DIGEST OF FINAL ORDERS PASSED BY THE APPELLATE AUTHORITY

CONTAINING

ORDERS PASSED IN THE APPEALS RECEIVED AGAINST THE ORDERS OF BOARD OF DISCIPLINE AND/OR DISCIPLINARY COMMITTEE OF THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA, THE INSTITUTE OF COMPANY SECRETARIES OF INDIA AND THE INSTITUTE OF COST ACCOUNTANTS OF INDIA DECIDED BY THE APPELLATE AUTHORITY FROM THE YEAR 2011 TO 25th JANUARY, 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)

JANUARY, 2018

Delhi Office:	**NCR Office:**
The Institute of Chartered Accountants of India, ICAI Bhawan, 4th Floor, Legal Section, Indraprastha Marg, New Delhi-110002	The Institute of Chartered Accountants of India, ICAI Bhawan, Research Block, 2nd Floor, A-29, Sector-62, Noida-201301
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JANUARY, 2018

Published by The 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

The Appellate Authority has been constituted by the Central Government vide its notification in the Official Gazette, dated March 20, 2009, in terms of S. 22A (1) of the Chartered Accountants Act, 1949, S. 22A of the Cost and Work Accountants Act, 1959 and S. 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 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 unfailing 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 the Institutes (professional) who is aggrieved by an order of the Board of Discipline or the Disciplinary Committee of the Institute 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.

Present Constitution and Composition of the Appellate Authority

Chairperson:

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

Members:

1. CA. Sunil Goyal, Past President of the Institute of Chartered Accountants of India
2. CA. Kamlesh S. Vikamsey, Past President of the Institute of Chartered Accountants of India
3. CS. Preeti Malhotra, Past President of the Institute of Company Secretaries of India
4. CS. Sanjay Grover, Former Central Council Member of the Institute of Company Secretaries of India
5. CMA Brij Mohan Sharma, Past President of the Institute of Cost Accountants of India
6. CMA Pravakar Mohanty, Past President of the Institute of Cost Accountants of India
7. Shri Heerak Basu, Former Council Member of the Institute of Actuaries of India
8. Ms. Vibha Bagaria, Former Council Member of the Institute of Actuaries of India
9. Shri Praveen Garg, Joint Secretary, Ministry of Finance, Government of India
10. 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

Registrar:

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

FOREWORD

The Institute of Chartered Accountants of India incorporated under the Chartered Accountants Act, 1949; the Institute of Company Secretaries of India incorporated under the Company Secretaries Act, 1980 and the Institute of Cost Accountants of India incorporated under the Cost Accountants Act, 1959, being regulatory bodies for their respective members have a well-established procedure for dealing with the complaints and "Information" cases for Professional and Other Misconduct against members (Professionals) of these Institutions.

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. 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 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. 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 errant members are accordingly prosecuted and punished by the Director (Discipline) either through the Board of Discipline or the Disciplinary Committee, as the case may be.

Any member of the Institutes (professional) who is aggrieved by an order of the Board of Discipline or the Disciplinary Committee of the Institute imposing a penalty on him, may appeal against the Order to this Appellate Authority. As such, This Appellate Authority constituted by the Central Government through Gazette Notification under 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 exercises its appellate jurisdiction against the orders passed by the Board of Discipline and 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.

Since inception to 25th January, 2018, in exercise of its appellate jurisdiction all the final Orders passed by this Authority are being brought for reference and information purposes through this Digest for all concerned with a view that the same will help and assist these professionals to desist themselves from such acts and activities which may result in the Professional and Other Misconduct against them, while performing of their duties. Per Contra, 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 place on record my appreciation of the efforts put in by Shri Ravindra Singh Pundhir, Registrar of this Authority and all the persons involved in preparing, completing and bringing out this first volume of the digest containing the final orders passed by this Authority since its inception to 25th January, 2018.

(Justice M. C. Garg)
Chairperson

25th January, 2018
New Delhi

PREFACE

The importance of the constitution of this Appellate Authority by way of amendments in three enactments namely the Chartered Accountants Act, 1949, the Company Secretaries Act, 1980 and the Cost and Works Accountants Act, 1959 by the Parliament of India in the year 2006 was necessitated by the need to bring about the systematic and institutional changes in respect of the disciplinary mechanism within the frame work of the respective Professional Institutes to ensure well considered and expeditious disposal of the complaints against the respective members of these Institutions regarding Professional or Other Misconducts besides ensuring the fastest delivery of justice and to deal with appeals arising from the decisions of the Disciplinary Authorities of these Institutions. That is why a provision was made under section 22G of the Chartered Accountants Act, 1949, whereby, a right was given to the members to file an appeal before this Appellate Authority, which under the un-amended Act previously could be made only to the High Court.

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 justice to the aggrieved members of these respective Professional Institutes.

The object of bringing out of this digest of final Orders passed by this Appellate Authority is 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. This will further 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. I hope that this volume of the final Orders 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.

It is clarified that this digest is published on the condition and understanding that the information, comments, and views it contains are merely for guidance and reference and

must not be taken as having the Authority of, or being binding in any way on the author, editors, publisher and seller, who do not owe any responsibility whatsoever for any loss, damage or distress to any person, whether or not a purchaser of this publication. Further, it is clarified that despite all the care taken, errors or omissions may have crept inadvertently into this publication, therefore, for authoritative order of any appeal, please contact the Appellate Authority.

I would like to take this opportunity to place on record my appreciation of the efforts put in by all the persons involved in preparing this digest more particularly to Ms. Anjali Gupta, working as an Assistant Legal and Ms. Sonam Chauhan, working as a Stenographer in this Authority in assisting me for completing and bringing out this first volume containing the final Orders passed by this Authority since its inception to 25th January, 2018.

