discipline of the Institute of Chartered Accountants of India. The present appeal is not maintainable according to section 22G of the Chartered Accountant Act, 1949, as the appellant not being

an aggrieved Member of the Institute, is not entitled to file an appeal before the Appellate Authority. Section 22G reads as under:-

"22G: - Appeal to Authority:-

- 1) *Any member of the Institute aggrieved by any order of the Board of Discipline or the Disciplinary Committee imposing on him any of the penalties referred to in sub-section (3) of Section 21A and sub-section (3) of Section 21B, may within ninety days from the date on which the order is communicated to him, prefer an appeal to the Authority;*

Provided that the Director (Discipline) may also appeal against the decision of the Board of Discipline or the Disciplinary Committee to the Authority, if so authorized by the Council, within ninety days;

Provided further that the Authority may entertain any such appeal after the expiry of the said period of ninety days, if it is satisfied that there was sufficient cause for not filing the appeal in time.

- 2) *The Authority may, after calling for the records of any case, revise any order made by the Board of Discipline or the Disciplinary Committee under sub-section (3) of Section 21A and sub-section (3) of Section 21B and may-*

- a) confirm, modify or set aside the order;*
b) impose any penalty or set aside, reduce, or enhance the penalty imposed by the order;
c) remit the case to the Board of Discipline or Disciplinary Committee for such further enquiry as the Authority considers proper in the circumstances of case; or
d) pass such other order as the Authority thinks fit:

Provided that the Authority shall give an opportunity of being to the parties concerned before passing any order."

3. This Section clearly states that only that member of the Institute can file an Appeal before the Appellate Authority who has been awarded any of the punishment as provided under Section 21A (3) or Section 21B (3) of the Chartered Accountant Act, 1949.

4. Moreover, the Appellate Authority has already dealt with and decided the similar complaints in the past in the following appeals :-

- i. A.N. Kulkarni Vs. May & Company and Ajit Ji Pemdse, Order dated 24th September, 2011
- ii. Savitri Devi Kabra Vs. N L Maheshwari, Order dated 24th September, 2011
- iii. Amresh Kumar Vashisth Vs. ICAI & Others, Order dated 28th January, 2012
- iv. B L N Phani Kumar Vs. ICAI & RBI , Order dated 17th July, 2012
- v. Dr. G. Sucharitha Vs. ICAI , Order dated 30th January, 2016
- vi. A.N. Iyer Vs. ICAI, Order dated 1st March, 2016

- vii. Umed Raj Singhvi Vs. ICAI and CA K Ramachandra Murthy, Order dated 27th June, 2016
- viii. Bipin Arora Vs. ICAI & Others, Order dated 17th April, 2017
- ix. Subhashchandra R. Pal Vs. ICAI & Others, Order dated 25th August, 2017

5. The Appellate Authority decided the above referred appeals by holding that an Appeal filed by any other person than the aggrieved Member of the Institute who has been found guilty of some misconduct and awarded any of the punishment provided under Section 21A (3) or under Section 21B (3) of the Chartered Accountants Act, 1949, is not maintainable in terms of Section 22G of the Act as referred above and the same is liable to be rejected on this ground alone without going into the merit of the case.

6. Therefore, in view of the aforesaid the present appeal is rejected as being not maintainable.

Justice M.C. Garg
Chairperson

Praveen Garg
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY
(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 05/ICAI/2018

IN THE MATTER OF:

Hasmukhlal Rangildas Ghael

....Appellant

Versus

**Board of Discipline/ Disciplinary Committee
(Institute of Chartered Accountants of India)**

....Respondent No. 1

CA. Champaklal Chunilal Sukhadia

....Respondent No. 2

CORAM

Hon'ble Mr. Justice M.C. Garg
Hon'ble Mr. Praveen Garg
Hon'ble Dr. Navrang Saini

Chairperson
Member
Member

PRESENT:

For the Appellant:

1. Mr. Pruthvi Ghael, authorized representative

For the Respondents:

1. Dr. Rakesh Sharma, Assistant Secretary, Legal, ICAI
2. Mr. Akshay Chandan, Executive Officer, Disciplinary Directorate, ICAI

ORDER

Date: 23.04.2018

1. It has been informed by the Registrar of the Appellate Authority that CA. Sunil Goyal, one of the members of the Authority is not available for hearing this appeal today on the ground of some medical exigency in his family. Another member namely CA. Kamlesh S. Vikamsey, has also informed that he wish to recuse himself from the hearing of this appeal on the ground that his brother CA. Nilesh S. Vikamsey was one of the member of the Disciplinary Committee of the Institute of Chartered Accountants of India, which has passed the Impugned Order, against which, this appeal has been preferred by the Appellant.

2. This Appeal has been filed by Mr. Hasmukhlal Rangildas Ghael, who was a complainant before the Disciplinary Committee of the Institute of Chartered Accountants of India. The present appeal is not maintainable according to section 22G of the Chartered Accountant Act, 1949, as the Appellant not being an aggrieved Member of the Institute, is not entitled to file an appeal before the Appellate Authority. Section 22G reads as under:-

"22G: - Appeal to Authority:-

1) *Any member of the Institute aggrieved by any order of the Board of Discipline or the Disciplinary Committee imposing on him any of the penalties referred to in sub-section (3) of Section 21A and sub-section (3) of Section 21B, may within ninety days from the date on which the order is communicated to him, prefer an appeal to the Authority;*

Provided that the Director (Discipline) may also appeal against the decision of the Board of Discipline or the Disciplinary Committee to the Authority, if so authorized by the Council, within ninety days;

Provided further that the Authority may entertain any such appeal after the expiry of the said period of ninety days, if it is satisfied that there was sufficient cause for not filing the appeal in time.

2) *The Authority may, after calling for the records of any case, revise any order made by the Board of Discipline or the Disciplinary Committee under sub-section (3) of Section 21A and sub-section (3) of Section 21B and may-*

- a) *confirm, modify or set aside the order;*
- b) *impose any penalty or set aside, reduce, or enhance the penalty imposed by the order;*
- c) *remit the case to the Board of Discipline or Disciplinary Committee for such further enquiry as the Authority considers proper in the circumstances of case; or*
- d) *pass such other order as the Authority thinks fit:*

Provided that the Authority shall give an opportunity of being to the parties concerned before passing any order."

3. This Section clearly states that only that member of the Institute can file an Appeal before the Appellate Authority who has been awarded any of the punishment as provided under Section 21A (3) or Section 21B (3) of the Chartered Accountant Act, 1949.

4. Moreover, the Appellate Authority has already dealt with and decided the similar complaints in the past in the following appeals :-

- i. A.N. Kulkarni Vs. May & Company and Ajit Ji Pemdse, Order dated 24th September, 2011
- ii. Savitri Devi Kabra Vs. N L Maheshwari, Order dated 24th September, 2011

- iii. Amresh Kumar Vashisth Vs. ICAI & Others, Order dated 28th January, 2012
- iv. B L N Phani Kumar Vs. ICAI & RBI , Order dated 17th July, 2012
- v. Dr. G. Sucharitha Vs. ICAI , Order dated 30th January, 2016
- vi. A.N. Iyer Vs. ICAI, Order dated 1st March, 2016
- vii. Umed Raj Singhvi Vs. ICAI and CA K Ramachandra Murthy, Order dated 27th June, 2016
- viii. Bipin Arora Vs. ICAI & Others, Order dated 17th April, 2017
- ix. Subhashchandra R. Pal Vs. ICAI & Others, Order dated 25th August, 2017
- x. Shankar Pirmal Yadav Vs. CA. Tejprakash Dangi & Others, Order dated 23rd April, 2018

5. The Appellate Authority decided the above referred appeals by holding that an Appeal filed by any other person than the aggrieved Member of the Institute who has been found guilty of some misconduct and awarded any of the punishment provided under Section 21A (3) or under Section 21B (3) of the Chartered Accountants Act, 1949, is not maintainable in terms of Section 22G of the Act as referred above and the same is liable to be rejected on this ground alone without going into the merit of the case.

6. Additionally, other facts relating to this matter are also relevant to note. The first is that this Appeal is time barred and the second is that the Chartered Accountant against whom this Appeal has been filed is no more, as has been informed by his grandson namely CA. Jignesh Ashok Sukhadia vide his letter dated 18th April, 2018 to the Registrar of this Authority.

7. Therefore, in view of the aforesaid the present appeal is rejected as being not maintainable.

Justice M.C. Garg
Chairperson

Praveen Garg
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY
(Constituted under Section 22A of the Chartered Accountants Act, 1949)

APPEAL NUMBERS 01 / ICAI/2017 AND 02/ ICAI/2017

IN THE MATTER OF:

V. Ajay

...Appellant in both Appeals

Versus

**Disciplinary Committee,
Institute of Chartered Accountants of India**

...Respondent No. 1

Shri R. Hithendra, Head Branch, CBI, Bangalore
(Appeal No. 01/ICAI/2017)

...Respondent No. 2

Shri S. Vijay Kumar, S. P, CBI, Bangalore
(Appeal No. 02/ICAI/2017)

...Respondent No. 2

CORAM:

Hon'ble Mr. Justice M.C. Garg
Hon'ble Mr. Sunil Goyal
Hon'ble Mr. Praveen Garg
Hon'ble Dr. Navrang Saini

Chairperson
Member
Member
Member

PRESENT:

For the Appellant: Mr. K. Ravi, Advocate

For the Respondents:

1. Mr. Amit Sharma, Advocate along-with CA. Parvesh Bansal, Assistant Secretary, Disciplinary Directorate, appearing for Respondent No. 1 in both the Appeals.
2. Mr. P. Subrahmanyam, CBI, appearing for Respondent No. 2 in both the Appeals.

ORDER

Date: 03.07.2018

1. This Order deals with the above mentioned two appeals filed by the Appellant before this Authority. First appeal has been filed against an Order dated 20th January, 2017, passed by the Disciplinary Committee of the Institute of Chartered Accountants of India under section 21B(3) of the Chartered Accountants Act, 1949, consequent upon a Report of the Disciplinary Committee dated 14th October, 2015, wherein the Appellant was held guilty under Clauses (7) and (8) of Part-I of the Second Schedule to the Act, whereby, the Appellant has been awarded the punishment of the removal of his name from the Register of Members for a period of one year and also imposed a consolidated penalty of

Rs. 50,000/- (Rupees Fifty Thousand Only) upon him to be paid within a period of 30 days from the date of receipt of the Impugned Orders.

2. The second appeal has been filed by him against another Order of even date passed by the Disciplinary Committee of the Institute of Chartered Accountants of India, under section 21B(3) of the Chartered Accountants Act, 1949, consequent upon a Report of the Disciplinary Committee dated 9th February, 2016, wherein the Appellant was held guilty under clauses (7) and (8) of Part-I of the Second Schedule to the Act, whereby, the Appellant has been awarded the punishment of the removal of his name from the Register of Members for a period of one year and also imposed a fine of Rs. 25,000/- (Rupees Twenty Five Thousand Only) upon him to be paid within a period of 30 days from the date of receipt of the Impugned Order.
3. Additionally, in respect of the punishment of removal of the name of the Appellant and imposing monetary penalty upon him vide Para (7) of the aforesaid Order dated 20th January, 2017, passed in the second appeal, the Disciplinary Committee further ordered as here under:-

"Para 7: The committee further orders that the above punishment in respect of removal of name of the member from the Register of Members shall run concurrently with punishment awarded to the Respondent in other Disciplinary Case against him bearing reference No. PR / P / 6 / S / 12/DD/5/S/INF/12/DC/296/13 and decided on even date. In effect, the committee Orders that in respect of both the cases, the name of the Respondent stands removed for a period of one year and he shall remit a consolidated penalty of Rs. 50,000/- (Rupees Fifty Thousand Only) within a period of 30 days from the date of receipt of the Order."

4. Therefore, considering as both the aforesaid appeals have the same parties and almost same facts except the name of auditees, besides that the punishment awarded to the Appellant is also concurrent, hence, we thought it appropriate to dispose of both these Appeals by this common order.

5. The brief facts of the First appeal number 01/ICAI/2017, as narrated in the Report of the Disciplinary Committee and which we have noted are as under:

- 5.1 *That as per the 'information' letter dated 30th November, 2011 read with letter of the CBI dated 22nd September, 2011, to the Institute of Chartered Accountants of India, CBI made various allegations against the appellant alleging that during the course of investigation by CBI, it has been revealed that Shri P. Vankatachalapathy, proprietor of M/s Kantha Spinning Mills Pvt Ltd. (sic M/s Kantha Spinning Mills) approached M/s Global Trade Finance Ltd., Coimbatore (now known as SBI Global Factors Ltd) (hereinafter referred to as M/s **GTFL**) for trade finance facility for the purpose of doing business in manufacturing and trading of Hank Yarn.*
- 5.2 *That in order to obtain trade finance facility from M/s GTFL, Shri P. Vankatachalapathy had furnished fake and fabricated audited Balance Sheets and Profit and Loss Accounts to M/s GTFL, which were issued under the seal and signature of the Respondent, the appellant herein. The audited balance sheet shows the turnover of M/s Kantha Spinning Mills for the years 2004-05, 2005-06 & 2006-07 as Rs 5,25,23,250/-; Rs 10,16,67,140/-and Rs 13,35,86,690/- respectively. Acting on the said false and inflated audited financial statements, huge trade finance limit of Rs 15 Crore was sanctioned by M/s GTFL in favour of M/s Kantha Spinning Mills on 19th March 2008.*
- 5.3 *Further, it is revealed that M/s Kantha Spinning Mills had never existed and is a fictitious M/s Kantha Spinning Mills and neither any manufacturing activity nor any business transactions ever took place by the said fictitious M/s Kantha Spinning Mills as certified by the Respondent. The Respondent had never checked any statutory records or any supporting documents before certifying the audited financial statements. Further, it is also provided that no IT return has been filed in the name of M/s Kantha Spinning Mills for the years 2004-05; 2005-06 and 2006-07. The same has been admitted by the Respondent before the CBI. Shri P. Vankatachalapathy had defaulted and failed to pay the limits availed by him to M/s GTFL and thus caused a wrongful loss of around Rs 17, 89,972/- to M/s GTFL as on 28th February 2010.*
- 5.4 *That investigation has conclusively established that the Respondent had enabled Shri P. Vankatachalapathy to secure trade finance facility from M/s GTFL by dishonestly issuing false and bogus audited*

financial statements and audit reports in respect of M/s Kantha Spinning Mills certifying huge turnover and profits for the years 2004-05, 2005-06 and 2006-07 from the business and thus facilitated Shri P. Vankatachalapathy in committing fraud.

6. The brief facts of the Second appeal number 02/ICAI/2017, as narrated in the Report of the Disciplinary Committee, which we have also noted are as under:

- 6.1 *That as per the information letter dated 1st June 2012 read with letter of CBI dated 13th December, 2011, the CBI alleged that during investigation, it has been revealed that Shri R. Selvakumar, Managing Director, M/s Paranthaman Spinning & Weaving Mills Private Limited (hereinafter referred as **the Company**) engaged in the business of manufacturing and trading of cotton yarn, polyester yarn etc. have availed of Domestic Factoring Limit (Trade Finance) of Rs 10 Crore from M/s Global Trade Finance Limited (now known as M/s SBI Global Factors Limited) during January, 2008 against the trade receivables from 6 debtors viz. M/s Shri Sri Agencies, M/s Sri Venkateshwara Cottons, M/s Harsha Cottons, M/s Sri Sri Agencies India Pvt Ltd, M/s Sri Venkateshwara Cottons Pvt Ltd and M/s Harsha Cottons Private Limited.*
- 6.2 *That investigation has revealed that the Company has submitted a request to M/s Global Trade Finance Limited (hereinafter referred as **GTFL**) during February, 2008 for enhancing the trade finance limit to Rs 20 Crore by including 4 more debtors viz. M/s East West Fabrics, M/s P.V. Enterprises, M/s Mithul Textiles and M/s Milan Tex Fabrics and has submitted provisional balance sheet, provisional profit & loss account as on 27th February 2008 certified by the Respondent, wherein the profit of the Company was falsely shown as Rs 150.47 lakhs. Acting on the above, GTFL has enhanced the Trade Limit to Rs 20 Crore to the Company on 15th March, 2008. The Respondent has further audited the accounts of the Company and certified the balance sheet as on 31st March, 2008 wherein the net profit of the Company was shown as Rs 181.49 lakhs.*
- 6.3 *Further, it has been revealed during investigation that the Company had never made any trade transaction with the above mentioned 10 buyers and these buyer/entities were non-existent and constituted only on papers of the Company for the purpose of fraudulently availing Trade Finance Limit from GTFL, by furnishing false and forged supply invoices in the names of these buyers and by mentioning imaginary lorry numbers in the invoices which are either*

pertaining to Motorcycles/LMV or unregistered vehicles. The above mentioned 10 buyer/entities have either filed NIL returns or no returns to the Commercial Taxes Department during the relevant period and have also not filed IT returns or paid Income tax.

- 6.4 *The Respondent had not checked any statutory records or any supporting documents while certifying the audited financial statements, which has been admitted by him before CBI. The financial statements prepared at the behest of Shri R. Selvakumar, Managing Director of the Company were signed by the Respondent. The Company had no business transactions with above mentioned 10 buyer/entities and the financial statements of the Company has been falsely certified by the Respondent, reflecting a net profit of Rs 150.47 lakhs as on 27th February 2008 and Rs 181.49 lakhs as on 31st March, 2008. The Company has also not filed any Income Tax Return or paid Income Tax during the relevant period and has not filed the Annual Report/Balance sheet with Registrar of Companies. The Company has fraudulently availed the trade Finance Limit from GTFL and had defaulted and failed to pay the limits availed to GTFL and thus caused a wrongful loss of Rs 22,72,66,747.53 excluding other charges to GTFL (presently known as M/s SBI Global Factors Limited)*
- 6.5 *Investigation has conclusively established that the Respondent has enabled Shri R. Selvakumar, Managing Director of the Company to secure Trade Finance Limit from GTFL by dishonestly certifying the false and bogus audited financial statements in respect of the Company certifying huge turnover and net profits, whereas the Company had no such business transactions and thus facilitated Shri R. Selvakumar, Managing Director of the Company in perpetrating the fraud.*

7. In both these matters, pursuant to preliminary examination, Prima Facie Opinions were formed by the Director (Discipline) of the Institute of Chartered Accountants of India, whereby, he found the Appellant as Prima Facie Guilty under various Clauses of the Chartered Accountants Act, 1949. These matters were then placed by him before the Disciplinary Committee in accordance with the applicable provisions of the Chartered Accountants Act, 1949 read with rules of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 for further detailed

examination thereof by the Disciplinary Committee, which in turn examined both the cases in detail.

8. The Disciplinary Committee in both these matters directed the Appellant to submit his working papers and various documents from time to time to prove that he had actually carried out the audit. Accordingly, in response, the Appellant submitted various papers including the following:

- a) Copy of some working papers
- b) Copy of bank statement
- c) Copy of some management representations
- d) Trial balance and financial statements of auditee
- e) Copies of some income tax returns

9. We have also noted that in respect of the matter involved in the First appeal number 01/ICAI/2017; the Disciplinary Committee in its Report observed as hereunder:

9.1 That looking into the merits of the case, the Committee noted that the charge against the Respondent is that he had never checked any statutory records or any supporting documents before certifying the audited financial statements and audit reports in respect of M/s Kantha Spinning Mills certifying huge turnover and profits for the years 2004-05, 2005-06 and 2006-07. It was also admitted by the Respondent before CBI that no Income Tax returns has been filed in the name of M/s Kantha Spinning Mills for these years.

9.2 The Committee noted that the Respondent in his statement dated 9/12/2010 recorded by the CBI, has admitted that he had certified Form 3CB & 3CD as on 31/3/2005, 2006 & 2007. Further in said statement, the Respondent has admitted that he had not gone through tax records, stock records and signed tax audit reports only on his belief on Shri E. Mathan.

9.3 It is also noted by the Committee that the Respondent had admitted before it that his working papers were taken by Shri E. Mathan and he is not having any working papers. The Committee noted that as per AAS-3, working papers are the property of the auditor and he ought to have retained the same for a period of time sufficient to meet the needs of his practice which the Respondent failed to do so.

9.4 *Further, it is clear from the statements of the Respondent that he had merely relied upon the trial Balance and the statements of Shri E. Mathan before certifying the accounts of M/s Kantha Spinning Mills. Hence, it is clear that the Respondent not only performed his duties negligently but also failed to obtain substantial information for expressing an opinion. Accordingly the Committee holds him guilty of professional misconduct falling within the meaning of Clauses (7), and (8) of Part I of Second Schedule to the Chartered Accountants Act, 1949.*

9.5 *The CBI had alleged about certification of false turnover. The Respondent failed to defend this allegation in absence of his working papers. Further, the Trial Balance submitted by him did not carry any signatures to establish its authenticity. It is also observed that the appointment letter submitted by the Respondent bore different type of stamping and bore different address. Hence, the documents submitted by the Respondent cannot be accepted and accordingly, in the view of the Committee, the Respondent has failed to bring any new evidences to defend himself.*

9.6 *The Committee noted without pain that the Respondent not only acted negligently but also was very causal in his approach during the hearings. A Chartered Accountant should exercise extreme caution before signing any document and check the necessary supporting papers as the authentication by a Chartered Accountant carries immense value in the eyes of the law and the general public, alike. More so, when the end user of the said statement is financial institutions.*

10. Similarly, in second appeal number 02/ICAI/2017, the Disciplinary Committee has observed hereunder:

10.1 *That looking on the facts of the case, the Committee noted that the charge against the Respondent was that he had never checked any statutory records or any supporting documents before certifying the audited financial statements and audit reports in respect of M/s Paranthaman Spinning & Weaving Mills Private Limited certifying huge turnover and profits for the years 2007-08. It was also admitted by the Respondent in his statement recorded before CBI that he had not checked the related records.*

10.2 *The Committee noted that the Respondent in his statement dated 5th May, 2011 recorded by the CBI, has admitted that he had signed the*

Balance Sheet of the Company after verification of Trail Balance produced before him by Shri E. Mathan.

- 10.3 *It is further noted that in the said statement, it was also mentioned that he has not received the appointment letter regarding his appointment as auditor of the Company. The Committee also noted that with his written statement dated 20th July, 2012, the Respondent had submitted a letter dated 15th June, 2008 seeking no objection from previous Auditor in respect of audit for the Financial Year 2007-08. The Committee observed that the Respondent now with his letter dated 23rd July, 2015 is producing his letter dated 29th August, 2008 from the Company in respect of his appointment for the Financial Year 2007-08. The Committee noted that it was matter of incongruence that for the appointment done on 29th August, 2008, the Respondent was sending a letter of no objection on 15th June, 2008. The Committee decided that additional evidences need not be taken into consideration because the Respondent is producing what appear to be antedated evidences to substantiate his defence.*
- 10.4 *It is also noted by the Committee that the Respondent had admitted before it that his working papers were taken away by Shri E. Mathan and he is not having any working papers. The Committee noted that as per AAS-3, working papers are the property of the Auditor and he ought to have retained the same for a period of time sufficient to meet the needs of his practice which the Respondent failed to do so. The Committee also noted that the Respondent also failed to bring on record any action taken by him in respect of non-returning of documents by Shri E. Mathan who was supposed to be mere Accountant of the concerned company.*
- 10.5 *Further, it is clear from the statements of the Respondent that he had gone through the Trial Balance and merely placed reliance on the statements of Shri E. Mathan before certifying the accounts of the company. Thus, the Respondent not only performed his duties negligently but also failed to obtain sufficient information for expressing an opinion. Accordingly, the Committee holds him guilty of Professional Misconduct falling within the meaning of Clauses (7) & (8) of Part-I of Second Schedule to the Chartered Accountants Act, 1949.*
- 10.6 *It was also noted by the Committee that the Respondent had given the Report on Form 3CB. To a specific question by the Committee to the Respondent as to why he had certified on Form 3CB and not Form 3CA, the Respondent failed to give a satisfactory reply and just mentioned that this was done in his initial year of practice. It was further noticed by the Committee that the Respondent has also made*

modification in Form 3CB and had also not mentioned date on Audit Report.

10.7 The Committee views with serious concern that the Respondent not only appeared to have acted negligently but also seemed to take a very casual approach during the hearings.....”

11. Based on the above facts and findings of the Disciplinary Committee in both these matters, it is observed that as the working papers produced by the Appellant were very vague and general, the Disciplinary Committee asked him to produce relevant full papers. In reply the Appellant said that the said papers are with Shri E. Mathan and the Appellant further stated that he wanted to produce Shri E. Mathan as his witness, with whom as per version of the Appellant all the working papers were lying. However, when Disciplinary Committee asked him to produce the said witness, the Appellant stated that Shri E. Mathan had undergone Brain surgery and he was not able to produce him and sought time. The Committee noted that it had already granted a number of adjournments in these matters but the Appellant was very casual in approach and he did not produce the said Shri E. Mathan.

12. Looking to the casual approach of the Appellant and considering that neither producing the complete working papers nor producing Shri E. Mathan as his witness, the Disciplinary Committee concluded the hearings and on merits of the case in both these matters, the Committee found the Appellant guilty for the violation of clauses (7) and (8) of Part I to Second Schedule to the Chartered Accountants Act 1949, as amended from time to time and awarded the punishment as narrated *supra*.

13. Thus, aggrieved by the aforesaid Orders passed by the Disciplinary Committee of the Institute of Chartered Accountants of India, the Appellant approached this Authority by way of filing the above mentioned two Appeals.

14. In both these Appeals, the Appellant raised various common grounds against the said Orders which are being dealt with in this Order. However, the first ground of Appeals is general in nature hence not discussed.

15. The next ground taken by the Appellant in both the Appeals is that the Disciplinary proceedings initiated by the Disciplinary Committee of the Institute of Chartered Accountants of India were barred by limitation. In response thereto, the Respondent ICAI has submitted a detailed reply during the proceedings of these Appeals before us submitting that in both these Appeals, the information was received by the Institute from CBI vide different letters on different dates and no complaint in Form "I" was filed by CBI. It was further submitted that when they finally requested the matter to be taken up as "information" only thereafter the matter was proceeded in accordance with the provisions of Rule 8 (1) (a) of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 and therefore, these matters were accordingly proceeded with, which are within limitation. However, no convincing response or reply was given by the Appellant to the same. Accordingly, we find no merit in this ground taken by the Appellant and therefore, the same is hereby rejected.

16. Another ground of Appeal in Appeal Number 01/ICAI/2017 taken by the Appellant is that the complaint is with reference to M/s Kantha Spinning Mills Private Limited, which is no entity and never audited by the Appellant. In fact, Appellant had audited M/s Kantha Spinning Mills, Proprietor Shri P. Venkatachalapathy. We find that this is only a typing mistake at one place in a CBI letter but at all other places and examination, the CBI has mentioned only M/s Kantha Spinning Mills, Proprietor Shri P. Venkatachalapathy. The said typing mistake at one place does not vitiate the proceedings. Para 8.2 of '*Prima-Facie Opinion*' formed by Director (Discipline) dated 19th July, 2013 also clarifies this point. In the written reply by the Appellant dated 15th January, 2012 and 25th December, 2013, about the complaint and thereafter during the Disciplinary

proceedings before the Institute, the Appellant has also submitted all replies about M/s Kantha Spinning Mills Proprietor Shri P. Venkatachalapathy firm and therefore, we observed that there is no confusion in respect of the name of the auditee. Thus, we hereby reject this ground of Appeal also taken by the Appellant.

17. We have also considered other grounds of Appeal as raised by the Appellant about lack of opportunity, reliance placed on the statements recorded before CBI which are not admissible and delay not being on his part etc. Therefore, in the interest of justice, we have provided him opportunity to present all evidence in his defence even if it was not presented before the Disciplinary Committee of the Institute and have given him adequate hearings. Further, we have also observed that as far as the misconduct on which he is found guilty by the Committee, no reliance is placed by the Disciplinary Committee on the proceedings before the CBI.

18. Pursuant to rejection of the aforesaid grounds of Appeal, we would now like to examine the main issue involved in both these Appeals for which the Appellant has been found guilty under Clauses (7) and (8) of Part-I of the Second Schedule to the Chartered Accountants, 1949, as amended from time to time. The said Clauses are reproduced as here under :

"Part-I Professional Misconduct in relation to Chartered Accountants in Practice

A chartered Accountant in practice shall be deemed to be guilty of Professional Misconduct, if he –

(7) does not exercise due diligence, or is grossly negligent in the conduct of his professional duties;

(8) fails to obtain sufficient information which is necessary for expressions of an opinion or its exceptions are sufficiently material to negate the expression of an opinion"

19. Thus, we have noted that the Appellant was found guilty by the Disciplinary Committee on account of not applying due diligence or being grossly negligent in

carrying out professional duties in addition to his failure for obtaining sufficient information which was necessary before expressing an opinion.

20. Further, while enquiring about the work done by the Appellant before issue of the audit opinion, the Appellant made various submissions before the Disciplinary Committee as well as before us. In this regard, it is notable here that one of his main defences was that he had all the working papers which have been taken away by Mr. E Mathan and the Disciplinary Committee did not examine Mr. E Mathan as one of his witness. The Appellant had taken this plea before the Disciplinary Committee as well as before us. We have noted that the Appellant wanted to produce him as his witness. We find that the Disciplinary Committee had given many opportunities to the Appellant to produce him as his witness but the Appellant failed to produce him. The findings given vide Para 15 and 16 in the Report of the Disciplinary Committee are relevant in this regard.

21. Furthermore, before us also, the same request was made on behalf of the Appellant and we have given him many chances to produce Mr. E. Mathan as his witness. Yet, the Appellant failed to do so even before us in spite of summons sent to Mr. E. Mathan by us. The said witness, despite service of notice of summons, has not appeared before us by taking excuse on medical grounds. Since, it was a responsibility of the Appellant to produce the records which he claimed to be in the possession of said Mr. E. Mathan even by visiting him personally but the Appellant has not taken efforts or any burden in discharging his obligations. Needless to mention that as Mr. E. Mathan was a witness of the Appellant, hence, it was the duty of the Appellant to ensure his appearance before us to prove his case. Accordingly, since the Appellant has failed to produce Mr. E. Mathan before us, we have proceeded to decide these cases on the basis of materials on record.

22. We have heard the parties at length, perused all records and evidence produced before us and examined all evidence on record.

23. We have also gone through the working papers relating to the audits conducted by the Appellant which were filed before the Disciplinary Committee and copies were also produced before us. Resultantly, we have observed that the working papers are very general and sketchy and do not contain the required information as mandated by the Auditing Standards i.e., AAS-3. In many cases even the year for which audit is done, name of person in-charge who carried out the examination and the details of his observations are not mentioned. Further, how the observations were satisfied is also not mentioned. When we asked about the Audit programme, even no proper audit programme was found in the working papers.

24. Additionally, we drew the attention of the Appellant towards the complaint that the financial statements certified by him were found to be fraudulent later on and huge losses were suffered by financial institutions/NBFC, therefore, there is more need on his part to establish that he carried out his duties diligently as per the Auditing Standards in vogue at that time. However, no convincing reply was given by the Appellant thereto.

25. In fact in a letter dated 5th November 2014, which was filed by the Appellant in reply to hearing in both the appeals before the Disciplinary Directorate, he has stated that :

" As I have said earlier, I have checked the trial balance which would also mean confirming the balances as available in the trial balance with books of accounts and other records. "

Similar reply was given in another letter dated 25th December, 2013, which reads as under:

"I have clearly said that I have gone through the trial balance and statements prepared by Shri Mathan. Similarly in 3rd para page 2, I have stated I have gone through the Trial balance and statements prepared by Shri Mathan. "

When we asked him as to whether this would be sufficient examination, the Appellant again reiterated that proper examination and due diligence was done

by him but the records were taken away by the said Mr. E. Mathan. Why records were taken by him, why no FIR was filed by the Appellant against him for records, was also not answered. The examination of the working papers produced before us do not prove that the Appellant had taken proper care and did due diligence before giving his opinion on the financial statements in both these matters.

26. Therefore, based on the facts involved in both these Appeals in addition to pursuing all records and evidence besides hearing of the arguments of the parties, we are of the considered view that the Appellant undoubtedly has failed to prove that he had obtained all the information which was necessary for expressing the opinion and had exercised due diligence in the performance of his professional duties. Accordingly, we find no merit in both these Appeals and thus, both the Appeals are hereby dismissed.

27. In addition, on the ground of quantum of punishment, we have heard the Learned Counsel appearing on behalf of the Appellant and under the facts and circumstances of both these Appeals and in the interest of justice, we find no reason to interfere with the punishment awarded by the Disciplinary Committee of the Institute of Chartered Accountants of India to the Appellant. Hence, that prayer is also dismissed.

28. Stay granted, if any, are vacated. No Order as to cost. The Registrar of the Authority is hereby directed to keep a copy of this Order in the relevant files of both these Appeals for records.

29. With the above, both the aforesaid appeals are disposed of accordingly.

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Praveen Garg
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 07/ICAI/2018

IN THE MATTER OF:

Ramchandra Y. Kulkarni

...Appellant

Versus

**Disciplinary Committee of the Institute
of Chartered Accountants of India (ICAI)**

...Respondents No. 1

**Satish Kumar Arora, President & Chief Operating Officer, M/s. International
Asset Reconstruction Co. (P) Ltd., Mumbai**

....Respondents No. 2

CORAM:

Hon'ble Mr. Justice M.C. Garg

Chairperson

Hon'ble Mr. Sunil Goyal

Member

Hon'ble Mr. Praveen Garg

Member

Hon'ble Dr. Navrang Saini

Member

PRESENT:

For the Appellant:

Mr. S.G. Gokhale, Advocate along-with Mr. Ramchandra Y. Kulkarni, Appellant in person

For the Respondents:

Mr. Amit Sharma, Advocate along-with Mr. S.V. Krishanmohan, Chief Legal Advisor and Ms. Khushboo Khandelwal, Project Associate appearing on behalf of Respondent No.1.

None for Respondent No. 2

ORDER

Date: 04.08.2018

1. Being aggrieved by the Report dated 6th February, 2017 and Order dated 7th November, 2017 (Impugned Order), passed by the Disciplinary Committee of the Institute of Chartered Accountants of India under Section 21B (3) of the Chartered Accountants Act, 1949 read with Rule 19 (1) of *the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007*, **CA. Ramchandra Y. Kulkarni (M. No. 036596)**, a practicing Chartered Accountant, Appellant herein, has filed this appeal against the Institute of Chartered Accountants of India and others, challenging the impugned order, whereby, the Disciplinary Committee holding

him guilty under Clauses (7) and (8) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949 awarded punishment of **'removal of name of the Appellant from the Register of Members for a period of one year** and also imposed **a fine of Rs.50,000/- (Rupees fifty thousand only)** upon him, to be paid within 30 days of the receipt of the aforesaid Order. The said Clauses (7) & (8) of Part-I of the Second Schedule of the Act reads as under:

"PART-I: Professional misconduct in relation to chartered accountants in practice

A chartered accountant in practice shall be deemed to be guilty of Professional Misconduct, if he –

- (7) does not exercise due diligence, or is grossly negligent in the conduct of his professional duties;*
- (8) fails to obtain sufficient information which is necessary for expression of an opinion or its exceptions are sufficiently material to negate the expression of an opinion."*

2. The brief facts of the instant appeal, as narrated in the aforesaid Report of the Disciplinary Committee of the Institute of Chartered Accountants of India, are as under:

- 2.1 *Shri Satish K. Arora, President & COO of M/s International Asset Reconstruction Company Private Limited, Mumbai (hereinafter referred to as the "**Complainant**") has filed complaint in Form 'I' dated 25th October, 2013 against CA. Ramchandra Yashwant Kulkarni & Associates, Pune, Appellant herein, alleging that M/s International Asset Reconstruction Company Private Limited (IARC) is a Reserve Bank of India licensed Securitization Company (SR/RC) registered under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). RCs have been set up with the objective of managing and recovering illiquid NPAs, RCs, after acquiring financial assets from banks/financial institution, act as dedicated resolution companies with a view to resolve the debt and thereby resurrect productive assets.*
- 2.2 *Pursuant to Section 5 of the said SARFAESI Act, IARC has acquired the entire debts of AV Forging Private Limited, CIN U74210PN 1984PTC 033477 and having its Registered Office at Plot No 320, J Block, MIDC Bhosari, Pune, Maharashtra-411026 from Axis Bank limited vide a Registered Assignment Agreement dated 31.03.2011. Upon assignment under section 5 of the SARFAESI Act, all interest and rights in such NPA accounts along with underlying securities are assigned in favour of IARC and the IARC becomes the full and absolute legal owner and the only legal entity to recover and receive all amounts due, including the right to file suits/initiate such other recovery proceedings in its own name and to exercise all other rights of the bank/financial institution in relation thereto.*

- 2.3 IARC has become the secured creditors of the borrower Company in place of Axis Bank Limited upon assignment of debt by Axis Bank to IARC. The facilities which have been so acquired by IARC from Axis Bank are;

Nature of Facility	Amount (in Rs.)
Cash Credit	16,00,00,000/-
Term Loan-1	4,50,00,000/-
Term Loan-2	4,30,00,000

The fact of the said assignment was advised to the Borrower Company by both Axis Bank Limited and IARC vide letter No. AXISBK/RWC/004/2011-12, dated 11.04.2011 and IARC/MUM/RES/11-12/82, dated 15.04.2011 respectively.

- 2.4 The above mentioned facilities were being recognized as secured liabilities of the Borrower Company every year in their balance sheet. With the assignment of above debts to IARC, IARC becomes and therefore is to be shown as the 'Secured lender' in place of Axis Bank in the financial statements of the Company for the year 2011 onwards in respect of the entire amount of outstanding. However, in spite of the clear statutory provisions in this regard, the Respondent (Appellant herein) has chosen to ignore the same and have instead chosen to allow misrepresenting IARC's dues at a lower amount and still showing Axis Bank as their secured lender in respect of the various facilities, year after year. An extract of the borrower Company for the years 2010-11 and 2011-12 is reproduced below:

Particulars	As at 31st March, 2012	As at 31st March, 2011
Term Loan from Axis Bank Ltd (Hypothecation of Machinery)	3,76,01,058.25	3,76,01,058.25
Term Loan from Axis Bank Ltd (Hypothecation of Machinery)	2,95,09,272/-	2,95,09,272/-
IARC Limited	10,48,00,000/-	10,48,00,000/-
Short Term Borrowings		
Cash Credit from Axis Bank limited (Hypothecation of Stocks and Book debts)	5,51,03,249.52	5,51,03,249.52

- 2.5 The Respondent (Appellant herein) in spite of clearly being in knowledge of facts of the said assignment has chosen to allow to misrepresent facts and has not disclosed the correct liability of the Borrower Company with respect to IARC, the disclosure of which is necessary, thereby giving rise to professional misconduct in relation to Chartered Accountants in practice in terms of Clauses (5), (6) and (7) of Part I of Second Schedule to the Chartered Accountants Act, 1949.

3. Accordingly, this complaint was taken up for consideration by the Director (Discipline), who vide Order dated 4th December, 2015 found the Appellant

Prima Facie guilty of the professional misconduct falling within the meaning of Clauses (7) and (8) of Part I of the Second Schedule to the Chartered Accountants Act, 1949.

4. Pursuant to forming of the Prima Facie Opinion, the Director (Discipline), in terms of the requirements of Section 21 (3) of the Act read with rules as applicable, placed his Prima Facie Opinion before the Disciplinary Committee of the Institute for consideration, which, in turn, on examination of the said complaint, written statements, evidence written as well as oral, further replies Prima Facie Opinion and after hearing the parties, while agreeing with the Prima facie Opinion decided to proceed further in the matter and accordingly gave the findings as hereunder:

- 4.1 *The Committee noted that the Company has taken a loan of Rs. 248 Crores (sic) from Axis bank Limited which becomes NPA as on 31.03.2011. The Axis bank under SARFAESI Act, entered into an agreement with IARC for assignment of loan and pursuant to which amount of Rs. 10.48 Crores was credited to the loan account of the Company as on 31.03.2011. The Respondent (Appellant herein) has shown the said amount due to IARC in the audited balance sheet as on 31.03.2011 under the category of secured loan.*
- 4.2 *The Committee further noted that the Respondent (Appellant herein) has taken the plea that he was not aware of the said agreement of assignment of loan as neither the Company nor IARC informed him. As per the Complainant, they submitted Form 8 with the ROC for modifications of charges. The issue before the Committee is that the amount of Rs. 10.48 Crores was already there in the loan account of the Company before 31.03.2011. The Respondent (Appellant herein) was aware that the loan account has become NPA. The Committee is not convinced with the reasoning given by the Respondent (Appellant herein) that he was not aware of the agreement or any such arrangements under SARFAESI Act. The Respondent (Appellant herein) as a matter of abundant caution and keeping in view the fact that the loan account has already become NPA should have enquired how the material amount of Rs. 10.48 Crores has come into the loan account of the Company on 31.03.2011.*
- 4.3 *The Respondent (Appellant herein) as a matter of abundant caution and while exercising due diligence should have disclosed the fact in his audit report that the loan account has become NPA and the IARC has entered into arrangement with Axis Bank for takeover of loan and the said arrangement has been disputed by the Company AVFL. Rather accepting his mistake, the Respondent (Appellant herein) tried to take plea that he was not aware of the said arrangement and the said information was not disclosed to him. The Committee was surprised to record that Respondent (Appellant herein) took plea of ignorance and on other hand, he was shown Rs. 10.48 Crores*

in the name of IARC limited which indicates that in spite of being aware about the transaction of arrangement, neither bother to inquire about the nature of transaction nor bother to point out the fact that the aforesaid arrangement has been challenged by the Company before the concerned court of law. Further, no disclosure has been made in the financial statements in this regard.

4.4 *The Respondent (Appellant herein) has himself submitted a letter dated 30.12.2013 wherein it was mentioned that the Company did not accept and approve the actions of Axis Bank under SARFAESI Act and the company has filed a suit in the court of law against the said arrangement. After the perusal of letter dated 30.12.2013, the Respondent (Appellant herein) has neither qualified the Audit Report nor has made any disclosure in the financial statements. Accordingly, the Committee is of the view that the Respondent (Appellant herein) failed to disclose the proper facts in the audited Balance Sheet and is therefore, guilty of professional misconduct.*

5. Thus, based on the above findings, the Disciplinary Committee held the Appellant guilty of professional misconduct and awarded the punishment as mentioned under Para (1) of this Order *supra*.

6. We have observed that the complainant is an Asset Reconstruction Company and the only grievance of the Complainant is that the Appellant who was auditor of M/s AV Forging Private Limited, a company which had taken loans from M/s Axis Bank amounting to Rs. 22.70 Crores approximately, which were taken over by the Complainant IARC from the said Bank by way of assignment and the same was intimated by them to Company vide letter dated 11th April, 2011, but in the balance sheets of auditee for the years ended on 31.3.2011 and 31.3.2012, the same was not properly shown by the Appellant. In those balance sheets a sum of Rs. 10.48 crores were shown as due towards IARC Limited and the balance amount was still shown as payable to Axis Bank under different facilities, which according to the complainant is violative of statutory provisions and the Appellant, despite of his knowledge of irregularity, allowed the same.

7. During the proceedings of this Appeal before us, Shri S. G. Gokhale, the Learned Counsel appearing on behalf of the Appellant took various grounds of defence, which are being dealt with and disposed of as below.

8. The first ground of appeal taken on behalf of the Appellant is regarding the constitution of the bench of the Disciplinary Committee. However, at the very commencement of the arguments, the learned counsel for appellant informed that the appellant is not pressing this ground. Hence the same is rejected by us as "not pressed".
9. The second ground of appeal is regarding not considering of certain evidence by the Disciplinary Committee. We allowed placing such evidence before us. Accordingly, we have examined all such evidences.
10. All other grounds of Appeal are about justification on the part of the Appellant about due diligence exercised by him and the manner in which the information was disclosed in the accounts audited by him, which are also being dealt with by us in this Order.
11. Shri S. G. Gokhale, the Learned Counsel appearing on behalf of the Appellant submitted before us that while it is correct that the amount shown due towards the Complainant, in the accounts of M/s A. V. Forgings Limited (AVFL) was not correct but it was not due to his fault as he had no knowledge of the assignment of the debt of Axis Bank to the Complainant. Neither the complainant nor the AVFL intimated him about the same. He also submitted that he had exercised due care and diligence while conducting the audit.
12. Further, it was submitted that during the course of his examination, the Appellant came to know about Rs. 10.48 Crores being credited in the Axis Bank loan account of AVFL, which was not out of repayment made by AVFL. On enquiry about the same the AVFL informed him that it was an amount paid by IARC. Accordingly this amount was transferred by company AVFL in the name of IARC from Axis Bank. Additionally, the Appellant deputed his one assistant namely Mr. Sukumar Kondekar, to visit the Axis Bank and to enquire the nature of credit from them. The affidavit of Mr. Sukumar Kondekar was also filed before

the Disciplinary Committee and produced before us as well to this effect. The said Mr. Sukumar has affirmed that on enquiry in Axis Bank also no further information was given by them, except the deposit of Rs. 10.48 Crores by IARC in the bank account. Furthermore, it was submitted that thereafter he examined the Register of Charges maintained by AVFL, in which also there was no mention of IARC assignment. The Appellant also produced a letter from AVFL before the Disciplinary Committee, mentioning that they had not accepted the assignment and hence not carried out the changes in their books and records. He further submitted that if the account of AVFL had become NPA in the record of Axis Bank, it has no bearing on his report or disclosures.

13. Learned Counsel appearing on behalf of the Appellant also submitted that when the Appellant examined the records of Registrar of Companies (ROC), he found that in the details of Charges registered with ROC, the name of Axis Bank was still appearing. Vide his letter dated 28.04.2016 filed before Disciplinary Committee, he attached the printouts of the official website of the Ministry of Corporate Affairs (MCA) as on 25.4.2016, wherein the Charge against the loan of Axis Bank was still appearing. Even during the course of hearings before us, on 13th July, 2018, he showed that the official website of MCA was still showing the charge against the loan of Axis Bank pending. He thus submitted that it was not possible to draw an inference that all the loans of Axis Bank to AVFL have been transferred to IARC, the complainant. Additionally, it was submitted by him before the Disciplinary Committee as well as before us that the loan towards Axis Bank and IARC were shown as 'secured loans' only and their character was not altered and therefore, the true and fair view was not impaired at all and at the worst, it can only be described as a technical error which does not constitute professional misconduct on the part of the Appellant.

14. The Learned Counsel appearing on behalf of the Appellant vehemently argued that the said technical error in no way affected any right or remedy of the

Complainant and it is wrong to term the same as material misstatement. No loss whatsoever was caused to the Complainant or to any other person. He further submitted that the true and fair view of the financial statements was also not impaired in any manner. The Appellant has exercised all due care and diligence and cannot be said to be grossly negligent in the conduct of his professional duties and he had obtained sufficient information to warrant the expression of his opinion as given.

15. Further, in respect of Clause (8) also, the Learned Counsel submitted before us that there was no material on record to show that the Appellant had not obtained necessary information or has given a wrong opinion. Thus, a technical mistake on the part of the Appellant is not sufficient to hold him guilty of professional misconduct under the provisions of the Chartered Accountants Act, 1949, as held by the Disciplinary Committee.

16. The Appellant who was also personally present, humbly submitted before us that he is of 68 years and in his professional career has never violated the ethics of the profession and in his twilight years of profession when he came to know about the fact of the complete information not being given by AVFL to the auditor, he got very upset and left the assignment of the said audit immediately.

17. Per Contra, Shri Amit Sharma, Advocate appearing on behalf of the Institute of Chartered Accountants of India vehemently supported the Impugned Order passed by the Disciplinary Committee. However, despite notice issued to Mr. Satish Kumar Arora, President and Chief Operating Officer of the M/s. International Asset Reconstruction Co. (P). Ltd., Original Complainant, he has not appeared before us on any date of the proceedings of this Appeal.

18. We have heard all the parties in detail, examined all pleadings on records in addition to perusing all relevant documents and evidence produced before us as well as before the Disciplinary Committee.
19. Thus, on careful consideration of all the facts and the evidence on record, we observed that in his written statement dated 28.4.2016 before the Director (Discipline) and subsequently before the Disciplinary Committee; the Appellant had raised all the issues as discussed above. However, no suitable rebuttal of the same was given by the Complainant. The Complainant failed to point out as to how the true and fair view was impaired, or how any statutory compliance was violated or how his rights were affected in any manner whatsoever. In fact, the Learned Counsel appearing on behalf of the Institute of Chartered Accountants fairly admitted that there is no charge of impairment of true and fair view of financial statements.
20. We have also observed that the issue of compliance of SA 505 raised by Director (Discipline) in his Prima Facie Opinion has also not been raised by the Disciplinary Committee and appears to have been dropped. Thus no violation of the law has been pointed out in the impugned Order passed by the Disciplinary Committee nor has any charge of impairment of true and fair view been levied. The fact of account of AVFL becoming NPA in Axis Bank is also of no relevance for the purpose of audit either for true and fair view or disclosure. Even there is no charge framed on this account.
21. We also find that the Appellant diligently performed his duties *inter-alia* when he sent his assistant to Axis Bank to verify the loan amount. The affidavit of said assistant before Disciplinary Committee remains uncontroverted by the Institute of Chartered Accountants of India or by the Complainant. The examination of Register of Charges maintained by the company was also proper diligence. Further the AVFL has also confirmed non intimation about the assignment of loan

to the Appellant which has also not been replied by the Complainant. The verification of pendency of the Charges of Axis Bank against AVFL in the records of ROC till date also shows proper and diligent enquiry made by him.

22. In view of the above discussion, we agree with the Appellant that it may at worst be a technical error and therefore, it cannot be said that the due diligence was not exercised or there was any negligence, much less gross negligence. Accordingly, we find the appellant 'Not Guilty' under clause (7) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949.

23. As regards charge against the Appellant under Clause (8) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949 is concerned, we find that no specific reason or basis of the same has been given by the Complainant nor it is mentioned in the Order of Disciplinary committee. The clause (8) reproduced *supra* mandates about failure to obtain sufficient information to express an opinion or exceptions being sufficiently material to negate the expression of such opinion. Under the circumstances of the present matter, we have noted that no case is made out by the Complainant that there is any exception to negate the expression of opinion as no instance is cited by him for the same. Coming to later part of clause as to whether the Appellant had obtained sufficient information to express of an opinion, as discussed above, the Appellant had made various enquiries and obtained the required information and explanations as he considered necessary. No deficiency in the same has been pointed out by the Complainant. Thus we are of the considered view that there is no substance in this charge also and we find the Appellant 'Not Guilty' under Clause (8) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949 also. However, considering the technical mistake on the part of the Appellant, we would like to direct the Appellant to be more cautious in future, while dealing with such cases.

24. In view of the aforesaid, the impugned Report dated 6th February, 2017 and Order dated 7th November, 2017, passed by the Disciplinary Committee of the Institute of Chartered Accountants of India are set aside. Interim orders, if any are vacated. In case, the Appellant has deposited the amount with the Institute towards fine during the stay proceedings, the same shall be refunded to him within 60 days from the date of receipt of this Order. No Order as to costs.

25. With this the present Appeal is allowed.

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Praveen Garg
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY
(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 08/ICAI/2018

IN THE MATTER OF:

Durga Prasad Sarada

...Appellant

Versus

**Board of Discipline of the
Institute of Chartered Accountants
of India(ICAI)**

...Respondents No. 1

**SSSB Ray (Commissioner of Income Tax
Central, Nagpur)**

...Respondents No. 2

CORAM:

Hon'ble Mr. Justice M.C. Garg
Hon'ble Mr. Sunil Goyal
Hon'ble Mr. Praveen Garg
Hon'ble Dr. Navrang Saini

Chairperson
Member
Member
Member

PRESENT:

For the Appellant:

Mr. Durga Prasad Sarada, Appellant in person

For the Respondents:

Mr. Ravinder Agarwal, Advocate along-with CA. Harleen Bhalla, Assistant Secretary, Disciplinary Directorate appearing on behalf of Respondent No. 1

Mr. Aakash Dewangan, Additional Commissioner of Income Tax appearing on behalf of Respondent No. 2

ORDER

Date: 04.08.2018

1. This appeal has been filed by the Appellant **CA. Durga Prasad Sarada (M. No. 43035)** before this Authority against the Order dated 18th August, 2017 (Impugned Order) passed by the Board of Discipline of the Institute of Chartered Accountants of India under Section 21A (3) of the Chartered Accountants Act, 1949 read with Rule 15 of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007, against the Institute of Chartered Accountants of India and others challenging the impugned order, whereby, the Board of Discipline held him guilty under Clause (10) of Part-I and Clause (2) of Part-IV of the First Schedule to the Chartered

Accountants Act, 1949 and awarded punishment of removal of name of the Appellant from Register of Members for a period of one month besides a fine of Rs. 50,000/- (Rupees Fifty Thousand Only), to be paid within 60 days of the receipt of the aforesaid Order. The said Clauses (10) of Part-I and Clause (2) of Part-IV of the First Schedule of the Act read as under:-

"First Schedule:-

PART-I: Professional misconduct in relation to chartered accountants in practice

A chartered accountant in practice shall be deemed to be guilty of Professional Misconduct, if he –

(10) Charges or offers to charge, accepts or offers to accept in respect of any professional employment, fees which are based on a percentage of profits or which are contingent upon the findings, or results of such employment, except as permitted under any regulation made under this Act;

PART-IV: Other misconduct in relation to members of the Institute generally

A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he –

(2) in the opinion of the Council, brings disrepute to the profession or the Institute as a result of his action whether or not related to his professional work."

2. The facts of the present appeal as narrated in the Report dated 19th January, 2017 of the Board of Discipline are that Shri SSSB Ray, Nagpur has filed a complaint in Form 'I' dated 27th May, 2013 against the Appellant. The brief of the charges alleged by the complainant in his complaint are as under:-

- i. The Respondent, the appellant herein, had arranged accounting bills raised by 16 parties amounting to Rs. 14.09 Crores to M/s Sunil Hi-Tech Engg. Ltd (SHEL).The said entries were not genuine.
- ii. The Respondent, the appellant herein, had charged commission @0.25% to 1% of the transactions for arranging accounting entries.
- iii. The Respondent, the appellant herein, had been involved in arranging bogus bills, accommodation entries and circular transactions for trading in coal through bank LC limits for various other parties.

3. The aforesaid complaint was taken up for consideration by the Director (Discipline) of the Institute of Chartered Accountants of India, who vide Order dated 10th October, 2015 found the Appellant Prima Facie Guilty of the

misconduct falling within the meaning of the aforesaid Clauses of the Chartered Accountants Act , 1949.

4. Director (Discipline) placed the complaint, written statements and the 'Prima-Facie Opinion' (PFO) along-with all other documents on record before the Board of Discipline of the Institute of Chartered Accountants of India for consideration. Accordingly, on perusal of the documents on record viz. the complaint, the written statement of the Respondent, Appellant herein, the Prima Facie Opinion of the Director (Discipline), and after hearing the submissions of the parties, the Board of Discipline gave its findings as under:-

4.1 The Board noted that the charges on which the Respondent has been held Prima Facie guilty are as under:-

- a) Arranging accounting bills raised by 16 parties amounting to Rs.14.09 crores to M/s Sunil Hi-Tech Engg. Ltd.
- b) Charging commission @0.25% to 1% of the transactions for arranging accounting entries.
- c) Involvement in arranging bogus bills, accommodation entries and circular transactions for trading in coal through bank LC limits for various other parties.

4.2 The Board noted that the Respondent in his statement to Income Tax Department on 8th October, 2009 has admitted that Mr. R. S. Tiwari, G. M. (Finance) of SHEL requested him to arrange for the Bills. He further admitted that the bills were made on his personal computer and he had obtained signatures of these persons on the bills. Most of the bank Cheque were obtained by him and handed over to Mr. R. S. Tiwari. It was also submitted by the Respondent that his office was used as Liaoning between Company and these 16 persons.

4.3 The Board further observed that the Respondent, Appellant herein, in his statement to Income Tax Department on 23rd October, 2009 had admitted as under:

"Commission in respect of the transactions described above and earlier during his statement recorded u/s 131 on 8th October, 2009 done through accounts in the name of various sub-contractors was charged @0.25% of the bill amount. In respect of transactions done through accounts & in the name of Shri Mahendra Bokade and Shri Ganesh Prasad Shukla commission was charged @0.75% of the bill amount."

4.4 The Board also perused the Order No. CIT (A)-3/517/2011-12 dated 21st July,2016 passed by the CIT (Appeals)-3, Nagpur in the Income Tax Matter of the Respondent, wherein it is stated as under:

"21. On a careful consideration, it is seen that the AO has adduced sufficient circumstantial evidences showing that the assessee was arranging bogus sub-contract bills as well as other accommodation entries for his clients mainly Gupta Coal Group, Sunil Hitech Group and Linkson Group. On the basis of documents seized during search and the statements of the assessee as well as his employees, the AO has observed that the assessee, Shri D.P. Sarda had floated various concerns in the name of his relatives

and persons of very low or no means. For example, concerns were floated in the names of employees like drivers (Baban Yadav, servants (Ravi Yadav), petty shop keepers' workers, etc. or the relatives. These persons being of no-means agreed to lend their names for small amounts of Rs.500/- to Rs.10,000/-. For example, M/s Ajay Trade Link is the proprietary concern of Shri Ajay Yadav (a relative of assessee's servant, Shri Ravi Yadav), M/s S.N. Coals and Coke is a concern of Ravi Yadav (a servant of the assessee) and P.R. Traders is a concern of Rajesh Dass, who is an associate of the assessee. Signature of these people was obtained on blank documents to open Bank accounts, and to obtain PAN for these concerns. Signatures of these people were obtained on blank cheque books and Income Tax Returns forms. Moneys were circulated from one Bank Accounts to another for the purposes of providing accommodation entries to various parties like Gupta Coal Group, using the blank signed cheques of different persons. The bills were issued by the assessee to his 'clients' from the concerns floated by Shri D.P. Sarda to facilitate booking of expenses (as in case of Sunil Hitech Ltd) and arranging L.C. limits on these bills (as in Gupta Coal Group) it is seen from the seized document that commission was charged by the assessee for arranging these transactions. The percentage of commission was dependent on the nature of transactions.

22. In the statement recorded u/s 31 of the Income Tax Act, dated 8th October, 2009, the assessee has admitted that he has arranged bogus bills and accommodation entries by using the names of his employees and friends. The statement is reproduced below:

Q2 I am showing you the statements recorded u/s 131 of the following persons on various dated between 15th September, 2009 and 30th September, 2009:-

- i. Sachin Agarkar
- ii. Mahendra R. Bokde
- iii. Shirish B. Agarkar
- iv. Santosh S. Morya
- v. Ravi S. Mohod.
- vi. Sanjay Ramnaresh Yadav
- vii. Ashwal Yadav
- viii. Shivkumar Sompal
- ix. Ganesh Prasdial Bihari Sukla
- x. Sainath Suresh Kayarkar
- xi. Baban Yadav
- xii. Ravindra H. Kharparde

Kindly go through the same and give your comments?"

Ans. I have gone these statements of the above mentioned 12 person. It is true that bills for sub-contract work done for Sunil Hitech Engineers Ltd. (SHEL) were raised in the names of these 12 persons mentioned above. All these bills were made on the personal computer in my office. Mr. Radhe Shyam Tiwari, G.M. (Finance), SHEL had requested me to arrange for bills in the name of above persons accordingly, the bills were prepared and signatures of above persons in the respective bills were obtained by me from them most of the blank cheques signed by each of these persons were also obtained from them by me handed over to Shri R.S. Tiwari, GM (Finance).

Q3. Bills for sub-contract work for SHEL has also been found to be raised in the names of Smt. Sandhya Dass, Smt. Dudha Nawal & M/s. Raj Industries, prop. Shri Rajkumar Sarda. Kindly confirm whether bills were prepared in the names of these three persons / concerns in the same manner as was described by you in your reply to questions No. 2 in respect of bills raised in the names of the 12 persons mentioned therein?

Ans. Yes, bills were prepared in the names of Smt. Sandhya Dass Smt. Dudha Nawal & M/s. Raj Industries in the same manner & blank signed cheques were also obtained from there three persons and handed over to Shri R. S. Tiwari, GM (Finance), SHEL in the same manner."

23. It is seen that Shri D.P. Sarda has admitted that bills for sub-contract work done for Sunil Hitech Engineers Ltd (SHEL) were raised in the names of these 12 persons mentioned above. All these bills were made on his personal

computer in his office. Mr. Radhey Shyam Tiwari, G.M. (Finance), SHEL had requested the assessee to arrange for bills, accordingly the bills were prepared and signature of above persons in the respective bills were obtained by him.

24. The statements of the 12 persons mentioned above were recorded during the assessment proceedings by the AO each one of them has confirmed that the assessee had used these persons for his various activities. These persons were barely educated and were in poor financial condition and therefore could easily come under the control and influence of the assessee. These persons have admitted to have signed blank documents, cheque-books, etc. in return for small amounts of money from the assessee. These persons did not have any knowledge of the transactions which the assessee was performing in their names by obtaining their signatures on the blank documents and cheque-books. The assessee had operated bank accounts of these persons to provide accommodation entries to various parties and the assess has earned commission in the process. The rate of commission adopted by the AO is 1.4% of the amount of transactions referred in the assessment order. The AO has based on the rate of commission on the seized item No. B/3 in which on page 77, the rates are stated at 1.335% to 1.41% on the transactions. The AO has listed the transactions of search accommodation entries in the nature of bogus expenses, share premium, circular transactions for artificially hiking the turnover.

25. In view of the above, the assessment made by the AO is upheld. The addition made by the AO of the Commission amounting Rs.75, 81,304/- is confirmed. The AO is accordingly directed."

- 4.5 The Board noted that the Respondent accepted all above facts in his statement recorded by the Department without any denial. Further the addition made by the AO of the Commission amounting to Rs.75,81,304/- has been confirm by the CIT (Appeals).
- 4.6 Thus, the Board held that there does exists the involvement of the Respondent in arranging accommodation entries and had in fact received commission for arranging those entries which was also added to his Income as undisclosed income.
- 4.7 The Board also noted that further to the receipt of the Prima Facie Opinion (PFO) in the matter, the only defence of the Respondent was that there is nothing afresh to inform institute in the matter which in itself points to the admission of the charges alleged and lack of any further defence/evidence from his side.

5. Also vide Para (14) of the Report, the Board of Discipline elaborately dealt with the Order No. CIT (A)-3/517/2011-12 dated 21st July, 2016 passed by the CIT (Appeals)-3, Nagpur in the Income Tax Matter of the Respondent, the Appellant herein, wherein the said CIT (A) has reviewed all statements recorded, documents seized and the statement of the Appellant before the Income Tax and found the Appellant involved in arranging the bogus bills through bogus concerns promoted by him and charged commission for that.

6. Accordingly, the Board of Discipline found the Appellant guilty of professional and other misconduct falling within the meaning of the aforesaid clauses of the

Chartered Accountants Act, 1949, and subsequently awarded the punishment as detailed *supra*.

7. During the proceedings of the present Appeal before us, the Appellant was present in person, where he reiterated the same submissions as made by him before the Board of Discipline and have taken various grounds of Appeal which are being disposed of as below.

8. The first ground of Appeal taken by him is about not getting adequate opportunity of hearing before the Board of Discipline. The Appellant submitted that he was not given adjournment and proper time to submit evidence and defend his case. We asked the Appellant that whatever opportunity was not given to him by the Board of Discipline, he can file any new evidence and raise any argument now before us. However, in response, no new evidence or argument was brought by the Appellant before us. In fact, we have noted that the Board of Discipline has also in its Order has recorded that the Appellant pleaded that he has nothing further to submit. Accordingly, we heard the Appellant at length and afforded him full opportunity to produce any new evidence but nothing was brought on record before us, therefore, this ground stands disposed of, as being without any merit.

9. Other grounds of Appeal raised by the Appellant are about placing the reliance by the Board of Discipline on the evidence including the statement of Appellant before Income Tax Department. The Appellant submitted that the Board of Discipline relied upon the statements of various persons recorded before Income Tax Department without providing any opportunity to the Appellant to cross examine them. The Appellant accordingly vehemently argued that the Board of Discipline relied on various documents without having those documents or without examining veracity thereof. He also submitted that his statement before the Income Tax Department was taken under coercion.

10. The Appellant, also raised a new plea vide written reply filed on 18th July, 2018 before us that he had received the commission amount as a trustee on behalf of various contractors.

11. Adversely, the Learned Counsel Shri Ravinder Agarwal appearing on behalf of the Institute of Chartered Accountants of India cited various instances before us to the effect as to where the Appellant has admitted the commission and thus vehemently supported the Order passed by the Board of Discipline. Likewise, Mr. Aakash Dewangan, Additional Commissioner of Income Tax appearing on behalf of Respondent No. 2 also supported the Impugned Order.

12. We have heard rival submissions of all the parties and also examined all the documents, pleadings and evidence produced before us as well as before the Board of Discipline.

13. Pursuantly, we have noted that all Cheque books of the said bogus concerns were lying with the Appellant and the said bogus bills were made on the computer of the Appellant. We also find that there is admission of Appellant himself before the Income Tax Department that he arranged bogus bills for commission. His reply to Question No. 15 of his statement recorded on 10th July, 2014 is relevant to note, where he is admitting as hereunder:

"On page No. 62, names of the contractors who issued bills to SHEL are mentioned along-with the details of amount received by them through cheques against bills raised. On the bottom of Pg. 62 and on Pg. 61 accounts were prepared to return the cash after deducting the commission. These calculations pertain to amount withdrawn in cash from bank A/c in the names of the mentioned contractors and returned to the promoters of SHEL. Commission in respect of the transactions described above and earlier during my statement recorded u/s 131 on 08.10.09 done through accounts in the name of various sub-contractors was charged @0.25% of the bill amount. In respect of transactions done through accounts & in the name of Mahendra Bokade and Ganesh Prasad Shukla commission was charged @0.75% of the bill amount. These calculations are on Pg. No. 61 & 62 are in my own handwriting."

14. The said statement remained uncontroverted till now. The learned CIT (A) upheld the addition of said commission in the hands of the Appellant. No order of Tribunal was produced before us to reverse the same but it was said that the appeal is pending. Even copy of appeal was not filed before us. It is also relevant

to record here that the Appellant stated that the statement recorded by the Income Tax Department was under coercion. However, when we inquired from him that the statement was recorded on 23rd October, 2009 and for the last Nine years why he has not retracted or disputed the same, for which, no answer at all was given by the Appellant.

15. Additionally, we have also observed that the complainant in his complaint vide Para No. (4) had made allegation as under:

"4. Shri Durga Prasad Sarda, CA. has charged commission @ 0.25% to 1% for arranging the accommodation bills. This fact was accepted by Shri D. P. Sarda in his statement on oath recorded u/s 132(4) of the Income Tax Act, 1961, on 23rd October, 2009 "

While replying the same vide his written statement dated 26th May, 2014 in respect of the said Para No. (4), the Appellant has categorically admitted as under that:-

"4. Yes, it is a fact already admitted on oath."

16. Besides above, we have also noted that the Appellant has even accepted his guilt during the proceedings while awarding punishment in this matter before the Board of Discipline, which is manifestly clear from Para No. (8) of the Impugned Order, which reads as hereunder:-

"That CA. Durga Prasad Sarda in his oral submissions before the Board while reiterating his written representation categorically accepted his guilt but stated that the quantum of commission charged was less. He also stated that it is the first time in his professional career that he has been held guilty of misconduct."

17. Even before us, the Appellant has admitted that he had taken the commission but it was taken by him as a trustee on behalf of various contractors, which, considering the facts and circumstances involved in the matter, according to us is totally untenable. Further, the allegation of the Appellant that the Board of Discipline relied on statements of other persons or on documents not before it, is also not true as the Board of Discipline has relied only on the statement of Appellant himself and the aforesaid Order passed by the learned CIT (A). More

so, the veracity of these documents has not been disputed by the Appellant anywhere and at any stage of the proceedings of this matter.

18. Consequently, when the Appellant has himself admitted charging commission at every stage of proceedings, there is no scope to challenge the findings and the Order passed by the Board of Discipline.

19. In view of the above, we are of the considered view that the Appellant was undoubtedly involved in arranging bogus bills through dummy concerns and charged commission for the same and therefore he was rightly held guilty under the aforementioned clauses for committing the Professional and Other Misconduct by the Board of Discipline of the Institute of Chartered Accountants of India.

20. Thus, we find no merit in the present Appeal and the same is hereby dismissed. Further, on the careful perusal and consideration of the materials on record, we do not find any ground to reduce the punishment awarded to the Appellant as well.

21. Resultantly, the present Appeal is disposed of by sustaining the Order dated 18th August, 2017 passed by the Board of Discipline. Stay orders, if any, are vacated. No order as to cost.

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Praveen Garg
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY
(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 10/ICAI/2018

IN THE MATTER OF:

Ishaq Esmail Lakkadghat

...Appellant

Versus

Income Tax officer, 11(3)-1 Mumbai

...Respondents No. 1

**The Disciplinary Committee, Institute
of Chartered Accountants of India (ICAI)**

...Respondents No. 2

CORAM:

Hon'ble Mr. Justice M.C. Garg

Chairperson

Hon'ble Mr. Sunil Goyal

Member

Hon'ble Mr. Kamlesh S. Vikamsey

Member

Hon'ble Mr. Praveen Garg

Member

Hon'ble Dr. Navrang Saini

Member

PRESENT:

For the Appellant:

Nil

For the Respondents:

Mr. Ravinder Agarwal, Advocate along-with Mr. Suneel Kumar, Assistant Secretary and Ms. A. Aruna Sarma, Senior Executive Officer, Disciplinary Directorate, ICAI

ORDER

Date: 27.08.2018

1. Being aggrieved by the Report dated 14th October, 2015 and Order dated 27th May, 2017 (Impugned Order), passed by the Disciplinary Committee of the Institute of Chartered Accountants of India under Section 21B (3) of the Chartered Accountants Act, 1949 read with Rule 19 (1) of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007, CA. Ishaq Esmail Lakkadghat (M. No. 120260), a practicing Chartered Accountant, Appellant herein, has filed this appeal against the Institute of Chartered Accountants of India and others, challenging the impugned order, whereby, the Disciplinary Committee holding him guilty under Clauses (7) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949 awarded punishment of removal of name of the Appellant

from the Register of Members for a period of one year. The said Clause (7) of Part-I of the Second Schedule of the Act reads as under:

"Second Schedule:

PART-I: Professional misconduct in relation to chartered accountants in practice

A chartered accountant in practice shall be deemed to be guilty of Professional Misconduct, if he –

- (7) does not exercise due diligence, or is grossly negligent in the conduct of his professional duties;*

2. The brief facts of the instant appeal, as narrated in the aforesaid Report of the Disciplinary Committee of the Institute of Chartered Accountants of India, are as under:

2.1 *Shri S. D. Darde, ITO Mumbai (hereinafter referred to as the "Complainant") has filed complaint in his individual capacity dated 22nd March, 2010 against CA. Ishaq Esmail Lakkadghat, Mumbai (hereinafter referred to as the 'Respondent').*

2.2 *The Complainant in his complaint has alleged that as per Tax Audit Report of Dr. Mohd. Usmaan Shaikha (hereinafter referred as the Assessee) dated 25th October, 2007, Col No. 17 h (B), amount admissible u/s 40A (3) read with rule 6DD and computation thereof is mentioned as NIL while completing scrutiny assessment for AY 2007-08, it is seen that the assessee has made payment of consultancy charges amounting to Rs.5, 45,715/- to various Doctor which exceeds Rs.20, 000/-. The assessee has made this payment in cash which is exceeding Rs.20, 000/- and no tax has been deducted which is required u/s 194J of the Income Tax Act, 1961. These facts have not been mentioned in the Tax Audit Report certified by the Respondent.*

2.3 *A survey was conducted u/s 133A on 30th September, 2009. A statement on Oath of the assessee was recorded, wherein the assessee has agreed of the payment made in cash to various Doctors amounting to Rs.1,91,50,669/- for A.Y. 2008-09 and Rs.2,13,77,220/- for A.Y. 2009-10. No TDS has been deducted which is required u/s 194 J of the Income Tax Act, 1961.*

3. Accordingly, this complaint was taken up for investigation by the Director (Discipline), who vide Order dated 17th December, 2013, found the Appellant 'Prima Facie' Guilty of the professional misconduct falling within the meaning of aforesaid Clause (7) of Part I of the Second Schedule to the Chartered Accountants Act, 1949.

4. Thereafter the matter was examined by the Disciplinary Committee and after examination of the complaint, written submissions, all written and oral evidence, further replies and after hearing the parties, the Disciplinary Committee gave the following findings:-

- 4.1 *As regard the allegation relating to the failure to report contravention of provision of Section 194J, the Respondent stated that since the Doctors did not provide any professional service to the Hospital, the provisions of Section 194J would not be attracted. In this regard, on perusal of Profit & Loss Account of the Hospital vis-à-vis working papers of the Respondent, it has been noted that consultancy charges were shown as expenses in the Profit & Loss Account of the Hospital. On being enquired from the Respondent about the same, he stated that as per the judgment passed by the Special Bench in case of "Merilyn Shipping and Transports-vs ACIT, Section 40 (a) (ia) is applicable only to the amounts of expenditure which are payable as on 31st March of every year and it cannot be invoked to disallow the amounts which have been actually paid during the previous year, without deduction of tax at source. Further, all payments were made to the respective doctors before 31st March, 2007. As per his belief, the payment made to the Doctors by way of reimbursement of the fees does not fall under the TDS Act and even if it falls, these payments would not be disallowable u/s 194J of the Income Tax Act.*
- 4.2 *In this regard, the Committee is of the view that it is for the assessee to reply on any judgment for making deduction of TDS on payment of consultancy fees u/s 194J. As per provision of the Income Tax Act, 1961 and Guidance notes on Tax Audit issued by the Institute, the Auditor is required to report as to whether any amount is inadmissible under Section 40 (a) the Income Tax Act, 1961. If the Assessee did not deduct TDS based on a judgment given in a particular case, the Respondent being a Statutory Tax Auditor was required to disclose the same in his report so as to enable the Income Tax Department to know the reason as to why TDS was not deducted by the Assessee u/s 194J of the Income Tax, 1961.*
- 4.3 *Since the Respondent failed to make proper disclosure as required by the Guidance note on tax audit, the Respondent is held guilty of Professional Misconduct falling within the meaning of Clause (7) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949.*

5. Based on the above, the Disciplinary Committee found the Respondent, the Appellant herein, guilty of professional misconduct falling within the meaning of aforesaid Clause (7) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949 and awarded the punishment as mentioned in Para (1) of this Order *supra*.
6. On the date fixed for hearing of the matter, the Appellant did not appear before us due to illness of his mother. Nor any Counsel appeared on behalf of the Appellant. However, vide letter dated 30th July, 2018, the Appellant filed his written arguments/submissions before us and requested that the same may be considered and the Appeal be heard by the Authority. No request for adjournment was made. Hence, we considered the same and proceeded to decide the appeal finally.
7. The first ground of appeal pertains to condone the delay in filing the appeal. The Appellant has mentioned that he was not aware of the process of filing of an appeal and sought guidance from the Institute of Chartered Accountants of India

to file the appeal and thereafter the appeal was filed. He also filed documents before us to this effect in support of his submissions. After considering the bonafide of the contention, the delay was condoned by the Authority and the Appellant was allowed to proceed with appeal.

8. The only issue in other grounds of appeal with us is that the Appellant who carried the audit u/s 44AB of the Income tax Act, 1961 of Dr. Usman Shaikh Prop, Faujiya Hospital, for the year ended on 31st March, 2007, did not report about non deduction of the tax u/s 194J of the Income tax Act, 1961, from professional charges amounting to Rs. 5,45,715/- paid by the said hospital to various doctors.

9. The facts in this case are very brief and are admitted. The Appellant submitted his report for the above audit vide report dated 23rd October, 2007 in Form No. 3CB of the Income Tax Rules, attaching therewith a further statement of particulars in Form No. 3CD of the Income tax Rules. As per clause 27(b) (i) of the Form 3CD there is a specific requirement to report :

- “(i) Tax deductible and not deducted at all
- (ii) Shortfall on account of lesser deduction
- (iii) -----”

10. Mr. Ravinder Agarwal, the Learned Counsel appearing on behalf of the Institute of Chartered Accountants of India vehemently supported the Impugned Order. He also pointed out that against these columns; no figure has been mentioned whereas, as per the law, the Appellant should have mentioned here, the figure of consultation charges paid to doctors from whom no tax was deducted. Therefore, he has failed to do so and that is why, he is rightly guilty of the violation of Clause (7) of Part-I of Second Schedule.

11. The only defence taken by the Appellant before the Disciplinary Committee, which was reiterated before us, is that in such cases the Assessee (client) was not liable to make any TDS u/s 194J of the Income tax Act, 1961 and hence there is no negligence in non-reporting the same. He further

explained his contention that sometimes due to unavoidable reasons/circumstances, the Assessee (client) has collected Doctors Consultation Fees on behalf of those Doctors and the same has been paid back/returned to the doctors immediately. It was further explained that these are the payments made to the doctors and are not in any way expenses of the Assessee (client) and hence question of TDS does not arise.

12. Further, the Appellant has prayed that as he was passed Chartered Accountancy only in 2005, he was very new in the profession and it is possible that he did not understand the proper interpretation of Section 194J of the Income Tax Act 1961. Therefore he prayed that his mistake may be condoned and lenient view may be taken.

13. We have heard all the parties, examined all documents, evidences produced and pleadings on records. We have also examined the written submissions made by Appellant before us as well as before the Disciplinary Committee of the Institute.

14. It is very clear from the facts on record, which have been elaborated in detail in the order of Director (Discipline) and in the Impugned Report of the Disciplinary Committee that an Auditor was required to report instances where tax was deductible by the auditee but not deducted by him. The CBDT vide Notification No. 208/2006 dated 10th August, 2006 had widened reporting requirements of Form 3CD. This Form came into effect for all audit reports signed on or after 10th August 2006. Admittedly in this matter the audit was carried out for the year ended on 31.3.2007 and audit report of the same was signed on 23.10.2007. Thus, it was the duty of the Appellant to report such transactions in the Form 3CD, which he failed to do.