(Ravindra Singh Pundhir)
Registrar, Appellate Authority

Place: New Delhi
Date: 25th January, 2018

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

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 3/ICAI/2011

IN THE MATTER OF

Makhan Lal Satnaliwala .....Appellant
Through Ms. Amita Gupta

Versus

ICAI & Ors. .....Respondent
Through Sh. J.S. Bakshi, Advocate for ICAI
Respondent No. 4 Sh. Amharpal Singh Kohli, in person

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE MR. ASHOK HALDIA, MEMBER
HON'BLE MR. KAMLESH VIKAMSEY, MEMBER
HON'BLE MR. T. N. MANOHARAN, MEMBER

Date of hearing:
22nd October, 2011

Date of judgment:
28th January, 2012

JUDGMENT

1. This appeal has been preferred by the appellant aggrieved by the order dated 3rd February, 2011 and 3rd December, 2010 passed by the Board of Discipline. The appellant was found guilty of professional misconduct falling within Clause 2 of Part-IV of First Schedule of the Chartered Accountants Act, 1949 ("the Act" for short) by the Board of Discipline vide its order dated 3rd December, 2010 and by order dated 3rd February, 2011, the Board of Discipline imposed a punishment to the appellant that the name of the appellant be removed from the Register of Members for a period of 3 Months and also imposed a fine of Rs.1 lac on him.

2. The complainant, one Shri Amhar Pal Singh Kohli, reported to the Institute that the Appellant's son and daughter-in-law were operating 73 bogus companies in Kolkata. The appellant herein was a director in 6 of those companies namely (1) Brahmad Telecom Pvt. Ltd. (2) Anmol Commodeal Pvt. Ltd. (3) Bikram Commodeal Pvt. Ltd. (4) Matangi Apartments Pvt. Ltd. (5) Uplabdhi Traccom Pvt. Ltd. & (6) Goodfriends Traccom Pvt. Ltd. and the other Directors were his son and daughter-in-law. The Appellant, appellant's son and daughter-in-law had been forging signatures and seal of a Chartered Accountant, viz. Mr. Sumitra Sarkar and Mr. A.K. Tulsayan on the balance sheets of the aforesaid companies and submitted balance sheets with forged signatures with the Office of Registrar of Companies in Kolkata

over last ten years. The appellant along with his son and daughter-in-law and also forged signatures of other directors of these bogus companies. The Appellant had not obtained necessary permission from the Institute of Chartered Accountants of India to become a Director in the said companies. He was guilty of professional misconduct within the meaning of Clause-11 Part-I and Clause-2 of Part IV of First Schedule to the Chartered Accountants Act, 1949 as amended in 2006.

3. The complainant along with complaint has filed documents substantiating the allegations. The Director (Discipline) made necessary enquiries and after considering the written submissions made, gave a prima facie opinion that the allegations leveled against the appellant were having substance and prima facie the appellant seemed to be guilty of professional misconduct. Before the Board of Discipline, the stand of the appellant was that he had not forged the signatures of the Auditor. He was the director only in 2/3 companies out of the 6 companies mentioned by the complainant and these companies had no business and all the companies were investment companies. He admitted that on one or two occasions the signatures of Chartered Accountant on the balance sheets were forged by some one from the staff of the Group of Companies. The purpose behind the same was to save the Auditor's fee. All the companies belonged to his son and daughter-in-law. The complainant had some dispute with appellant's son and in order to settle the score, he made a complaint to the Institute. The appellant admitted that he had signed the Balance Sheets of two companies and in one company he also acted as a Chairman of the Company. This he did because the designated Chairman was not available. In 2003, he resigned from the Directorship of all the companies. If there was any negligence on his part, the same could not be construed as professional misconduct. He was having a long standing as a Chartered Accountant and a bright past career.

4. The Board of Discipline examined the Appellant and asked him to place on record the documents showing the appointment of Auditors whose signatures (forged one) were there on the balance sheet of different companies. The appellant failed to produce on record any document to show that the CA firm whose signatures were allegedly found on the balance sheets were ever appointed by the company as Auditors, on whose Board appellant was there as a Director. The appellant was also directed by the Board of Discipline to file a certificate from the Banks that he was not the signatory for operating bank account of the companies. The appellant failed to produce such certificate. The Board of Discipline also enquired from the appellant that since he was the director on the Board of Companies and it had come to his knowledge that the signatures on the statutory documents of the companies had been forged by the staff of the companies (as contended by him), what action did he take in this context. The response of the appellant was that since he had resigned in 2003, he could not take any action now.

5. The Board of Discipline after verifying the record noted that the appellant was a Director in six companies as stated above. He admitted his Directorship in two companies and had signed the balance sheets of these companies as a Director & in one company as Chairman. The Appellant also failed to file requisite certificate from the bank that he was not a signatory to the bank accounts of the companies.

6. The Board observed that a director simplicitor could not sign Balance Sheet and financial accounts of a company as Chairman of the Company as this would tantamount to involvement in day to day affairs of the company and for this a specific approval of the Council/Institute was required. The Board held that very fact that the appellant signed balance sheet and accounts as Chairman of the Company, showed that he was involved in day to day affairs to the Act on account of involvement of the appellant in business of the companies. The Board of Discipline also considered the conduct of the appellant of getting balance sheets of the companies, of which he was a director, filed with the statutory authorities on the basis of forged signatures of Auditors, who were never appointed by any of the companies of the appellant. The Board of Discipline found him hand in glove with other directors in committing forgery of the signatures of the Auditors. The Board of Discipline also noted that the Auditors whose signatures were forged had given affidavits that they or their CA firm were not ever appointed as Auditors of the companies of the appellant and their signatures had been forged.