15. Even the contention of the Appellant that the payment which was made to Doctors are not expenses of the assessee, was found to be incorrect as the Profit & Loss Account of the said auditee for the year ended on 31st March, 2007 shows consultancy charges of Rs 6,54,380/- appearing in the expenses side. Thus, it is incorrect to say that these are not expenses of the assessee.
16. We have considered the submissions of the Appellant about being new in the profession and not being able to understand properly the ambit of section 194J of the Income Tax Act. However, it is a fact that he completely ignored the new reporting requirements imposed by the CBDT from 10th August, 2006, as detailed above. Therefore, we agree with the findings of the Disciplinary Committee that under the circumstances as present in the matter, the Appellant did not exercise due diligence in carrying out his professional duties, which is expected from him. Accordingly, we concur with the finding of Disciplinary Committee holding him guilty under the aforesaid Clause (7) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949 and upheld the same.
17. We have also observed that in the Impugned Order, there is reference of Section 40(a) (ia) of the Income Tax Act, 1961 while discussing the said default under section 194J as well as in terms of the requirements of Guidance Note on Tax Audit. However, no specific finding has been given on the same in this regard in the Order passed by the Disciplinary Committee of the Institute.
18. Additionally, on examination of the complaint, we found that there was no complaint by the complainant about not reporting of transactions falling under Section 40(a) (ia) of the Income Tax Act, 1961, and also no show cause was given to the Appellant in this regard. No specific charge was framed on this.

19. Under the above circumstances, as no specific finding has been given by the Disciplinary Committee on this count, we understand that the same was mentioned for discussion only and the same is not relevant for the purpose of examining final decision of the Disciplinary Committee on the issue of the said default of non-reporting of transactions on which TDS was not deducted u/s 194J as complained by the complainant. Accordingly, we are not giving any finding on the issue.

20. As regards to the issue of quantum of punishment, the Appellant prayed for taking lenient view and explained that he was very new in the profession and he might not have been fully aware of the recent amendments in the law, and he also pleaded that the default was for a very small quantum.

21. Looking to all the facts involved and the fact that the Appellant fully cooperated in all proceedings at every level of enquiry, we feel that the "ends of justice" would meet, if the Appellant is awarded punishment to "Reprimand". We, accordingly modify the Impugned Order of the Disciplinary Committee to this extent. Though, further, we direct the Appellant to be more cautious in future while dealing with such situations.

22. The Appeal is disposed of accordingly. Interim orders, if any, are vacated.

No order as to costs.

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Kamlesh S. Vikamsey
Member

Praveen Garg
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 09/ICAI/2018

IN THE MATTER OF:

Mahavir Jain

..Appellant

Versus

Disciplinary Committee,

Institute of Chartered Accountants of India (ICAI)Respondents No.1

Relationship Manager,

State Bank of India, Mumbai

.....Respondents No. 2

CORAM:

Hon'ble Mr. Justice M.C. Garg

Chairperson

Hon'ble Mr. Sunil Goyal

Member

Hon'ble Dr. Navrang Saini

Member

PRESENT:

For the Appellant:

Mr. S. G. Gokhale, Advocate along-with Mr. Mahavir Jain, Appellant in person and Mr. Saurabh Agarwal, authorized representative.

For the Respondents:

Mr. Shresh Srivastava and Mr. Vinayak Srivastava, Advocates along with Mr. Amit Threja, Deputy Secretary, Disciplinary Directorate, ICAI.

ORDER

05.10.2018

1. This Appeal has been filed by the Appellant before this Authority against the Order dated 7th November, 2017 passed by the Disciplinary Committee (Bench-I) of the Institute of Chartered Accountants of India under Section 21B (3) of the Chartered Accountants Act, 1949 read with Rule 19 (1) of the Chartered Accountants (Procedure of Investigation of Professional and Other misconduct and Conduct of Cases) Rules, 2007, consequent upon a Report of the Disciplinary Committee dated 6th February, 2017, wherein the Appellant was held guilty under Clauses (7) and (8) of Part-I of the Second Schedule to the Act, whereby, the Appellant has been awarded the

punishment of Reprimand and also imposed fine of Rs.50,000/- (Rupees Fifty Thousand Only) upon him to be paid within a period of 30 days from the date of receipt of the Impugned Order. The said Clauses (7) & (8) of Part-I of the Second Schedule of the Act reads as under:

"Second Schedule:-

PART-I: Professional misconduct in relation to chartered accountants in practice

A chartered accountant in practice shall be deemed to be guilty of Professional Misconduct, if he –

- (7) does not exercise due diligence, or is grossly negligent in the conduct of his professional duties;*
- (8) fails to obtain sufficient information which is necessary for expression of an opinion or its exceptions are sufficiently material to negate the expression of an opinion."*

2. The brief facts of the instant appeal, as narrated in the aforesaid Report of the Disciplinary Committee of the Institute of Chartered Accountants of India, are as under:

- "1.1 The Respondent as auditor of Resurgere Mines & Minerals India Ltd. (hereinafter referred to as the "Company") for financial year 2010-11 has refused to take responsibility of certification of inventory and sundry debtors of the Company as mentioned in the Balance Sheet audited by him.*
- 1.2 He relied solely on the physical verification certificate produced and representation given by the Management for valuing stocks.*
- 1.3 Fixed Assets as certified by the Respondent as auditors in the Balance Sheet could not be verified by the lenders during inspection.*
- 1.4 As per Annexure to the Auditor's Report dated 30th May, 2011, the Company has not defaulted in repayment of its dues to banks and Financial Institutions except in the repayment of Term Loan from the Union Bank of India, whereas the Company has defaulted in payment of interest of all Working Capital Consortium Banks.*
- 1.5 The end use of money raised by issue of GDR has not been mentioned in the Annual Report.*
- 1.6 The Company has submitted false statement of account of Keonjhar Central Co-op Ban (KCCB) for the period 1st April, 2010 to 31st March, 2011 to consortium member Banks in support of routing transactions through the Current Account maintained with KCCB. The matter has been reported as fraud to RBI."*

3. Accordingly, this complaint was taken up for consideration by the Director (Discipline), who vide Order dated 1st June, 2015 found the Appellant

Prima Facie guilty of the professional misconduct falling within the meaning of aforementioned Clauses (7) and (8) of Part I of the Second Schedule to the Chartered Accountants Act, 1949, in respect of some of the charges mentioned in Para (2) *supra*.

4. Pursuant to forming of the Prima Facie Opinion, the Director (Discipline), in terms of the requirements of Section 21 (3) of the Act read with rules as applicable, placed his '*Prima-Facie Opinion*' before the Disciplinary Committee of the Institute for consideration, which, in turn, on examination of the said complaint, written statements, evidence written as well as oral, further replies '*Prima-Facie Opinion*' and after hearing the parties, while agreeing with the '*Prima-Facie Opinion*' decided to proceed further in the matter and accordingly gave its findings as hereunder:

"21. As regard this charge, it has been alleged against the Respondent that he has failed to Report submitting false statement of current account maintained with KCCB for the period 1st April, 2010 to 31st March, 2011. The Respondent submitted that he relied on the bank statements provided to him by the Auditee Company as in case of other banks. The Respondent came to know about the false bank statement of KCCB being submitted by the Company when the Complainant mentioned the same in their correspondence with the Respondent.

22. The Committee in this regard noted the further submission of the Respondent that he has written a specific letter dated 28th June, 2012 to the said Bank. Since by that time, he had ceased to be the auditor, the Bank failed to respond to the said letter. The submission made by the Respondent as regards the balance confirmation is noted by the Committee. Out of 18 bank accounts, 4 bank accounts statements were relied upon in absence of the balance confirmation out of which one was the said bank in question.

23. The Committee in this regard felt that the Respondent ought to have used his professional scepticism and made a note of the same in the audit report issued by him that the balance confirmation could not be made available as regards 4 bank accounts. The Respondent as an auditor was required to bring the same to the knowledge of the users of the financial statements through his audit report that sufficient audit evidence and appropriate information could not be obtained by him despite writing letters to the Bank. The Committee is thus of the view that since the Respondent failed to exercise due diligence and also failed to gather sufficient information for expression of opinion he is therefore guilty of professional misconduct for this charge falling within the meaning of Clauses (7) and (8) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949."

5. Thus, based on the above findings, the Disciplinary Committee held the Appellant guilty of professional misconduct only in respect of charge number 1.6 mentioned in Para (2) *supra* and awarded the punishment as mentioned under Para (1) of this Order *supra*.
6. Aggrieved by the same the Appellant is in appeal before us.
7. During the proceedings of this Appeal before us, Shri S. G. Gokhale, the Learned Counsel appearing on behalf of the Appellant took various grounds of defence, which are being dealt with and disposed of as below. The Appellant reiterated before us the same submissions.
8. The facts of the case are very brief and not disputed. As mentioned in complaint, the Appellant was an Auditor of M/s Resurgere Mines & Minerals India Ltd. (the company) for the year ended on 31st March, 2011, which obtained loans from various banks. It is also mentioned in complaint that the said company committed fraud and defaulted in repayment of interest and loan. The said fraud has been reported to RBI. It is alleged that the Appellant did not carry out the audit properly and relied upon the false Statement of Account of Keonjihar Central Co-operative Bank (KCCB) given by the company. The Disciplinary Committee observed that the Appellant did not use the professional skepticism and neither obtained the balance confirmation of closing balances as prescribed in the Auditing Standards, nor reported this matter in the Audit Report.
9. The Appellant while admitting that he did not obtain the balance confirmation of KCCB submitted that out of total 18 banks he had obtained the balance confirmation of the 14 Banks and only 4 banks were remaining with which the dealings and balances were small. He also submitted that it was general practice that banks do not issue the balance confirmations despite reminders. He further submitted that he had placed reliance on

bank statement given to him by the company, which was ultimately found to be fake. He also submitted that it was impossible to detect the fraud as he was carrying out the statutory audit and not the investigation. The Learned Counsel of the Appellant admitted that the Appellant committed mistake in not obtaining the external confirmation of KCCB but it was not gross negligence.

10. The Appellant also relied upon the following observations in the 'Code of Ethics', 11th edition, reprinted in December, 2010, at Pages 251-252, as issued by the Institute of Chartered Accountants of India:-

"Professional misconduct on the part of a person practicing one of the technical professions cannot fairly or reasonably be found merely on a finding of a bare non-performance of a duty or some default in performing it. The charge is not one of inefficiency but of misconduct. Imputation of certain mental condition is always involved. The test must always be whether in addition to the failure to do the duty, there has also been a failure to act honestly and reasonably."

"The misconduct implies failure to act honestly and reasonably either according to the ordinary and natural standard or according to the standard of a particular profession"

11. The Learned Counsel appearing on behalf of the Respondent Institute vehemently supported the Impugned Order passed by the Disciplinary Committee.

12. We have heard rival submissions of all the parties in detail, examined all pleadings on records in addition to perusing all relevant documents and evidence produced before us as well as before the Disciplinary Committee.

13. We have also examined the said fake statement of account of KCCB which is said to have been given to the Appellant by the Company. We find that this is only a printed paper bearing no signatures or the seal of the bank. We have also noted that the transactions are also in millions of rupees and not that of small amount. No suitable reply was given by the Appellant, as

to how he assessed the Risk of Material misstatement in the financial statements, which would be very high while relying on a printed paper as evidence. The procedure is clearly laid down in Standard on Auditing (SA 315) **"IDENTIFYING AND ASSESSING THE RISK OF MATERIAL MISSTATEMENT THROUGH UNDERSTANDING THE ENTITY AND ITS ENVIRONMENT."**

14. The Standard on Auditing (SA 330) **"THE AUDITOR'S RESPONSES TO ASSESSED RISKS"** provides that after assessment of the Risk, the auditor is required to consider whether external confirmation procedures are to be performed as substantive audit procedures. In our opinion the fact that the account statement of KCCB was not properly authenticated increased the risk and the Appellant was required to use his expertise about how to mitigate the same, including obtaining External Confirmations. The detailed procedure of obtaining and examining such external confirmations are prescribed in Standard on Auditing (SA-505) **"EXTERNAL CONFIRMATIONS"** which was followed for 14 banks out of 18 but not for others including the KCCB which turned out to be fabricated.

15. It appears from the records that the Appellant was having knowledge of the relevant Auditing Standards and had assessed the risk of Material Misstatement as higher. Therefore, he had obtained the External confirmations of 14 Banks out of 18 Banks. However, no justifiable reason was explained as to why the External Confirmations of the remaining 4 banks were not obtained more so when the Bank statement of KCCB was nothing but a computer printout without any seal, signature or authentication.

16. When we enquired as to whether Appellant had sent the letter to KCCB or asked the company to send letter to KCCB seeking confirmation of account, no evidence was produced to proving dispatch of such letter. Therefore, we

are of the view that he did not exercise due diligence expected from him as per Auditing Standards and also did not obtain sufficient information for expression of opinion on the Financial Statements of the Company.

17. Additionally, the Learned Counsel for the Appellant heavily relied upon the following judicial pronouncements:

- i. *Council of Institute of Chartered Accountants of India Vs. Somnath Basu (AIR 2007 Calcutta 29)*
- ii. *The Council of Institute Chartered Accountants of India Vs. V. Rajaram (AIR 1960 Madras 122 (V.47 C36))*

The Learned Counsel of the Appellant drew our attention towards the following observations in case of Council of Institute of Chartered Accountants of India vs. Somnath Basu:-

59. Failure to rise to the expected level of efficiency in discharging professional duties cannot be regarded as misconduct treating such failure as negligent act in the conduct of the professional duties. In the Division Bench judgement of this Court in the case of S. Ganesan v. A.K. Joscelyne reported in AIR 1957 Calcutta 33. Chief Justice Chakravarti observed as hereunder:-

"33.....Professional misconduct on the part of the person exercising one of the technical professions cannot fairly or reasonably be found, merely on a finding of a bare non-performance of a duty or some default in performing it. The charge is not one of inefficiency, but of misconduct and in an allegation of misconduct an imputation of a certain mental condition is always involved. I think, it would be impossible for any professional man to exercise his profession if he was to be held guilty of misconduct simply because he had not, in a given case, been able to do all that was required in the circumstances or that had misconceived his duty or failed to perform a part of it. I think the test must always be whether in addition to the failure to do the duty, partial or entire, which had happened, there had also been a failure to act honestly and reasonably."

18. However, this Authority pointed out to him that these judgements are under the Chartered Accountants Act, as it stood before the amendment in the year 2006. As per un-amended Law clause (7) was as under:

"Second Schedule:-

PART-I: Professional misconduct in relation to chartered accountants in practice requiring action by a High Court

A chartered accountant in practice shall be deemed to be guilty of Professional Misconduct, if he –

(7) is grossly negligent in the conduct of his professional duties."

19. Whereas after amendment in the year 2006, the said clause (7) has been amended and now reads as mentioned under Para (1) of this Order, *supra*, for which no satisfactory reply or explanation was given by the Leaned Counsel of the Appellant.

20. In our view, it is clear that the scope of clause (7) has been widened by the Parliament of India by way of inserting the words "does not exercise due diligence" and therefore the said judicial pronouncements are not relevant for the present case.

21. Thus, it is evident that the Appellant did not exercise due diligence expected from him and also did not obtain sufficient information for expression of opinion on the Financial Statements of the Company.

22. We are of the considered view that the Disciplinary Committee was justified in holding the Appellant guilty under Clauses (7) & (8) of Part-I of the Second Schedule of the Act and thus, we upheld the findings of the Disciplinary Committee, as noted above. Thus we find no merit in the appeal and the same is dismissed.

23. On the issue of punishment as awarded by the Disciplinary Committee of the Institute, we are of the view that the same is very minimal and thus, we found no grounds to reduce the same.

24. Consequently, based on the above, the present appeal is dismissed and the Orders passed by the Disciplinary Committee are sustained. Stay orders, if any, are vacated. No order as to cost.

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY
(Constituted Under the Chartered Accountants Act, 1949)

S. No.	Name of Appeal	Appeal No	Appellant/ Respondents
1.	Radhey Shyam Bansal Vs. The Institute of Chartered Accountants of India and others	14/ICAI/2017Appellant Respondents
2.	Anil Kumar Aggarwal Vs. The Institute of Chartered Accountants of India and others	12/ICAI/2017Appellant Respondents

CORAM:

Hon'ble Mr. Justice M.C. Garg
Hon'ble Mr. Sunil Goyal
Hon'ble Mr. Praveen Garg
Hon'ble Dr. Navrang Saini

Chairperson
Member
Member
Member

PRESENT:

For the Appellant:

Mr. Sandeep Manaktala, Authorized Representative along-with Mr. Anil Kumar Aggarwal, Appellant in person in Appeal No 12/ICAI/2017 and Mr. Radhey Shyam Bansal, Appellant in person in Appeal No 14/ICAI/2017.

For the Respondents:

Ms. Pooja M. Saigal, Advocate (in Appeal Nos. 12/ICAI/2017 and 14/ICAI/2017) along-with Mr. S.V. Krishanmohan, Chief Legal Advisor, Legal Department, ICAI

ORDER

Date: 18.10.2018

1. The cause of action in both the above appeals is similar and involves common issues. Hence both the above appeals are being disposed off by this common order.
2. In brief, the facts and findings of both these appeals are as under:

(i) Radhey Shyam Bansal vs The Institute of Chartered Accountants of India [Appeal No. 14/ICAI/2017]

3. This appeal has been filed by the Appellant before this Authority against the Order dated 30th May, 2017 (Impugned Order) passed by the Board of Discipline of the Institute of Chartered Accountants of India (ICAI) under Section 21A (3) of the Chartered Accountants Act, 1949 read with Rule (15) of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct

and Conduct of Cases) Rules, 2007, whereby, the Appellant has been awarded the punishment of the removal of his name from the Register of Members for a period of three months and also imposed a fine of Rs.1,00,000/- (Rupees One lakh) upon him, consequent upon a Report of the Board of Discipline dated 26th April, 2017, wherein, the Appellant was held guilty under clause (2) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949.

4. The facts of the instant appeal as narrated in the Report of the Board of Discipline at Para No. (1) are as under:

"1. A sting operation conducted by Aaj Tak News Channel and aired on 14th November, 2016 under the title "Jugadu Mechanic Part-3" containing allegations against CA. Radhey Shyam Bansal (M. No. 091903), Delhi (hereinafter referred to as the "Respondent") was brought to the attention of this Directorate by CA. Deep Jain vide his email dated 14th November, 2016. On an examination of the contents of the above video clip, it was decided to treat the same as "information" within the meaning of Rule 7 of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007."

5. Accordingly, this matter was taken up for consideration by the Director (Discipline), who vide Order dated 3rd March, 2017 found the Appellant 'Prima Facie' guilty of the Professional Misconduct falling within the meaning of Clause (2) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949.
6. Pursuant to forming of the Prima Facie Opinion, the Director (Discipline), in terms of the requirements of Section 21 (3) of the Act read with rules as applicable, placed his 'Prima-Facie Opinion' before the Board of Discipline of the Institute for consideration, which, in turn, on examination of the said complaint, written statements, evidence written as well as oral, further replies, 'Prima-Facie Opinion' and after hearing the parties, while agreeing with the 'Prima-Facie Opinion' decided to proceed further in the matter and accordingly gave its findings as hereunder:

"8.1 The allegation against the Respondent is that a sting operation was conducted by "Aaj Tak" News Channel which was broad cast by the Channel on 14th November, 2016, under the title 'Jugadu Mechanic Part-3'. In the aforesaid telecast, the Respondent was show discussing with some individual about the manner of converting black money into white money after charging a cost / charge of 30% to 40%. The aforesaid act on the part of the Respondent has caused grave disrepute to entire fraternity and to the Institute.

8.2 The main focus of the defence of the Respondent or written / oral submission were relating to;

(1) Non maintainability of Clause 2 of Part-IV of First Schedule under which the Respondent had been held Prima Facie guilty.

omission provided in any of the Schedules, but nothing in this Section shall be construed to limit or abridge in any way the power conferred or duty cast on the Director (Discipline) under sub-section (1) of Section 21 to inquire into the conduct of any member of the Institute under any other circumstance.

In view of the above the Board does not agree with the submission made by the Respondent.

8.6 The next plea raised by the Counsel for the Respondent is that the Rule 14(1) of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 provides for summary procedure therefore, the Board of Discipline cannot summon a witness and if being so the Respondent may also been given an opportunity. He further pointed out that Rule 14(1) of the said Rules reads as under:-

"14. Procedure to be followed by the Board of Discipline:

(1) The Board of Discipline shall follow summary disposal procedure in dealing with all cases before it, as laid down in this chapter."

8.7 The Board agrees with the contentions raised that the Board of Discipline shall follow summary procedure. However, the Board wishes to mention here that it is the Respondent himself who has raised the objection that in the telecast version the channel has distorted the original clip. In order to clear the air of doubt on the sting operation and keeping in view the importance attached to the matter, the Board decided to call for the raw footage of the sting operation. During the course of hearing the Respondent has not disputed that the contents of information tallies with the conversation contained in the raw footage.

8.8 The Counsel for the Respondent further submitted that the Channel has intruded into the privacy of the Respondent and made him fall into a trap. In support of this submission he has attempted to draw strength from the judgement of Hon'ble Supreme Court in the Criminal Petition No. 747 and 748/2010 (Rajat Prasad Vs. CBI-SC) dated 24th April, 2014.

8.9 Thereafter, the Board decided to examine the contentions of the Respondent given in the written submission based on the merits of the allegation made out against the Respondent. The Board observed the written representation of the Respondent who had submitted as under:-

"A CA has hard job in hand while convincing a tax evader to comply with the law and to pay taxes. A straight call to pay taxes, in the very first meeting would not yield any positive result from a tax evader. On the contrary, it would only jeopardize the prospects of getting a new client. A CA has to carefully choose his strategy to retain the good impression of the potential client. Therefore, a CA is likely to strike a conversation that would find a meeting ground with a potential client. During this process of relationship building, in response to coaxing by the potential client, if a CA reacts to help him, it has to be considered as a normal human behaviour, after all survival of a CA depends on finding his clients. In this background it is submitted that a conversation or two between a CA and a potential client that sounded as loose talk cannot become the yardstick to establish that the professional has behaved unethically".

8.10 The Board has gone through the contents of the judgment relied upon by the Counsel for the Respondent. The Board finds that the reliance on the aforesaid Order is misplaced as the same relates to criminal proceedings. The Board, on having viewed the telecast footage and the raw footage of the sting operation finds that the Respondent himself during the initial part of his discussion with the reporter has asked individual to give the reference so that he can discuss the matter. This makes the intent and objective of the Respondent very much clear.

8.11 The Board has carefully considered and deliberated on the aforesaid submission of the Respondent and is of the view that the way and manner in

which the Respondent has expressed himself as depicted in the discussion / telecast with the potential client is completely unethical. The manner of the discussions shows that these types of activities suggested by the Respondent are a regular practice indulged in by him and he does not bother about the legality of the advice given by him. In fact as per the video footage, the Respondent was also there and he was also handling the demonetised currency notes. This shows that he was dealing in those nefarious and illegal activities in a regular manner without any feeling of guilt."

7. Thus, the Board of Discipline found the Appellant guilty of other misconduct falling within the meaning of clause (2) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949 and subsequently awarded the punishment as *supra*.

(ii) Anil Kumar Aggarwal vs. The Institute of Chartered Accountants of India [Appeal No. 14/ICAI/2017]

8. This appeal has been filed by the Appellant before this Authority against the Order dated 30th May, 2017 (Impugned Order) passed by the Board of Discipline of the Institute of Chartered Accountants of India (ICAI) under Section 21A (3) of the Chartered Accountants Act, 1949 read with Rule (15) of the Chartered Accountants (Procedure of Investigation and Other Misconduct and Conduct of Cases) Rules, 2007, whereby, the Appellant has been awarded the punishment of the removal of his name from the Register of Members for a period of three months and also imposed a fine of Rs.1,00,000/- (Rupees one lakh) upon him, consequent upon a Report of the Board of Discipline dated 26th April, 2017, wherein, the Appellant was held guilty under clause (2) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949. The said clause reads as under:

"PART IV: - Other misconduct in relation to members of the Institute generally

A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he—

1. x x x

2. in the opinion of the Council, brings disrepute to the profession or the institute as a result of his action whether or not related to his professional work".

9. The facts of this appeal as narrated under Para No. (1) in the Report of the Board of Discipline are as under:

"1. A sting operation conducted by Aaj Tak News Channel and aired on 14th November, 2016 under the title "Jugadu Mechanic Part-3" containing allegations against CA. Anil Kumar Aggarwal (M. No. 093064), Delhi (hereinafter referred to as the "Respondent") was brought to the attention of this Directorate by CA. Deep Jain vide his email dated 14th November, 2016. On

an examination of the contents of the above video clip, it was decided to treat the same as "information" within the meaning of Rule 7 of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007."

10. Accordingly, this matter was taken up for consideration by the Director (Discipline), who vide Order dated 3rd March, 2017 found the Appellant '*Prima Facie*' guilty of the professional misconduct falling within the meaning of Clause (2) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949.

11. Pursuant to forming of the Prima Facie Opinion, the Director (Discipline), in terms of the requirements of Section 21 (3) of the Act read with rules as applicable, placed his '*Prima-Facie Opinion*' before the Board of Discipline of the Institute for consideration, which, in turn, on examination of the said complaint, written statements, evidence written as well as oral, further replies, '*Prima-Facie Opinion*' and after hearing the parties, while agreeing with the '*Prima-Facie Opinion*' decided to proceed further in the matter and accordingly gave its findings as hereunder:

"6.1 The allegations against the Respondent is that a sting operation was conducted by 'AAJ TAK' news channel which was broadcast by the Channel on 14th November, 2016, under the title 'Jugadu Mechanic Part-3'. In the aforesaid telecast, the Respondent was shown discussing with some individual about the manner of converting black money into white money after charging a cost / charge of 30% to 40%. The aforesaid act on the part of Respondent has caused grave disrepute to the entire fraternity and to the Institute.

6.2 The Counsel at the first instance made a submission that the Respondent has been found prima facie guilty of Clause (2) of Part-IV of First Schedule. A bare reading of the said clause shows that at first, there has to be an opinion of the 'Council' that the aforesaid act on the part of the Respondent brought disrepute to the profession or the Institute. In this regard, he stated that the said clause reads as under;

"PART IV: - Other misconduct in relation to members of the Institute generally

A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he—

1. x x x

2. in the opinion of the Council, brings disrepute to the profession or the institute as a result of his action whether or not related to his professional work".

6.3 It may be noted that the Chartered Accountants Act was amended in the year 2006. While amending the provisions of the Act, especially related to the disciplinary mechanism of the Institute, all the powers vested with the Council in the pre-amended Act, has been vested in Director (Discipline), Board of Discipline and Disciplinary Committee as the case may be. As per the present scheme, the prima facie opinion is formed by Director (Discipline) and in turn placed before Board of Discipline or Disciplinary Committee as the case may be for its approval. Whereas,

the Board of Discipline consists of Presiding Officer, a member of the Council and a nominee of Central Government, the Disciplinary Committee consists of a Presiding officer, two members of the Council and two nominees appointed by the Central Government. Further, the Central Government has also notified Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 laying down the manner to deal with the complaints/information so received by the Disciplinary Directorate.

6.4 Further, it is the contention of the Board that on earlier several occasions the misconduct of other Respondents under this clause was considered by the Board in terms of provisions of Section 22 of the Chartered Accountants Act, 1949 which reads as under:-

22. Professional or other misconduct defined for the purposes of this Act, the expression "professional or other misconduct" shall be deemed to include any act or omission provided in any of the Schedules, but nothing in this Section shall be construed to limit or abridge in any way the power conferred or duty cast on the Director (Discipline) under sub-section (1) of Section 21 to inquire into the conduct of any member of the Institute under any other circumstance.

In view of the above the Board does not agree with the submission made by the Respondent.

6.5 The next plea raised by the Counsel for the Respondent is that the Rule 14 (1) of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 provides for summary procedure therefore, the Board of Discipline need not summon a witness and if so the Respondent may also been given an opportunity. He further pointed out that Rule 14 (1) of the said Rules reads as under:-

"14. Procedure to be followed by the Board of Discipline:

(1) The Board of Discipline shall follow summary disposal procedure in dealing with all cases before it, as laid down in this chapter."

6.6 The Board agrees with the contentions raised that the Board of Discipline shall follow summary procedure. However, the Board wishes to mention here that it is the Respondent himself who has raised the objection that in the telecast version the channel has distorted the original clip. In order to clear the air of doubt on the sting operation and keeping in view the importance attached to the matter, the Board decided to call for the raw footage of the sting operation. During the course of hearing the Respondent has not disputed that the contents of information tallies with the conversation contained in the raw footage.

6.7 The Counsel for the Respondent further submitted that the Channel has intruded into the privacy of the Respondent and made him fall into a trap. In support of this submission he has attempted to draw strength from the judgement of Hon'ble Supreme Court in the Criminal Petition No. 747 and 748/2010 (Rajat Prasad Vs. CBI-SC) dated 24th April, 2014.

6.8 The Board has gone through the contents of the judgment relied upon by the Counsel for the Respondent. The Board finds that the reliance on the aforesaid Order is misplaced as the same relates to criminal proceedings. The Board, on having viewed the telecast footage and the raw footage of the sting operation finds that the Respondent himself during the initial part of his discussion with the reporter has asked individual to give the reference so that he can freely discuss the matter. This makes the intent and objective of the Respondent very much clear.

12. Thus, the Board of Discipline found the Appellant guilty of other misconduct falling within the meaning of clause (2) of Part-IV of the First Schedule to the

Chartered Accountants Act, 1949 and subsequently awarded the punishment as *supra*.

13. Aggrieved by the same the Appellants are in appeal before us.

14. Both the Appellants and their Counsel Mr. Sandeep Manaktala vehemently challenged the Impugned Orders. Per Contra, the Learned Counsel Ms. Pooja M. Saigal appearing on behalf of ICAI vehemently supported the Impugned Order. Voluminous set of documents were also filed by both the parties.

15. The Appellants have raised a number of grounds of appeal which are similar in nature. Firstly, we take up following ground of appeal:

‘c. NON-APPLICABILITY OF THE FIRST SCHEDULED, PART-IV, CLAUSE (2) OF THE CHARTERED ACCOUNTANTS ACT, 1949

1 It is further brought to the attention of the Hon’ble Board (*Sic. Authority*) that the undersigned has been held guilty under First Schedule, Part-IV, Clause (2), of the Act, which read as follows:-

“A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he –

1. XXX
2. in the opinion of the Council, brings disrepute to the profession or the institute as a result of his action whether or not related to his professional work.”

On behalf of the Appellants, it has been submitted that for invoking the above provision, it is necessary for the “Council” to arrive at a clear finding or opinion that the actions of the member, proposed to be charged of “Other Misconduct” have brought disrepute to the profession or the Institute, which has not been done in the present cases . Therefore, the proceedings are not valid.

16. This ground has been taken in both the appeals. We have noted that this issue has also been dealt with elaborately in the Impugned Order. The counsels of both the sides made their submissions in this regard.

17. It is pertinent to note here that this Authority has already dealt with and decided this issue in the Appeals earlier namely *Gyan Prakash Agarwal (Appeal No. 08/ICAI/2014)*, *Rajiv Maheshwari (Appeal No. 05/ICAI/2014)* and *Sameer Kumar Singh Vs. ICAI (Appeal No. 07/ICAI/2014)* and has held as under:-

“15. Based on the above and by taking note of the written submissions made on behalf of the Institute of Company Secretaries of India, the Institute of Cost Accountants of India and the Institute of Chartered Accountants of India containing the detailed

analysis of the issue in question, we are of the considered view that the proper and correct interpretation which can be given to Clause (2) of Part-IV of the First Schedule to the respective Acts, in the light of the principles laid down and having regard to the case laws of various courts and further considering the basic objects, reasons and purpose of the amendment brought in the statutes as quoted above is that, 'Prima facie Opinion (PFO)' formed by the Director (Discipline) in all such complaints / information cases serves the purpose for proceeding further for taking disciplinary action against the errant members as in terms of the amended mechanism for conduct of cases, it is the Director (Discipline) who has to form the first Prima Facie Opinion for the disciplinary proceedings to be initiated. Therefore, the opinion of council as is mentioned in the clause (2) of Part-IV of the First Schedule to the Act has to be given a purposive meaning and has to be read in consonance with the letter and scheme of the enactment".

18. In our considered view, the same shall *mutatis mutandis* apply in both these Appeals and accordingly, we find no merit in this ground. Thus, we hereby reject this ground of Appeal as taken by the Appellants.

19. Further, in both these appeals, a number of other grounds have also been taken while challenging the Impugned Order. In summary, they *inter-alia* relate to the following:-

- I. The case was heard in a summary manner as per Rule 14 (1) of Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 and a summary trial was concluded. No opportunity was given to appellants to cross examine any witness.
- II. The BOD failed to examine the reporter who allegedly did the sting operation and recorded the video as alleged and failed to examine the veracity of the alleged video.
- III. The unedited video was not made available to the Appellants till very late and thereafter no proper opportunity was given to them to rebut the same. [In case of Shri Radhey Shyam Bansal, it was made available to him pursuant to the direction of this Authority only].
- IV. The proceedings were concluded in undue haste without giving adequate opportunity to the Appellants to present their defence.
- V. An allegation based on Sting operation is not admissible as an evidence as per the law prevailing in India. .

20. The Learned Counsel appearing on behalf of the Appellants argued that the entire news telecasted by the said TV Channel and the sting was not based on the facts. He invited our attention to various letters submitted before the Director (Discipline) as well as before the Board of Discipline, stating that it was a manipulated video clip which was presented after a lot of editing and does not represent the truth. He denied the contents of the same and claimed that they were manipulated. He also submitted that the original uncut recording was not given to Appellants but was only displayed before the Board of Discipline and no reasonable opportunity was given to controvert the same. He further stated that the original recording was obtained by Shri Anil Aggarwal after filling a RTI

application and in case of Shri Radhey Shyam Bansal; it was given only after the directions of this Authority. Thus in both these matters, the raw footage was given to them after Board of Discipline had issued its Report.

21. Additionally, he submitted that after receipt of the original unedited recording, both the Appellants have made detailed objections and submissions in that regard before this Authority. In these submissions, the Learned Counsel has raised various objections about the authenticity, absence of proper procedure and lack of verification of the same. It was further submitted that as per notes of hearing of the case on 17th April, 2017 one Dr. Puneet Jain from Aaj Tak Channel appeared and gave evidence about the originality of the said recording. However, he was not the person who recorded the sting operation. The person who recorded the same was never produced. No opportunity was given to Appellants to cross examine the said witness, whereas they had specifically asked for the same which is clearly recorded on page No. 2 of the Notes of Hearing held on 17th April, 2017.

22. The Learned Counsel appearing on behalf of the Appellants also submitted that the summary procedure of trial, adopted as per as per Rule 14 (1) of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 was wrongly followed. Summary trial does not mean that Principles of Natural Justice can be violated. It was submitted before us that in these matters neither reasonable opportunity was given nor the evidence relied upon was provided to the Appellants nor the veracity of the same was examined. Thus, he submitted that the Impugned Order is bad in Law. Further, no opportunity to cross examine the witness was given as was requested vide Para (9) of the letter dated 18th April, 2017 submitted before the Board of Discipline by the Appellants.

23. Furthermore, the Learned Counsel for the Appellants has filed detailed objections before us, for which he submitted that the same could not be produced before the Board of Discipline as no reasonable opportunity of hearing was given. In these submissions, he has submitted para wise objections to the procedure and the raw footage as such.

24. The Learned Counsel further arguing about lack of opportunity, while narrating the chronological sequence of events, submitted before us that the cases were concluded only in one hearing on 17th April, 2017 and when the Appellants wanted to submit the objections to the footage, he was given only time of one day and asked to submit by next day as mentioned in Para (5.2) of the said Order. It was informed to us that the Appellants have submitted detailed

objections on 18th April, 2017 by two letters raising all the above mentioned objections. However, the said letter dated 18th April, 2017 was not even considered while holding him guilty, whereas the said Report of the Board of Discipline was finalised on 26th April, 2017. He further argued that these objections have not been even referred to in the said Report of the Board of Discipline.

25. In case of Shri Radhey Shyam Bansal, in addition to above, it was submitted that the father of Shri Bansal had expired on 15th April, 2017 and the hearing of 17th April, 2017 was adjourned to 21st April, 2017 despite his request for a longer time. Shri Bansal also filed a detailed reply vide letter dated 21st April, 2017, where he could not be present due to rituals in his family. But the letter was not considered and the hearing was concluded in a hurried manner on 21st April, 2017 without appreciating the physical and mental state of Shri Bansal and the matter was concluded in a great hurry in total violation of the Principles of Natural Justice.

26. Further, challenging the correctness of sting operation and the proceedings, the Learned Counsel of the Appellants have raised various grounds before us that the case was disposed of in a summary manner and even the veracity of the said raw footage has not been proved. He invited our attention towards Letter of the ICAI dated 5th April, 2017 informing that the Editor in Chief of the India Today Group was summoned in the matter but he never appeared. It was thus submitted that the authenticity of the raw footage was never proved and relied upon without any basis.

27. The Learned Counsel appearing on behalf of the Appellants also pleaded that it was an act of entrapment which was not legal and cannot be considered as evidence.

28. Finally, the Learned Counsel appearing on behalf of the Appellants placed reliance upon the following pronouncements in support of his arguments:-

a. Alagaapuram R. Mohanraj v/s Tamil Nadu Legislative Assembly (SC) (2016) 6 SCC 82

b. Rajat Prasad v/s CBI (SC) (2014) 6 SCC 495

c. Court On Its Own Motion v/s State [146 (2008) DLT 429]

29. As regards the punishment awarded to the Appellants, the Learned Counsel submitted that it was very harsh and un-justified.

30. On the other hand, the Learned Counsel appearing on behalf of the Institute vehemently supported the Order passed by the Board of Discipline. She argued that the proceedings were rightly concluded under summary procedure as per Law. She further stated that the Appellants have neither disputed any part of raw footage of the sting operation nor they have challenged their presence in the sting operation. Furthermore, she submitted that in view of the admission by the Appellants no further evidence was required to be produced and thus the matters were correctly decided.
31. Additionally, as regards not giving copy of raw footage, she submitted that it was duly played in the meeting of the Board of Discipline and the Appellants had adequate opportunity to repudiate the same. She also submitted that adequate opportunity was given to Appellants and thus this argument of the Appellants is not justified. Besides, she also pleaded that there was no entrapment by the Institute rather it was a third party sting operation and therefore the same was not entrapment.
32. As regards the admissibility of sting operation as evidence, she relied heavily on the judgement of Hon'ble Supreme Court in the case of R. K. Anand V/s Registrar Delhi High Court (SC) (2009), 8 SCC 106 and submitted that such sting operation is admissible as evidence in any judicial or quasi-judicial proceedings. Thus she prayed to sustain the orders passed by the Board of Discipline under challenge before us.
33. We have heard rival submissions of all the parties and also examined all the documents, pleadings and evidence produced before us and before lower authorities. We have also viewed the telecasted version of the sting operation besides, examined the verbatim version of the relevant portion of un-edited raw footage and submissions made by both the parties in that regard in addition to perusing the judicial pronouncements cited by both the parties.
34. Regarding the summary procedure as per Rule 14 (1) of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007, we have already decided the instant issue in principle, in Appeal No. 05/ICAI/2014 namely Rajiv Maheshwari Vs. ICAI & Others dated 25th September, 2017, in which he have held as under:-

"16. However, to see that the disposal by summary procedure do not require collection of any evidence, will not be appropriate to say so. The summary procedure only means disposal quickly and by adopting such means as would curtail the allegations in a summary manner such as by taking Affidavits from both the sides, as is being done for disposal of a summary suit under Order 37 of Civil Procedure of Code, 1908. Similarly, other way to decide the matter summarily may involve calling upon the parties to admit/deny the documents filed by them and then take note of the admitted documents for disposal of the controversy.

Following the same, in our view, the summary procedure cannot abridge the Principles of Natural Justice or do away the need of producing proper evidence to hold the member charged as guilty.

35. In the present Appeals, it is true that the Appellants have not denied their appearance in the sting operation but from the very beginning they are denying the contents and the manner in which it was presented to the Institute. The raw footage which was the basic evidence in these Appeals should have been made available to the Appellants and reasonable time should have been given to them to controvert the same. Admittedly, in both these Appeals, the raw footage of the video was given to them after the Board of Discipline had issued the Report of holding them guilty. It is also not understandable why the final Order was passed so hurriedly and more so in the case of Shri Bansal, whose father expired on 15th April, 2017 which is a very valid ground for giving him more time of defence. It is relevant to note here that after receipt of the raw footage, the Appellants have submitted detailed objections which need to be properly examined, which Board of Discipline could have done, had raw footage of the video of sting operation given in time to the Appellants.

36. We are very surprised to note that most of the objections taken before us were filed before the Board of Discipline well within the time given by them but the Board of Discipline has not even dealt with the same in its Report. In fact, there is not even a mention of the same in the Report. We fail to understand why the same were not considered in the Impugned Report.

37. As far as the issue of admissibility of the sting operation is concerned, the Hon'ble Supreme Court has prescribed many safe guards before accepting the same as evidence. The most important is that the veracity of the evidence must be established. In case of R. K. Anand *supra*, relied upon by the Institute, the same principle has been upheld. In the instant Appeals, one witness namely Mr. Puneet Jain was examined but it is not on record how he verified the veracity of raw footage of the video recorded based on which news were telecasted. The request of the Appellants to cross examine him was also not acceded, which, in our considered view is not justified.

38. In the light of these deficiencies in the procedure followed by the Board of Discipline in the name of summary procedure, we have no other option but to remand back both these Appeals to the Board of Discipline for consideration of all the issues as raised by both the Appellants herein and to decide these matters by passing a fresh Order within a period of six months from the date of receipt of

this Order. Needless to mention that the Board of Discipline will provide to the Appellants adequate opportunity of being heard. We also grant liberty to both the Appellants to raise before Board of Discipline all issues raised before us or any other issue as well and produce any evidence in support of their defence. The Board of Discipline will be entitled to admit the evidence of sting operation only after following procedure as per law. If any witness is examined or already examined by the Board of Discipline, then full opportunity to cross examine the same will also be given to the Appellants, if required or asked by the Appellants, an opportunity to lead evidence in rebuttal may also be granted subject to time frame.

39. Since, we have decided to remand back these Appeals to the Board of Discipline, under the circumstances, we do not consider it necessary to comment on the other grounds raised by the Appellants. However, the Appellants will be entitled to raise all those grounds before the Board of Discipline.

40. Before finally disposing of these Appeals, we wish to express our serious concerns over the casual and careless manner in which these matters were decided by the Board of Discipline. Even the issues raised by the Appellants within the time allowed to them were not considered. The whole process was completed in an unnecessary hurry without any justifiable cause. We direct the Board of Discipline to be more careful in future while deciding the matters of such nature.

41. These appeals are disposed off accordingly. Interim orders, if any, are vacated. No order as to cost.

42. Registrar of the Authority is hereby directed to keep a copy of this common Order in both the Appeal files for records, future reference and compliance at the end of the Registry.

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Praveen Garg
Member

Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY
(Constituted Under the Chartered Accountants Act, 1949)

S. No.	Name of Appeal	Appeal No	Appellant/ Respondents
1.	Radhey Shyam Bansal Vs. The Institute of Chartered Accountants of India and others	14/ICAI/2017Appellant Respondents
2.	Anil Kumar Aggarwal Vs. The Institute of Chartered Accountants of India and others	12/ICAI/2017Appellant Respondents

CORAM:

Hon'ble Mr. Justice M.C. Garg
Hon'ble Mr. Sunil Goyal
Hon'ble Mr. Praveen Garg
Hon'ble Dr. Navrang Saini

Chairperson
Member
Member
Member

PRESENT:

For the Appellant:

Mr. Sandeep Manaktala, Authorized Representative along-with Mr. Anil Kumar Aggarwal, Appellant in person in Appeal No 12/ICAI/2017 and Mr. Radhey Shyam Bansal, Appellant in person in Appeal No 14/ICAI/2017.

For the Respondents:

Ms. Pooja M. Saigal, Advocate (in Appeal Nos. 12/ICAI/2017 and 14/ICAI/2017) along-with Mr. S.V. Krishanmohan, Chief Legal Advisor, Legal Department, ICAI

ORDER

Date: 18.10.2018

1. The cause of action in both the above appeals is similar and involves common issues. Hence both the above appeals are being disposed off by this common order.
2. In brief, the facts and findings of both these appeals are as under:

(i) Radhey Shyam Bansal vs The Institute of Chartered Accountants of India [Appeal No. 14/ICAI/2017]

3. This appeal has been filed by the Appellant before this Authority against the Order dated 30th May, 2017 (Impugned Order) passed by the Board of Discipline of the Institute of Chartered Accountants of India (ICAI) under Section 21A (3) of the Chartered Accountants Act, 1949 read with Rule (15) of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct

and Conduct of Cases) Rules, 2007, whereby, the Appellant has been awarded the punishment of the removal of his name from the Register of Members for a period of three months and also imposed a fine of Rs.1,00,000/- (Rupees One lakh) upon him, consequent upon a Report of the Board of Discipline dated 26th April, 2017, wherein, the Appellant was held guilty under clause (2) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949.

4. The facts of the instant appeal as narrated in the Report of the Board of Discipline at Para No. (1) are as under:

"1. A sting operation conducted by Aaj Tak News Channel and aired on 14th November, 2016 under the title "Jugadu Mechanic Part-3" containing allegations against CA. Radhey Shyam Bansal (M. No. 091903), Delhi (hereinafter referred to as the "Respondent") was brought to the attention of this Directorate by CA. Deep Jain vide his email dated 14th November, 2016. On an examination of the contents of the above video clip, it was decided to treat the same as "information" within the meaning of Rule 7 of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007."

5. Accordingly, this matter was taken up for consideration by the Director (Discipline), who vide Order dated 3rd March, 2017 found the Appellant 'Prima Facie' guilty of the Professional Misconduct falling within the meaning of Clause (2) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949.
6. Pursuant to forming of the Prima Facie Opinion, the Director (Discipline), in terms of the requirements of Section 21 (3) of the Act read with rules as applicable, placed his 'Prima-Facie Opinion' before the Board of Discipline of the Institute for consideration, which, in turn, on examination of the said complaint, written statements, evidence written as well as oral, further replies, 'Prima-Facie Opinion' and after hearing the parties, while agreeing with the 'Prima-Facie Opinion' decided to proceed further in the matter and accordingly gave its findings as hereunder:

"8.1 The allegation against the Respondent is that a sting operation was conducted by "Aaj Tak" News Channel which was broad cast by the Channel on 14th November, 2016, under the title 'Jugadu Mechanic Part-3'. In the aforesaid telecast, the Respondent was show discussing with some individual about the manner of converting black money into white money after charging a cost / charge of 30% to 40%. The aforesaid act on the part of the Respondent has caused grave disrepute to entire fraternity and to the Institute.

8.2 The main focus of the defence of the Respondent or written / oral submission were relating to;

(1) Non maintainability of Clause 2 of Part-IV of First Schedule under which the Respondent had been held Prima Facie guilty.

omission provided in any of the Schedules, but nothing in this Section shall be construed to limit or abridge in any way the power conferred or duty cast on the Director (Discipline) under sub-section (1) of Section 21 to inquire into the conduct of any member of the Institute under any other circumstance.

In view of the above the Board does not agree with the submission made by the Respondent.

8.6 The next plea raised by the Counsel for the Respondent is that the Rule 14(1) of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 provides for summary procedure therefore, the Board of Discipline cannot summon a witness and if being so the Respondent may also been given an opportunity. He further pointed out that Rule 14(1) of the said Rules reads as under:-

"14. Procedure to be followed by the Board of Discipline:

(1) The Board of Discipline shall follow summary disposal procedure in dealing with all cases before it, as laid down in this chapter."

8.7 The Board agrees with the contentions raised that the Board of Discipline shall follow summary procedure. However, the Board wishes to mention here that it is the Respondent himself who has raised the objection that in the telecast version the channel has distorted the original clip. In order to clear the air of doubt on the sting operation and keeping in view the importance attached to the matter, the Board decided to call for the raw footage of the sting operation. During the course of hearing the Respondent has not disputed that the contents of information tallies with the conversation contained in the raw footage.

8.8 The Counsel for the Respondent further submitted that the Channel has intruded into the privacy of the Respondent and made him fall into a trap. In support of this submission he has attempted to draw strength from the judgement of Hon'ble Supreme Court in the Criminal Petition No. 747 and 748/2010 (Rajat Prasad Vs. CBI-SC) dated 24th April, 2014.

8.9 Thereafter, the Board decided to examine the contentions of the Respondent given in the written submission based on the merits of the allegation made out against the Respondent. The Board observed the written representation of the Respondent who had submitted as under:-

"A CA has hard job in hand while convincing a tax evader to comply with the law and to pay taxes. A straight call to pay taxes, in the very first meeting would not yield any positive result from a tax evader. On the contrary, it would only jeopardize the prospects of getting a new client. A CA has to carefully choose his strategy to retain the good impression of the potential client. Therefore, a CA is likely to strike a conversation that would find a meeting ground with a potential client. During this process of relationship building, in response to coaxing by the potential client, if a CA reacts to help him, it has to be considered as a normal human behaviour, after all survival of a CA depends on finding his clients. In this background it is submitted that a conversation or two between a CA and a potential client that sounded as loose talk cannot become the yardstick to establish that the professional has behaved unethically".

8.10 The Board has gone through the contents of the judgment relied upon by the Counsel for the Respondent. The Board finds that the reliance on the aforesaid Order is misplaced as the same relates to criminal proceedings. The Board, on having viewed the telecast footage and the raw footage of the sting operation finds that the Respondent himself during the initial part of his discussion with the reporter has asked individual to give the reference so that he can discuss the matter. This makes the intent and objective of the Respondent very much clear.

8.11 The Board has carefully considered and deliberated on the aforesaid submission of the Respondent and is of the view that the way and manner in

which the Respondent has expressed himself as depicted in the discussion / telecast with the potential client is completely unethical. The manner of the discussions shows that these types of activities suggested by the Respondent are a regular practice indulged in by him and he does not bother about the legality of the advice given by him. In fact as per the video footage, the Respondent was also there and he was also handling the demonetised currency notes. This shows that he was dealing in those nefarious and illegal activities in a regular manner without any feeling of guilt."

7. Thus, the Board of Discipline found the Appellant guilty of other misconduct falling within the meaning of clause (2) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949 and subsequently awarded the punishment as *supra*.

(ii) Anil Kumar Aggarwal vs. The Institute of Chartered Accountants of India [Appeal No. 14/ICAI/2017]

8. This appeal has been filed by the Appellant before this Authority against the Order dated 30th May, 2017 (Impugned Order) passed by the Board of Discipline of the Institute of Chartered Accountants of India (ICAI) under Section 21A (3) of the Chartered Accountants Act, 1949 read with Rule (15) of the Chartered Accountants (Procedure of Investigation and Other Misconduct and Conduct of Cases) Rules, 2007, whereby, the Appellant has been awarded the punishment of the removal of his name from the Register of Members for a period of three months and also imposed a fine of Rs.1,00,000/- (Rupees one lakh) upon him, consequent upon a Report of the Board of Discipline dated 26th April, 2017, wherein, the Appellant was held guilty under clause (2) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949. The said clause reads as under:

"PART IV: - Other misconduct in relation to members of the Institute generally

A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he—

1. x x x

2. in the opinion of the Council, brings disrepute to the profession or the institute as a result of his action whether or not related to his professional work".

9. The facts of this appeal as narrated under Para No. (1) in the Report of the Board of Discipline are as under:

"1. A sting operation conducted by Aaj Tak News Channel and aired on 14th November, 2016 under the title "Jugadu Mechanic Part-3" containing allegations against CA. Anil Kumar Aggarwal (M. No. 093064), Delhi (hereinafter referred to as the "Respondent") was brought to the attention of this Directorate by CA. Deep Jain vide his email dated 14th November, 2016. On

an examination of the contents of the above video clip, it was decided to treat the same as "information" within the meaning of Rule 7 of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007."

10. Accordingly, this matter was taken up for consideration by the Director (Discipline), who vide Order dated 3rd March, 2017 found the Appellant '*Prima Facie*' guilty of the professional misconduct falling within the meaning of Clause (2) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949.

11. Pursuant to forming of the Prima Facie Opinion, the Director (Discipline), in terms of the requirements of Section 21 (3) of the Act read with rules as applicable, placed his '*Prima-Facie Opinion*' before the Board of Discipline of the Institute for consideration, which, in turn, on examination of the said complaint, written statements, evidence written as well as oral, further replies, '*Prima-Facie Opinion*' and after hearing the parties, while agreeing with the '*Prima-Facie Opinion*' decided to proceed further in the matter and accordingly gave its findings as hereunder:

"6.1 The allegations against the Respondent is that a sting operation was conducted by 'AAJ TAK' news channel which was broadcast by the Channel on 14th November, 2016, under the title 'Jugadu Mechanic Part-3'. In the aforesaid telecast, the Respondent was shown discussing with some individual about the manner of converting black money into white money after charging a cost / charge of 30% to 40%. The aforesaid act on the part of Respondent has caused grave disrepute to the entire fraternity and to the Institute.

6.2 The Counsel at the first instance made a submission that the Respondent has been found prima facie guilty of Clause (2) of Part-IV of First Schedule. A bare reading of the said clause shows that at first, there has to be an opinion of the 'Council' that the aforesaid act on the part of the Respondent brought disrepute to the profession or the Institute. In this regard, he stated that the said clause reads as under;

"PART IV: - Other misconduct in relation to members of the Institute generally

A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he—

1. x x x

2. in the opinion of the Council, brings disrepute to the profession or the institute as a result of his action whether or not related to his professional work".

6.3 It may be noted that the Chartered Accountants Act was amended in the year 2006. While amending the provisions of the Act, especially related to the Disciplinary mechanism of the Institute, all the powers vested with the Council in the pre-amended Act, has been vested in Director (Discipline), Board of Discipline and Disciplinary Committee as the case may be. As per the present scheme, the prima facie opinion is formed by Director (Discipline) and in turn placed before Board of Discipline or Disciplinary Committee as the case may be for its approval. Whereas,

the Board of Discipline consists of Presiding Officer, a member of the Council and a nominee of Central Government, the Disciplinary Committee consists of a Presiding officer, two members of the Council and two nominees appointed by the Central Government. Further, the Central Government has also notified Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 laying down the manner to deal with the complaints/information so received by the Disciplinary Directorate.

6.4 Further, it is the contention of the Board that on earlier several occasions the misconduct of other Respondents under this clause was considered by the Board in terms of provisions of Section 22 of the Chartered Accountants Act, 1949 which reads as under:-

22. Professional or other misconduct defined for the purposes of this Act, the expression "professional or other misconduct" shall be deemed to include any act or omission provided in any of the Schedules, but nothing in this Section shall be construed to limit or abridge in any way the power conferred or duty cast on the Director (Discipline) under sub-section (1) of Section 21 to inquire into the conduct of any member of the Institute under any other circumstance.

In view of the above the Board does not agree with the submission made by the Respondent.

6.5 The next plea raised by the Counsel for the Respondent is that the Rule 14 (1) of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 provides for summary procedure therefore, the Board of Discipline need not summon a witness and if so the Respondent may also been given an opportunity. He further pointed out that Rule 14 (1) of the said Rules reads as under:-

"14. Procedure to be followed by the Board of Discipline:

(1) The Board of Discipline shall follow summary disposal procedure in dealing with all cases before it, as laid down in this chapter."

6.6 The Board agrees with the contentions raised that the Board of Discipline shall follow summary procedure. However, the Board wishes to mention here that it is the Respondent himself who has raised the objection that in the telecast version the channel has distorted the original clip. In order to clear the air of doubt on the sting operation and keeping in view the importance attached to the matter, the Board decided to call for the raw footage of the sting operation. During the course of hearing the Respondent has not disputed that the contents of information tallies with the conversation contained in the raw footage.

6.7 The Counsel for the Respondent further submitted that the Channel has intruded into the privacy of the Respondent and made him fall into a trap. In support of this submission he has attempted to draw strength from the judgement of Hon'ble Supreme Court in the Criminal Petition No. 747 and 748/2010 (Rajat Prasad Vs. CBI-SC) dated 24th April, 2014.

6.8 The Board has gone through the contents of the judgment relied upon by the Counsel for the Respondent. The Board finds that the reliance on the aforesaid Order is misplaced as the same relates to criminal proceedings. The Board, on having viewed the telecast footage and the raw footage of the sting operation finds that the Respondent himself during the initial part of his discussion with the reporter has asked individual to give the reference so that he can freely discuss the matter. This makes the intent and objective of the Respondent very much clear.

12. Thus, the Board of Discipline found the Appellant guilty of other misconduct falling within the meaning of clause (2) of Part-IV of the First Schedule to the

Chartered Accountants Act, 1949 and subsequently awarded the punishment as *supra*.

13. Aggrieved by the same the Appellants are in appeal before us.

14. Both the Appellants and their Counsel Mr. Sandeep Manaktala vehemently challenged the Impugned Orders. Per Contra, the Learned Counsel Ms. Pooja M. Saigal appearing on behalf of ICAI vehemently supported the Impugned Order. Voluminous set of documents were also filed by both the parties.

15. The Appellants have raised a number of grounds of appeal which are similar in nature. Firstly, we take up following ground of appeal:

‘c. NON-APPLICABILITY OF THE FIRST SCHEDULED, PART-IV, CLAUSE (2) OF THE CHARTERED ACCOUNTANTS ACT, 1949

1 It is further brought to the attention of the Hon’ble Board (*Sic. Authority*) that the undersigned has been held guilty under First Schedule, Part-IV, Clause (2), of the Act, which read as follows:-

“A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he –

1. XXX
2. in the opinion of the Council, brings disrepute to the profession or the institute as a result of his action whether or not related to his professional work.”

On behalf of the Appellants, it has been submitted that for invoking the above provision, it is necessary for the “Council” to arrive at a clear finding or opinion that the actions of the member, proposed to be charged of “Other Misconduct” have brought disrepute to the profession or the Institute, which has not been done in the present cases . Therefore, the proceedings are not valid.

16. This ground has been taken in both the appeals. We have noted that this issue has also been dealt with elaborately in the Impugned Order. The counsels of both the sides made their submissions in this regard.

17. It is pertinent to note here that this Authority has already dealt with and decided this issue in the Appeals earlier namely *Gyan Prakash Agarwal (Appeal No. 08/ICAI/2014)*, *Rajiv Maheshwari (Appeal No. 05/ICAI/2014)* and *Sameer Kumar Singh Vs. ICAI (Appeal No. 07/ICAI/2014)* and has held as under:-

“15. Based on the above and by taking note of the written submissions made on behalf of the Institute of Company Secretaries of India, the Institute of Cost Accountants of India and the Institute of Chartered Accountants of India containing the detailed

analysis of the issue in question, we are of the considered view that the proper and correct interpretation which can be given to Clause (2) of Part-IV of the First Schedule to the respective Acts, in the light of the principles laid down and having regard to the case laws of various courts and further considering the basic objects, reasons and purpose of the amendment brought in the statutes as quoted above is that, 'Prima facie Opinion (PFO)' formed by the Director (Discipline) in all such complaints / information cases serves the purpose for proceeding further for taking disciplinary action against the errant members as in terms of the amended mechanism for conduct of cases, it is the Director (Discipline) who has to form the first Prima Facie Opinion for the disciplinary proceedings to be initiated. Therefore, the opinion of council as is mentioned in the clause (2) of Part-IV of the First Schedule to the Act has to be given a purposive meaning and has to be read in consonance with the letter and scheme of the enactment".

18. In our considered view, the same shall *mutatis mutandis* apply in both these Appeals and accordingly, we find no merit in this ground. Thus, we hereby reject this ground of Appeal as taken by the Appellants.

19. Further, in both these appeals, a number of other grounds have also been taken while challenging the Impugned Order. In summary, they *inter-alia* relate to the following:-

- I. The case was heard in a summary manner as per Rule 14 (1) of Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 and a summary trial was concluded. No opportunity was given to appellants to cross examine any witness.
- II. The BOD failed to examine the reporter who allegedly did the sting operation and recorded the video as alleged and failed to examine the veracity of the alleged video.
- III. The unedited video was not made available to the Appellants till very late and thereafter no proper opportunity was given to them to rebut the same. [In case of Shri Radhey Shyam Bansal, it was made available to him pursuant to the direction of this Authority only].
- IV. The proceedings were concluded in undue haste without giving adequate opportunity to the Appellants to present their defence.
- V. An allegation based on Sting operation is not admissible as an evidence as per the law prevailing in India. .

20. The Learned Counsel appearing on behalf of the Appellants argued that the entire news telecasted by the said TV Channel and the sting was not based on the facts. He invited our attention to various letters submitted before the Director (Discipline) as well as before the Board of Discipline, stating that it was a manipulated video clip which was presented after a lot of editing and does not represent the truth. He denied the contents of the same and claimed that they were manipulated. He also submitted that the original uncut recording was not given to Appellants but was only displayed before the Board of Discipline and no reasonable opportunity was given to controvert the same. He further stated that the original recording was obtained by Shri Anil Aggarwal after filling a RTI

application and in case of Shri Radhey Shyam Bansal; it was given only after the directions of this Authority. Thus in both these matters, the raw footage was given to them after Board of Discipline had issued its Report.

21. Additionally, he submitted that after receipt of the original unedited recording, both the Appellants have made detailed objections and submissions in that regard before this Authority. In these submissions, the Learned Counsel has raised various objections about the authenticity, absence of proper procedure and lack of verification of the same. It was further submitted that as per notes of hearing of the case on 17th April, 2017 one Dr. Puneet Jain from Aaj Tak Channel appeared and gave evidence about the originality of the said recording. However, he was not the person who recorded the sting operation. The person who recorded the same was never produced. No opportunity was given to Appellants to cross examine the said witness, whereas they had specifically asked for the same which is clearly recorded on page No. 2 of the Notes of Hearing held on 17th April, 2017.
22. The Learned Counsel appearing on behalf of the Appellants also submitted that the summary procedure of trial, adopted as per as per Rule 14 (1) of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 was wrongly followed. Summary trial does not mean that Principles of Natural Justice can be violated. It was submitted before us that in these matters neither reasonable opportunity was given nor the evidence relied upon was provided to the Appellants nor the veracity of the same was examined. Thus, he submitted that the Impugned Order is bad in Law. Further, no opportunity to cross examine the witness was given as was requested vide Para (9) of the letter dated 18th April, 2017 submitted before the Board of Discipline by the Appellants.
23. Furthermore, the Learned Counsel for the Appellants has filed detailed objections before us, for which he submitted that the same could not be produced before the Board of Discipline as no reasonable opportunity of hearing was given. In these submissions, he has submitted para wise objections to the procedure and the raw footage as such.
24. The Learned Counsel further arguing about lack of opportunity, while narrating the chronological sequence of events, submitted before us that the cases were concluded only in one hearing on 17th April, 2017 and when the Appellants wanted to submit the objections to the footage, he was given only time of one day and asked to submit by next day as mentioned in Para (5.2) of the said Order. It was informed to us that the Appellants have submitted detailed

objections on 18th April, 2017 by two letters raising all the above mentioned objections. However, the said letter dated 18th April, 2017 was not even considered while holding him guilty, whereas the said Report of the Board of Discipline was finalised on 26th April, 2017. He further argued that these objections have not been even referred to in the said Report of the Board of Discipline.

25. In case of Shri Radhey Shyam Bansal, in addition to above, it was submitted that the father of Shri Bansal had expired on 15th April, 2017 and the hearing of 17th April, 2017 was adjourned to 21st April, 2017 despite his request for a longer time. Shri Bansal also filed a detailed reply vide letter dated 21st April, 2017, where he could not be present due to rituals in his family. But the letter was not considered and the hearing was concluded in a hurried manner on 21st April, 2017 without appreciating the physical and mental state of Shri Bansal and the matter was concluded in a great hurry in total violation of the Principles of Natural Justice.

26. Further, challenging the correctness of sting operation and the proceedings, the Learned Counsel of the Appellants have raised various grounds before us that the case was disposed of in a summary manner and even the veracity of the said raw footage has not been proved. He invited our attention towards Letter of the ICAI dated 5th April, 2017 informing that the Editor in Chief of the India Today Group was summoned in the matter but he never appeared. It was thus submitted that the authenticity of the raw footage was never proved and relied upon without any basis.

27. The Learned Counsel appearing on behalf of the Appellants also pleaded that it was an act of entrapment which was not legal and cannot be considered as evidence.

28. Finally, the Learned Counsel appearing on behalf of the Appellants placed reliance upon the following pronouncements in support of his arguments:-

a. Alagaapuram R. Mohanraj v/s Tamil Nadu Legislative Assembly (SC) (2016) 6 SCC 82

b. Rajat Prasad v/s CBI (SC) (2014) 6 SCC 495

c. Court On Its Own Motion v/s State [146 (2008) DLT 429]

29. As regards the punishment awarded to the Appellants, the Learned Counsel submitted that it was very harsh and un-justified.

30. On the other hand, the Learned Counsel appearing on behalf of the Institute vehemently supported the Order passed by the Board of Discipline. She argued that the proceedings were rightly concluded under summary procedure as per Law. She further stated that the Appellants have neither disputed any part of raw footage of the sting operation nor they have challenged their presence in the sting operation. Furthermore, she submitted that in view of the admission by the Appellants no further evidence was required to be produced and thus the matters were correctly decided.
31. Additionally, as regards not giving copy of raw footage, she submitted that it was duly played in the meeting of the Board of Discipline and the Appellants had adequate opportunity to repudiate the same. She also submitted that adequate opportunity was given to Appellants and thus this argument of the Appellants is not justified. Besides, she also pleaded that there was no entrapment by the Institute rather it was a third party sting operation and therefore the same was not entrapment.
32. As regards the admissibility of sting operation as evidence, she relied heavily on the judgement of Hon'ble Supreme Court in the case of R. K. Anand V/s Registrar Delhi High Court (SC) (2009), 8 SCC 106 and submitted that such sting operation is admissible as evidence in any judicial or quasi-judicial proceedings. Thus she prayed to sustain the orders passed by the Board of Discipline under challenge before us.
33. We have heard rival submissions of all the parties and also examined all the documents, pleadings and evidence produced before us and before lower authorities. We have also viewed the telecasted version of the sting operation besides, examined the verbatim version of the relevant portion of un-edited raw footage and submissions made by both the parties in that regard in addition to perusing the judicial pronouncements cited by both the parties.
34. Regarding the summary procedure as per Rule 14 (1) of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007, we have already decided the instant issue in principle, in Appeal No. 05/ICAI/2014 namely Rajiv Maheshwari Vs. ICAI & Others dated 25th September, 2017, in which he have held as under:-

"16. However, to see that the disposal by summary procedure do not require collection of any evidence, will not be appropriate to say so. The summary procedure only means disposal quickly and by adopting such means as would curtail the allegations in a summary manner such as by taking Affidavits from both the sides, as is being done for disposal of a summary suit under Order 37 of Civil Procedure of Code, 1908. Similarly, other way to decide the matter summarily may involve calling upon the parties to admit/deny the documents filed by them and then take note of the admitted documents for disposal of the controversy.

Following the same, in our view, the summary procedure cannot abridge the Principles of Natural Justice or do away the need of producing proper evidence to hold the member charged as guilty.

35. In the present Appeals, it is true that the Appellants have not denied their appearance in the sting operation but from the very beginning they are denying the contents and the manner in which it was presented to the Institute. The raw footage which was the basic evidence in these Appeals should have been made available to the Appellants and reasonable time should have been given to them to controvert the same. Admittedly, in both these Appeals, the raw footage of the video was given to them after the Board of Discipline had issued the Report of holding them guilty. It is also not understandable why the final Order was passed so hurriedly and more so in the case of Shri Bansal, whose father expired on 15th April, 2017 which is a very valid ground for giving him more time of defence. It is relevant to note here that after receipt of the raw footage, the Appellants have submitted detailed objections which need to be properly examined, which Board of Discipline could have done, had raw footage of the video of sting operation given in time to the Appellants.

36. We are very surprised to note that most of the objections taken before us were filed before the Board of Discipline well within the time given by them but the Board of Discipline has not even dealt with the same in its Report. In fact, there is not even a mention of the same in the Report. We fail to understand why the same were not considered in the Impugned Report.

37. As far as the issue of admissibility of the sting operation is concerned, the Hon'ble Supreme Court has prescribed many safe guards before accepting the same as evidence. The most important is that the veracity of the evidence must be established. In case of R. K. Anand *supra*, relied upon by the Institute, the same principle has been upheld. In the instant Appeals, one witness namely Mr. Puneet Jain was examined but it is not on record how he verified the veracity of raw footage of the video recorded based on which news were telecasted. The request of the Appellants to cross examine him was also not acceded, which, in our considered view is not justified.

38. In the light of these deficiencies in the procedure followed by the Board of Discipline in the name of summary procedure, we have no other option but to remand back both these Appeals to the Board of Discipline for consideration of all the issues as raised by both the Appellants herein and to decide these matters by passing a fresh Order within a period of six months from the date of receipt of

this Order. Needless to mention that the Board of Discipline will provide to the Appellants adequate opportunity of being heard. We also grant liberty to both the Appellants to raise before Board of Discipline all issues raised before us or any other issue as well and produce any evidence in support of their defence. The Board of Discipline will be entitled to admit the evidence of sting operation only after following procedure as per law. If any witness is examined or already examined by the Board of Discipline, then full opportunity to cross examine the same will also be given to the Appellants, if required or asked by the Appellants, an opportunity to lead evidence in rebuttal may also be granted subject to time frame.

39. Since, we have decided to remand back these Appeals to the Board of Discipline, under the circumstances, we do not consider it necessary to comment on the other grounds raised by the Appellants. However, the Appellants will be entitled to raise all those grounds before the Board of Discipline.

40. Before finally disposing of these Appeals, we wish to express our serious concerns over the casual and careless manner in which these matters were decided by the Board of Discipline. Even the issues raised by the Appellants within the time allowed to them were not considered. The whole process was completed in an unnecessary hurry without any justifiable cause. We direct the Board of Discipline to be more careful in future while deciding the matters of such nature.

41. These appeals are disposed off accordingly. Interim orders, if any, are vacated. No order as to cost.

42. Registrar of the Authority is hereby directed to keep a copy of this common Order in both the Appeal files for records, future reference and compliance at the end of the Registry.

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Praveen Garg
Member

Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY

(Constituted Under the Chartered Accountants Act, 1949)

S. No.	Name of Appeal	Appeal No	Appellant/ Respondents
1.	Devendraa P. Kapur Vs. Institute of Chartered Accountants of India & Others Additional Director (FA), SFIO	02/ICAI/2018	...Appellant Respondent No. 1 to 5 Respondent No. 6
2.	Devendraa P. Kapur Vs. Institute of Chartered Accountants of India & Others Additional Director (FA), SFIO	03/ICAI/2018	...Appellant Respondent No. 1 to 5 Respondent No. 6
3.	Devendraa P. Kapur Vs. Institute of Chartered Accountants of India & Others Additional Director (FA), SFIO	04/ICAI/2018	...Appellant Respondent No. 1 to 5 Respondent No. 6

CORAM:

Hon'ble Mr. Justice M.C. Garg
Hon'ble Mr. Sunil Goyal
Hon'ble Mr. Praveen Garg
Hon'ble Dr. Navrang Saini

Chairperson
Member
Member
Member

PRESENT:

For the Appellant:

Mr. Arvinder Pal Singh, authorized representative along-with Mr. Devendraa P. Kapur, Appellant in person, CA. V.K. Kapur, Mr. Kamal Bahri and Ms. Sapna Kapur, all appearing for all the above mentioned Appeals.

For the Respondents:

Mr. Amit Sharma, Advocate, in all the above mentioned Appeals appearing on behalf of ICAI.

Mr. Saud Ahmad, Joint Director & Mr. Ajeet Kumar Srivastava, Prosecutor appearing on behalf of SFIO in all the above mentioned Appeals.

ORDER

Date: 01.11.2018

1. These appeals have been filed by the Appellant before this Authority against the Order dated 12th July, 2017, passed by the Disciplinary Committee (Bench-I) of the Institute of Chartered Accountants of India, under section 21B (3) of the Chartered Accountants Act, 1949 read with Rule 19 (1) of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct

and Conduct of Cases) Rules, 2007, whereby, the Appellant has been awarded the composite punishment for all the three cases, of the removal of his name from the Register of Members for a period of two years and also imposed a consolidated amount of fine of Rs. 5,00,000/- (Rupees Five Lakh Only) upon him, to be paid within a period of 30 days from the date of receipt of the Impugned Order with a rider that in case the Appellant fails to deposit the amount of penalty within the aforesaid period then his name shall be removed from the Register of Members for a further period of six months. This order was passed consequent upon a Report of the Disciplinary Committee dated 8th February, 2015, wherein, the Appellant was held guilty under Clause (4) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949, in each of these cases.

2. The said clause (4), as prevailing before the Chartered Accountants (Amendment) Act, 2006, effective from 17th November, 2006, reads as under:

"Second Schedule:

PART I: - Professional misconduct in relation to chartered accountants in practice requiring action by a High Court

A chartered accountant in practice shall be deemed to be guilty of professional misconduct, if he—

- | | | | | | | |
|----|---|---|---|---|---|---|
| 1. | x | x | x | x | x | x |
| 2. | x | x | x | x | x | x |
| 3. | x | x | x | x | x | x |

4. expresses his opinion on financial statements of any business or enterprise in which he, his firm or a partner in his firm has a substantial interest, unless he discloses the interest also in his report"

3. It is to be noted that after the amendment in the Chartered Accountants Act, 1949, in the year 2006, the said clause (4) reads as under:

"Second Schedule:

PART I: - Professional misconduct in relation to chartered accountants in practice

A chartered accountant in practice shall be deemed to be guilty of professional misconduct, if he—

- | | | | |
|----|---|---|---|
| 1. | x | x | x |
| 2. | x | x | x |
| 3. | x | x | x |

4. expresses his opinion on financial statements of any business or enterprise in which he, his firm, or a partner in his firm has a substantial interest".

4. All these three appeals filed by the Appellant involve common facts, common issues and common grounds. The only difference in these three Appeals is that the name of Auditee in Appeal No. 02/ICAI/2017 is JVG Farm Fresh Limited; in Appeal No. 03/ICAI/2017 the name of the Auditee is JVG Housing Finance Limited and in Appeal No. 04/ICAI/2017, the Auditee is JVG Overseas Limited. Mr. D. K. Kapur, Appellant herein, was a statutory Auditor of all these Group of Companies during the period 1993-94 to 1996-97. Hence, we are disposing of all these three appeals by passing this common order.
5. The brief and common facts of these appeals, as narrated in the aforesaid Report of the Disciplinary Committee of the Institute of Chartered Accountants of India, in appeal number 02/ICAI/2017 are as hereunder. As mentioned above, in other two appeals also, the facts are similar with the change being only the name of the company which was audited by the Appellant.

- 1.1 *The Government of India, Ministry of Corporate Affairs ordered an investigation into the affairs of M/s JVG Farm Fresh Limited vide its Order No.7/89/2004/CL-II, dated 9th July, 2007 under Section 235 of the Companies Act, 1956. During the Investigation of M/s JVG Farm Fresh Ltd., it was revealed that the Respondent was working as Statutory Auditor of JVG Group of Companies for the period 1993-1994 to 1996-1997 (except 1995-1996). On the other hand, he was holding the position of Executive Director (Finance) in the JVG Group of Companies and was controlling and conducting the whole financial affairs of the Company. This way, he was holding both the positions of Statutory Auditor as well as Executive Director (Finance). He had misused both the positions. On one hand, he showed rosy picture about financial health of the Company and allured the investors to deposit and invest their hard earned money with JVG Group of Companies, on the other hand, he was the authorized signatory in various bank accounts of the Company. He signed various important business deals as an authorized signatory on behalf of JVG Investments. He not only neglected his responsibility as statutory auditor of the JVG Group of Companies but also facilitated in siphoning off the huge amounts by misappropriating and transferring through various firms owned, managed and controlled by him through intra-group transactions. The siphoning off money of JVG Group of Companies, through the front Companies of Pee Dee Kapoor & Co i.e., by the Respondent has already been investigated by EOW, Crime Branch, Delhi Police. In this case two FIRs bearing Nos. 239/98 and 240/98 have been filed against the Respondent. He was arrested by the EOW during the year 2003 and was remanded to Police custody for ten days. Later, on furnishing the personal surety/bond of Rs.3.00 crores he was released on bail. A case under Section 420 and 120B of the IPC is filed against him by Delhi Police in the Court of Chief Metropolitan Magistrate, Patiala Court, New Delhi in which the trail is pending.*
- 1.2 *The Respondent was having a very important position in JVG Group of Companies and his role has also been mentioned in the RBI Inspection Report (Annexure Q of Investigation Report) upon inspection conducted during the period from 18th December, 1997 to 15th January, 1998. The RBI has also filed a complaint case against JVG Finance Ltd and JVG Group of Companies, its Directors and the Respondent to prosecute them under various provisions of the RBI Act. The Respondent challenged the same upto Hon'ble Supreme Court of India and Relief was given to him and presently the accused is on bail in the said case.*
- 1.3 *It is observed from the copies of FIRs and other papers that the Respondent was called several times in the office EOW to Join the Investigation and to explain his role and transactions of the firms owned and controlled by him namely Action Credit Pvt. Ltd, Ronak Finance Ltd., APM Financial Consultancy Pvt. Ltd as well as Shivam Investment Pvt. Ltd owned by his wife Smt Sushma Kapoor with JVG Group of Companies. From time to time the Respondent submitted bulky replies claiming that he was merely a Statutory Auditor in the JVG Group of Companies and was never*

appointed as Executive Director (Finance) of the Group. The Respondent has also explained that various transactions with JVG Group of Companies and amounts transferred in the name of various firms including Action Credit Pvt. Ltd., Ronak Finance Pvt. Ltd, APM Finance Pvt. Ltd and Shivam Investment Pvt. Ltd were merely business transactions and the amount credited in these firms were merely the return of the amount due from JVG Group of Companies as an advance or Loan given to them. His replies were also scrutinized from time to time but same could not be found upto the satisfaction mark.

1.4 *The aforesaid charged, if proved, would render the Respondent guilty of Professional and Other Misconduct falling within meaning clauses (2) of Part-IV of the First Schedule and Clauses (4) and (7) of Part-I of the Second Scheduled to the Chartered Accountants Act, 1949 (as amended by the Chartered Accountants Amendment Act, 2006)."*

6. Accordingly, this complaint was taken up for consideration by the Director (Discipline), who vide Order dated 16th March, 2012 found the Appellant 'Prima Facie' guilty of the professional misconduct falling within the meaning of Clause (2) of Part-IV of the First Schedule and Clauses (4) and (7) of Part I of the Second Schedule to the Chartered Accountants Act, 1949.

7. Pursuant to forming of the Prima Facie Opinion, the Director (Discipline), in terms of the requirements of Section 21 (3) of the Act read with rules as applicable, placed his '*Prima-Facie Opinion*' before the Disciplinary Committee of the Institute for consideration, which, in turn, on examination of the said complaints and other records as available, while agreeing with the '*Prima-Facie Opinion*' decided to proceed further in the matter and accordingly, after a thorough examination of the matter and subsequent to hearing of the parties concerned, gave its findings as hereunder:

"12. The Committee noted that it has been alleged against the Respondent that he was holding dual position as Statutory Auditor of JVG Group of Companies for the period 1993-1994 to 1996-1997 on one hand and on the other hand, he was holding the position of Executive Director (Finance) in the JVG Group of Companies and was controlling and conducting the whole financial affairs of the group. This way, he was holding both the position of Statutory Auditor as well as Executive Director (Finance) of JVG Group of Companies. The Committee in this regard, on perusal of the papers on record, noted that the firm of the Respondent was the statutory auditor and certified the financial statements of the Company for the financial 1993-94 and 1996-97. However, for the financial year 1995-96, although the respondent firm had acted as the statutory auditor, yet a person other than the Respondent has certified the statements of the Company. The Committee has also perused various other related documents which have been submitted on record by both the Complainant and Respondent in this regard.