7. The appellant appeared before the Appellate Authority through his son and a counsel. It was argued that the appellant was only a Director in the companies and being a director was not a professional misconduct in terms of Clause 11 of First Schedule to the Act.

8. This Appellate Authority in Appeal No. 10/ICAI/2011, Mahen J. Dholam vs. Ashish Kulkarni analyzed the position between a Director simplicitor and a director involved in day-to-day business of the company and observed as under:

"6. A perusal of above provision clearly shows that in case a Chartered Accountant wants to engage in the business simultaneously with the profession of Chartered Accountant, he has to seek permission of the Council. However, proviso to Clause 11 specifies that no approval is required for a Chartered Accountant from being a Director of a company (not being a Managing Director or a whole time Director) unless he or any of his partners is interested in such company as an Auditor. Thus, what we have to examine is under what circumstances, a Director of a company can be said to be engaged in its business and under what circumstances he simply remains a Director without being engaged in the business.

7. The intention of the legislature is reflected from Clause 11 to Part I of First Schedule to the Act itself. While the proviso permits a Chartered Accountant to be a Director of a Company without permission of the Council, it specifically provides that such a Director should not be a Managing Director or a whole-time Director. A Managing Director or a whole-time Director is the one who, on behalf of the company, discharges all day-to-day functions of the company and is authorized by the Board of Directors to act on behalf of the company. Section 269 of Companies Act, 1956 provides for mandatory appointment of a Managing Director or whole-time Director in case of such companies which have a specified paid-up-share-capital. Thus, the Legislature envisaged two kinds of directors; those who were involved in the business of the company and those who were not involved in day-to-day business affairs of the company but were on Board of the company in order to ensure that the company moves in right direction. The Board of Directors collectively have to take decisions for the benefit of the company to be implemented by the Managing Director or

whole-time Director or other executives of the company. We, therefore, consider that a Director who is not involved in day to day business of the company but who participates in the Board meetings and even receives remuneration for such participation and takes part in policy decisions, financial decisions but does not execute the decisions, is a Director not doing the business of the Company but is a Director simplicitor. Such a Director merely by virtue of obligations as a Director without actually participating in the business of company would not be said to be involved in the business of the company. However, a person being a Director of the Company if operates the accounts of the company and executes the business of the company or participates in other activities of the company apart from attending Board Meetings and signing the statutory documents as required to be signed by a Director, then such a Director has to be considered a Director involved in the business of the Company."

9. In the instant case, we are dismayed the way Director (Discipline) conducted inquiry and for that matter, the Board of Discipline conducted this case. This case should have been thoroughly investigated since it appears that the son and daughter-in-law of appellant were running around 70 companies. It seems that these companies were being run under the guidance of appellant with ulterior motives. This is fortified from the fact that the appellant's son who appeared during the proceedings admitted that criminal cases had been registered against him and he was on ball. Under these circumstances, it was the duty of Director (Discipline) to call for the record of the companies and criminal cases and if the record was not tendered, to seek assistance of Registrar of Companies in getting the record of all the companies and to find out from the Registrar of Companies as to in how many companies, the appellant's involvement was there.

10. The Complainant who appeared before the Appellate Authority has submitted that he had only limited resources and had to collect information. With limited resources, he could not do the required spade work whereas the Institute had tremendous resources at its disposal and the Institute when found that one of its members was involved in activities of forging signatures of other Chartered Accountant Firms, it was incumbent upon the Director (Discipline) to do thorough investigation. A perusal of the complaint, affidavits filed by CA's viz. S. Sarkar, A. K. Tulsayan and the criminal complaint filed by them makes it abundantly clear that none of these CAs were ever appointed as Auditor of the companies of which appellant was a director and the balance sheets were being filed with the statutory authorities under their forged signatures within the knowledge of appellant. The companies for which this forgery of signatures was done were the companies of his son and daughter-in-law and the appellant, a seasoned Chartered Accountant, was a director in at least six of those companies. It cannot be believed that he was oblivious to the fact that the balance sheets filed by the appellant companies were bearing forged signatures of CAs, since CA seemed to have never been appointed as statutory auditor of the companies in terms of Section 224 of the Companies Act. He was thus hand in glove with his son and daughter in law in putting the forged signatures of CAs on the statutory documents.

11. It is settled principle of law that a person having special knowledge of a particular thing has to prove that thing (Sec. 106 of Evidence Act). As a Director of the companies, it was within the special knowledge of the appellant as to whether a Chartered Accountant was appointed

in the AGM or in the Board Meeting as statutory Auditor. The appellant was asked to produce evidence to this effect but he did not produce the same. Similarly, it was within the special knowledge of the appellant whether he was signatory in the bank account of the companies or not. He was asked to obtain a certificate from the banks account of the companies had accounts, he did not produce the certificate from the bank to the effect that he was not a signatory to the bank accounts. Looking into the fact that the appellant was a Director of a few companies out of more than seventy being run by his son and daughter-in-law, most probably with ulterior motives, and that he was party to forwarding the annual accounts & balance sheets containing forged signatures of some chartered accountants and even when this fact came to light that the signatures of so called auditors were forged, he did not initiate any action or did not take any steps as a CA to bring the forgers to book, shows deep malice in the conduct of the appellant. The conduct of the appellant was not only professional misconduct but was actually a criminal conduct of entering into a conspiracy of forgery.