13. The Committee further noted that an inspection was conducted by the RBI of the JVG Group Finance Companies viz. JVG Finance Ltd. and JVG Securities Ltd with reference to the position as on 31st March, 1997, wherein it has mentioned that the group companies did not function as independent units and were managed as a part of the group only. There was no separate management team or hierarchy of officers for any company and all the companies were managed jointly by a common team of Directors/Managers/Employees. It further mentioned that there was concentration of powers at the top with no hierarchy of management team. The RBI Inspection Report dated 15th July, 2011 has categorically mentioned

w.r.t. the involvement or the role played by the Respondent in the Company as under:

"one of the intriguing features of the Management of the group was the involvement of the statutory auditor Shri D.K. Kapoor in the day to day affairs of the Company, being the defacto Executive Director (Finance) of the JVG Group and known in the organization by such designation. He was controlling the finance, banking and accounting functions of all the Group Companies after Mr. V.K. Sharma he was the most important man in the group and had direct control over the finances of the group. He was authorized signatory for the operation of various bank accounts of the Companies and almost all the cheques were signed/approved by him. The inspecting Officer saw salary sheets of the group employees signed by him with the designation of Executive Director (Finance). He also signed different agreements with the outside parties on behalf of the Company in the capacity of Executive Director (Finance). Needless to the point out that performance of such executive functions in the group, directly conflicted with the functions of the statutory auditors, and writing of audit report was only done as merely statutory obligation which the Company to comply with. As such there was no auditor of the Company which checked the financial and accounting accuracy of the group companies, as what was to be supposedly checked was done by the same man."

14. The Committee also noted that the Complainant Department has also while investigating the matter under Section 235 of the Companies Act 1956 into the affairs of the Company has submitted a report dated 10th July, 2009 wherein the role of the Respondent in the working of the JVG Group Companies has been mentioned as under:

"On the other hand, he was holding the position of Executive Director (Finance) in the JVG Group of Companies and was controlling and conducting the whole financial affairs of the Company. This way, he was holding both the position of Statutory Auditor as well as Executive Director (Finance). He has misused both the positions. On one hand, he showed rosy picture about financial health of the Company and allured the investors to deposit and invest their hard earned money with JVG Group of Companies, on the other hand, he was the authorized signatory in various bank accounts of the Company. He signed various important business deals as an authorized signatory on behalf of JVG investments. He not only neglected his responsibility as statutory auditor of the JVG Group of Companies but also facilitated in siphoning of the huge amounts by misappropriating and transferring through various firms owned, managed and controlled by him through intra-group transactions. The siphoning off money of JVG Group of Companies, through the front Companies of Pee Dee Kapoor & Co. i.e., by the Respondent has already been investigated by EOW, Crime Branch, Delhi Police. In this case two FIRs bearing Nos. 239/98 and 240/98 have been filed against the respondent. He was arrested by the EOW during the year 2003 and was remanded to Police custody for ten days.

15. The Committee thus noted that the role of the Respondent as brought out by the Inspection report of the RBI is same vis-à-vis what has been reported by the Complainant's Department although the scope of both the investigations is different. The Committee noted that the Respondent in this regard has submitted in his defense at the time of hearing, that the compendium of Notes issued by the ICAI in 1997 states that an auditor may prepare or assist in the preparation of the accounts of a Company before proceeding to audit them or agree to provide financial advice or to represent the Company for its tax matters without impairing his independence in anyway. These functions are complementary in character to the performance of the function of an auditor. The Counsel for the Respondent in this context thus submitted before the Committee that acting as a consultant and providing financial advice and actual preparation of the accounts, all these functions while simultaneously acting as the Statutory Auditor of the Body Corporate were permissible by the Institute in 1996 when the audit of the Company was actually conducted by the Respondent. In this context, he also brought on record a copy of the resolution passed at the meeting held on 11th

August, 1994, wherein it was resolved that the Respondent be authorized to counter sign cheques of such amounts and drawn on such banks as may be specified from time to time, jointly with any other authorized signatory to ensure compliance of all legal technicalities for the payments before him and to see that the same are properly accounted.

16. *The Committee noted that the scope and duties of the statutory auditor is to ensure that he reports on the true and fair view of the financial statements i.e. the Balance sheet, Profit and Loss account and Cash Flow statements and the same are free from any material misstatements. The Committee noted that the compendium of ICAI on 'Independence of Auditors' as referred to by the Counsel for the Respondent in his submissions inter-alia states as under:*

"An auditor may prepare or assist in the preparation of the accounts of a company before proceeding to audit them, or agree to provide financial advice or to represent the Company for its tax matters without impairing the independence in any way".

On the perusal of the same, the Committee noted that as per the publication of the Institute, an auditor way back in 1996-97 was permitted to prepare or assist in preparation of the accounts of the Company but the same has not in any way permitted the auditor by any stretch of imagination to perform the managerial functions or day-to-day operations of the Company which would in fact beyond doubt impair his independence to perform the statutory audit. The spirit behind such publication issued by the ICAI in 1996-97 was limited to ensure that the expertise of the auditor may be used to draw Financial Statements which in today's scenario has been categorically prohibited to ensure the existence of independence. The Committee further noted that the allegations raised in the instant complaint is not with respect to writing of accounts of the Company by the Respondent but the same is relating to the dual role played by the Respondent during the said years. The Committee perused copy of numerous cheques of the Company signed by the Respondent as the authorized signatory pursuant to the resolution dated 11th August, 1994 passed at the Board Meeting of the Company. In the said resolution, it has been authorized to countersign cheques of such amounts and drawn on such banks as may be specified from time to time, jointly with any other authorized signatory and further in the said resolution, he was entrusted with the responsibility to ensure the compliance of all legal technicalities for the payment placed before him and also to see that they are properly accounted for as per the accounting procedure adopted by the Company. In this context, the Committee is of the view that when a person is entrusted with the responsibility to act as the statutory auditor of the Company, he is expected to act independently to form an opinion as regard to the true and fair view of the financial position and operating result of a company and if such other duties are also undertaken by him which by nature fall within the day to day operations of the Company, then he cannot be deemed to have acted independently as statutory auditor.

17. *The pronouncement of the ICAI on the independence of the Auditors very clearly provides that the Independence of mind is a fundamental concept and / or expression of opinion on the Financial Statements in any Form, and therefore, must always be maintained. Nothing can substitute for the essential and fundamental requirement of independence. The said pronouncement further provides that the Independence of the auditors has not only to exist in fact, but also appear to so exist to all reasonable persons. The relationship between the auditor and the clients' needs to be such that firstly, he is himself satisfied about his independence and secondly, no unbiased person would be forced to conclude on an objective assessment of circumstances that there is likely to be an abridgement of the auditor's independence. Thus, independence of auditor is a pre-requisite whose existence needs to be assured.*
18. *In the instant case, the Committee noted that the Respondent while acting as the statutory auditor of the Company from the F.Y.1993-94 and 1996-97 (except 1995-96), has in fact signed the cheques for the company, thereby, involving himself in the day-to-day functioning of the Company which is not excepted of an auditor who is expected to maintain highest degree of independence. The Committee in this context, is further of the view that by undertaking the responsibility of signing of the Cheque on behalf of the Company, the Respondent has also undertaken the responsibility to ensure the compliance of all legal technicalities for the payments placed before him which in fact was in conflict with his role as the statutory auditor whereby he was expected to act*

independently. Thus, the Committee is of the considered opinion that the Respondent has acted in dual capacity whereby on one hand he has performed the managerial responsibilities of signing as authorized signatory and assuming the custodianship of the finances of the Company and on the other hand holding the position of the Statutory auditor as well. Thus in conclusion, the Respondent is guilty of Professional Misconduct falling within the meaning of Clause (4) of Part-I of the Second Schedule to the Chartered Accountant Act, 1949.

19. *The Committee further noted that the Complainant Department has also placed on record zerox copies of certain salary sheets of the employees of the Company which have been signed / initialed by the Respondent as E.D. Finance which have been counter signed by the Assistant Official Liquidator, High Court, Delhi. The Complainant in this context submitted that the Company had gone into liquidation and all the documents were sized and kept in a building and with the help of Official Liquidator, certain documents were retrieved and zerox of the same were taken for the purpose of Investigation by the Complainant Department. The zerox of the salary sheets of the employees of the company forms part of such retrieved documents which is an evidence of the de-facto role assumed and played by the Respondent in the Management of the Company. The Committee is quite mindful of the fact that the same have been negated by the Respondent while submitting his defence, however, no documentary evidence has been placed on record by the Respondent to substantiate or establish that the said documents are forged or fabricated."*

8. As per these findings, the Disciplinary Committee found the Appellant NOT GUILTY of professional misconduct falling within the meaning of Clause (2) of Part-IV of the First Schedule and Clauses (7) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949 and found him GUILTY of professional misconduct falling within the meaning of Clause (4) of Part-I of the Second Schedule of the Chartered Accountants Act, 1949, and subsequently awarded the punishment as detailed *supra* in all these three matters.
9. Aggrieved by the same the Appellant is in appeal before us in these cases.
10. Before us, the Appellant was present through his authorized representative Mr. Arvinder Pal Singh besides being present in person. The Appellant reiterated the same submissions and has taken various grounds of appeal before us, for which all his submissions are being discussed in this Order.
11. As is evident from the above facts, these cases were initiated on the complaint filed by the Serious Fraud Investigation Office (SFIO), consequent upon the investigation carried out by the Ministry of Corporate Affairs in the cases of JVG Group of Companies. The case was initiated with various charges; however after examination, only charge under clause (4) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949, survived as per the Report of the Disciplinary Committee for which the Appellant was found guilty.
12. The said clause (4) as reproduced *supra*, deals with the independence of the auditors. It is perceived that if the auditor has substantial interest in the entity being audited by him, then he will lose independence. In this regard the basic

principle has been explained by the Council of the ICAI from time to time by issuing of various Guidance notes, Code of Conduct and Code of Ethics etc.

13. This issue arose due to the RBI Inspection Report dated 15th July, 2011, as reproduced in Para (13) of the findings of the Disciplinary Committee *supra*, alleging the involvement of Appellant in JVG Group of Companies as a statutory auditor as well as de-facto Executive Director (Finance). The same allegations were also levied in the Investigation Report of the Ministry of Corporate Affairs as reproduced in Para (14) of the Findings *supra*. It is alleged that besides being auditor of the Company the Appellant was controlling the Finance, Banking and Accounting functions of the JVG Group of Companies. In Para (16) of the findings, the Disciplinary Committee also found that the Appellant has signed numerous cheques of the Company as signatory authorised by the Board of Directors of the Company, a fact not disputed by the Appellant.

14. The Appellant explained before the Disciplinary Committee of the Institute of Chartered Accountants of India that he was never even a Director in the Company, leave aside being a Finance Director or Executive Director, as was evident from the records of the Registrar of Companies and other Statutory Filings. Nor he or his relative anytime had any substantial interest in the Company audited by him. He further submitted that he only signed cheques as 'Authorised Signatory', the payments of which were duly approved by the management. Thus, he did not perform any managerial function and had no discretionary power or authority. He also pleaded that at the relevant time, the Guidance Note on Independence of Auditors, as issued by the Institute, *inter alia*, allowed that :-

"An auditor may prepare or assist in the preparation of the accounts of a company before proceeding to audit them, or, agree to provide financial advice or to represent the Company for its tax matters without impairing the independence in any way".

15. The Appellant thus submitted that at that relevant time, the relevant framework of the applicable Law permitted the auditors to perform certain other services as well. In other words, he submitted that at that time, the said work of signing of cheques done by the Appellant was not prohibited and thus there is no misconduct on his part on this account.

16. On the other hand, Mr. Amit Sharma, Advocate appearing on behalf of the Institute of Chartered Accountants of India as well as Mr. Saud Ahmad, Joint

Director & Mr. Ajeet Kumar Srivastava, Prosecutor appearing on behalf of SFIO in all the above mentioned Appeals vehemently supported the Impugned Order passed by the Disciplinary Committee. They submitted that the act of the Appellant was misconduct within the meaning of the said clause (4) of the Act. Mr. Amit Sharma, Advocate appearing on behalf of the Institute of Chartered Accountants of India also relied on the Code of Conduct issued by the Institute, 1995 Edition, which was then in vogue. He submitted that while interpreting this, the Council has widened the scope and covered all cases where there can be a conflict of interest or threat to Independence of Auditors. He drew our attention to page 59 of the said Code of Conduct, it *inter alia* provided that, even the following was mis-conduct as per the said Code of Conduct :-

- a) *Accept the auditor ship of a college, if he is working as part time lecturer in the college*
- b) *Where relative of auditor or partner or auditor has any substantial interest in the business being audited*

He submitted that the role played by the Appellant as alleged in report of RBI and Ministry was of much more involvement in the affairs of the auditee. Thus, he was guilty of said misconduct as decided by Disciplinary committee.

17. Additionally, the Appellant submitted before us that he had also raised a preliminary objection before the authorities below, which was initially filed before the Director (Discipline) that the Complaint was time barred for consideration as per the Rules and Regulations. He pleaded that the complaint relates to very old period and he does not have records as all of them have been submitted to SFIO on demand. The Appellant further submitted that the same objection was also raised even before the Disciplinary Committee.

18. The Learned Counsel appearing on behalf of the Appellant submitted the same arguments before us regarding the role of the Appellant in the auditee companies. He submitted that various activities were permitted to be performed by the auditors at that relevant time and the act of the Appellant is covered by those and therefore, the Appellant has not committed any misconduct and thus, he should not be penalised for the same.

19. He further submitted that due to lapse of time and various events, various papers that he wanted to produce are not in his possession. Furthermore, it is submitted that he has raised the ground of limitation before lower authorities but the same was not considered without giving any reason and that the same has been ignored by the Director (Discipline) while forming the 'Prima Facie Opinion' and no findings on the same was given even by the Disciplinary Committee.

Thus, according to the Appellant, neither Director (Discipline) nor the Disciplinary Committee have even considered the said preliminary objection.

20. The Learned Counsel appearing on behalf of the Appellant pleaded that this was an important safeguard provided to the members of the Institute, in case they were unable to produce evidence and record due to lapse of long time. The Learned counsel for the Appellant argued forcefully that the authorities below have erred in not considering and deciding this fundamental issue which precludes the Appellant from advancing evidence in support of work done by him which was permissible as per the Code of Conduct then prevailing.

21. Per Contra, the Learned Counsel appearing on behalf of the Respondent Institute supported the orders of lower authorities in this regard as well. He submitted that as mentioned in the PFO, as the matter was under investigation since 1998, the matter was not considered to be time barred. He further submitted that except merely taking defence about time barring, the Appellant has not sated at all as to what evidence he wanted to produce and why the same is now not available with him.

22. The Learned Counsel appearing on behalf of the Appellant submitted that in Appeal before this Authority also, he has raised the same ground being Ground No. (G4) of his Appeal Book by stating that the complaint itself was barred by limitation.

23. The learned Counsel appearing on behalf of the Appellant also relied upon various judicial pronouncements in his defence including the following:-

1. Sunderdas Thakersey and Brothers V/s P K Mukherji, AIR 1966 Cal 468
2. Kishori Lal Datta V/s P K Mukherji, AIR 1964 Cal 131
3. H.V. Panchaksharappa V/s K.G.Eshwar, AIR 2000 SC 3344

24. We have noted that the Appellant has repeatedly taken the defence of limitation since inception of proceedings, and it appears from the records available before us that the same has not been properly examined and decided either by the Director (Discipline) or by the Disciplinary Committee of the Institute, thus, under the circumstances and in the interest of justice, we consider it appropriate to discuss and decide this issue first.

25. Though, we found that this ground had been raised by the Appellant before the Director (Discipline) vide his preliminary submissions dated 21st January, 2011 and the same was briefly narrated in Para (3.1) of the Prima facie Opinion formed by the Director (Discipline) but the same was not properly addressed by her in the PFO and was dismissed by a brief mention as under:

"The plea taken by the respondent that the matter is 15 years old does not stand as since 1998 the matter is under investigation".

26. We have also noted that the Disciplinary Committee even has not discussed this issue of limitation anywhere either in its Report or in its Impugned Order, much less giving any findings on the same.

27. At this stage, it is also relevant to record here the Law relating to the limitation of entertaining any complaint of professional or other misconduct against any member of the Institute by the Disciplinary Directorate, which, before the Chartered Accountants (Amendment) Act, 2006, was contained in Regulation (14) of the Chartered Accountants Regulations, 1988. The said Regulation is reproduced hereunder:

"14. Time limit on entertaining complaint or information

[Applicable to a complaint or information pending before the Council or any inquiry initiated by the Disciplinary Committee or any reference or appeal made to a High Court prior to 17.11.2006]

Where the Council is satisfied that there would be difficulty in securing proper evidence of the alleged misconduct, or that the member against whom the complaint has been filed, would find it difficult to lead evidence to defend himself on account of the time lag, or that changes have taken place rendering the inquiry procedurally inconvenient or difficult, the Council may refuse to entertain a complaint or information in respect of misconduct made more than 10 years after the same was alleged to have been committed."

28. After enactment of Chartered Accountants (Amendment) Act, 2006, altogether a new set of Procedure Rules to deal with the complaints or information of any misconduct alleged to be committed by any member of the Institute, namely the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 has been brought by the Central Government in exercise of the powers conferred by clauses (c) and (d) of sub-section (2) of Section 29A read with sub-section (4) of Section 21 and sub-sections (2) and (4) of Section 21B of the Chartered Accountants Act, 1949, into existence applicable w.e.f. the date of their publication in the Official Gazette i.e., 28th February, 2007. Rule (12) of these aforementioned rules now deals with the issue of limitation, which is also reproduced hereunder :-

"12. Time limit on entertaining complaint or information:-

Where the Director is satisfied that there would be difficulty in securing proper evidence of the alleged misconduct, or that the member or firm against whom the information has been received or the complaint has been filed, would find it difficult to lead evidence to defend himself or itself, as the case may be, on account of the time lag, or that changes have taken place rendering the inquiry procedurally inconvenient or difficult, he may refuse to entertain a complaint or information in respect of any misconduct made more than seven years after the same was alleged to have been committed and submit the same to the Board of Discipline for taking decision on it under sub-section (4) of Section 21A of the Act."

29. We have heard rival submissions of all the parties, examined all the documents, pleadings and evidence produced before us and before lower authorities besides perusing various case laws cited by the parties.

30. The law of limitation under various statutes is not merely a legal right but it has been prescribed with definite objects in mind to ensure that proper justice is delivered to the litigants.

31. In Halsbury's Laws of England, the objects of the Limitation Acts have been presented as follows:

"The Courts have expressed various reasons supporting the existence of statutes of limitation, including the following -

(i) That a defendant might have lost the evidence to dispute the State claim."

32. Further, the Encyclopedia Britannica also defined the significance of Law of Limitation as under:-

"Statute of limitations, legislative act restricting the time within which legal proceedings may be brought, usually to a fixed period after the occurrence of the events that gave rise to the cause of action. Such statutes are enacted to protect persons against claims made after disputes have become stale, evidence has been lost, memories have faded, or witnesses have disappeared."

33. The Hon'ble Supreme court of California, in the case of Addison v. State, 21 Cal. 3d 313. 317. 578 P.2d 941. 942-43. 146 Cal. Rptr. 224. 226 (1978) has observed as under:

"It is fundamental that the principal purpose of statutes of limitation is to prevent the assertion of stale claims by plaintiffs who have failed to file their action until evidence is no longer fresh and witnesses are no longer available The statutes, accordingly, serve a distinct public purpose, preventing the assertion of demands which, through the unexcused lapse of time, have been rendered difficult or impossible to defend"

34. It is therefore clear that the right of any respondent to take defence of Limitation is a substantial right and cannot be rejected lightly without examining all facts of the case.

35. On examination of Rule (12) of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007, it is clear that the defence of limitation provided in this Rule is not absolute right of Defendants, but it certainly casts a responsibility on the Director (Discipline) to examine as to whether on the facts of the case, the

Defendant would find difficult to defend himself or lead evidence, on account of time lag or changes have taken place rendering the enquiry procedurally difficult.

36. While on the one hand, we find that the Appellant has taken this ground from very beginning but he has not submitted any details or description of the evidence which he wants to produce in support of his contention, which as per his version is not available now with him. On the other hand, we also find that the Director (Discipline) has summarily rejected the same without examining the facts of the matter and without passing a reasoned Order. The Disciplinary Committee has not even considered this ground much less giving any finding on the issues.

37. Be that as it may be, but it is clear from the records available with us that no enquiry has been carried out either by the Director (Discipline) or by the Disciplinary Committee of the Institute of Chartered Accountants of India about the facts in this regard. More so, when the Appellant is raising it from very beginning.

38. Here before us, the issue is to ascertain the actual services rendered by the Appellant to the Companies, in addition to being their statutory auditor. In this regard, we are of the view that these were required to be ascertained from the evidence on record by the Director (Discipline) and/or by the Disciplinary Committee and also to examine the contentions raised by the Appellant about inability to file evidence in his defence. Clearly, the same has not been done. This involves detailed examination of facts, Report of RBI, Report of Ministry of Corporate Affairs, specific defence of Appellant about what evidence he is precluded from leading and all other evidence on Record, for the first time. Considering these facts and circumstances of the case, in the interest of justice, we feel that it would be proper to carry out this exercise at the level of the Disciplinary Committee.

39. In the light of this, we have no option but to set aside all these cases to the Disciplinary Committee. We accordingly set aside the same and remit back all the cases to Disciplinary Committee. The Disciplinary Committee is directed to examine and decide by reasoned order the preliminary issue of limitation as raised by the Appellant in the light of observations made in this Order and decide the other Grounds after examining the objections raised by the Appellant in appeal. Needless to say that the Disciplinary Committee will provide the Appellant adequate opportunity of being heard. The Appellant will be at liberty to raise before Disciplinary Committee all issues raised before us or any other issue as well and produce any evidence in support of their case. The Disciplinary

Committee will dispose of these cases within six (6) months from the date of receipt of this order.

40. The Appellant has also taken a ground of Appeal before us that the Disciplinary Committee has decided these cases in accordance with the law which was not prevalent when the alleged misconduct was committed but came into effect after the amendment made in the year 2006 in the Chartered Accountants Act 1949, and/or by revised publications of ICAI. Since, we have set aside the Impugned Orders and the matters have been **remanded back to the Disciplinary Committee**, we direct the committee to also examine this issue and to decide these cases as per law prevailing at the relevant time including code of conduct and guidelines issued by the Council, whichever were in force at that relevant time, of the alleged misconduct and not as per the law enacted subsequently.

41. It is clarified that since the matters have been remanded back to the Disciplinary Committee, therefore, we have not decided any issue on merit and we do not consider it necessary to decide other grounds of appeal raised by the Appellant under the circumstances, though, the Appellant will be at full liberty to raise all grounds of Appeal before the Disciplinary Committee.

42. These appeals are disposed of accordingly. Interim orders, if any, are vacated. No order as to cost.

43. Registrar of the Authority is hereby directed to keep a copy of this common order in each appeal file.

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Praveen Garg
Member

Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY
(Constituted under The Company Secretaries Act, 1980)

APPEAL NO. 10/ICSI/2015

IN THE MATTER OF:

Benny Methew

....Appellant

Versus

Institute of Company Secretaries of India and others

.....Respondents

CORAM

Hon'ble Mr. Justice M.C. Garg
Hon'ble Ms. Preeti Malhotra
Hon'ble Mr. Praveen Garg
Hon'ble Dr. Navrang Saini

Chairperson
Member
Member
Member

PRESENT

For the Appellant:

Dr. KBS Rajan, Advocate through proxy Mr. Arjun Gadhoke appearing on behalf of the Appellant

For the Respondents:

1. Mr. R.D. Makheeja appearing on behalf of the ICSI
2. Mr. Gaurav Tandon, Assistant Director (Discipline) appearing on behalf of the ICSI
3. Mr. Surya Narayan Mishra, Joint Director, Law appearing on behalf of the ICSI
4. Mr. Rasbihari Tiwari, Executive (Law) appearing on behalf of the ICSI
5. Ms. Meenakshi Gupta, Director Discipline appearing on behalf of the ICSI

ORDER

Date: 03.02.2018

1. Being aggrieved by the Order dated 1st August, 2016 passed by this Authority in Appeal No.10/ICSI/2015 namely Benny Methew (Appellant) vs. M/s Kerala Tourism Development Corporation Ltd (KTDC) and the Institute of Company Secretaries of India (Respondents), whereby the Appellate Authority *inter-alia* directed that a cost of Rs. 20,000/- (Rupees twenty thousand only) be paid by the Institute of Company Secretaries of India (ICSI) to the Appellant in addition to the refund of fine imposed on him by the Disciplinary Committee of ICSI, if the same is already stand paid by the Appellant, the present review application has been filed by the ICSI praying that the present review application be allowed and the aforesaid Order of the Authority be amended relating to the payment of cost of Rs. 20,000/- (Rupees twenty thousand only) by the ICSI to the Appellant in addition to any other Order as may be appropriate in the facts and circumstances of the matter.
2. For the purpose of deciding the present review application the brief facts of the matter are that M/s Kerala Tourism Development Corporation Ltd (KTDC) filed a complaint in Form-I under Section 21 of the Company Secretaries Act, 1980, read with Rule (3) of

the Company Secretaries (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases), Rule 2007 against the Appellant alleging professional misconduct on the grounds that (i) the appellant undertook private work as Company Secretary without prior permission from M/s KTDC, (ii) utilized the materials and human resources of M/s KTDC for private works and (iii) affixed fraudulently the signature of Managing Director in communication to the Government.

3. The Disciplinary Committee of the ICSI, after examining the complaint, the reply thereto and other materials on records in addition to hearing of both the parties held the Appellant guilty of Professional Misconduct relating to affixing the signature of Managing Director in a communication to the Government, misusing the computer for his private work while employed as Secretary and Finance Controller of M/s KTDC and undertaking private work as a Company Secretary without obtaining prior permission from M/s KTDC and accordingly, the Appellant was awarded the penalty of removal of his name from the Register of Members of ICSI for a period of 30 days and also imposed fine of Rs. 20,000/- vide Order dated 9th June, 2015 signed on 30th July, 2015.
4. Aggrieved by the aforesaid Order of the Disciplinary Committee of ICSI, the Appellant filed an Appeal under Section 22E of the Company Secretaries Act, 1980, before this Authority, which was allowed by the then bench of the Appellate Authority presided over by the Hon'ble Mr. Justice P. K. Bhasin by setting aside the Impugned Order of the Disciplinary Committee and a cost of Rs. 20,000/- was also imposed on ICSI to be paid to the Appellant by observing that a harsh punishment of removal of the name of the Appellant from the Register of Members of ICSI along-with a fine of Rs. 20,000/- has been given to the Appellant there being no sufficient evidence against him.
5. As noted above in Para (1) of this Order, being aggrieved by the Order passed by this Authority, ICSI filed this review application before us.
6. We have perused the relevant records of this matter and also heard the oral arguments of the parties. The liberty of filing written arguments was also granted to them.
7. During the course of proceedings before us, the Learned Counsel Shri R.D. Makheeja, Advocate appearing on behalf of ICSI submitted that the ICSI was not a party before the Disciplinary Committee and even in the present Appeal also only the Appellant, Mr. Benny Methew and the Respondent M/s KTDC were the necessary parties. Therefore, the ICSI was not a party either before the Disciplinary Committee or in the Appeal Memo but registered his presence pursuant to a Notice received from the Appellate Authority in

the matter. ICSI was only a *Pro-forma* party as no relief has been sought by the Appellant against the ICSI.

8. Additionally, it was also submitted before us that ICSI was not given an opportunity by this Hon'ble Authority in terms of sub-Section (2) of Section 22E of the Company Secretaries Act, 1980, before imposing the cost. Further, it was also submitted that the Director (Discipline) and the Disciplinary Committee of ICSI are independent quasi-judicial authorities in their respective functioning. The Learned Counsel submitted that it is true that the Disciplinary Directorate and the Disciplinary Committee are constituted by the Council of the ICSI in exercise of its power conferred on it under Section 21 and Section 21B, respectively, of the Company Secretaries Act, 1980, but that does not make the ICSI responsible for the independent quasi-judicial function of these Authorities.
9. Furthermore, it was also submitted by Shri R.D. Makheeja, Advocate that the proper party for imposition of cost could be the complainant, i.e., M/s KTDC, which un-necessarily triggered the entire process and abused the process of Law.
10. Per contra, the Learned Counsel Dr. K.B.S. Rajan, Advocate appearing through Mr. Arjun Gadhoke on behalf of the Appellant submitted in writing that the Order dated 1st August, 2016 earlier passed by this Authority, against which the present review application has been filed is the full and judicious consideration by this Authority after hearing the Appeal at length which culminated in the comprehensive Order. It was further submitted that the present review application does not refer to any error or illegality on the face of records in the decision arrived at by this Authority. Furthermore, it was also submitted that the Appellant as well as the Institute herein were heard by the Authority before passing the aforesaid Order.
11. At this stage, however, during the course of hearing, we wish to observe that the Company Secretaries Act, 1980, does not contain any specific provision enabling this Authority to review its Orders. In the light of this observation, a very basic, fundamental and a core question arose before us for consideration as to whether the Appellate Authority, being a quasi-judicial body, in absence of any specific provision of review, has the power to review its own Orders/Judgments and whether this act of review would fall under a statutory or a procedural review?
12. In view of the aforesaid, we thought it appropriate to hear the arguments of both the parties so as to finally dispose of the present review application.

13. The Learned Counsel Shri R.D. Makheeja appearing on behalf of the ICSI submitted that it is an established principle of Law that where a court or quasi-judicial Authority having jurisdiction to adjudicate on merit, proceeds to do so, the judgments or the Orders can be reviewed only if the court or the quasi-judicial Authority is vested with the power of review by the express provision or by necessary implication. He further submitted that the review which has been requested by ICSI is a procedural review and the procedural review belongs to a different category. In such a review the court or a quasi-judicial authority having jurisdiction to adjudicate if commits a procedural illegality which goes to the root of the matter and invalidates the proceedings itself and consequently the Order passed therein, the same can be done. In this context, he has placed the reliance on the judgment of Hon'ble Supreme Court of India in case of **Kapra Mazdoor Ekta Union Vs. Management of Birla Cotton Spinning and Weaving Mills Ltd. (MANU/SC/0208/2005) (Para 19)**. The relevant Para (19) is reproduced as hereunder:-

"Applying these principles it is apparent that where a Court or quasi-judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the Court or the quasi-judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the Court or quasi-judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein. Cases where a decision is rendered by the Court or quasi-judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a case the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the Court or the quasi-judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein, inasmuch the opposite party concerned was not heard for no fault of his, or that the matter was heard and decided on a date other than the one fixed for hearing of the matter which he could not attend for no fault of his. In such cases, therefore, the matter has to be re-heard in accordance with law without going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding. In Grindlays Bank Ltd. vs. Central Government Industrial Tribunal and others (supra), it was held that once it is established that the respondents were prevented from appearing at the hearing due to sufficient cause, it followed that the matter must be re-heard and decided again."

14. Further, it was submitted that the present application of ICSI for review falls under the category of procedural review, the powers in respect of which can be exercised by this Authority even if it is not vested with powers of review by express provision of law. It was also submitted that the Order imposing cost on ICSI, which was not a party before

the Disciplinary Committee has no role to play was a procedural irregularity and could be rectified by this Authority by way of review.

15. Adversely, the Learned Counsel appearing on behalf of the Appellant submitted that argument taken by the Institute that the present case is that of a Procedural review is erroneous. The power of procedural review could only be exercised in case where a procedural error has occurred, as for example, non-adherence to the principles of natural justice of non-following of Wednesbury's principle which has been a consuetude even if not provided for in the statutes. He further submitted that in the present case not only that no specific power to review has been provided for review in the Act itself but at the same time there is no error in the judgment which could be termed as a procedural error.

16. Additionally, during the course of hearing on the core issue as above, our attention has also been drawn towards a case namely **Mr. Lokesh Dhawan vs. Union of India and Others** decided by the Hon'ble High Court of Delhi dated 11th August, 2003, wherein, it has been decided that it is clear that in so far as a quasi-judicial authority is concerned, it has no inherent power to review its own decision. The power to review must be conferred on it by statute, expressly or by necessary implication. In the present case, there is not such conferment of power of review by the said Act. We have also observed that the following cases decided by the Hon'ble Supreme Court of India have been referred therein:-

Patel Narshi Thakershi & Others Vs. Shri Pradyuman Singh Ji Arjun Singh Ji, the Hon'ble Supreme Court in Paragraph (4) in this case held as under:-

".....It is well settled that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication. No provision in the Act was brought to our notice from which it could be gathered that the Government had power to review its own order."

Again in case of **Dr. (Smt) Kunkesh Gupta vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P) & Others,** the Hon'ble Supreme Court categorically held that:-

"11. It is now well established that a quasi-judicial authority cannot review its own order, unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction."

In case of **Kewal Chand Mimani (D) by LRs. V. S.K. Sen and Others,** the Supreme Court reiterates the aforesaid principles following the decision of Patel Narshi Thakeshi's case (supra) as follows:-

"In any event, law is well settled on this score that the power to review is not any inherent power and it must be conferred by law either specifically or by necessary implication. In this context, reference may be made to the decision in Patel Narshi Thakershi v. Prdadyumnsinghji Arjunshinghji."

17. Having heard the arguments advanced by the parties as above besides perusing all relevant records including the Order against which the review is being sought in the present matter, in addition to considering the aforesaid judgments, we are of the considered view that it is a well settled law that the power to review is not an inherent power and it must be conferred by Law either specifically or by necessary implication, whereas, no specific provision of review is present in the Company Secretaries Act, 1980, whereby, this Appellate Authority had been empowered to review its own Order.
18. We may also add that we are not impressed by the submission of the Learned Counsel appearing on behalf of the Institute of the Company Secretaries of India that the Board of Discipline is altogether an independent and a separate body from the Institute itself and therefore, the Institute of Company Secretaries of India was not a party before the Appellate Authority, when, the Impugned Order was passed by it. In fact, this is the Council of the Institute of Company Secretaries of India which is required to constitute a Board of Discipline in terms of Section 21A and a Disciplinary Committee of the Institute in terms of Section 21B of the Company Secretaries Act, 1980. Thus, to consider the Board of Discipline something different from the Institute is not an appropriate and correct submission. Therefore, in case of any procedural wrong committed by the Board of Discipline or the Disciplinary Committee, as the case may be, we are of the view that the ultimate responsibility will lie on the Institute and the Board of Discipline and / or the Disciplinary Committee, being the quasi-judicial bodies of the Institute itself cannot be made a subject of imposing any penalty against them.
19. Consequently, based on the above principle of settled law and not being in agreement with the stand taken by the Learned Counsel appearing on behalf of the Institute that this is the procedural review, the present review application is accordingly rejected. No cost to either party.

Justice M. C. Garg
Chairperson

Preeti Malhotra
Member

Praveen Garg
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY
(Constituted Under The Company Secretaries Act, 1980)

APPEAL NO. 15/ICSI/2017

IN THE MATTER OF:

Praveen Kumar Kanungo

Versus

....Appellant

**Disciplinary Committee
Institute of Company Secretaries of India**

....Respondent No.1

Shri Pawan Kumar Shadija

....Respondent No. 2

CORAM

Hon'ble Mr. Justice M.C. Garg
Hon'ble Mr. Sanjay Grover
Hon'ble Dr. Navrang Saini

Chairperson
Member
Member

PRESENT

For the Appellant:

1. Mr. Praveen Kumar Kanungo, Appellant in person
2. Mr. Natwar Rai, Advocate appearing on behalf of Appellant

For the Respondents:

1. Mr. R.D. Makheeja appearing on behalf of ICSI
2. Mr. Gaurav Tandon, Assistant Director (Discipline) appearing on behalf of ICSI
3. Mr. Satish Kumar, Executive (Law) appearing on behalf of ICSI

ORDER
26.03.2018

1. Being aggrieved of the Order dated 26th September, 2017 passed by the Disciplinary Committee of the Institute of Company Secretaries of India under sub-section (3) of Section 21B of the Company Secretaries Act, 1980 (hereinafter referred to as the "Act") read with Rule 19 (1) of the Company Secretaries (Procedure of Investigations of Professional and other misconduct and conduct of cases) Rules, 2007 (hereinafter referred to as the "Rules"), Mr. Praveen Kumar Kanungo, a Practicing Company Secretary, the Appellant herein, against whom a complaint was filed by Shri Pawan Kumar Shadija, one of the Promoter Directors of M/s Akruiti Trexim Private Limited (hereinafter referred to as the "Company"), in form (I) on 14th January, 2014 under Section 21 of the Act read with sub-rule (1) of Rule (3) of the Rules, has filed this appeal under Section 22E of the Act for seeking quashing of the aforesaid Order dated 26th September, 2017 against the

Institute of Company Secretaries of India (ICSI) and others, whereby, the Disciplinary Committee held him guilty of professional misconduct under clause (7) of Part-I of the Second Schedule of the Act and awarded punishment of removal of Appellant's name from the Register of members for a period of one year after expiry of 60 days from the issuance of the aforesaid order and also imposed fine of Rs.1,00,000/-(Rupees One Lakh Only). In case of failure of the appellant to pay fine of Rs.1,00,000/-(Rupees One Lakh Only) within the stipulated time period, his name shall be removed from the Register of Members of the ICSI for another period of one year, after 60 days from the date of issue of the aforesaid final order. The said clause (7) of Part-I of the Second Schedule of the Act reads as under:-

**"Second Schedule
Professional misconduct in relation to Company Secretaries in Practice**

A Company Secretary in practice shall be deemed to be guilty of professional misconduct, if he-

(7) does not exercise due diligence, or is grossly negligent in the conduct of his professional duties."

2. For the purpose of deciding the present Appeal, the brief facts of the matter, which we have noted from the records are that Mr. Pawan Kumar Shadija, Complainant before the Institute of Company Secretaries of India made a complaint under Section 21 of the Act read with Sub-Rule (4) of Rule 3 of the Company Secretaries (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 against the Appellant namely Mr. Praveen Kumar Kaunungo alleging the following:-
 - i. That Mr. Praveen Kumar Kanungo had not exercised due diligence while certifying two Forms 32, due to which name of four Directors, i.e., (a) Pawan Kumar Shadija, (b) Ms. Sandhya Shadija, (c) Mr. Akash Kumar Shadija; and (d) Mr. Neeraj Kumar Shadija of Akruti Trexim Private Limited were removed from the website of the Ministry of Corporate Affairs;
 - ii. That he has given wrong certification of Form 20(b) pertaining to M/s Akruti Trexim Private Limited for the financial year ending 31st March, 2012; and
 - iii. That he had also issued a wrong certificate to the Statutory Auditors regarding shareholding pattern of the company.
3. Pursuant to the receipt of the aforesaid complaint, the Director (Discipline) found Mr. Praveen Kumar Kaunungo Prima-Facie guilty of professional misconduct under clause (7) of Part-I of the Second Schedule of the Act for certifying two

Forms 32 pertaining to the removal of Directors of M/s Akruti Trexim Private Limited as Mr. Praveen Kumar Kaunungo did not exercise due diligence which is expected from a professional. However, he was not found guilty of professional misconduct regarding certifying Form 20 (b) for the financial year ended 31st March, 2012 of M/s Akruti Trexim Private Limited.