12. We consider that the Board of Discipline rightly held the appellant guilty of professional misconduct under clause 11 of Part-I of the First Schedule and also for other misconducts under Clause – 2 of Part – IV of the First Schedule and the Board of Discipline rightly awarded punishment of removal of his name from the Register of Members for a period of three months. Every such professional who indulges into criminal activities of forging of signatures & remains a part of the noble profession, tarnishes the image of the profession beyond damage. The appeal filed by the appellant is dismissed with costs of Rs.25,000/-. Out of the cost, Rs.10,000/- be paid to the complainant and the remaining cost be deposited with the Registrar, Appellate Authority within a period of 30 days from today.

    A copy of this order be sent to Registrar of Companies, West Bengal for taking necessary action for filing documents with forged signatures.

Justice S.N. Dhingra (Retd.)
(Chairperson)

Rakesh Chandra
(Member)

Ashok Haldia
(Member)

Kamlesh Vikamsey
(Member)

T. N. Manoharan
(Member)

BEFORE THE APPELLATE AUTHORITY

[Constituted under the Chartered Accountants Act, 1949
The Cost & Work Accountants Act 1958 &The Company Secretaries Act 1980]

APPEAL NO. 4/ICAI/2011

IN THE MATTER OF

A.N. KULKARNI ....Petitioner
Through: None

Versus

M/s. May & Company &Ajit G. Pandse. ....Respondent
Through: Respondent in person
Shri J. S. Bakshi, Advocate for ICAI

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE MR. ASHOK HALDIA, MEMBER
HON'BLE MR. KAMLESH VIKAMSEY, MEMBER
HON'BLE MR. T.N.MANOHARAN, MEMBER

Date of hearing:
20th August, 2011

Date of judgment:
24th September, 2011

JUDGMENT

1. By present appeal, the Appellant has assailed an order dated 4th May, 2010 whereby the Board of Discipline of the Institute of Chartered Accountants of India observed that Respondent was not guilty of "professional misconduct" or "other misconduct" either under the First Schedule of Chartered Accountants (Amendment) Act, 2006 (hereinafter the Act).

2. The brief facts relevant for deciding the appeal are that the Respondent was appointed by State Bank Officers Association Education Society (hereinafter referred as SBOA Education Society), Mumbai Circle, to find out the details of transactions of accounts of a School being run by the Association at Harsul, Aurangabad and to study the accounting system followed at the schools and to point out the shortcomings and advise the change in the accounting system. The appellant's grievance is that the Respondent having been assigned this job, in his report not only advised about the accounting system but transgressed his jurisdiction and commented upon the duties of the Complainant, who was Financial Secretary of the Association. He complained to the Institute that by commenting upon performance of the Financial Secretary, the Respondent Chartered Accountant went out of way and thus was guilty of professional misconduct. The Board did not find any substance in the complaint and held that Respondent was not guilty.

3. Section 22G, of the Act under which appeals can be preferred before Appellate Authority, reads as under:

"22G Appeal to Authority-(1) Any member of the Institute aggrieved by any order of the Board of Discipline 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 authorised 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 the 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 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 the case; or

(d) Pass such other order as the Authority thinks fit:

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

4. In view of the provisions of Section 22G of the Act, this appeal raised an issue:

"Whether a Complainant can approach the Appellate Authority on his complaint being dismissed by either the Board of Discipline or Disciplinary Committee."

5. The Appellate Authority has been vested with the powers of deciding appeals under the provisions of the Act. A perusal of the above provision clearly shows that an appeal can be preferred before the Appellate Authority only by a member of the Institute against whom an order imposing a penalty has been passed by the Board of Discipline or Disciplinary Committee. There is no scope of filing appeal by the complainant whose complaint has been dismissed, under the Act. However, Director (Discipline), if not satisfied with the order of Board or Committee, may prefer an appeal.

6. Since an appeal against order of Board of Discipline or Disciplinary Committee lies before the Appellate Authority only by a member of Institute who has been punished, an appeal

in respect of dismissal of a complaint against a member of Institute by the complainant personally would not lie before the Appellate Authority. Though Section 22G(2) gives power to the Appellate Authority to revise orders of the Board of Discipline or Disciplinary Committee, after it has summoned the records, however, summoning of record of Board of Discipline or Disciplinary Committee can be done by the Appellate Authority only in those cases where an appeal has been preferred. Appellate Authority is not a supervisory authority of the Board of Discipline or Disciplinary Committee of the Institute of Chartered Accountants of India.

7. We consider that Section 22G needs to be amended and the remedy of appeal should also be provided to the Complainant. Under the existing provisions, a Complainant has no remedy under the Chartered Accountants Act of assailing the order of Board of Discipline or Disciplinary Committee, if this complaint is unjustly rejected. It would not be appropriate for the Appellate Authority to enlarge the scope of Section 22G by way of interpretation, as the Section is not ambiguous and the rule of literal interpretation has to be followed by the Appellate Authority. We therefore, hold that the present appeal is not maintainable and that the Legislature will take note of this and Section 22G would be suitably modified so as to do justice to the Complainants.

As a result of above discussion, the appeal is hereby dismissed.

S.N. Dhingra
(Chairperson)

Rakesh Chandra
(Member)

Ashok Haldia Kamlesh Vikamsey
(Member)

(Member)

T.N. Manoharan
(Member)

September 24, 2011

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act 1949,
The Cost & Work Accountants Act 1958 & The Company Secretaries Act 1980)

APPEAL NO. 8/ICAI/2011

IN THE MATTER OF

D.K. Bansal ……Appellant
Through Shri K.L. Goel, FCA

Versus

The Board of Discipline, ICAI, New Delhi …….Respondent
Through Shri J.S.Bakshi, Advocate

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE MR. ASHOK HALDIA, MEMBER
HON'BLE MR. KAMLESH VIKAMSEY, MEMBER
HON'BLE MR.T.N.MANOHARAN, MEMBER

Date of hearing:
20th August, 2011

Date of judgment:
24th September 2011

JUDGEMENT

1. The Appellant has preferred this appeal against the order of the Board of Discipline of The Institute of Chartered Accountants of India dated 03.02.2011 whereby the Appellant was awarded a punishment of removal of his name from the Register of Members of Institute of Chartered Accountants of India for a period of one month.