4. The Director (Discipline) placed his report of the Prima-Facie guilty before the Disciplinary Committee for its consideration, wherein, the Disciplinary Committee agreed with the Prima Facie opinion of the Director (Discipline) and decided to proceed further in the matter in accordance with the Act and the Rules applicable in this regard. Accordingly, after hearing of all the related parties and examining of the complaint, written statement and various other documents on record, the Disciplinary Committee passed an Order dated 26th September, 2017 whereby, the Appellant was held guilty and awarded the punishment as mentioned in Paragraph (1) above of this Order.
5. Subsequent to noting of the facts of the matter as above and at the time of final hearing on 25th February, 2018, wherein the Appellant along with his Counsel Mr. Natwar Rai was present, submitted before us that the punishment awarded by the Disciplinary Committee to the Appellant is not justified considering the nature of the professional misconduct on the part of the Appellant as alleged and awarded by the Disciplinary Committee in other cases of the violation of the said clause or for the similar nature of Professional misconduct, wherein the Disciplinary Committee of the Company Secretaries of India awarded the punishment of either reprimand or reprimand with fine. Whereas, in this case the Disciplinary Committee awarded an exorbitant punishment of removal of the name of the Appellant from the Register of Members of the Institute for a period of one year along-with a fine of Rs.1,00,000/-.
6. The Learned Counsel further submitted that the Appellant does not want to argue in respect of the alleged professional misconduct, however, he wants to argue on the issue of quantum of punishment, without pressing on the merits of the case relating to professional misconduct. Therefore, the Learned Counsel appearing on behalf of the Appellant submitted that the punishment awarded to the Appellant is too harsh. The Disciplinary Committee has not been fair in awarding the punishment as it has taken a different view in this case and

therefore, by submitting few Orders passed by the Disciplinary Committee relating to similar nature of default (Certification of Form 32/DIR 12), submitted that the same requires consideration by this Authority.

7. We have noted the details of punishment awarded by the Disciplinary Committee in similar matters, as brought on record by the Learned Counsel appearing on behalf of the Appellant, as hereunder:

Case no.	Name of Parties	Date of Decision of Disciplinary Committee	Misconduct	Punishment awarded
ICSI/DC/311/2013 ICSI/DC/312/2013 ICSI/DC/314/2013 ICSI/DC/314/2013	Anil Kumar Agarwal Vs. Ms. Seema Sharma, ACS 25258 CP No. 11118	28-04-2017	Certified Form DIR-12	(Common order in four complaints) Reprimand, and Consolidated fine of Rs.10,000/- in all four complaints payable within 60 days from the date of issue of this final Order. In case of failure of the Respondent to pay the amount of Rs.10,000/- within the stipulated time period, her name shall be removed from the Register of Members of the ICSI for a period of 30 days.
ICSI/DC/313/2015	Sunil Kumar Agarwal Vs. Ms. Seema Sharma, ACS 25258 CP No. 11118	28-04-2017	Certified Form DIR-12	Reprimand
ICSI/DC/156/2012	Pramod Khosla Vs. Sital Prasad Swain	28-04-2017	Certified Form DIR-12	Reprimand and Fine Rs. 5,000/-

8. On the other hand, the Learned Counsel appearing on behalf of the Institute did not object for review of quantum of punishment and submitted before us that the Authority may decide the same considering the merit of the case.
9. From the perusal of Orders of the Disciplinary Committee in three cases referred in the table above, it appears that Disciplinary Committee has taken a different

view in this case though the nature of professional misconduct relates to certification of Forms.

10. Accordingly, after perusing the documents on record and hearing the arguments of the Learned Counsel of the Appellant on the core issue of quantum of punishment, we are of the considered view that punishment awarded to the Appellant in the present matter is certainly on the higher side, enormous and harsh in comparison with the punishment awarded to the errant members of the Institute by the Disciplinary Committee for the violation of same professional misconduct in other cases. Further, we are of view that the interest of justice will be met out by reducing the punishment awarded to the Appellant. Therefore, in exercise of the powers conferred on this Authority under clause (b) of subsection (2) of Section 22E of the Company Secretaries Act, 1980, we hereby reduce the punishment awarded and the fine imposed on the Appellant by the Disciplinary Committee of the Institute and passes the following order in this regard.

- i. Reprimand and fine of Rs.50000/- payable within sixty days from the date of issue of this Order.**
- ii. In case of failure of the Appellant to pay the fine of Rs.50000/- within the stipulated time, his name shall be removed from the Register of Members of the Institute for a period of one month, after sixty days from the date of issue of this order.**

11. Needless to mention that in case the Appellant has already deposited that amount of fine of Rs. 1,00,000/- in the Institute, the balance amount of Rs. 50,000/- be refunded to him within a period of 45 days from the date of receipt of this Order.

12. The Authority also wishes to advise the Disciplinary Committee to keep uniformity in awarding the punishment in similar nature of professional misconduct in the interest of justice in future, of course the ultimate impact of the negligence caused by the Appellant be given the appropriate weightage besides considering other facts and circumstances involved in the matter for deciding the punishment for violation of any professional duty expected to be carried out by the members of the Institute.

13. A copy of this Order be sent to the Institute of Company Secretaries of India, as well as to the Appellant for information, records and compliance at their respective end.

14. With this, the present Appeal is disposed of. No cost to either party.

Justice M. C. Garg
Chairperson

Sanjay Grover
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY
(Constituted under the Company Secretaries Act, 1980)

APPEAL NO. 07/ICSI/2017

IN THE MATTER OF:

Sital Prasad Swain

Versus

....Appellant

**Disciplinary Committee, Institute
of Company Secretaries of India**

....Respondent No. 1

Shri Pramod Khosla

....Respondent No. 2

**The Institute of Company
Secretaries of India**

....Respondent No. 3

CORAM

Hon'ble Mr. Justice M.C. Garg

Chairperson

Hon'ble Ms. Preeti Malhotra

Member

Hon'ble Mr. Praveen Garg

Member

Hon'ble Dr. Navrang Saini

Member

PRESENT

For the Appellant:

Shri Kamal Bansal, Advocate along-with Mr. Sital Prasad Swain, Appellant in person

For the Respondents:

Mr. R.D. Makheeja, Advocate along-with Mr. Satish Kumar, Executive Law and Mr. Gaurav Tandon, Assistant Secretary (Law) appearing for ICSI.

Mr. Biswajit Das, Advocate along-with Mr. Mohit Sharma, Advocate, CS. Sunita Mukhopadhyaya, authorized representative and Mr. Nitin Khosla, Son of Mr. Pramod Khosla appearing for Respondent No. 2

ORDER

Dated: 04.08.2018

1. Being aggrieved by the Order dated 28th April, 2017 (Impugned Order) passed by the Disciplinary Committee of the Institute of Company Secretaries of India under Sub-Section (3) of Section 21B of the Company Secretaries Act, 1980 (hereinafter referred to as the "Act") read with rule 19 (1) of the Company Secretaries (Procedure of Investigations of Professional and Other Misconduct of Cases) Rules, 2007 (hereinafter referred to as the "Rules"), Mr. Sital Prasad Swain has filed this appeal under Section 22E of the Act challenging the Impugned Order.
2. The original proceedings started with filing of the complaint dated 10th September, 2011 by Mr. Pramod Khosla (hereinafter referred to as complainant) wherein, it was alleged that professional misconduct has been committed by the

Appellant while practicing as a Company Secretary for M/s. Khosla Steel Industries Private Ltd. (hereinafter referred to as Company). It was alleged that in the Board of Directors meeting held on 10th August, 2011, while Mr. Bishendra Singh was appointed only as an Additional Director of the Company with effect from 10th August, 2011 under section 260 of the Companies Act, 1956, and was to hold his office up to the conclusion of the next Annual General Meeting (AGM), in Form – 32, signed by Mr. Kishor Khosla (KK), a Director of the Company and verified by the Appellant, wherein, the appointment of Mr. Bishendra Singh was shown as a Director under the category of 'Promoter' and not as Additional Director.

It was further alleged that Mr. Kishore Khosla, resigned on 20th December, 2011 and his resignation was accepted by the Board of Directors (BOD) in the meeting held on the same day. The Complainant and his wife (who were also the Directors of the Company) were present in that Meeting. It has also been alleged that Form-32 showing the cessation of Mr. Pramod Khosla and his wife Ms. Sarita Khosla on the ground of their having vacated offices of Director under Section 283 (1) (g) of the Companies Act, 1956 was signed by Mr. Bishender Singh, though he was not a Director of the Company on that date, and was filed by the Appellant after verifying and certifying the said form. It has been alleged that in this Form the reason for removal mandatorily required to be attached in terms of Ministry of Corporate Affairs Circular No.01/2012 dated 10th February, 2012 were not attached. It has been stated that in meetings held on 27th February, 2012, the cessation of Mr. Pramod Khosla and Mrs. Sarita Khosla was wrongly approved on the ground that they had not attended the previous three meetings consecutively held on 11th November, 2011, 13th December, 2011 and 19th January, 2012, by ignoring the Board of Directors meeting held on 20th December, 2011 as they had attended the said meeting and could not have been treated as absent from three consecutive meetings as required by the Section 283 (1) (g) of the Companies Act, 1956 in the complaint. The Board of Directors

meeting held on 20th December, 2011 in which the Complainant and his wife were present, had been ignored while certifying Form 32 by the Appellant. It has been alleged that at the Board of Directors meeting held on 20th December, 2011, the resignation of Shri Kishore Khosla, another Director of the Company was accepted, which fact, was informed to them by ROC.

It was further stated that the Annual General Meeting (AGM) of the Company was held on 30th August, 2011. Mr. Bishender Singh, whose appointment could only be as Additional Director, was not re-appointed as a Director of the Company at the AGM held on 30th August, 2011 and therefore, he ceased to be an Additional Director of the company on the conclusion of the AGM. Therefore, he could not have signed Form 32 showing the cessation of Shri Pramod Khosla and Ms. Sarita Khosla under section 283 (1) (g) of the Companies Act, 1956. With these averments, the complainant submitted that the Appellant while working as Company Secretary for the company did not exercise due diligence in verifying and certifying Form-32 on both the occasions.

3. On the aforesaid complaint, the Director (Discipline) formed a '*Prima-Facie Opinion*' (PFO) that there had been laxity on the part of the Appellant while certifying Form-32 and observed that he was Prima Facie Guilty of Professional Misconduct under item (7) of Part-I of the Second Schedule of the Act having not exercised due diligence and being grossly negligent in the conduct of professional duties.
4. The matter was finally decided by the Disciplinary Committee holding Appellant guilty of committing misconduct under item (7) of Para-I of Second Schedule of the Company Secretaries Act, 1980, for not exercising due diligence in the conduct of his professional duties and awarded the punishment of (i) reprimand and (ii) a fine of Rs.5,000/- (Rupees Five Thousand Only).
5. The Appellant then filed an appeal against the said order before this Authority which at the relevant time was presided over by Justice P.K. Bhasin. The said

appeal was registered vide Appeal No.11/ICSI/2015. The Authority at that time, after hearing the parties set aside the order of the Disciplinary Committee and remanded the matter by giving certain directions to the Disciplinary Committee to pass a fresh order.

6. It was in these circumstances, the matter came up before the Disciplinary Committee of the Institute again. The matter was taken up on 7th August, 2016 when the Disciplinary Committee called upon all the parties concerned before it and also gave liberty to them to file additional documents on 11th November, 2016. Mr. Nitin Khosla son of the Complainant appeared and made oral submissions on behalf of the Complainant. The Appellant did not appear as he had sought adjournment for the hearing.

7. The Disciplinary Committee directed Mr. Khosla to submit documents, not later than 21st November, 2016, namely, (i) Copy of Notice, (ii) Proof of service of the said notice, (iii) Attendance Register and (iv) Minutes of meeting of the AGM of M/s. Khosla Steel Industries Pvt. Ltd., held on 30th August 2011. The Disciplinary Committee further directed the Complainant to submit the aforesaid documents by 21st November, 2016 along with any additional document that would be directly relevant to the Complaint and fixed the hearing of the matter on Friday, the 2nd December 2016, at New Delhi.

8. Before the Disciplinary Committee, the Complainant submitted the following documents on 02-12-2016:-

(a) Notice of AGM dated 30/08/2011

(b) Attendance Sheet of AGM dated 30/08/2011

(c) Proof of service

(d) Minutes of meeting of AGM held on 30/08/2011.

9. After the hearing the parties including the Appellant, the Disciplinary Committee gave following findings:-

32. The allegations in the complaint are that the Appellant failed to exercise due diligence while certifying and filing two (2) Forms-32 relating to (i) the appointment of Shri Bishender Singh as a "Promoter Director" of Khosla Steel Industries Pvt. Ltd. and (ii)

cessation of Shri Pramod Khosla and his wife Ms. Sarita Khosla as Directors of the Company under section 283 (1) (g) of the Companies Act, 1956.

33. *In so far as the Form relating to the appointment of Shri Bishernder Singh as Promoter Director of the Company is concerned it has been alleged by the Complainant that the Board of Directors in its meeting held on 10.08.2011, had approved the appointment of Shri Bishernder Singh as an Additional Director of the Company, in terms of Section 260 of the Companies Act, 1956. The Additional Director appointed by the Board of Directors shall hold office only upto the date of next Annual General Meeting of the Company. In the Form – 32 certified by the Appellant for the appointment of Shri Bishernder Singh he has not been shown as an Additional Director as approved by the Board of Directors but has been shown as Director under the category of "Promoter" Director.*
35. *The Promoter Director concept can be inferred from the Companies Act, 1956, and as well as by prevailing practice in the companies. The Promoter Director is a person who is instrumental in the formation of the company, incorporates the company, brings the capital and commences its business or who has taken the control of the company and whose name has been identified as Promoter Director and accepted by the Board of Directors. The second situation in the course of affairs generally emerges in listed or public companies where the change of management happens.*
36. *In the given case, there are two contradictory resolutions submitted by the parties before the Disciplinary Committee namely-*
- (a) Resolution passed in the meeting of Board of Directors purported to have been held on 10th August, 2011, for appointment of Shri Bishernder Singh as Additional Director of M/s. Khosla Industries Pvt. Ltd. which is signed by 3 Directors, submitted by the complainant; and;*
- (b) Resolution passed in the Extra Ordinary General meeting purported to have been held on 10th August, 2011 for appointment of Shri Bishernder Singh as Director (Executive Director and Promoter Category) of M/s. Khosla Industries Pvt. Ltd. which is signed by Ms. Neelam Khosla without mentioning the date and place, which was submitted by the Appellant.*
37. *It is prerequisite for a certified copy of a resolution that it shall be signed with date and place. It has been alleged by the complainant that Ms. Neelam Khosla could not have signed the purported EOGM Resolution dated 10.08.2011 as she was not a Director at that time. She has also not signed the Attendance Register for Board Meetings for last so many years since she had shifted to Delhi in 2004 and she procured her DIN in 2012 only.*
38. *In form 32 pertaining to the appointment of Shri Bishernder Singh as Promoter Director certified by the Appellant, no certified copy of resolution is produced. Moreover, verification in Form 32 states that the signatory i.e. Shri Kishore Khosla is authorised by the Board of Directors vide Resolution No. 2 dated 10th August, 2011 which matches with the resolution submitted by the Complainant signed on 2nd September, 2011.*
39. *Further, with respect to Form 32 pertaining to the Appointment of Shri Bishernder Singh it was the duty of the Appellant who is a Practising Company Secretary (PCS) to act with due diligence while certifying the form to ensure that the Director so appointed as per the form has been duly appointed by the Company as per the provisions of the Companies Act, 1956. The PCS is required to ensure that a copy of the resolution is annexed as an attachment to the Form for the record of the Regulatory Authorities while filing the form in support of his diligence, at least in crucial and specific cases where the matter is sub-judice also when there are disputes in the management.*
40. *The Practising Company Secretary, while certifying the form for appointment of a Director who was appointed in an Extra Ordinary General Meeting, is required to verify the following for his diligence and keep copies in his custody of the following:*
- (i) Copies of the notice of the Extra Ordinary General meeting.*
- (ii) Evidence not only of dispatch but of service of such notices within stipulated time.*
- (iii) Copy of the extract of minute/minute of the meeting.*
- (iv) Explanatory Statement.*
- (v) Copy of the Resolution for appointment/authority.*
- (vi) Agenda of Extra Ordinary General meeting.*

41. In the present case, the Appellant has submitted only an extract of the Resolution of the Extra Ordinary General Meeting held on 10th August, 2011 signed by Ms. Neelam Khosla but the Form 32 was certified by Shri Kishore Khosla.
42. The Appellant, by affixing his signature on the said Form 32, endorsed the authority of Shri Kishore Khosla to sign the form though, the copies of the resolution are not mandatory attachments but certain documents are required to be maintained by the Practising Company Secretary for his diligence and also for the records of the Regulatory Authorities.
43. Based on the above documents, it is evident that the appointment of Shri Bishender Singh as Promoter Director was not properly verified with proper documents viz Consent of Director in Board Meeting/Agreement/Specific documents of Extra Ordinary General Meeting with explicit statement of authorisation with duly certified Board Resolution and reliance of the Appellant on the certified copy of extract of the minutes of the Extra Ordinary General Meeting held on 10th August, 2011, which is not in order, shows that the Appellant has failed to exercise due diligence while certifying the Form 32 pertaining to appointment of Shri Bishender Singh.
44. In the common parlance a Promoter Director means a person who promotes a Company and is named as one of the First Directors in the articles of association of the Company. Shri Bishender Singh did not fulfil this requirement. Therefore, the Appellant has not exercised due diligence in certifying and filing this Form-32 relating to the appointment of Additional Director of the Company despite having been fully aware of the fact that the Board of Directors in its meeting held on 10.08.2011 had approved the appointment of Shri Bishender Singh only as an Additional Director. By changing the category of Shri Bishender Singh from Additional Director to Promoter Director the Appellant tampered with the public record to show that Shri Bishender Singh was not liable to retire at the next Annual General Meeting of the Company.
45. There is a dispute about the date of holding of AGM. According to the Complainant the AGM was held on 30.08.2011 but the agenda of the meeting did not include any item pertaining to the appointment of Shri Bishender Singh as Director. In the absence of such an item, Shri Bishender Singh ceased to be Director of the Company with effect from 10.08.2011. In support of his contention the Complainant has produced Notice of the Meeting, Proof of Service, the attendance sheet signed by the shareholders and copy of the Minutes of the AGM held on 30.08.2011.
46. The case of the Appellant, on the contrary, is that no AGM was held on 30.08.2011. According to him the AGM was held on 18.08.2012. In support of his contention it has been stated that the Annual Accounts of the Company were signed by the statutory auditors only on 14.05.2012 and, therefore, the AGM could not be held on a date prior to the date of signing of the Annual Accounts by the statutory Auditors. In response to this contention, the Complainant has stated that the Annual Accounts could not be adopted in the AGM on 30.08.2011 as the Statutory Auditors did not sign the Annual Accounts in connivance with the other side, though these accounts had been sent to him. The item relating to the consideration and adoption of the Annual Accounts had to be postponed.
47. The averments of the complainant are not borne out by the minutes of the 25th AGM of the company held on 30.08.2011. In the aforesaid minutes it is recorded as under;

"The Chairman expressed his hope that the member present have gone through the audited accounts for the FY 2010-11, auditor's report and the Directors' Report for the year which were sent to them along with notice calling the Annual General Meeting. Mr. Kishore Khosla stated that let the Notice calling the Annual General meeting, annual audited accounts for FY 2010-11, auditor's report thereon and the Director's Report for the year be treated as read.

The members discussed the reports, accounts and a detailed discussion followed. After that the Chairman moved the motion to adopt the audited Profit & Loss Accounts for the year ended 31.04.2011, the Balance Sheet as at 31.03.2011 along with its Schedule and notes to accounts, auditor's report thereon and the Director's report for the year. The motion and the following resolution was:

Proposed by Mrs. Veena Khosla

Seconded by Mrs. Sarita Khosla

"RESOLVED THAT the audited profit and loss account for the year ended 31.10.2011 the Balance Sheet as 31.03.2011 along with its Schedules and notes to account, auditor's report thereon and the Directors' report for the year for the company, be, and/are, hereby received, adopted and approved"

48. *The appraisal of the aforesaid facts brings out that AGM was held on 30.08.2011 and since the agenda for the meeting did not contain any item relating to the appointment of Shri Bishender Singh, he, in terms of the provisions of the Companies Act, 1956, ceased to be the Director of the Company from that date. It is clearly established that the Appellant failed to exercise diligence, expected of him, while certifying and filing Form 32 regarding the Appointment of Shri Bishender Singh as "Promoter Director".*
49. *In so far as Form-32 relating to the removal of the Complainant and his wife from the directorship of M/s Khosla Steel Industries Pvt. Ltd., purportedly under section 283 (1) (g) of the Companies Act, 1956, is concerned the Disciplinary Committee noted that Section 283 (1)(g) of the Companies Act, 1956, read as under:*

"Vacation of office by the Directors

283 (1): The office of the Directors shall become vacant if-

X x x x x

(g): He absents himself from three consecutive meetings of the Board of Directors, or from all meetings of the Board for a continuous without obtaining leave of absence from the Board."

50. *The Complainant has alleged that the Appellant did not exercise due diligence to ensure that the conditions laid down in Section 283 (1) (g) of the Companies Act, 1956, were satisfied, while verifying and certifying the Form-32 in this regard. It has been alleged by the Complainant that he and his wife attended the Board of Directors meeting held on 20.12.2011 in which the resignation of Shri Kishore Khosla, another Director of the Company, was accepted by the Board of Directors. The alleged removal of the Complainant and his wife from the directorship of the Company in the Board of Directors meeting held on 27.02.2012 was on the ground of absence from three consecutive Board meetings stated to have been held on 11.11.2011, 13.12.2012, 09.01.2012. He has alleged that the Appellant did not take into account the Board of Directors meeting held on 20.12.2011, and consequently the appellant is guilty of not exercising due diligence.*
52. *The Disciplinary Committee considered the arguments of the representatives of the Complainant and the appellant on 2nd December, 2016 and examined all the documents submitted by the Complainant vide letter dated 6th December, 2016 and by the appellant vide email dated 6th December, 2016. It has been observed that the dispatch proof has been submitted by the appellant with respect to the Board Meeting held on 27th February, 2012 addressed to Jamshedpur. The frequency of Board meetings was so regular within the span of 3 months with regular and routine items of business. The fact that the Complainant is not available was also known to the appellant because of non-bailable warrants issued against the Complainant and his family. It appears from the documentary evidence that the appellant construed the violation intended under section 283(1)(g) in literal sense for removal of Directors.*
53. *The appellant, who is PCS, is not required to understand the intention. However, he is required to exercise due diligence by verifying the following documents:*
- (i) Notice of the Board meeting.*
 - (ii) Agenda of the Board meeting.*
 - (iii) Proof of Dispatch of Notice of the Board Meeting.*
 - (iv) Minutes of the meeting duly signed by the Chairman.*
 - (v) Documentary Evidence for requisite Quorum i.e. Attendance Sheet.*
54. *The removal of a Director of the Company is a serious matter particularly when the Appellant was aware of the existence of the management dispute. Therefore, it was incumbent upon him to be more vigilant and send a written communication to the Director for providing him an opportunity before verifying and certifying Form-32 for his removal as a principle of natural justice.*

55. *In the present case, the appellant verified the minutes and relied on the proof of dispatch of the notice sent through Speed Post on 22nd February, 2012 which was sent to Jamshedpur address. There is no proof of service of the notices on the Complainant and his wife. The fact that the management conducted the Board Meeting for the removal of Director by sending notice to a place where the Complainant was not available, appears to have been known to the Appellant while certifying the form as the appellant has admitted in his submission dated 2nd December, 2016, that he relied upon the Advocate's Report stating that the Complainant is absconding with this family.*
56. *The diligence which is supposed to be shown by the Practising Company Secretary is not merely restricted to the verification of the documents but also it extends to the purpose of law for which it is envisaged to be exercised by him.*
57. *Section 283(1) (g) of the Companies Act, 1956 provides for Removal of Director who after due notice of Board meeting fails to attend the meeting either intentionally or because of pre-occupation or for any other reason but surely not for failure to receive the notice.*

10. Consequently, the Disciplinary Committee of the Institute held that the Appellant was guilty of negligence as detailed by them under Para (58 to 61) of the Impugned Order and again hold the Appellant guilty and awarded the same punishment which was awarded earlier in Para (62) of the order which reads as under:-

After considering the pleadings, material on record detailed submissions of both the parties, hearing arguments at length and totality of all the facts and circumstances, the Disciplinary Committee reiterates its earlier decision passed vide order dated 22nd July, 2015 wherein the Appellant was held guilty of professional or other misconduct for not exercising due diligence and passed the following Order under Section 21(B) (3) of the Company Secretaries Act, 1980 read with proviso to Rule 19(1) of the Company Secretaries Procedure (Procedure of Investigations of Professional or Other misconduct and Conduct of Cases) Rules, 2007:

(i) Reprimand and; (ii) Fine Rs. 5000/-

11. It is against the aforesaid order; the Appellant approached us by filing the present appeal.

12. During the course of hearing, we were confronted with basic controversy regarding filing of Form-32, regarding resolutions dated 10th August, 2011 and 20th December, 2011. We, therefore, thought it appropriate to pass the following order on 19.01.2018, this order reads as under:-

"After hearing of both the parties, we feel that perusal of the original minute's book pertaining to all dates of which there is reference regarding the resolutions which have been passed by the Company and perused by the Appellant in this case before certifying Form 32 are required to verify certain facts in the present matter. Therefore, we direct the parties of this matter more particularly in whose possession the same are kept, to bring the original minutes book before us on the next date of hearing of this Appeal. In case, if it is not in the possession of either party than they are directed to file an Affidavit, as to whether those documents are not in their profession.

2. In the meanwhile, both the parties are directed to file their respective written submissions highlighting the main issues pointing out the differences before the Authority before the next date of hearing."

13. On 10th April, 2018, we have passed the following order:-

"2. Further, in terms of the directions issued vide Order dated 19th January, 2018 passed earlier by this Authority, the Appellant as well as Respondent No.2 were directed to file an Affidavit specifying that under whose possession the original minutes book pertaining to all dates of which there is reference regarding the resolutions which have been passed by the Company and perused by the Appellant in this case before certifying Form 32. Therefore, in compliance, both the parties have filed an Affidavit along-with written submissions stating that the original minute books and the resolutions passed are not in their respective possession.

3. Therefore, in view of the above, the core issue involved in this case before us for consideration, which requires its proper response so as to decide the matter finally, is that when Form-32 were filed by the Appellant as a Company Secretary on both the dates, i.e., on 5th September, 2011 and 27th February, 2012, whether he had seen the original minutes before certifying Form-32 on both the mentioned dates. If yes, who saw him these original minutes? In other words, under whose physical possession, the said original minutes were at that relevant time? Further, while certifying and filing Form-32 on both the dates, what documents were filed as an attachment with these Forms by the Appellant?

4. Based on the above, therefore, we hereby direct the Appellant to file an affidavit mentioning specifically the details as to the observations made by us under Para (3) of this Order, within two weeks from the date of receipt of this Order. An advance copy of the affidavit to be filed before this Authority shall also be provided by the Appellant to Respondent No.2 well before at least one week from the next date of hearing of this matter.

5. Further, in case the appellant has copies of the original minutes in his possession, we also grant the liberty to him to annex the copy of the same with other relevant documents on which he relied before certifying and filing Forms-32 along-with the requisite affidavit. "

14. It is pointed out that none of the parties filed the original minute books or the resolution passed which are the subject matter relevant to the filing of two forms i.e. Form-32 filed for the appointment of Shri Bishender Singh as an Additional / Promoter Director and secondly, the form regarding cession of Pramod Khosla and his wife as the Directors of the Company under Section 283(1) (g) of the Companies Act, 1956.

15. It was in these circumstances, after giving detailed hearing to both the parties and having gone through the record of this case, and the order passed by the Disciplinary Committee dated 22nd July, 2015 extract whereof we have discussed in this order in detail, we are of the considered view that in this case, it has been clearly held that the Appellant was negligent in filing Form-32 on both the occasions and failed to exercise diligence required on his part.

16. We have also gone through the Written Arguments, filed on behalf of both the parties. We are of the considered view that it is not a case where the professional i.e. the Appellant was expected to act as an investigator. What was required for him was to only see the contents of the resolution passed and relied upon in support of Form-32 himself and in case, it was shown to him in minute books, than he should have been very categorical as to who was in possession of minute books shown to him containing the resolutions in question. However, in this regard, no assistance has been provided to us.

17. As stated above, we are of the considered view that in the present case, the Disciplinary Committee after the remand of the matter has gone through the entire controversy in detail, given cogent reasons in holding that the Appellant was Guilty of Professional Misconduct under item (7) of Part-I of the Second Schedule of the Act in as much as he did not exercise due diligence while certifying the two Forms-32 on both the occasions and as such he was grossly negligent in the conduct of his professional duties. We accordingly dismiss the appeal while maintaining the order of sentence as awarded by the Disciplinary Committee in this case, which according to us is not excessive in any manner.

18. We, however, make it clear that since there is a dispute of management by the two sides of Khosla family and parties are already before various forums, observations made by us against the Appellant who is a professional will not be used against him in other litigations.

Justice M. C. Garg
Chairperson

Preeti Malhorta
Member

Praveen Garg
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY
(Constituted under the Company Secretaries Act, 1980)

APPEAL NO. 08/ICSI/2017

IN THE MATTER OF:

Mr. Ashwani Khanna

....Appellant

Versus

The Institute of Company Secretaries of India

....Respondent No. 1

Mr. Ashok Kumar Sharma, CBI

....Respondent No. 2

CORAM

Hon'ble Mr. Justice M.C. Garg

Chairperson

Hon'ble Ms. Preeti Malhotra

Member

Hon'ble Mr. Sanjay Grover

Member

Hon'ble Mr. Praveen Garg

Member

Hon'ble Dr. Navrang Saini

Member

PRESENT

For the Appellant:

Dr. Rajansh Thukral, Advocate along-with Mr. Ashwani Khanna, Appellant in person and Mr. Abhinav Khanna, Authorized Representative

For the Respondents:

Mr. R.D. Makheeja, Advocate along-with Mr. S.N. Mishra, Mr. Gaurav Tandon, Assistant Director (Law) and Mr. R.B. Tiwari, all appearing on behalf of Respondent No. 1.

Mr. Ajay Singla, Sub-Inspector, Shimla appearing on behalf of Respondent No. 2.

ORDER

Date: 17.07.2018

1. This is in continuation of our earlier Order dated 24th April, 2018, whereby we accepted the request of the Institute of Company Secretaries of India to grant them further time to enquire about the status and authority of the person who authorized Mr. Ashok Kumar Sharma of CBI to file a complaint against the Appellant.
2. According to the Institute, the Central Bureau of Investigation vide its letter no. 359 (C) / RC / 0962012 A0006 / CBI / ACP /Shimla dated 23rd May, 2018 provided the following information:-

S. No	Information sought for	Reply
a)	The name of the officer who gave the authorization	Dr. Armaan Deep Singh, the then SP/HOB, CBI, ACB, Shimla Branch (since expired on 14.04.2018). Initially, a Self-Contained Note (SCN) dated 31.07.2014/01.08.2014 was sent for taking such action as deemed fit against Shri Ashwani Khanna, Company Secretary (CP-0002) for his alleged professional, dishonesty/misconduct as per order/approval dated 14.04.2014 (vide Para-137/N) of the then Head of Zone/Joint Director, CBI, Chandigarh Zone (Shri O. P. Galhotra, IPS). However, later on, on the request of ICSI letter dated 05.08.2014, a formal complaint dated 12.08.2014 under the signature of Shri Ashok Kumar, Additional SP, CBI, ACB, Shimla was sent to the ICSI under the authorization issued by said Dr. Armaan Deep Singh, Head of Branch, CBI, ACB, Shimla, with the approval of the above Competent Authority.
b)	The designation and scale of pay of the officer	Superintendent of Police/Head of Branch, CBI ACB, Shimla. Grade Pay- Rs. 7600/- (pre-revised)
c)	Whether the post held by him is equivalent to the Joint Secretary to the Government of India	As per 6 th CPC, Joint Secretary in Gol & Joint Director in CBI were in PB-4 with Grade Pay of Rs. 10,000/-. Hence, the post of HOZ/Joint Director, CBI Chandigarh was equivalent to the rank of Joint Secretary to the Govt. of India during the relevant period. Please read here reply to Query-(a) above in addition.
d)	A copy of order/noting giving the authorization.	Copy of relevant portion of order/noting order/approval dated 14.07.2014 (vide Para-137/N) approving for sending SCN by HOZ, CBI, Chandigarh and authorization dated 11.08.2014, which has been issued with the approval of the Competent Authority as stated above, are enclosed. Request: <u>This order may be considered as confidential and may not be shared with any other person/accused under RTI Act without taking the comments of CBI, ACB, Shimla branch.</u>
e)	Whether the post held by the officer signing the complaint is equivalent to Under Secretary to the Government of India	Yes. The complaint was signed by Shri Ashok Kumar, Addl. SP, CBI, Shimla, as authorized above. The Under Secretary in Government of India & Additional Superintendent of Police in CBI, in PB-3 with Grade Pay of Rs. 6600/-. Hence, Shri Ashok Kumar, Additional Superintendent of Police was holding the rank/post equivalent to the post of Under Secretary to the Government of India during the relevant period.

3. After perusing the aforesaid details, we have observed that the authorization was given by Dr. Armaan Deep Singh to Mr. Ashok Kumar Sharma to file the present complaint against the Appellant herein before the Institute. However, Dr. Armaan Deep Singh was not holding the post equivalent to Joint Secretary to the

Government of India at that relevant time and therefore he was not competent to authorize Mr. Ashok Kumar Sharma to file this complaint. Although, Mr. Ashok Kumar Sharma who has filed and signed the present complaint was holding the post equivalent to Under Secretary to the Government of India at the time of filing the present complaint.

4. Therefore, under the aforesaid circumstances, there is only one question before us to decide as to whether the approval granted by Mr. O.P. Galhotra, Joint Director, IPS, Hoz, Chandigarh on a note sheet, wherein, it is mentioned that "the recommendations of IO with respect to Ashwani Khanna, proprietor of M/s Khanna Ashwani & Associates, Company Secretary, Ludhiana, for sending a self-contained note to the Institute of Company Secretaries of India for taking such action against him is also approved" suffice the requirements of the authorization as required in terms of sub-rule (2) of Rule (3) of Rules and further as to whether the 'Approval' and 'Authorization' both are the same and one thing, for which we have also directed the Institute of Company Secretaries of India to brought on record any case law which may clarify the position.
5. In response to the above, the Learned Counsel appearing on behalf of the Institute of Company Secretaries of India brought on record a judgment dated 19th July, 2011 delivered by the Gwalior Bench of the Hon'ble High Court of Madhya Pradesh in W.P. No 4298/2011 namely Ramhet Tyagi Vs. State of M. P. & Others. We have perused the said judgment and found that the same is not relevant to the facts and circumstances involved in the present matter and therefore does not address the issue as to whether the 'Approval' and 'Authorization' both are the same and one thing.
6. Adversely, the Learned Counsel appearing on behalf of the Appellant had also brought on record two judgments delivered by the Hon'ble Supreme Court namely Barium Chemicals Ltd & another Vs. The Company Law Board & Others, 1976 AIR 295, 1966 SCR 311 and A. K. Roy & Another Vs. State of Punjab &

Others, 1986 AIR 2160 SC. The perusal of judgment namely Barium Chemicals Ltd & Another Vs. The Company Law Board & Others, shows that **"as a general rule, if the statute directs that certain acts shall be done in a specified manner or by certain persons, their performance in any other manner than that specified or by any other person than one of those names is impliedly prohibited"** and **"Prima Facie, a discretion conferred by a statute, on any authority is intended to be exercised by that authority, and by no other"**. Further, the perusal of the judgment delivered by the Hon'ble Supreme Court in A. K. Roy & Another Vs. State of Punjab & Others clearly hold that **"if the requirements of a statute which prescribe the manner in which something is to be done are expressed in negative language, that is to say, if the statute enacts that it shall be done in such a manner and in no other manner, it has been laid down that those requirements are in all cases absolute, and that neglect to attend to them will invalidate the whole proceeding"**. It is further held by the Hon'ble Supreme Court in this case that **"where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other modes of performance are necessarily forbidden. The intention of the Legislature in enacting s.20 (1) was to confer a power on the authorities specified therein which power had to be exercised in the manner provided and not otherwise"**.

7. It is also relevant to record here that there is a well-known principle of law that 'delegates non potest delegare' but even though there is no document on record even to show any delegation of authority by Shri O.P. Galhotra, Joint Director, IPS, Hoz, Chandigarh to file a complaint under sub-rule (2) of Rule (3) of the aforesaid rules in favour of Dr. Armaan Deep Singh who ultimately signed the authorization dated 11th August, 2014, which is on record and on the basis of which the present complaint was filed.

8. At this stage, we make also take note of the so called authorization / approval given by Mr. O.P. Galhotra, Joint Director, IPS, Hoz, Chandigarh, which reads as hereunder:-

"Shri Ashok Kumar, Addl. Superintendent of Police, Central Bureau of Investigation, Anti-Corruption Branch, Shimla is hereby authorized to lodge a complaint against Shri Ashwani Khanna, Company Secretary (CP-2220), Proprietor of M/s Khanna Ashwani & Associates, Office No. 4, 2nd Floor, Guru Har Rai Complex, Industrial Estate Road, Near Manju Cinema, Ludhiana-141003 (Punjab) before Director (Discipline), Institute of Company Secretaries of India, Headquarters ICSI House, 22, Institutional Area Lodi Road, New Delhi-110003, for taking disciplinary action against him under clause-7 of Part-I Second Schedule of Company Secretaries Act, 1980.

This issues with the approval of the Competent Authority.

(Dr. Armaan Deep Singh)
Head of Branch,
CBI, ACB, Shimla"

9. Accordingly, it is abundantly clear that the present complaint was not filed by the Central Bureau of Investigation in accordance with satisfying the requirements of sub-rule (2) of Rule (3) of the Company Secretaries (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007.

10. Therefore, under the circumstances, we hereby reiterate our earlier considered view that as such, the arguments made on behalf of the Appellant that the present complaint could not have even been taken cognizance of by the Disciplinary Committee of the Institute of Company Secretaries of India, and, therefore, passing of any order thereon by the Disciplinary Committee was absolutely without having any jurisdiction, holds water and are fully supported by the legal provisions as applicable in this matter.

11. Thus, in exercise of the powers conferred upon this Authority under clause (a) of sub-section (2) of section 22E of the Company Secretaries Act, 1980, we hereby set aside the impugned order dated 28th April, 2017 passed by the Disciplinary Committee of the Institute of Company Secretaries of India and further the

Institute is directed to refund the amount of fine deposited by the Appellant, if any within a period of one month from the date of receipt of this Order.

12. However, in case the Central Bureau of Investigation wants to file this complaint afresh, we hereby grant the liberty to them to file the said complaint before the Director (Discipline) of the Institute of Company Secretaries of India, of course, after complying and satisfying the statutory requirements as applicable in terms of sub-rule (2) of Rule (3) of the Company Secretaries (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007, within one month from the date of receipt of this Order.