2. Vide its order dated 03.02.2011, the Board of Discipline held the Appellant guilty of professional misconduct within the meaning of clause (9) of Part I of First Schedule of the Chartered Accountants Act, 1949 (as amended up-to-date) (hereinafter referred to as "Act") and awarded him above punishment.

3. At the very outset, the Appellant admitted that he did not dispute the finding given by the Board of Discipline about his committing "professional misconduct" as defined under Clause (9) of Part I of First Schedule of the Chartered Accountants Act. The appellant only argued that the punishment awarded to him was harsher in nature and instead of awarding him punishment of removal of his name from the Register for a period of one month, a reprimand would have been sufficient. He has further argued that he had unblemished record of practicing as a Chartered Accountant since 1978 and looking at his long standing, the punishment awarded to him be diluted.

4. Brief facts relevant for purpose of considering this argument of the Appellant are as under:

(i) Agra Club Limited, a Company incorporated under the Companies Act had statutory auditor M/s. Farsaiya and Co.

(ii) Agra Club Limited issued a notice of Annual General Meeting (AGM) on 3rd December, 2006 and item No.3 of the notice read "to appoint auditors and fix their remuneration (the retiring auditor being eligible for reappointment had offered themselves for reappointment).

(iii) In the AGM of 30th December, 2006 the earlier auditor viz. M/s. Farsaiya and Co. was removed as statutory auditor of the company and the Complainant was appointed as statutory auditor of the Company.

(iv) There is no dispute that the Company had not complied with provisions of Section 225 of the Companies Act and there is no dispute that the Appellant had not ascertained from the Company whether the requirements of Section 225 of the Companies Act, 1956 in respect of his appointment have been duly complied with nor even communicated with the previous auditor about his appointment.

5. The Appellant has admitted that his conduct of accepting the appointment as a statutory auditor was is in violation of Section 225 of the Companies Act and in violation of the provisions of the Chartered Accountant Act. He admitted that this amounted to professional misconduct within the meaning of clause (9) of Part I of First Schedule under Section 22 of the Act.

6. The plea of leniency raised by the Appellant is not tenable at all. The Appellant, being in practice since 1978 has been in the profession for more than 30 years. If a Chartered Accountant in profession for more than 30 years ventures to act contrary to the provision of Companies Act and Chartered Accountant Act, there must be some ulterior motives behind it. An external auditor of the Company is an independent watchdog appointed under the provisions of Companies Act. He can be removed only in accordance with the provisions of the Companies Act, unless he chooses to retire. Apart from the fact that an auditor cannot be removed except under the circumstances as provided under the Companies Act, the Chartered Accountant Act ensured that another chartered accountant does not undertake the work of a statutory auditor of a Company, unless he ensures that the Company seeking to appoint him has complied with the law. Statutory provisions are clear and categorical that the Legislature looked upon unceremonious removal of a statutory auditor very harshly, not only for the Company who removes the statutory auditor unceremoniously but even for the Chartered Accountant who accepts the position of statutory auditor, without first ascertaining from the Company whether the requirements of Section 225 of the Companies Act, 1956 in respect of such appointment have been duly complied with. These statutory provisions have been made under the Companies Act and under Chartered Accountant Act only to ensure that a Company does not remove an external auditor because the external auditor is uncomfortable to the Company. An external auditor has been vested with powers under the Companies Act, 1956 and is required to report on various matters including opining on the

"true & fair view" of the Company's Financial Statements. If an external auditor is allowed to be removed unceremoniously merely because he is inconvenient to the Management & its Board of Directors, no external auditor can work with independence and impartiality. If an external auditor, in order to see that his appointment is renewed every year, has to follow the wishes of the management & directors in giving his report, the character of the external auditor of being a statutory watchdog shall stand threatened. It is for this reason that the Chartered Accountants Act considered acceptance of statutory auditorship by the members of Institute contrary to the provisions of Section 225 of the Companies Act, as a professional misconduct. Every chartered accountant is bound to know these statutory provisions of the Companies Act and Chartered Accountant Act. If a Chartered Accountant pleads that he was not aware of these provisions or he was swayed by a report of Company Secretary about compliance of Section 225 and he himself did not ensure the compliance of Section 225, this itself is unprofessional conduct on his part. We, therefore, consider that there is no ground for any leniency to the Appellant. Accordingly, the punishment awarded by the Board of Discipline does not call for any interference.

We, therefore, dismiss the appeal.

S.N. Dhingra
(Chairperson)

Rakesh Chandra
(Member)

Ashok Haldia
(Member)

Kamlesh Vikamsey
(Member)

T.N. Manoharan
(Member)

September 24, 2011

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act 1949,
The Cost & Work Accountants Act 1958 & The Company Secretaries Act 1980)

APPEAL NO. 9/ICAI/2011

IN THE MATTER OF

Naveen Chaudhary .....Appellant
Through Shri V.C.Sajan, FCA

Versus

The Board of Discipline, ICAI, New Delhi .....Respondent
Through Shri J.S.Bakshi, Advocate for ICAI
Shri Rajiv Aggarwal, Director, Scan Holdings Pvt. Ltd.