13. The Institute of Company Secretaries of India will entertain such a complaint, if filed, and will proceed in accordance with law irrespective of our aforesaid order which would not be taken as an opinion expressed on the merits of the case.

14. The aforesaid Order dated 24th April, 2018 passed by this Authority shall form the part of this Order.

15. The Registrar of the Authority is hereby directed to release both these Orders to the concerned parties as well as ensuring placing of the same in the relevant files of this matter.

16. With this the present appeal is disposed of. No Order as to cost.

Justice M. C. Garg
Chairperson

Preeti Malhotra
Member

Sanjay Grover
Member

Praveen Garg
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY
(Constituted under the Company Secretaries Act, 1980)

APPEAL NO. 11/ICSI/2018

IN THE MATTER OF:

Shaleen V. Vaid

....Appellant

Versus

**Board of Discipline
(The Institute of Company Secretaries of India)**

....Respondent No. 1

Pooja Mayank Jain

....Respondent No. 2

CORAM

Hon'ble Mr. Justice M.C. Garg

Chairperson

Hon'ble Mr. Sanjay Grover

Member

Hon'ble Mr. Praveen Garg

Member

Hon'ble Dr. Navrang Saini

Member

PRESENT:

For the Appellant:

Mr. Arjun D. Singh, Advocate along-with Mr. Shaleen V. Vaid in person

For the Respondents:

Mr. Rasbihari Tiwari, Executive Law along-with Mr. Satish Kumar, Executive Law appearing for ICSI.

ORDER

Date: 07.08.2018

1. This Appeal has been filed by Mr. Shaleen V. Vaid, who was a complainant before the Board of Discipline of the Institute of Company Secretaries of India. The present appeal is not maintainable according to section 22E of the Company Secretaries Act, 1980, as the Appellant not being an aggrieved Member of the Institute, is not entitled to file an appeal before the Appellate Authority. Section 22E reads as under:-

"22E: - Appeal to Authority:-

- 1) *Any member of the Institute aggrieved by any order of the Board of Discipline or the Disciplinary Committee imposing on him any of the penalties referred to in sub-section (3) of Section 21A and sub-section (3) of Section 21B, may within ninety days from the date on which the order is communicated to him, prefer an appeal to the Authority;*

Provided that the Director (Discipline) may also appeal against the decision of the Board of Discipline or the Disciplinary Committee to the Authority, if so authorized by the Council, within ninety days;

Provided further that the Authority may entertain any such appeal after the expiry of the said period of ninety days, if it is satisfied that there was sufficient cause for not filing the appeal in time.

2) The Authority may, after calling for the records of any case, revise any order made by the Board of Discipline or the Disciplinary Committee under sub-section (3) of Section 21A and sub-section (3) of Section 21B and may-

- a) confirm, modify or set aside the order;
- b) impose any penalty or set aside, reduce, or enhance the penalty imposed by the order;
- c) remit the case to the Board of Discipline or Disciplinary Committee for such further enquiry as the Authority considers proper in the circumstances of case; or
- d) pass such other order as the Authority thinks fit:

Provided that the Authority shall give an opportunity of being to the parties concerned before passing any order."

2. This Section clearly states that only that member of the Institute can file an Appeal before the Appellate Authority who has been awarded any of the punishment as provided under Section 21A (3) or Section 21B (3) of the Company Secretaries Act, 1980.

3. Moreover, the Appellate Authority has already dealt with and decided the similar complaints in the past in the following appeals :-

- i. M/s Sanghi Polysters Ltd. Vs. Mr. AAN Murthy, Order dated 10th August, 2011
- ii. Pravin Mirajakar Vs. ICSI & Others, Order dated 10th August, 2011
- iii. Naresh Mohan Mittal Vs. ICSI & Others, Order dated 10th August, 2011
- iv. Dr. P.G. Kale Vs. ICSI, Order dated 10th August, 2011
- v. Pradeep K. Mittal Vs. ICSI , Order dated 14th February, 2014

4. The Appellate Authority decided the above referred appeals by holding that an Appeal filed by any other person than the aggrieved Member of the Institute who has been found guilty of some misconduct and awarded any of the punishment provided under Section 21A (3) or under Section 21B (3) of the Company Secretaries Act, 1980, is not maintainable in terms of Section 22E of the Act as referred above and the same is liable to be rejected on this ground alone without going into the merit of the case.

5. Therefore, in view of the aforesaid the present appeal is rejected as being not maintainable.

Justice M. C. Garg
Chairperson

Sanjay Grover
Member

Praveen Garg
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY
(Constituted under the Company Secretaries Act, 1980)

APPEAL NO. 08/ICSI/2017

IN THE MATTER OF:

Mr. Ashwani Khanna

....Appellant

Versus

The Institute of Company Secretaries of India

....Respondent No. 1

CBI through Mr. Manoj Kumar

....Respondent No. 2

CORAM

Hon'ble Mr. Justice M.C. Garg

Chairperson

Hon'ble Mr. Sanjay Grover

Member

Hon'ble Mr. Praveen Garg

Member

Hon'ble Dr. Navrang Saini

Member

PRESENT

For the Appellant:

Absent

For the Respondents:

Mr. R.D. Makheeja, Advocate along-with Mr. Gaurav Tandon, Assistant Director (Law) and Mr. R.B. Tiwari, Executive Officer and Mr. Satish Kumar, Executive Law all appearing on behalf of Respondent No. 1.

Mr. Manoj Kumar, Additional Superintendent of Police, CBI, Shimla appearing on behalf of Respondent No. 2.

ORDER

Date: 23.10.2018

1. Ms. Preeti Malhotra, one of the members of the Authority, is not available for hearing the application for condonation of delay filed by CBI with the Institute of Company Secretaries of India, which in turn was forwarded to this Authority by the Institute of Company Secretaries of India, in terms of the liberty granted to CBI vide an earlier Order dated 17th July, 2018 passed by this Authority while disposing of Appeal No. 08/ICSI/2017 today as she is pre-occupied elsewhere.
2. Further, a request for adjournment of hearing today has also been received through email dated 22nd October, 2018 from CS Ashwani Khanna, Appellant in this Appeal, on the ground that his Counsel is pre-occupied for some other matters listed in the Chandigarh Bench of NCLT today. Furthermore, the Appellant is also not in a position to appear in person before us.

3. It is relevant to record here that our earlier order dated 17th July, 2018 passed by this Authority while disposing of Appeal No. 08/ICSI/2017 permitted the CBI to file a fresh complaint, if they wish to do so, within a period of 30 days from the date of receipt of the said Order. As such, the fresh complaint should have been filed by CBI with the Institute of Company Secretaries of India latest by 16th August, 2018, whereas, the fresh complaint along-with an application requesting condonation of delay of 25 days was filed and received on 13th September, 2018, that is beyond 30 days.
4. Under the circumstances, an issue arises as to whether this fresh complaint can be allowed to be entertained by the Institute of Company Secretaries of India or not?
5. Even though, on behalf of the proposed Respondent namely Mr. Ashwani Khanna, the application for condonation of delay of 25 days is sought to be opposed by filing a detailed reply for which vide an email dated 22nd October, 2018 addressed to the Registrar of the Authority, he has also requested that a copy of the said application filed by CBI be supplied to him.
6. Much that, we have considered the opposition of Mr. Ashwani Khanna and certainly, we direct the Registrar of the Appellate Authority to supply a copy of the application to him by speed post within seven days from today but taking into consideration that the Company Secretaries Act, 1980 does not allow us to review our own Orders, therefore, we are of the considered view that granting more time, as requested by CBI to file a fresh complaint with the Institute, will tantamount to review the aforesaid Order dated 17th July, 2018 passed earlier by this Authority and certainly by doing so, we would be going ahead out of the legal domain available to us under the said Act.
7. Additionally, in view of our another Order dated 3rd February, 2018 passed in an Appeal No. 10/ICSI/2015 namely Benny Methew vs. ICSI, we have already held that this Authority does not have the power to review its own Orders either expressly or by necessary implication. The relevant paragraphs of this Order are reproduced as hereunder:-

“17. Having heard the arguments advanced by the parties as above besides perusing all relevant records including the Order against which the review is being sought in the present matter, in addition to considering the aforesaid judgments, we are of the considered view that it is a well settled law that the power to review is not an inherent power and it must be conferred by Law either specifically or by necessary implication, whereas, no specific provision of review is present in the

Company Secretaries Act, 1980, whereby, this Appellate Authority had been empowered to review its own Order.

18. *We may also add that we are not impressed by the submission of the Learned Counsel appearing on behalf of the Institute of the Company Secretaries of India that the Board of Discipline is altogether an independent and a separate body from the Institute itself and therefore, the Institute of Company Secretaries of India was not a party before the Appellate Authority, when, the Impugned Order was passed by it. In fact, this is the Council of the Institute of Company Secretaries of India which is required to constitute a Board of Discipline in terms of Section 21A and a Disciplinary Committee of the Institute in terms of Section 21B of the Company Secretaries Act, 1980. Thus, to consider the Board of Discipline something different from the Institute is not an appropriate and correct submission. Therefore, in case of any procedural wrong committed by the Board of Discipline or the Disciplinary Committee, as the case may be, we are of the view that the ultimate responsibility will lie on the Institute and the Board of Discipline and / or the Disciplinary Committee, being the quasi-judicial bodies of the Institute itself cannot be made a subject of imposing any penalty against them.*
19. *Consequently, based on the above principle of settled law and not being in agreement with the stand taken by the Learned Counsel appearing on behalf of the Institute that this is the procedural review, the present review application is accordingly rejected. No cost to either party."*

8. In view of the aforesaid, we cannot entertain the present application dated 13th September, 2018 filed by the Institute of Company Secretaries of India to us seeking advice to entertain the fresh complaint being filed by CBI beyond 30 days granted to them vide our Order dated 17th July, 2018, as permitting to entertain the said complaint by the Institute of Company Secretaries of India would tantamount reviewing our Order. Though, CBI may approach the appropriate forums, in case they wish to continue to file the fresh complaint against Mr. Ashwani Khanna.

9. With these observations, the entire proceedings of this matter are being brought to an end.

Justice M. C. Garg
Chairperson

Sanjay Grover
Member

Praveen Garg
Member

Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY

(Constituted under The Cost Accountants Act, 1959)

IN THE MATTER OF:

S. No.	Name of Appeal	Appeal No	Appellant/ Respondents
1.	Ashok B. Nawal Vs. Director (Discipline) Institute of Cost Accountants of India Ashish P. Thatte	04/ICWAI/2017	Appellant Respondent No. 1 Respondent No. 2
2.	Ashish P. Thatte Vs. Director (Discipline) & Another Ashok B. Nawal	11/ICWAI/2017	Appellant Respondent No. 1 Respondent No. 2

CORAM:

Hon'ble Mr. Justice M.C. Garg	Chairperson
Hon'ble Mr. B.M. Sharma	Member
Hon'ble Mr. Praveen Garg	Member
Hon'ble Dr. Navrang Saini	Member

PRESENT:

1. Mr. Ashok B Nawal, Appellant in person for Appeal No. 04/ICWAI/2017
2. Mr. Mahfooz Nazki, Mr. Priyank Mangal and Mr. Pradeep Dahiya, Advocates
3. CMA. Ashish P. Thatte, Appellant in person for Appeal No.11/ICWAI/2017
4. Mr. L. Gurumurthy, Director (Discipline) for Respondent No. 1 in Appeal No. 04/ICWAI/2017
5. Mr. Kush Chaturvedi and Mr. Somay Kapoor Advocates for Respondent No. 2 in Appeal No. 04/ICWAI/2017
6. Mr. Peeyosh Kalra, Advocate for Respondent No. 1 in Appeal No. 04/ICWAI/2017

ORDER
20.04.2018

1. Today, one of the members of the Authority namely Shri Pravakar Mohanty is not available for hearing of this matter due to some urgent preoccupation.
2. Pursuant to the directions given vide Order dated 19th July, 2017 passed earlier by this Authority, to the Disciplinary Committee of the Institute of Cost Accountants of India, whereby, the Disciplinary Committee was directed to issue notice compelling the attendance of the witness in response of the request of Mr. Ashok B. Nawal, the Appellant herein, for cross examination thereof and the entire proceedings in the matter was required to be completed within a period of three months from the date of the receipt of the said order and thereafter the matter was required to be referred back to

the Appellate Authority for its further consideration, as mentioned under Para (9) of the aforesaid Order, the Disciplinary Committee held its proceedings in the matter and accordingly, a compliance report dated 17th February, 2018 was submitted by the Institute of Cost Accountants of India in the Registry of the Authority, whereby, it is informed that CMA. Ashok B. Nawal, appellant herein, did the cross-examination of CMA. (Dr.) Ashish P. Thatte. However, the Disciplinary Committee put a stop thereafter, as if, the Order, if any, was finally required to be passed by the Appellate Authority.

3. We, therefore, wish to clarify that it was also incumbent upon the Disciplinary Committee to pass a fresh Order on consideration of the examination, cross examination of the witness and the evidence, if any, as came on record after hearing the Appellant as well as the complainant / witness in the matter.
4. Furthermore, the original complainant of this matter, namely CMA (Dr.) Ashish P. Thatte also filed an Appeal in this Authority against Order dated 27th June, 2017 passed by the Disciplinary Committee of the Institute of Cost Accountants of India in Complaint No. 21/CA (20)/2014 titled as Ashish Thatte vs. Ashok Nawal, requesting for reframe the charges against Mr. Ashok B. Nawal and to hold him guilty of Professional and Other Misconduct under clause (6) and clause (7) of Part First of the First Schedule to the Cost and Works Accountants Act, 1959 also.
5. We have noted that according to sub-section (1) of Section 22E of the Cost Accountants Act, 1959, the Appeal filed by the complainant is not maintainable as the Appellant, not being an aggrieved Member of the Institute, is not entitled to file an appeal before the Appellate Authority. The said sub-section (1) of Section 22E of the Act reads as under:-

"22E: - Appeal to Authority:-

1. *Any member of the Institute aggrieved by any order of the Board of Discipline or the Disciplinary Committee imposing on him any of the penalties referred to in sub-section (3) of Section 21A and sub-section (3) of Section 21B, may within ninety days from the date on which the order is communicated to him, prefer an appeal to the Authority;*

Provided that the Director (Discipline) may also appeal against the decision of the Board of Discipline or the Disciplinary Committee to the Authority, if so authorized by the Council, within ninety days;

Provided further that the Authority may entertain any such appeal after the expiry of the said period of ninety days, if it is satisfied that there was sufficient cause for not filing the appeal in time.

6. Therefore, this Section clearly states that only that member of the Institute can file an Appeal before the Appellate Authority, who has been awarded any of the punishment as provided under Section 21A (3) or Section 21B (3) of the Cost Accountants Act, 1959.

7. However, a prayer was made on behalf of the original complainant in this case to consider his Appeal as a cross objection under Order 41 Rule 22 of the Civil Procedure Code, 1908 in Appeal No. 04/ICWAI/2017 namely Ashok B Nawal Vs. Institute of Cost Accountants of India & Others.
8. In view of the above observations and considering the legal position, we hereby remand back the matter relating to Appeal No. 04/ICWAI/2017 namely Mr. Ashok B. Nawal Vs. ICWAI & Others to the Disciplinary Committee of the Institute of Cost Accountants of India for the purpose of passing a fresh Order on consideration of the examination and cross examination of the witness besides other submissions made on behalf of the complainant as well as respondents. We also wish to clarify that the Disciplinary Committee is free to consider all submissions, objections, cross objections on behalf of the complainant as well as respondent in addition to considering of all other relevant evidences which may come on record including the aspect of quantum of punishment, during the proceedings before the Disciplinary Committee before passing a fresh Order in the matter for which the matter is being remanded back. The entire proceedings in this matter shall be completed within a period of three months from the date of receipt of this Order and Appeal No. 11/ICWAI/2017 namely CMA (Dr.) Ashish P. Thatte Vs. ICWAI & Others as well as his miscellaneous application dated 9th April, 2018 filed under Rule 20 of the 'Procedure to be followed for the Appeals by the Appellate Authority, 2013', by CMA (Dr.) Ashish P. Thatte, the original complainant in the matter, is hereby disposed of, as not maintainable.
9. Appeal No. 04/ICWAI/2017 namely Ashok B. Nawal Vs. ICWAI & Others is disposed of in terms of the observations/directions as noted above. Further, needless to mention that if Mr. Ashok B. Nawal feels aggrieved from the Order which shall be passed by the Disciplinary Committee in terms of the directions as being given vide this Order, he may approach the Appellate Authority by filing a fresh Appeal or alternately matter be treated as closed if he does not wish to file an Appeal against the Order to be passed by the Disciplinary Committee.
10. A copy of this Order be kept in both the files.

Justice M. C. Garg
Chairperson

B.M. Sharma
Member

Praveen Garg
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY

(Constituted under The Cost Accountants Act, 1959)

IN THE MATTER OF:

S. No.	Name of Appeal	Appeal No	Appellant/ Respondents
1.	Ashok B. Nawal Vs. Director (Discipline) Institute of Cost Accountants of India	04/ICWAI/2017	Appellant Respondent No. 1 Respondent No. 2
2.	Ashish P. Thatte Vs. Director (Discipline) & Another Ashok B. Nawal	11/ICWAI/2017	Appellant Respondent No. 1 Respondent No. 2

CORAM:

Hon'ble Mr. Justice M.C. Garg	Chairperson
Hon'ble Mr. B.M. Sharma	Member
Hon'ble Mr. Praveen Garg	Member
Hon'ble Dr. Navrang Saini	Member

PRESENT:

1. Mr. Ashok B Nawal, Appellant in person for Appeal No. 04/ICWAI/2017
2. Mr. Mahfooz Nazki, Mr. Priyank Mangal and Mr. Pradeep Dahiya, Advocates
3. CMA. Ashish P. Thatte, Appellant in person for Appeal No.11/ICWAI/2017
4. Mr. L. Gurumurthy, Director (Discipline) for Respondent No. 1 in Appeal No. 04/ICWAI/2017
5. Mr. Kush Chaturvedi and Mr. Somay Kapoor Advocates for Respondent No. 2 in Appeal No. 04/ICWAI/2017
6. Mr. Peeyosh Kalra, Advocate for Respondent No. 1 in Appeal No. 04/ICWAI/2017

ORDER
20.04.2018

1. Today, one of the members of the Authority namely Shri Pravakar Mohanty is not available for hearing of this matter due to some urgent preoccupation.
2. Pursuant to the directions given vide Order dated 19th July, 2017 passed earlier by this Authority, to the Disciplinary Committee of the Institute of Cost Accountants of India, whereby, the Disciplinary Committee was directed to issue notice compelling the attendance of the witness in response of the request of Mr. Ashok B. Nawal, the Appellant herein, for cross examination thereof and the entire proceedings in the matter was required to be completed within a period of three months from the date of the receipt of the said order and thereafter the matter was required to be referred back to

the Appellate Authority for its further consideration, as mentioned under Para (9) of the aforesaid Order, the Disciplinary Committee held its proceedings in the matter and accordingly, a compliance report dated 17th February, 2018 was submitted by the Institute of Cost Accountants of India in the Registry of the Authority, whereby, it is informed that CMA. Ashok B. Nawal, appellant herein, did the cross-examination of CMA. (Dr.) Ashish P. Thatte. However, the Disciplinary Committee put a stop thereafter, as if, the Order, if any, was finally required to be passed by the Appellate Authority.

3. We, therefore, wish to clarify that it was also incumbent upon the Disciplinary Committee to pass a fresh Order on consideration of the examination, cross examination of the witness and the evidence, if any, as came on record after hearing the Appellant as well as the complainant / witness in the matter.
4. Furthermore, the original complainant of this matter, namely CMA (Dr.) Ashish P. Thatte also filed an Appeal in this Authority against Order dated 27th June, 2017 passed by the Disciplinary Committee of the Institute of Cost Accountants of India in Complaint No. 21/CA (20)/2014 titled as Ashish Thatte vs. Ashok Nawal, requesting for reframe the charges against Mr. Ashok B. Nawal and to hold him guilty of Professional and Other Misconduct under clause (6) and clause (7) of Part First of the First Schedule to the Cost and Works Accountants Act, 1959 also.
5. We have noted that according to sub-section (1) of Section 22E of the Cost Accountants Act, 1959, the Appeal filed by the complainant is not maintainable as the Appellant, not being an aggrieved Member of the Institute, is not entitled to file an appeal before the Appellate Authority. The said sub-section (1) of Section 22E of the Act reads as under:-

"22E: - Appeal to Authority:-

1. *Any member of the Institute aggrieved by any order of the Board of Discipline or the Disciplinary Committee imposing on him any of the penalties referred to in sub-section (3) of Section 21A and sub-section (3) of Section 21B, may within ninety days from the date on which the order is communicated to him, prefer an appeal to the Authority;*

Provided that the Director (Discipline) may also appeal against the decision of the Board of Discipline or the Disciplinary Committee to the Authority, if so authorized by the Council, within ninety days;

Provided further that the Authority may entertain any such appeal after the expiry of the said period of ninety days, if it is satisfied that there was sufficient cause for not filing the appeal in time.

6. Therefore, this Section clearly states that only that member of the Institute can file an Appeal before the Appellate Authority, who has been awarded any of the punishment as provided under Section 21A (3) or Section 21B (3) of the Cost Accountants Act, 1959.

7. However, a prayer was made on behalf of the original complainant in this case to consider his Appeal as a cross objection under Order 41 Rule 22 of the Civil Procedure Code, 1908 in Appeal No. 04/ICWAI/2017 namely Ashok B Nawal Vs. Institute of Cost Accountants of India & Others.
8. In view of the above observations and considering the legal position, we hereby remand back the matter relating to Appeal No. 04/ICWAI/2017 namely Mr. Ashok B. Nawal Vs. ICWAI & Others to the Disciplinary Committee of the Institute of Cost Accountants of India for the purpose of passing a fresh Order on consideration of the examination and cross examination of the witness besides other submissions made on behalf of the complainant as well as respondents. We also wish to clarify that the Disciplinary Committee is free to consider all submissions, objections, cross objections on behalf of the complainant as well as respondent in addition to considering of all other relevant evidences which may come on record including the aspect of quantum of punishment, during the proceedings before the Disciplinary Committee before passing a fresh Order in the matter for which the matter is being remanded back. The entire proceedings in this matter shall be completed within a period of three months from the date of receipt of this Order and Appeal No. 11/ICWAI/2017 namely CMA (Dr.) Ashish P. Thatte Vs. ICWAI & Others as well as his miscellaneous application dated 9th April, 2018 filed under Rule 20 of the 'Procedure to be followed for the Appeals by the Appellate Authority, 2013', by CMA (Dr.) Ashish P. Thatte, the original complainant in the matter, is hereby disposed of, as not maintainable.
9. Appeal No. 04/ICWAI/2017 namely Ashok B. Nawal Vs. ICWAI & Others is disposed of in terms of the observations/directions as noted above. Further, needless to mention that if Mr. Ashok B. Nawal feels aggrieved from the Order which shall be passed by the Disciplinary Committee in terms of the directions as being given vide this Order, he may approach the Appellate Authority by filing a fresh Appeal or alternately matter be treated as closed if he does not wish to file an Appeal against the Order to be passed by the Disciplinary Committee.
10. A copy of this Order be kept in both the files.

Justice M. C. Garg
Chairperson

B.M. Sharma
Member

Praveen Garg
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY
(Constituted Under The Cost & Works Accountants Act, 1959)

APPEAL NO. 08/ICWAI/2015

IN THE MATTER OF:

Sanjiban Bandyopadhyaya

Versus

.....Appellant

**Institute of Cost Accountants of India
and others**

.....Respondents

CORAM

Hon'ble Mr. Justice M.C. Garg
Hon'ble Mr. B.M. Sharma
Hon'ble Mr. Praveen Garg
Hon'ble Dr. Navrang Saini

Chairperson
Member
Member
Member

PRESENT

For the Appellant:

1. Mr. Vijay Kumar Gupta along-with Mr. Mehul Gupta Advocate appearing on behalf of Appellant

For the Respondents:

1. Mr. Vijender Sharma, authorized representative of Mr. Biswarup Basu, Respondent No. 4
2. Mr. L. Gurumurthy, Director (Discipline) appearing on behalf of ICWAI

ORDER

Date: 09.04.2018

1. This appeal arises against the Order dated 27th May, 2015 passed by the Disciplinary Committee of the Institute of Cost Accountants of India in complaint No. Com-21/CWA (9)/2010 titled Shri Biswarup Basu, Membership No. 8237 (Complainant) Vs. Dr. Sanjiban Bandyopadhyaya, Membership No. 8601 (Respondent), whereby, the Appellant has been held guilty of Professional and Other Misconduct under the First Schedule and Second Schedule to the Cost and Works Accountants Act, 1959 ("Act") and awarded the following punishment:-

- a) Reprimanding the member,
- b) Repayment of the entire amount of Rs. 61,461/- (Rupees sixty one thousand four hundred and sixty one) only to EIRC of the Institute plus equivalent amount as fine to be paid within 30 days of the service of this Order and
- c) Removal of the name of the member from the Register of Members for a period of one year from the date of service of the Order.

2. For the purpose of deciding the present appeal, the brief facts of the matter, which we have noted are that Shri Biswarup Basu filed a complaint, dated 8th January, 2010 against Dr. Sanjiban Bandyopadhyaya in Form I alleging defalcation of funds of Eastern India Regional Council (EIRC) of the Institute of Cost & Works Accountants of India.
3. The Disciplinary Directorate having scrutinized the complaint and finding the same in order and on being satisfied that it is a fit case to be dealt with in the manner as prescribed in Chapter III of the Cost and Works Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007, ("Rules") proceeded to register the complaint vide complaint no. Com/21-CWA (9)/2010 and a copy of the said complaint was sent to Dr. Sanjiban Bandyopadhyaya, Respondent vide Ref No. G/DD (M-8237)/Com-C-9/1/01/2010 dated 21st January, 2010 pursuant to Rule 8(1) of the said Rules.
4. The Disciplinary Committee has investigated the complaint in accordance with the provisions of the Act and the Rules framed thereunder and accordingly the Appellant was asked to appear before it on various occasions for making submissions in his defence. However, the Appellant did not appear before the Committee for the reasons best known to him except on 6th February, 2015 when the Appellant stated that he would not like to submit anything. Though, the charges against the Appellant were read out and the Appellant left the said meeting without making any submission in his defence.
5. Accordingly, the Disciplinary Committee of the Institute of Cost and Works Accountants of India after perusing the complaint, written statements, rejoinders and all the related materials on record, passed the Impugned Order in terms of Section 21B (3) of the Act read with rule 19(1) of the Rules.
6. We have heard the parties of this appeal and during the proceedings before us, noted that the crux of the allegations made by the complainant against the respondent, the Appellant herein, is that of defalcation of funds of EIRC of the Institute of Cost Accountants of India in connection with the ICWAI Diamond Jubilee Conference organized by the Eastern India Regional Council at Hotel Peerless Inn held on 4th& 5th December, 2004, for which an advance amount of Rs. 50,000/- was admittedly taken by the Appellant namely Dr. Sanjiban Bandyopadhyay and the adjustment of the said amount by the Appellant through

voucher Nos. 108, 109, 111, 112, 113 and 114. Additionally, we have heard the oral arguments of the parties concerned besides their written arguments.

7. The complainant reiterated his submissions as alleged by him in his aforesaid complaint and *inter-alia* submitted that Dr. Sanjiban Bandyopadhyaya has committed financial irregularities and had submitted false claims in violation of the TA/DA rules of the Institute including the claims of taxi bills on the same dates from EIRC as well as Headquarter and thereby he has cheated the Institute.
8. Per-contra, the Learned Counsel appearing on behalf of the Appellant argued that all the claims made by the Appellant are in order and the same have been approved by the competent Authority of the Institute and only thereafter the same has been adjusted by the accounts department of the Institute. Further, he submitted that the whole disciplinary enquiry conducted in this matter is against the provisions of the applicable Law and the procedure prescribed for the purpose of enquiry in the matter of professional or other misconducts by the Disciplinary Committee.
9. Additionally, it was also submitted by him that the Disciplinary Committee of the Institute of Cost Accountants of India even has not mentioned that under which specific clause of the First or the Second Schedule, the action of the Appellant constituted as a professional or other misconduct and therefore, the Disciplinary Committee has simply make a sweeping remark in its aforesaid Order that Mr. Sanjiban Bandyopadhyaya is guilty under the First and Second Schedule of the Act. Furthermore, it was also submitted by him that no evidence at all has been led to prove facts by holding a statutory trial as prescribed before holding the Appellant guilty and the Disciplinary Committee has only placed reliance on the facts of the matter without proving and corroborating them with the necessary evidences by way of at least examining the necessary witnesses in this matter in terms of Rule 18(9), 18(10), 18(11), 18(12) and 18(13) of the Cost and Works Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 and therefore, nor any witness has been examined neither a chance of cross examination was offered to the Appellant.
10. At this point of time it will be appropriate to note the aforesaid rules, which are reproduced as hereunder:-

"(18) Procedure to be followed by the Committee:

(9) If the respondent does not plead guilty, then the Committee shall fix a date for examination of witness and production of documents.

(10) The Committee may, on application of the Director, issue notice for appearance to any of his witnesses directing him to attend or to produce any other document or material evidence.

(11) On the date so fixed, the Committee shall proceed to take all such evidence as may be produced by the Director, including oral examination of witnesses and production of documents:

Provided that the Committee may permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination.

(12) After the presenting of evidence by the Director is over, the complainant shall be given an opportunity, if present during the hearing, to present any additional evidence after satisfying the Committee that such evidence is relevant and has not been brought forward during the presentation by the Director.

(13) The respondent shall be then called upon to enter upon his defence and produce his evidence".

11. It is a matter of record that the Disciplinary Committee of the Institute has neither recorded any evidence nor any person has been examined as a witness. However, an officer to enquire about the veracity of the factum of holding the said programme on 4th and 5th December, 2004, in the Hotel Peerless Inn, was sent but even the said officer was also not examined as a witness in the matter.
12. Be it as it may be, after noting of the facts of the matter as above and hearing of the parties besides perusing all materials on record, we are of the considered view that the Disciplinary Committee of the Institute at least should have examined the representative of the Hotel Peerless Inn, in addition to the officer concerned of the accounts department of the Institute, who has cleared the aforesaid bills as well as the Officer of the Institute who has made an enquiry in the matter, as a witness, and after providing an opportunity to the Appellant herein for cross examining them, before finally deciding the matter.
13. In view of the above observations and considering the non-observance of the established procedure to be followed by the Disciplinary Committee of the Institute, we are therefore, in exercise of the powers conferred upon this Authority under clause (c) of sub-section (2) of section 22E of the Cost and Works Accountants Act, 1959, staying the operation of the Impugned Order passed by the Disciplinary Committee of the Institute till the completion of the directions for which the present matter is being remitted to the Disciplinary

Committee of the Institute of Cost Accountants of India for undertaking the aforesaid proceedings for the purpose as mentioned under Para (12) of this order and to pass a fresh Order. We also direct the Disciplinary Committee to consider any relevant evidence if any, sought to be produced by any of the party. The whole proceedings by the Disciplinary Committee be completed within a period of six months from the date of receipt of this Order. Needless to mention that the entitled party may approach this Authority in case of being felt aggrieved from the Order to be passed by the Disciplinary Committee in pursuance of the directions given to the Institute as aforesaid by way of filing a fresh appeal.

14. With this the present appeal is disposed of. No cost to either party.

Justice M. C. Garg
Chairperson

B.M. Sharma
Member

Praveen Garg
Member

Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY

(Constituted Under the Cost Accountants Act, 1959)

APPEAL NO. 12/ICWAI/2018

IN THE MATTER OF:

Ashok B. Nawal

Versus

...Appellant

**Institute of Cost Accountants of India
Ashish P. Thatte**

**...Respondent No. 1
...Respondent No. 2**

CORAM

Hon'ble Mr. Justice M.C. Garg
Hon'ble Mr. B.M. Sharma
Hon'ble Mr. Praveen Garg
Hon'ble Dr. Navrang Saini

Chairperson
Member
Member
Member

PRESENT

For the Appellant:

Mr. Mahfooz Nazki and Mr. Arpan Behl, Advocates

For the Respondents:

Mr. Peeyoosh Kalra, Mr. Vishal Aggarwal, Ms. Sona Babbar, Advocates along-with Mr. R.K. Jain, Deputy Director (Discipline), ICWAI

ORDER

Date: 17.09.2018

1. A complaint in Form-I was received against the Appellant filed by Shri Ashish Prakash Thatte (hereinafter referred to as complainant), alleging contravention of the provisions of CWA Act/CWA Regulations and Rules framed thereunder on account of:
 - (i) Accepting position as Managing Director (MD) in a company despite clearly prohibited by Cost and Works Accountants Act and Cost and Works Accountants Regulations
 - (ii) Accepting remuneration / fixed salary other than share in Partnership firm
 - (iii) Solicits clients indirectly by advertisement on Institute letterhead and material
 - (iv) Grossly negligent in conduct of his Professional duties.
2. On receipt of notice, the said complaint was defended by the Appellant by filing the Written Statement dated 18th December, 2014, wherein the Appellant submitted that the complaint was filed with malicious intention. However, on facts, the Appellant (Respondent before the DC) stated that the Respondent has

been providing professional services of consultancy and advisory to a company on retainer-ship basis and charges to the company professional fees and company has not paid him any salary or remuneration other than professional fees. Further, the company, Bizsolindia Services (P) Ltd has been engaged in providing services of consultancy, audit and implementation of taxation and economic laws. Therefore, the Respondent has accepted the position as a Managing Director of the company so as to provide advisory services in a better manner.

While denying the allegations levelled against him including against the alleged violation of Clause (10) of Part-I of the First Schedule, he stated that it is only when a Cost Accountant engages himself in any business or occupation than only, he will be said to violate the aforesaid clause. However, in his reply, he admitted that he was working as a Managing Director of Bizsolindia Services (P) Ltd, which also provides the services allowed to a Cost Accountant only. Further, relying upon Section 2 (54) and 2 (94) of the Companies Act, 2013, he denied that he falls within the definition of the Managing Director as he was not a whole-time Director including that of in the company namely Bizsolindia Services (P) Ltd.

3. The Disciplinary Committee, however, did not agree with the defense put forward by the Respondent, the Appellant herein. The Committee regarding the evidence, which came on record, observed as under:-

- i. It is evident from the letter dated 1st April, 2014 from the Chairman of Bizsolindia Services Private Limited that the Respondent was getting a fixed amount per annum under the guise of Professional fees. In case of any professional fees the scope of assignment is always defined. Whereas the letter issued by the Chairman of Bizsolindia Services Pvt Ltd to the Respondent is an open ended letter as regards "Scope of Work" to be performed by the Respondent.*
- ii. The whole structure of the letter is in the form of an employment agreement whereby the Respondent has accepted a fixed amount per annum and other restrictive conditions like not accepting any other employment, part time as otherwise etc. as per Clause (7) of other terms and conditions prescribed in the letter referred above.*

iii. *From the evidences already submitted, it was clear that despite knowing the fact that Managing Director (MD) was not allowed under the CWA Act, the Respondent had accepted the position of MD and also protecting the same. This clause had been inserted since 2006 and Respondent was holding this position since 14th May, 2004 which the Respondent, by a letter dated 20th April, 2014 informed the Disciplinary Directorate. This clearly shows gross negligence on his part. Knowing the fact that Practicing Cost Accountant cannot take remuneration, Respondent entered into company as Managing Director and accepted remuneration in the form of employee-employer relation and accepted executive position and was also responsible to sign executing documents which are signed by Managers or Employees of Company like executing agreements.*

4. Additionally, regarding the permission sought for by the Appellant from the Institute for working as a Managing Director of the company, it came on record that the Appellant sought permission only vide his letter dated 8th Aug, 2015 for using the designation of Managing Director. In other words, before 8th August, 2015, no permission was sought for by the Appellant.

5. In these circumstances, the Director (Discipline) formed his 'Prima-Facie Opinion' holding the Appellant Prima Facie Guilty of Clause (10) of Part-I of the First Schedule and Clause (1) of Part-II of the Second Schedule of the Act.

6. The Order dated 27th June, 2017 passed by the Disciplinary Committee of the Institute of Cost and Works Accountants of India under Para (13) also contains as hereunder: -

"13. The Director (Discipline) framed his prima facie opinion which was placed and accepted by the Disciplinary Committee at its 25th meeting held on 20th May, 2016 holding the respondent prima facie guilty on two counts:

- (i) Clause (10) of Part I of First Schedule to the CWA, Act, 1959*
- (ii) Clause (1) of Part II of Second Schedule to the CWA, Act, 1959."*

7. Since it was a case of pleading 'not guilty' by the Appellant to the allegations made against him, the Disciplinary Committee after Prima Facie Opinion formed by the Director (Discipline) thought it appropriate to call upon both sides to appear before it and to produce evidence, if any in support of their contention. While the Appellant did not use the opportunity, the complainant invited the attention of the Committee to his letter dated 13th October, 2015 and 24th September, 2015 wherein he has added

additional charge on Shri Ashok Nawal by insertion of Clause (7) of Part I of First Schedule to the Act which included the advertisement published on Bizsol India website in addition to advertisement published by Shri Ashok Nawal every month in the magazine of Bizsol India Limited.

8. The Disciplinary Committee under Para (26) of the Order dated 27th June, 2017 also recorded this fact and further stated that it clearly proves the charges under this section. Shri Ashok Nawal was openly using his designation as Managing Director in all places like reading material provided by Regional Council in February 2017, which was already submitted to Disciplinary Committee in previous hearing at the time of making oral submissions by the complainant. The complainant added that a seminar was to be held on 8th April, 2017 at Navi Mumbai, where the Respondent has consented to act as speaker and from the brochure that was available on the Institute website also reveals that the Respondent is Managing Director of Bizsol India Pvt. Ltd. Shri Ashok Nawal who is also speaker in these seminars to be held at Vapi dated 13th April, 2017, has again termed himself as Managing Director of Bizsol India Services Pvt. Ltd and the same is also available on the website of the Institute.

9. The Disciplinary Committee, while dealing with the matter also observed as follows:-

(i) In the various documents attached by Shri Nawal, he gives his email ID as nawal@bizsolindia.com. This is a clear indication about using name of another company as a practicing professional.

(ii) Shri Nawal has, in his written statement, failed to appreciate the stand taken by the Director (Discipline) about holding of substantial powers of company. However, Shri Nawal focused on proving his monthly retainership which he claims is not his remuneration but income from profession. The complainant stated that he would like to reply upon opinion formed by Director Discipline on Page 9 of the prima facie opinion. He also drew the attention of the learned Committee members between Bizsol India Services Private Limited and Shri Nawal which clearly compels Shri Nawal to devote full time with the company and execute decisions taken by company's Board of Directors.

- (iii) Any turnover statement, copies of TDS deducted, details of bifurcation between earnings from company or from own partnership firm etc., submitted by the Respondent are irrelevant matters in the present case.
- (iv) The Respondent has completely disregarded that he was Managing Director for quite a long period of time and deriving benefit from the same. However, Respondent has provided most of the documents after this complaint has been filed and not before the date of complaint. Hence, all such documents, which are filed after the date of complaint till date by the Respondent, are to be set aside and are irrelevant for the case.
- (v) The Respondent's statement of 'when advisory services are provided by the senior it is considered as authenticated and responsible' is completely a vague statement and accepting such position does not help anyone in providing services. Being Managing Director of the company is the only reason for continuing him to render services to the company.
- (vi) In case of practicing professional it is very clear that he can become director of the company but in other words he has to be Director Simplificator and not Managing Director or Whole time Director. By drawing huge sums every month from his company by virtue of his agreement which is in nature of employee and employer relationship clearly shows that Respondent is violating basic principle of law i.e. Director Simplificator.