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE MR. ASHOK HALDIA, MEMBER
HON'BLE MR. KAMLESH VIKAMSEY, MEMBER
HON'BLE MR. T.N. MANOHARAN, MEMBER

Date of hearing:
20th August, 2011

Date of judgment:
24th September 2011

JUDGMENT

1. This appeal has been preferred against the order of Board of Discipline of the Institute of Chartered Accountants of India dated 3rd February, 2011 whereby the Appellant was awarded penalty of removal of his name from the Register of Members for a period of one month, since the Board vide aforesaid order had come to conclusion that the Appellant was guilty of "other misconduct" falling within the meaning of Clause (2) of Part IV of First Schedule to the Chartered Accountants Act, 1949 (as amended uptodate).

2. A complaint against the Appellant was filed by Mr. Rajiv Aggarwal, Director of Scan Holding Pvt. Ltd (hereinafter referred to as "Company"). The Appellant was statutory auditor/ chartered accountant for Scan Holding Pvt. Ltd. from very inception of this Company and had been associated with the Company since 2002. He was being re-appointed year after year in each Annual General Meeting (AGM) till the AGM held in 2008. The things worked well for all these years between the Appellant and the Company and the Appellant had charged remuneration to the tune of around 1.5 lac per annum from the Company till the financial year 2008-09. It is only after March, 2009 when the accounts of the Company were to be finalized and the appellant was supposed to perform this function, the trouble started because the Appellant asked the Company to pay instead of Rs. 1.8 lac , Rs. 4.8 lac as the

audit fee. The complainant agreed to pay Rs. 1.8 lac, but Appellant was not satisfied. It is alleged that since the Company was not prepared to pay more than Rs. 1.8 lac as fee, the Appellant started creating problems for the Company and grossly misconducted himself. The company alleged that the Appellant misused his position as an insider to extract more money and he threatened of bringing extreme harm to his business interests in case the Company did not pay him the amount demanded. It is submitted on behalf of the Company that he had been acting as per the advice of the Appellant in fulfilling legal obligations. After March, 2009, the Appellant instead of guiding the company properly about his statutory obligations started blackmailing him so as to coerce him to pay Rs. 4.8 lac i.e. much more than the agreed amount of fee. He deliberately adopted delaying tactics to ensure that the Company missed the required statutory dates for fulfilling its statutory obligations. He tried to cheat the company by asking the accountant of the company to pass false entries in the Books of Accounts to show that the Company owed him Rs. 4.8 lac as fee for financial year. He illegally withheld certain documents and records of the Company in his possession and did not return the same despite the Company asking him to return the same. He used abusive and threatening language in his letters and e-mails with the intention of scaring and demoralizing the company. He made false legal statement that the auditor fee was not to be ascertained at the time of his appointment and he wrongly made allegations that his fee was not fixed at Rs. 1.8 lac for the financial year 2008-09.

3. The Appellant was given a notice of the complaint filed by the Complainant Company by Director (Discipline) of the Institute. The Appellant sought time from Director (Discipline) for filing reply to the complaint. Despite seeking time for submission of written statement, the Appellant did not submit his written reply. The Director (Discipline) submitted its report to the Board of Discipline on 1st January, 2010 observing that non-submission of the Written Statement by the Appellant implied that he accepted the allegations levelled against him by the Company. Looking at the manner the Appellant had been threatening the company, the Director (Discipline) observed that the Appellant had been using tactics unbecoming of a Chartered Accountant and brought disrepute to the profession of the Chartered Accountants. The matter went to the Board of Discipline. The Board of Discipline again gave an opportunity to the Appellant to file his response to the complaint (in accordance with the rules of Disciplinary Authority). The Appellant submitted his written statement to the complaint before the Board of Discipline.

4. The Board of Discipline after considering the documents submitted by both the parties and the submissions of the parties, gave its findings with regard to each of the allegations made by the company on 3.1.2010. The Board of Discipline came to the conclusion that the demand of higher fee cannot be termed as professional misconduct. The Complainant Company had not issued any appointment letter; neither Appellant obtained an engagement letter. It was a violation of Auditing and Assurance Standards -26, Terms of audit engagement and was not a prudent act on the part of Appellant. The Board of Discipline also concluded that the Appellant did not complete the audit due to dispute on professional Fee. The company was prepared to pay a fee of Rs. 1.80 lac for the year 2008-09 and while the appellant was demanding Rs. 4.80 lac. The Board of Discipline also looked into the bills raised by the

Appellant and found that the bill contained various items not connected with statutory audit. The Board of Discipline asked the Appellant to produce his books of accounts for last five years.

5. The Appellant raised a bill of Rs. 4.8 lac upon the company though he had earlier also raised a bill of Rs. 1.5 lac Complainant company for the same period dated 1st October, 2008 on the The Appellant did not submit his Books of Accounts for quite sometime and kept on seeking adjournment for submitting the Books of Accounts. Ultimately, on great insistence of the Board of Discipline, he submitted his Books of Accounts for the last three years, instead of five years. It was found that the Appellant was not registered with Service Tax authorities in the year 2006 and got service tax registration only recently. He, despite the Board of Discipline's asking to submit service tax number, service tax returns, income-tax returns, balance sheets for the last three years, did not file the same with the Board of Discipline. The Board of Discipline also found that the Appellant had billed the Complainant Company for individual returns apart from billing the Company for statutory audit fee. When the Board of Discipline enquired him as to how he had billed the Company for individual returns, the Appellant stated that he did not know whether the company accounted for the payments in the Book of Accounts or not. The Board of Discipline also found that despite being the statutory auditor of the Company, the Appellant had also billed the company for keeping books of accounts of subsidiary and joint venture companies. The Board of Discipline enquired from the Appellant if he could, being the statutory auditor of the Company, undertake the job of writing books of accounts of subsidiary and joint venture companies of the complainant Company and charge for the same, the Appellant had no reply.