10. Before finally deciding the matter, the Disciplinary Committee also took

note of the submissions made by the Appellant, which are as hereunder:-

- i. That the Respondent is not a salaried employee of Bizsolindia Services Pvt. Ltd and therefore, not in whole time employment.
- ii. That the Respondent is merely providing consultancy services. He is not filing Income Tax Return as a salaried employee.
- iii. The annual return of Bizsolindia Services Pvt. Ltd shows that income of the respondent from the said company is 40% while the rest comprising 60% income is from other clients/corporate.
- iv. Regarding the expression 'Director Simplificator' used by the complainant in Para (10) of his submissions dated 7th April, 2017, the Respondent stated that the expression 'Director Simplificator' does not appear in the CWA Act/Regulations or Code Ethics and cannot be considered.
- v. Regarding Para (11) of the submissions made by the complainant that the Respondent has made a false statement about his relationship with Dr. Dhananjay Joshi, the Respondent stated that the complainant, as on date, is a partner in Joshi Apte & Associates where Ms. Priyamwada D. Joshi, wife of Dr. Dhananjay Joshi is a partner. Hence, the statement of the Respondent was not false.

11. Further, the Disciplinary Committee finally in Para (36 to 37) of the Order

dated 27th June, 2017 also observed :-

"36. In the case Council of the Institute of Chartered Accountants of India Vs. Subodh Gupta decided by the Hon'ble Delhi High Court, the Hon'ble Court remarked "In the instant case the admitted position is that the respondent is registered with the Council to practice as a Chartered Accountant. He cannot be a director of a company without the permission of the Council. The appellant is the promoter of various companies of which he is a director as

per the evidence on record. Being a Chartered Accountant the respondent cannot actively carry on business through companies, trusts and firms. There is evidence that the respondent is doing so. Affirming the verdict of guilt and keeping the gravity of the misconduct we answer the reference by imposing the penalty of removal of respondent's name from the Register of members of the Institute of Chartered Accountants for a period of two years".

37. *The Disciplinary Committee concluded that the respondent is guilty of professional misconduct and takes the following action under Section 21B (3) of Cost and Works Accountants Act, 1959:*

- (a) Reprimand*
- (b) Removal of name from the Register of members for a period of two years.*
- (c) Fine of Rs.25000/- (Rupees twenty five thousand)*

The fine is to be paid within 30 days from the date of receipt of the order."

12. It is a matter of record that the aforementioned Order was assailed by the Appellant vide Appeal No. 04/ICWAI/2017. In the said appeal, the Appellate Authority vide its Order dated 19th July, 2017 stayed the Operation of the Impugned Order and permitted the Appellant to cross-examine the complainant and to adduce all the evidences and arguments in his favor, if any. In the said Order, the Authority also directed the Appellant to resign from all the Posts held by him as a Managing Director of various corporate bodies within a period of three days considering that the Appellant has admitted that he was working as a Managing Director for an annual remuneration as recorded in the said Order and also stated in his letter of renewal of appointment dated 1st April, 2014, that is why, this Appeal was remanded back to the Institute for the purpose as recorded herein.

13. Consequently, the Disciplinary Committee in compliance with our order dated 9th July, 2017 allowed the Appellant to cross-examine the complainant as well as to adduce evidence and address arguments in his defense and again passed a detailed order reiterating its earlier decision.

14. While passing the Impugned Order dated 6th July, 2018 assailed in this Appeal, the Disciplinary Committee under Para (XVIII, XIX and XX) observed:-

"XVIII. Based on the Evidence submitted by the Complainant, before the Director (Discipline) and the arguments, witness and documents advanced by the

Respondent, it is proven beyond doubt that Shri A.B. Nawal (M/5720) was holding the Position of Managing Director. Further, during the Cross-Examination on 17th Feb, 2018 Shri A.B.Nawal could not prove that he was not holding the position of Managing Director as alleged by the Complainant and he did not violate the provisions of CWA Act, 1959 by accepting the position of Managing Director. Further, the Respondent admitted that he was working as a Managing Director and also received annual remuneration and these facts were recorded by the Hon'ble Appellate Authority in its Order dated 19th July, 2017.

XIX. *In the considered view of the Disciplinary Committee, the moot question to be raised and decided was whether the Respondent Shri Ashok B Nawal (M/5720) was holding the Post of Managing Director in contravention of CWA Act/Rules/Regulations as alleged by the Complainant Shri Ashish P Thatte and whether Shri A.B. Nawal (M/5720) has contravened the clause (10) of Part-I of First Schedule to the CWA, Act, 1959 and Clause (1) of Part-II of Second Schedule to the CWA Act, 1959 and these questions were provided against the Respondent beyond doubt.*

XX. *Therefore, the Committee concluded that the Respondent has nothing more to offer to prove that he was not guilty and did not violate the provisions of CWA Act/Regulations and confirms the order issued by the Disciplinary Committee on 27th June, 2017 and concluded that the Respondent is guilty of Professional Misconduct and take the following under section 21B (3) of Cost and Works Accountants Act, 1959:*

- (a) Reprimand
- (b) Removal of name from the Register of Members for a period of two years
- (c) Fine of Rs.25000/- (Rupees Twenty Five Thousand Only)

The Fine is to be paid within 30 days from the date of receipt of the Order."

15. To appreciate the controversy and background of the matter leading to passing of the Impugned Order by the Disciplinary Committee, it will be appropriate to take note of the letter dated 1st April, 2014, which reads as under:-

"To,

Mr. Ashok B. Nawal
701, Supriya Classic
Near Sadanand Resort, Baner-Mahalunge Road,
Baner, Pune – 411045

Dear Mr. Nawal,

The Management is happy to place on records its appreciation for the Management Consultancy services rendered by you to the company. We desire to renew our previous contract with you w.r.t. professional services on Retainership basis for Professional advice and implement thereof on the defined scope of work for the year 2014-15. The contract will continue thereafter subject to the conditions mentioned elsewhere below.

The scope of work and the terms and conditions for the same would be as specified hereunder.

Scope of Work

1. ***You shall be responsible for training the Business Development Team w.r.t. several aspects of defining policies for capturing the business markets for various segments, expansion of client base and country coverage, strategic for its execution, etc.***

2. *You will co-ordinate with officials of the company to review budgets vis-à-vis actuals and offer you guidance for better implementation of business plan of the company and also provide the officials the necessary guidance required for execution of various projects and contracts materialized.*
3. *You will provide professional expertise services for conducting Project assignments and conducting audits wherever applicable.*
4. *You would also be primarily responsible for inclusion of New Service Areas like IFRS, Direct Tax Cod, Goods and Service Tax and any other such opportunities.*
5. *You will provide opinions in the area of Direct Tax, Indirect Tax, Foreign Trade Policy, EOU, SEZ matters.*
6. *You will advise on Cost Control and Cost Reduction to improve margins of the company.*
7. ***You will take issues at the right platform of clients of Bizsolindia and use your good office being on various Committees of the Associations or the Government.***
8. ***You will also do the necessary co-ordination and representation before the respective government Authorities for obtaining the necessary approvals wherever required.***

PROFESSIONAL FEES

The professional fees for the above scope of work will be Rs. 54,36,000/- per annum. The above fees are all inclusive, which would include all out of pocket expenses as well.

Expenses, if any incurred for conveyance/travel to any client/for business purpose would be reimbursed to you at actuals as per company norms only on receipt of bills from you to this effect. No additional expenses will be reimbursed, except with prior approval from the Board of Directors.

OTHER TERMS AND CONDITIONS

1. *The services to be availed by the company are expected to be of independent Professional nature and therefore objectively and due professional care should be exercised in execution of your responsibilities.*
2. *You shall maintain an office with sufficient staff recruited for providing support services and assisting our Team whenever required and any expenses incurred in maintaining and running such office shall be borne by you.*
3. *You will raise a monthly bill for the above professional fees and necessary service tax would be paid, only on compliance with the Service Tax provisions.*
4. *The above professional fees shall be subject to Tax deduction at source as per the applicable provisions of income tax.*
5. *The period of agreement will be valid till it is terminated by either party. However, consideration for each year will be decided by the company on year to year basis considering various factors. Termination of the said agreement can be done by either party only after giving 3 months' notice in writing. The notice in writing. The notice period from the company and terms thereof will not be applicable in case the termination of the agreement is on grounds of indiscipline, integrity or any similar grounds which are detrimental to the interest of the company and the company reserves the right to terminate the agreement with immediate effect in such cases.*
6. *You will devote your full time and attention to the job profile assigned to you. You will at all times abide by the lawful direction and Policies framed by the Board of Directors, and*

you will work diligently, faithfully and with utmost dedication towards achieving the Goals and Objectives of the company.

7. ***You will not accept any other employment, part time or otherwise or engage in any commercial ventures or business or pursuit, on your own account, or through any agent, individuals, company or agency which is directly related to our company's business interest or activities or which would be detrimental to the company's business activities, except with prior approval of the management.***
8. *You will not divulge to any persons, company or to any bodies company matters, confidential data or knowledge that you possess or would possess, unless prior management approval is obtained.*
9. *You will be responsible for the safekeeping and return in good condition and order, all of the company's property, material and data which may be in your use, custody or charge.*
10. *You will keep the company informed of any change in your profession address.*
11. ***You will be governed by the Company's model standing orders presently in force.***
12. *If the above terms and conditions are acceptable to you, kindly sign the duplicate copy of this letter as a token of acceptance.*

We wish you the Best in your future endeavors and look forward to your continuous contribution for benefit of the company.

Thanking you,

*Yours faithfully,
For Bizsolindia Services Pvt. Ltd.*

*Sd/-
Venkat R. Venkitachalam*

Chairman

*I Accept
Sd/-
Ashok B. Nawal"*

(Emphasis Supplied)

13. The aforesaid letter which is basically the letter of renewal which mentions that the Appellant had been working as Managing Director even earlier. Further, it will also be appropriate to take note of the Resolution passed by the Board of Directors being Resolution No (35) dated 23rd December, 2013 which also clarifies as to what kind of duties were to be exercised by the Appellant. The said Resolution reads as under:-

"CERTIFIED TRUE COPY OF THE EXTRACTS OF THE RESOLUTION PASSED AT THE MEETING OF THE BOARD OF DIRECTORS OF BIZSOLINDIA SERVICES PVT. LTD. HELD ON THE MONDAY THE 23RD DAY OF DECEMBER, 2013 AT 11:00 AM, AT THE REGISTERED OFFICE OF THE COMPANY AT 14-17, SUYASH COMMERCIAL MALL, S. NO. 74 & 75, NEAR PAN CARD CLUB, BANER PUNE – 411045. RESOLUTION NO. 35

CREATION OF CHARGE

"RESOLVED THAT, the draft of Agreement for creation of charge from HDFC Bank Ltd., Swargate Branch, Pune, presented before the Board for initialization by the Chairman for the purpose of identification be and is hereby approved by the Board.

RESOLVED FURTHER THAT, the Company does hereby create charge for Rs.27,80,000/- (Rupees Twenty Seven Lakhs Eighty Thousand Only) in favour of **'HDFC Bank Ltd. Swargate Branch, Pune**, for availing loan against Vehicle Audit A4 by way of hypothecation by exclusive charge over the vehicle/asset i.e. Audit A4 on the terms and conditions as may be decided between the Company and the Bank/Lender."

RESOLVED FURTHER THAT, Mr. Ashok Nawal, Managing Director of the Company be and is hereby authorized to make applications, submit documents and papers, give guarantees and sign other agreements, documents and papers as the Bank may require for the purpose of creation of charge and availing the said loan facilities and to accept, on behalf of the Company, such terms and conditions as the Bank may impose for that purpose.

RESOLVED FURTHER THAT, the Common Seal of the Company be affixed on documents such as deed of hypothecation, Loan agreement or such other documents as the Bank may require, under the signature of Mr. Ashok Nawal, Managing Director of the Company who shall sign in token thereof pursuant to the provisions of the Articles of Association of the Company".

RESOLVED FURTHER THAT, Mr. Ashok Nawal, Managing Director or any of the Directors of the Company be and is hereby authorized to sign, and execute such applications, documents and forms as may be required and to file e-forms no.8 or such other forms as may be required with the Registrar of Companies, Pune to give effect to this resolution.

For Bizsolindia Services Pvt. Ltd.

Manoj Behede
Joint Managing Director"

14. The bare perusal of the above referred letter dated 1st April, 2014 and Resolution dated 23rd December, 2013, particularly when there being no rebuttal to both these documents on behalf of the Appellant, Prima Facie leads to understand that there is no infirmity in the Impugned Order. However, taking into consideration various submissions made on behalf of the Appellant through his Counsel, we are of the considered view that the core issues which requires consideration and final decision thereon by this Authority are as hereunder:-

- i. **Whether the Appellant is guilty of Professional Misconduct under Clause (10) of Part-I of the First Schedule of the Act, as held by the Disciplinary Committee while accepting the Position of Managing Director of M/s Bizsolindia Services Pvt Ltd as well as simultaneously holding the Certificate of Practice (CoP) issued to him by the Institute of Cost Accountants of India?**

- ii. **Whether the Appellant is also guilty of Professional Misconduct under Clause (1) of Part – II of Second Schedule to the Act, as held by the Disciplinary Committee?**
- iii. **Whether the allegations leveled against the Appellant were required to be looked into by the Board of Discipline or the DC which passed the Impugned Order is justified to exercise its jurisdiction over the present matter?**
- iv. **Whether the Constitution of the DC, under sub-section (1) of Section 21B of the Cost and Works Accountants Act, 1959 is legal and consequently has jurisdiction to pass the Impugned Order? And;**
- v. **Whether the punishment awarded to the Appellant by the DC is justified under the facts and circumstances involved in the matter?"**

15. As regards issue No.1 as to whether the Appellant is guilty of Professional Misconduct under Clause (10) of Part-I of the First Schedule of the Act, the Learned Counsel appearing on behalf of the Appellant submitted that the Director (Discipline) vide its Order dated 15th June, 2016 had only found the Appellant Prima Facie Guilty of being a Managing Director in a Company. The said misconduct false under Schedule-I, Part- I, Clause-10 of the Cost and Works Accountants Act, 1959. There is no other misconduct that the Director (Discipline) found the Appellant to be guilty of. It is further submitted that the Appellant is not an employee and had no major responsibility as a Managing Director.

We have examined this issue on the basis of the materials on record including the complaint filed by the Complainant, written statement as submitted by the Appellant at the relevant time including other relevant papers namely his letter of renewal of appointment dated 1st April, 2014, Prima-Facie Opinion formed by the Director (Discipline) besides the Impugned Order passed by the Disciplinary Committee and observed that the Appellant was undoubtedly holding the position of a Managing Director of M/s Bizsolindia Services Private Limited as well as simultaneously holding the Certificate of Practice (CoP) issued to him by the Institute of Cost Accountants of India without seeking prior permission of the

Council of the Institute, which is certainly violative of Clause (10) of Part-I of the First Schedule of the Act. Thus, we hereby reject the arguments made on behalf of the Appellant that he was not an employee of the Company. Further, we have observed from his renewal of appointment that he was possessing all necessary powers to be exercised as a Managing Director of the said Company.

16. As regards issue No.2 as to whether the Appellant is also guilty of Professional Misconduct under Clause (1) of Part-II of the Second Schedule to the Act, the Learned Counsel appearing on behalf of the Appellant submitted that the only finding against the Appellant is that he was guilty of Misconduct under Clause (10) of Part-I of the First Schedule and Clause (1) of Part-II of the Second Schedule of the Act, whereas, according to him there was no allegation of any misconduct mentioned in the Second Schedule. He further submitted that neither in the complaint nor in the Prima Facie Opinion or in the Impugned Order, there was any discussion on the relevance of Second Schedule. Furthermore, he submitted that in the present case, the specific allegation against the Appellant was that of Part-I Misconduct. However, the Director (Discipline) as well as the Disciplinary Committee grossly erred in referring to Part-II of the Second Schedule which is an omnibus provision and is necessarily deemed to have been excluded in the present case where the specific provision has been provided under Part-I of the First Schedule of the Act, as it is a settled principle of Law that specific excludes the general. In view thereof, the whole proceedings are grossly misconceived since it ought to have been placed before the Board of Discipline and not before the Disciplinary Committee.

On the other hand, the Learned Counsel appearing on behalf of the Institute submitted that the Complainant himself has mentioned the violation of the Provisions of the Second Schedule besides that the Director (Discipline) in his Prima Facie Opinion held the Appellant guilty under the provision in question. The Impugned Order also contains that the Appellant is guilty of the said clause

obviously on the ground that the same is violative of the Council guidelines which requires the prior permission for undertaking any other business or occupation while holding the Certificate of Practice by any member of the Institute, whereas, the Appellant herein is not having any such required permission of the Council.

Hence, In view of the violation of the guidelines issued by the Council, we are of the view that the Appellant is certainly also guilty under clause (1) of Part-IV of the Second Schedule of the Act.

17. As regards issue No. 3 as to whether the allegations leveled against the Appellant were required to be looked into by the Board of Discipline or the Disciplinary Committee which passed the Impugned Order is justified to exercise its jurisdiction over the present matter, all arguments advanced by the Learned Counsel appearing on behalf of the Appellant are hereby rejected in view of our considered view as to issue No. 2 above. Thus, we are of the considered view that the Disciplinary Committee is fully justified to undertake and enquire in the present complaint.

18. As regards issue No. 4 as to whether the constitution of the Disciplinary Committee under sub-Section (1) of Section 21B of the Act, is legal and consequently have jurisdiction to pass the Impugned Order, the Learned Counsel appearing on behalf of the Appellant submitted that the Disciplinary Committee was not formulated in accordance with Section 21B of the Act but was constituted/re-constituted by the President and Presiding Officer of the Disciplinary Committee, which was objected to by various Council Members from time to time. He further submitted that the members of Disciplinary Committee were not elected and therefore the same is against the express provisions of the Act.

On the other hand, the Learned Counsel appearing on behalf of the Institute submitted that the contention of the Appellant that the said provision uses the

word 'elected' and no such election has taken place, is misconceived as the members constituting the Disciplinary Committee are unanimously elected from amongst the members of the Council and this fact is revealed from the minutes of 308th Meeting of the Council, which is already the part of the record. However, the Appellant did not attend the meeting of the said meeting of the Council in which the Disciplinary Committee was constituted. He further submitted that after the Appellant became Council Member, the Disciplinary Committee was also constituted in its 295th Meeting held on 22nd July, 2015 and he never raised his objection to the formation of the Committee and during the course of this Committee only the Prima Facie Opinion was formed.

We would like to make it very clear that the word 'elected' as used in sub-section (1) of Section 21B of the Act, does not mean and require election of the Members of the Disciplinary Committee every time on case to case basis. Thus, the Disciplinary Committee constituted by the Members of the Council unanimously is having the jurisdiction to decide all the complaints filed before it.

Based on the above arguments and after perusing the relevant records, we are of the considered view that there is no illegality in the constitution of the Disciplinary Committee and thus the same was having a lawful jurisdiction to decide the present complaint.

19. As regards issue No. 5 as to whether the punishment awarded to the Appellant by the Disciplinary Committee is justified under the facts and circumstances involved in the matter, the Learned Counsel appearing on behalf of the Appellant submitted that assuming, on demurer, that an alleged misconduct has been committed, the Impugned Order removing the name of the Appellant from the Register of Members for a period of two years is disproportional. In this regard, he has also brought on record a case namely **Bhagat Ram Vs. State of Himachal Pradesh and others, AIR 1983 SC 454** decided by the Hon'ble Supreme Court, wherein the Hon'ble Court held that *"it is equally true that the*

penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution."

After considering the nature of the misconduct committed by the Appellant, hearing arguments of the parties and considering the age of about 65 years of the Appellant, we are of the considered view that the ends of justice will be met out if we modify the punishment of removal of his name from the Register of Members for a period of one year instead of two years. Thus, we hereby modify the Impugned Order to this effect only.

20. All other arguments incidental to the main grounds of defence, raised on behalf of the Appellant, being distinguishable from the core issues involved, are hereby rejected.

21. Stay Order/Interim relief, if any, granted to the Appellant is vacated. With this the present appeal is disposed of. No cost to either party.

Justice M. C. Garg
Chairperson

B.M. Sharma
Member

Praveen Garg
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY
(Constituted Under The Cost & Works Accountants Act, 1959)

APPEAL NO. 08/ICWAI/2015

IN THE MATTER OF:

Sanjiban Bandyopadhyaya

Versus

...Appellant

**Disciplinary Committee
Institute of Cost Accountants of India**

...Respondent No. 1

**Presiding Officer, Institute of Cost
Accountants of India**

...Respondent No. 2

**Institute of Cost Accountants
of India**

...Respondent No. 3

Biswarup Basu

...Respondent No.4

CORAM

Hon'ble Mr. Justice M.C. Garg
Hon'ble Mr. B.M. Sharma
Hon'ble Mr. Praveen Garg
Hon'ble Dr. Navrang Saini

Chairperson
Member
Member
Member

PRESENT

For the Appellant:

None

For the Respondents:

1. Mr. S.C. Gupta, Director (Discipline) appearing on behalf of ICWAI
2. Mr. Vijender Sharma authorized representative appearing on behalf of the Respondent No. 4, the Original complainant (Mr. Biswarup Basu)

ORDER

Date: 31.10.2018

1. Despite notice issue, none appeared on behalf of the Appellant.
2. The Secretary of the Disciplinary Committee of the Institute of Cost Accountants of India vide an application dated 10th October, 2018 has sought further six months' time for completing the entire proceedings for the reasons explained in the letter dated 10th October, 2018.

3. The Complainant while stating that the Institute has not carried out the hearing of this matter for about five months has objected and prayed that the extension should not be granted for more than two months.
4. Taking all the facts of the matter and considering of the request made by the Institute, in the interest of justice, we hereby allow the application of the Director (Discipline) filed on 10th October, 2018 and grant a further period of four months from the date of receipt of this Order with a cost of Rs.20, 000/-(Rupees Twenty Thousand Only) to be deposited with the Appellate Authority within a period of four weeks from today and accordingly, direct the Institute of Cost Accountants of India to complete the entire proceedings within the extended period of four months. No further extension shall be granted in the matter.
5. The said application is disposed of as above. A copy of the Order be supplied to all parties by the Registry positively latest by 1st November, 2018.

Justice M. C. Garg
Chairperson

B.M. Sharma
Member

Praveen Garg
Member

Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY
(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 06/ IAI/2015

IN THE MATTER OF:

Dr. R. Kannan

...Appellant

Versus

**Institute of Actuaries of India
Disciplinary Committee (IAI)
Liyaquat Khan**

**...Respondent No. 1
...Respondent No. 2
...Respondent No. 3**

CORAM:

Hon'ble Mr. Justice M.C. Garg
Hon'ble Mr. Praveen Garg
Hon'ble Dr. Navrang Saini

Chairperson
Member
Member

PRESENT:

For the Appellant:

Mr. Kirit J. Hakani and Mr. Rahul Hakani, Advocates along-with Dr. R. Kannan, Appellant in person

For the Respondents:

Mr. Alok Kumar, Advocate

ORDER

Date: 07.07.2018

1. At the outset, we have noted that Shri Heerak Basu and Ms. Vibha Bagaria, both the members appointed by the Central Government in pursuance of the requirements of Section 32 of the Actuaries Act, 2006, as part-time members of the Authority on behalf of the Institute of Actuaries vide Notification No. 2522 dated 21st October, 2016, published in the Official Gazette of India, for a period of three years from the date on which they enters in office or until attaining the age of Sixty Seven (67) years or till further orders, whichever is earliest with effect from the date of said notification, have recused themselves from hearing of this Appeal on the ground of being members of the Council of the Institute of Actuaries of India at the relevant time when this order was passed, against which, the Appellant preferred this Appeal.

2. Despite the nonparticipation of both the above named members of the Institute of Actuaries of India, considering the judgment dated 12th March, 2018 delivered by the Hon'ble High Court of Delhi in W.P. (C) 8341/2017, namely Talluri Srinivas Vs. Union of India, Ministry of Corporate Affairs and another, we decided to proceed for hearing and deciding of the present Appeal.

3. For the purpose of understanding and deciding the present appeal in its totality, the brief facts which have been recorded by the Disciplinary Committee of the Institute of Actuaries of India (IAI) and also noted by us are as hereunder:-

3.1 Shri R.B.L Vaish, the former Prosecution Director of the Institute of Actuaries of India, in his letters dated 27th March, 2010 and 8th April, 2010, forwarded to the Disciplinary Committee members stated that Dr. R. Kannan, one of the member of the Institute of Actuaries of India and a member of the Council of the Institute, on behalf of the Insurance Regulatory Development Authority (IRDA) had submitted forged air tickets to the Institute and claimed reimbursement for the same. He alleged that Dr. R. Kannan has manipulated the tickets in six different ways wherein he has brought out confirmation/evidence from the airlines concerned, which are totally contrary to the details of the travels claimed by Dr. R. Kannan in his bills submitted and reimbursed by the Institute.

3.2 The Disciplinary Committee decided to treat the aforesaid two letters as 'Information' and process the same as per rules. Accordingly, the Prosecution Director was asked to treat the above mentioned letters of Shri R.B.L Vaish as 'Information', use the evidence already on record and call for any further information, if so desired and to submit his report at the earliest.

3.3 In compliance, the Prosecution Director, vide his letter dated 29th June, 2010 addressed to Dr. R. Kannan sent the particulars of the acts of Commissions and Omissions alleged, copies of the Information Letter dated 27th March and 8th April, 2010 received from Shri R.B.L Vaish along-with enclosures, namely, a letter dated 24th February, 2010 addressed by Shri R.B.L Vaish to Dr. R. Kannan, and a copy of four emails dated 30th June, 2009, 1st July, 2009, 10th September, 2009 and 29th September, 2009. The Prosecution Director accordingly, requested Dr. R. Kannan to submit his written statement on each of the points along-with documentary evidence, if any, within 21 days from the date of receipt of the aforesaid letter.

3.4 A brief summary of the allegations against Dr. R. Kannan was noted as hereunder:-

(i) Journey performed on 22nd March and 23rd March, 2008

Dr. R. Kannan claimed that the **Return Economy Class ticket** was booked online for Rs. 15,770/- by using Master Card No xxxxxxxx 6013. **Original Boarding Pass was not submitted for both the journeys.**

Jet airways vide their email dated 7th January, 2010 to Executive Director, IAI, confirmed that the ticket number does not exist in their data base.

(ii) Journey Performed on 23rd May and 24th May, 2008

Dr. R. Kannan claimed that the Return Economy Class ticket was booked for Rs. 13, 720/- through M/s Balmer Lawrie & Co Ltd, Hyderabad. **Original Boarding Passes were not submitted for both the journeys.**

Jet airways vide their certificate Ref TC/12-2009/25001 dated 7th December, 2009, confirmed that the ticket number related to travel by Dr. R. Kannan on 8th May, 2008 by 9W454 from Hyderabad to Mumbai and on 10th May, 2008 by 9W457 from Mumbai to Hyderabad, both by Business class. The fare shown is Rs. 26, 870/-.

(iii) Journey performed on 18th June and 20th June, 2008

Dr. R. Kannan claimed that Return Economy Class ticket was booked for Rs. 15,650/- through M/s Balmer Lawrie & Co Ltd, Hyderabad. **Original Boarding Pass was not submitted for both the journeys.**

Jet Airways vide their certificate Ref TC/12-2009/25002 dated 7th December, 2009, have confirmed that the Ticket number relates to one way travel by Dr. R. Kannan from Hyderabad to Mumbai on 18th June, 2008 by 9W452 in C Class i.e., Business Class. The actual fare paid is Rs.14, 725/-.

(iv) Journey performed on 10th July and 14th July, 2008

Dr. R. Kannan claimed that **Return Economy Class Ticket** was booked online for Rs. 17, 050/- by using Master Card No. xxxx xxxx 6013.

A Xerox copy of Boarding Pass for flight 9W 0454 from Hyderabad to Mumbai with 'O' class was submitted. A Xerox copy of Boarding Pass was also given for flight 9W 457 from Mumbai to Hyderabad.

Jet airways vide their certificate Ref TC/12-2009/25003 dated 7th December, 2009, have confirmed that the Ticket Number relates to Dr. R. Kannan for one way journey from Mumbai to Hyderabad on 14th July, 2008. Only Rs. 441/- was paid for the ticket. **(Fare basis X7JP i.e., Award Ticket in Economy Class).**

(v) Journey performed on 3rd January, 2009

Dr. R. Kannan claimed that **Return Economy Class Ticket** was booked online for Rs. 17, 059/- by using Master card xxxx xxxx 7271. **Original Boarding Pass was not submitted for both the journeys. A boarding pass was submitted but that pertains to flight 9W 456 on 2nd January, 2009 from Hyderabad to Mumbai.**

Jet airways vide email dated 2nd October, 2009 to Executive Director, IAI, have confirmed that only an amount of Rs. 1319/- was paid towards taxes, surcharge fee for the 'Award Ticket' issued in the name of Dr. R. Kannan for Hyderabad- Mumbai- Hyderabad Sector.

(vi) Journey performed on 8th June, 2009

Dr. R. Kannan claimed that Return Economy Class Ticket was booked online for Rs. 19,555/- by using Master Card xxxxxxxx7271. **Original Boarding Pass was not submitted for both the journeys. (This Bill was not settled by the Institute).**

Indian Airlines vide email dated 11th October, 2009, have confirmed that **the relevant ticket pertains to one Shri Kochar and not to Dr. R. Kannan.**

- 3.5 Dr. R. Kannan submitted his written statement dated 5th August, 2010 inter-alia stating that in the travel bills which he has submitted to the Institute, there were some inadvertent mistakes, due to his pressing pre-occupations. When he noticed this, he on his own, brought this to the notice of the then President somewhere in September, 2009 with bonafide intention to maintain high standards in public life. He also told to the then President clearly that the excess amount of claim could be informed to him so that he would pay back the excess.
- 3.6 Accordingly, this matter was discussed in the Council meeting held on 10th March, 2010 where also Dr. R. Kannan regretted for the unintentional mistake committed inadvertently. In the said meeting Executive Council discussed this issue for about three hours, though, Dr. R. Kannan withdrew himself during the discussion on this issue in the said meeting.
- 3.7 Subsequently, as informed in the Council to Dr. R. Kannan, he sent a Cheque for Rs. 1,00,000/- (Rupees One Lakh Only) and the Institute recovered Rs. 77,500/- (Rupees Seventy Seven Thousand Five Hundred Only) and the balance amount were returned to him in the month of April, 2010.
- 3.8 The Prosecution Director after carefully perusing the entire matter in totality, felt that it is stretching a bit too far to invoke Part-IV A (2) of the Schedule and / or apply Section 31, beyond the pale of Part-I, Part-II, Part-III and Part-IV of the Schedule, in this particular case and expressed his *Prima-Facie Opinion* (PFO) that Dr. R. Kannan is not guilty of any misconduct falling within the meaning of Part-IV A (2) of the Schedule read with Section 31 of the Actuaries Act, 2006.

- 3.9 The PFO so formed by the Prosecution Director was placed before the Disciplinary Committee of the Institute of Actuaries of India by him in its meeting held on 12th February, 2011, wherein, after deliberations, the Disciplinary Committee agreed with the findings of the Prosecution Director that Dr. R. Kannan attended the meetings at Mumbai on the relevant dates is not disputed. But there is absolutely no denial of each of the acts of the Commissions and Omissions alleged nor any attempt made to counter the allegation by bringing any evidence. Thus, the statements made by Dr. R. Kannan are an admission of the allegations made by Shri R.B.L Vaish. However, the Disciplinary Committee did not agree with the PFO of 'Not Guilty' formed by the Prosecution Director and while disagreeing with the conclusion of the Prosecution Director, the Disciplinary Committee decided to apply the provisions of Section 31 of the Actuaries Act, 2006 and proceeded under Chapter-IV of the Actuaries (Procedure for Enquiry of Professional and Other Misconduct) Rules, 2008.
- 3.10 Resultantly and pursuant to consideration of the written statement, various submissions made by Dr. R. Kannan and all other relevant documents relating thereto besides considering the oral submissions made by Prosecution Director, the Disciplinary Committee decided to apply the provisions of Section 31 of the Actuaries Act, 2006 and Part-III (1) & (3) and Part-IV (A) (2) of the Schedule, which are reproduced hereunder:-

"Section 31- Professional or other misconduct defined:

*For the purposes of this Act, the expression, '**Professional or other misconduct**' shall be deemed to include any act or omission provided in the Schedule, but nothing in this section shall be construed to limit or abridge in any way, the power conferred or duty cast on the Disciplinary Committee or the Prosecution Director to inquire into the conduct of any member of the Institute under any other circumstances.*

***Part-III (1)** - includes in any statement, return or form to be submitted to the Council any particulars knowing them to be false;*

***Part-III (3)** - does not supply the information called for or does not comply with the requirements asked for by the Council or any of its Committee and*

***Part-IV (A) (2)** - in the opinion of the Council, he brings disrepute to the profession or the Institute as result of his action whether or not related to his professional work."*

- 3.11 Based on the above, the Disciplinary Committee in its meeting held on 21st January, 2012 unanimously concluded that Dr. R. Kannan, the defendant is guilty of misconduct in terms of Section 31 of the Actuaries Act, 2006 and Part-III (1) & (3) and Part-IV (A) (2) of the Schedule to the Act and accordingly, Ordered the removal of the name of the member from the register of members permanently with immediate effect and also imposed a fine of Rs. 5,00,000/-

(Rupees Five Lakh Only) on Dr. R. Kannan vide its *ex-parte* Order dated 29th June, 2013.

4. Being aggrieved of an *ex-parte* Order dated 29th June, 2013 passed by the Council of the Institute of Actuaries of India under section 30 of the Actuaries Act, 2006 on the basis of *ex-parte* report of the Disciplinary Committee holding him guilty of Professional Misconduct under the provisions of Part- III (1) & (3) and Part-IV (A) (2) of the Schedule to the Act, Dr. R. Kannan, the Appellant herein, preferred this appeal before this Authority.
5. We have heard the parties and also perused all the materials on record in respect of this Appeal.
6. The Learned Counsel appearing on behalf of the Appellant submitted that the Impugned Order passed by the Disciplinary Committee is improper, mala-fide, invalid, illegal and unreasonable as the allegations made against the Appellant were already considered and decided by the Executive Council on 10th March, 2010 read with Action Taken on 8th May, 2010, whereby the matter was treated to be closed. Further, it was also submitted that the Disciplinary Committee has failed to consider the rules regarding Travel allowance framed by the Institute. Furthermore, it was submitted by the Learned Counsel appearing on behalf of the Appellant that the allegations against the appellant were made with ulterior motive and in un-lawful manner to tarnish the image of the Appellant, who has been not only the President of the Institute of Actuaries of India but also occupied a number of position, viz., an elected member of the Executive Council, Vice President, President of the Actuarial Society of India in addition to a member of the Solvency Committee of the International Actuarial Association, Vice Chairperson of the Solvency Committee of the International Association Insurance Supervisors, a Member of the Insurance Regulatory & Development Authority besides serving as the Economic Advisor to the Governor of the Reserve Bank of India.

7. Additionally, the Learned Counsel appearing on behalf of the Appellant submitted that both the Impugned Order / Report are beyond the scope of the Show Cause Notice issued to the Appellant. The Respondent No. 2 as well as the Respondent No. 1 erred to hold the Appellant as Guilty of Misconduct under Clause (1) & (3) of Part-III of the Schedule to the said Act without issuing Show Cause Notice alleging misconduct under the said Clause (1) & (3) of Part-III of the Schedule to the Actuaries Act, 2006.
8. Furthermore, it was also submitted on behalf of the Appellant that the denial of reasonable opportunity of hearing before passing the Impugned Order / Report is contrary to the Principle of Natural Justice and therefore, the Impugned report of the Respondent No. 2 and Order of the Respondent No. 1 is based on assumption, presumption and surmise on the basis of deemed admission of nonspecific denial of allegations that too without supporting materials and even without furnishing documents as requested by the Appellant. Furthermore, it is also submitted and argued on behalf of the Appellant that the punishment awarded to the Appellant is very harsh, unreasonable and not commensurating to the misconduct committed, if agreed for a moment of arguments and considering the interest of justice.
9. Adversely, the Learned Counsel appearing on behalf of the Respondents submitted and argued that the Executive Council has never decided to close the matter of initiating the Disciplinary Proceedings against Dr. R. Kannan and as mentioned in Action Taken Report, the matter is to be treated closed only in respect of the returning of the excess amount and therefore, the agenda item is very clear where no decision of treating the matter as closed was taken.
10. The Learned Counsel further submitted that the Report of the Disciplinary Committee as well as the Order Passed by the Executive Council of the Institute

of Actuaries of India is fully in accordance with the provisions of the Act and the applicable rules.

11. During the course of arguments, the Learned Counsel Mr. Kirit J. Hakani and Mr. Rahul Hakani, Advocates appearing on behalf of the Appellant, also submitted that considering the age of the Appellant and the fact that he is out of the practice of profession for the last four years, this Authority may please consider and decide the present matter by taking lenient view particularly on the quantum of sentence.

12. However, on the other hand, Mr. Alok Kumar, Advocate appearing on behalf of the Institute vehemently contested and opposed this request.

13. Be it as it may be, pursuant to noting of the facts and circumstances of the matter and hearing of the parties besides perusing of all materials on record in its totality, we are of the considered view that while there is no scope to interfere with the Impugned Order passed by the Disciplinary Committee of the Institute on merits but the punishment awarded is certainly exorbitant and does not commensurate with the misconduct. Therefore, in view of the fact that the reimbursement of excess amount already stands paid by the Appellant on his own not only to the Institute of Actuaries of India but also to the Insurance Regulatory and Development Authority, and the age of the Appellant about 69 years, he has already suffered a lot being out of practice of the profession as a member of the Institute of Actuaries of India till date i.e., about four years. Thus, the interest of justice will be met, if we modify the punishment imposed upon the Appellant and reduce the penalty.

14. Therefore, in exercise of the powers conferred on this Authority in terms of Clause (a) & (b) of sub-section (2) of Section 36 of the Actuaries Act, 2006, we hereby modify the Impugned Order and reduce the sentence and the penalty as hereunder:-

- (i) Removal of name of Dr. R. Kannan, the Appellant herein, for a total period from the date of passing of the Impugned Order till the date of receipt of this Order only as against the removal of his name permanently; and**
- (ii) A fine of Rs. 2 Lakh (Rupees Two Lakh Only) to be paid within a period of 30 days from the date of receipt of this Order by the Appellant as against Rs. 5 Lakh (Rupees Five Lakh Only).**

15. Further, it is clarified that subsequent to deposit of a sum of Rs. 2 lakh by the Appellant in the Institute of Actuaries of India within one month from the date of receipt of this Order, the name of the Appellant will stand restored, of course, subject to complying with the necessary formalities as may be required in this regard.

16. Accordingly, the Institute of Actuaries of India is also hereby directed to give effect to this Order for restoring the name of the Appellant within next one week from the date of receipt of an application to be submitted by the Appellant, for restoring the name, but after depositing the aforesaid amount of Rs. 2 Lakh with the Institute.

17. With this, the present appeal is disposed of. No Order as to cost.

Justice M. C. Garg
Chairperson

Praveen Garg
Member

Dr. Navrang Saini
Member



APPELLATE AUTHORITY

(Established by an Act of Parliament)

“ICAI Bhawan” A-29, Sector-62, Noida-201301 (U.P.)