6. It was undisputed that paid-up capital of the Company was more than 2 crore and turnover of the Complainant Company for the last three years was in excess of 5 crores and still the Company was not having a company secretary and an internal auditor, but the Appellant had not qualified his audit report of the earlier years about this discrepancy and raised this issue with the company after dispute over fee and asked the Company to explain as to why it was not having a company secretary and internal auditor.

7. It is undisputed that the Appellant was appointed to audit the Company for the year 2008-09 as well. However, the Appellant did not complete the audit due to dispute of professional fee. The Board of Discipline noted that up to May, 2009, the Appellant had not been finding fault with the working of the Company, but after dispute over fee, for the first time on 19th June, 2009, the Appellant cited various disqualifications on the working of the Company and asked the Company to rectify the same and one of the observations was that the Company was not having company secretary and internal auditor. The Board of Discipline considered that this was beyond comprehension because the Appellant had not qualified earlier audit reports regarding company secretary and internal auditors, despite having knowledge that the Company was not having company secretary and internal auditor. The Board of Discipline also noted that there was no justification for the Appellant to send consolidated bill in the name of Company as an external auditor including in the audit bill, the fee for individual

IT returns, fee for preparation of Balance Sheet, Profit & Loss Account and preparation for books of accounts of subsidiary and joint venture companies of the Scan Holding Pvt. Ltd.

8. On perusal of three years of Books of Accounts of the Appellant, the Board of Discipline noted certain cash entries showing cash receipt from Vijay Laxmi Aggarwal, one of the Directors of the Company, for TDS returns of two quarters. The Board of Discipline enquired from the Appellant as to how he could accept money in cash from the Director of Company on account of TDS of the Company and the Appellant had no answer to give. The Board of Discipline noted that the Appellant had shown cash entries from the Director of the Company on account of TDS of the Company for the various quarters. Similarly, on 8th October, 2008 Books of Accounts showed Rs. 1.25 lac as received from Scan Holding Pvt. Ltd., but he did not disclose in the narration on which account he got this money. The Appellant's answer was that he got money on account of agreement with Ball Packaging of USA. However, the Complainant denied of having entered into any such agreement. According to the Complainant, this amount was paid on account of advance audit fee. The Board of Discipline also noted that in respect of audit fee, the Appellant had submitted a bill of Rs. 1.5 lac and received amount of Rs. 1.25 lac.

9. It is a fact that the Complainant Company being unable to get Books of Accounts audited till March, 2010 applied for removal of Appellant with Regional Director and the Regional Director vide order dated 19th September, 2010 removed the Appellant from post of statutory auditor of the Company.

10. The Board of Discipline also went through the contents of e-mails and notices and found that the Appellant used absurd language, not expected of a prudent chartered accountant, in his e-mails to Company. The Board of Discipline, therefore, considered the entire facts and circumstances and came to conclusion that the Appellant was guilty of other misconduct and awarded punishment as aforesaid.

11. The Appellant has assailed the order of the Board of Discipline on the ground that the order was perverse and it misread the efforts of a hapless practicing Chartered Accountant to defend his rightful earning. It is also alleged that the decision of Board of Discipline was premeditated and against the principle of natural justice. He stated that paras 16, 17 and 19 of the order of the Board of Discipline were not relatable to misconduct and paras 18, 21 and 22 were not factually correct. He submitted that there was no dispute between the Appellant and the Complainant prior to financial year 2008-09, thus not obtaining engagement letter was inconsequential and observations of the Board of Discipline were not relevant. He further submitted that it was factually incorrect that the Appellant did not complete the audit due to dispute of fee with the Company; rather the Appellant was anxious to complete the audit but could not complete the audit due to attitude of the Complainant Company.

12. The Appellant relied upon e-mails sent by the Complainant Company to him to plead that Complainant's e-mails were equally absurd. He stated that the Board of Discipline had failed to appreciate that the Complainant Company had not replied to audit queries, so he could not complete the audit. He also refuted that there was failure of non-reporting

of deficiencies in the earlier years about not engaging a company secretary and internal auditor. He stated that there was no requirement under Section 227 of the Companies Act to report on non- compliance of Section 383 and non-compliance of 383A. He submitted CARO 2003 report also does not have a specific provision about Section 383A and that the reporting of non-compliance of law is subjective and it was within the discretion of the Appellant to report or not to report depending the circumstance. He however submitted that issuing of an audit query was pre- requisite of audit document and the Board of Discipline wrongly assumed that since he had issued an audit query about why company secretary was not appointed and internal auditor was not appointed, he was supposed to qualify his earlier audit reports also. He, however submitted that increase in paid-up capital happened only on 1st February, 2008 and therefore non-compliance of Section 383A of 2007-08 was not a reportable matter. Similarly, he argued that there was no failure in earlier years about reporting of lack of internal audit system. He submitted that if the external auditor considered the in-house control and examination appropriate, he was free not to qualify the report and since for earlier years he considered that the systems and in-house controls were in place, he was not required to qualify his report; however since the volume of work had increased, he considered that an internal auditor was necessity and, therefore, made query about it. His raising questions about existence or efficacy of internal audit in a query cannot be treated as a threat or blackmail. It was also submitted by the Appellant that issuing of a consolidated bill was not misconduct. Out of bill of Rs. 4.8 lac, only Rs. 10,000 was on account of personal income-tax returns of Director. He considered that this was not something for which he should have been hauled up or punished by the Board of Discipline. He rather stated that Board of Discipline had failed to understand different aspects properly and that difference of opinion on bills raised by a professional cannot be basis for holding him guilty of misconduct. He contended that Board of Discipline's decision amounted to breach of his constitutional right of conducting a profession freely. He submitted that enquiry was vitiated as the Board of Discipline did not attempt to find evidence in support of the allegations of the complaint; neither there was a delay in audit because of any of his act; he was never derelict in his duty to audit and there was no evidence to that effect. He also submitted that the Board of Discipline has failed to distinguish between emotional communication and threat.

13. We have heard the Appellant in person as well as his counsel, Director of Complainant Company and counsel for Institute. A perusal of the report of the Board of Discipline would show that the Board of Discipline had scanned through the entire conduct of the Appellant vis-à-vis Complainant prior to and after March, 2009 in order to appreciate the pleas of the parties. The Board of Discipline has not hauled up Appellant for demanding Rs. 4.80 Lac as audit fee nor found it misconduct on the part of the Appellant. However, the Board of Discipline had found that the attitude of the Appellant after the Complainant Company refused to pay the fee as demanded by the Appellant became an attitude of vengeance. The Appellant's failure to produce books of accounts of five years, his failure to file written statement before the Director (Discipline), his failure to explain his conduct in not conducting audit of the Company and closing his eyes on the so-called irregularities, which the Appellant was pointing out after June, 2009, his not filing service tax/ income-tax returns, his not

having service tax number and the kind of language used by the Appellant in his e-mails to the Complainant Company showed that the Appellant was actually taking benefit of his being an external auditor and of writing books of accounts of the Complainant Company and its subsidiary and joint venture companies. Even during arguments it was clear that the Appellant had in fact resorted to arm- twisting. It was pleaded by the Complainant during arguments that the Appellant was the person associated with the Company from the very inception. The company had started from a scratch and progressed well. The Company was taking guidance from the Appellant all along from time to time about compliance with provisions of Companies Act and other provisions of law and was adequately compensating the Appellant.

14. Despite the fact that the Appellant was a statutory auditor, the fact that the Appellant was also doing the work of writing account books of subsidiary and joint venture companies of the Complainant Company and was filing personal income-tax returns etc. of the Directors of the Complainant Company, showed that so long as the Appellant was satisfied with the fee, everything was alright with the Complainant and the moment the Complainant Company disagreed with the quantum of fee being demanded by the Appellant, the Appellant changed his colours and started threatening the Complainant to the extent of harming him in his business. The language of e-mails sent by Appellant was considered by the Board of Discipline as well as by us and we are in agreement with the conclusion arrived at by the Board of Discipline that conduct of the Appellant towards the Complainant was unbecoming of a Chartered Accountant and the appellant did use threatening language towards the Complainant as if he was going to use business secrets known to him of the Complainant, against the Complainant to harm him. This, in our opinion, brought disrepute to the profession.

15. We consider that the Board of Discipline rightly found the Appellant guilty of other misconduct and rightly awarded punishment of penalty of removal of his name for a period of one month from the Register of Members.

We, therefore, dismiss the appeal.

S.N. Dhingra
(Chairperson)

Rakesh Chandra
(Member)

Ashok Haldia
(Member)

Kamlesh Vikamsey
(Member)

T.N. Manoharan
(Member)

24th September, 2011

BEFORE THE APPELLATE AUTHORITY

(Established under the Chartered Accountants Act 1949,
The Cost & Work Accountants Act 1958 & The Company Secretaries Act 1980)

APPEAL NO. 13-ICAI-2011

IN THE MATTER OF

Smt. Savitri Devi Kabra
301, Midway Apartment, Appa Saheb Maratha Marg,
Mumbai-400 025 .....Appellant
(Through: Mrs. Neeta S. Jain, Advocate)

Versus

N.L. Maheswari, M/s P.D.Saraf & Co.,
1103, Arcadia 195,
Nariman Point, Andheri (E),
Mumbai 400 025 .....Respondent
(Through: None)

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. ASHOK HALDIA, MEMBER
HON'BLE MR. KAMLESH VIKAMSEY, MEMBER

ORDER
(24/09/2011)

In view of Section 22G of The Chartered Accountants Act 1949 (as amended up-to-date), which provides for filing of appeal before the Appellate Authority only by a Member of the Institute aggrieved by the order of the Board of Discipline/ Disciplinary Committee, the Counsel for the Appellant seeks to withdraw the appeal with liberty to file the same before the appropriate forum. The appellant is permitted to withdraw the appeal with the liberty as sought, is granted. The Registry is directed to refund the appeal fee if any, paid by the appellant.

S.N.Dhingra
(Chairperson)

Ashok Haldia
(Member)

Kamlesh Vikamsey
(Member)

24th September 2011

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 10/ICAI/2011

IN THE MATTER OF

Mahen J. Dholam ...Appellant

Versus

Ashish Kulkarni ...Respondent

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. ASHOK HALDIA, MEMBER
HON'BLE MR. KAMLESH VIKAMSEY, MEMBER

Date of hearing:
24th September, 2011

Date of judgment:
28th January, 2012

JUDGEMENT

1. This appeal has been preferred by the Appellant against the order of Board of Discipline dated 10th February 2010 whereby the appellant was held guilty of professional misconduct falling within Clause 11 of Part I of the First Schedule to the Chartered Accountant Act, 1949 ("the Act" for short) and against the order dated 3rd February, 2011 whereby the Board of Discipline after hearing the appellant, awarded punishment of removal of his name from the Register of Members of Chartered Accountants for a period of 7 days.

2. The complaint against the appellant was filed by M/s Shree Shri Dharkrupa Builders and Realtors Private Limited through its Chairman Managing Director Shri Ashish Kulkarni (hereinafter referred to as the Complainant). In his complaint, the complainant reported to the Institute that the appellant represented to the complainant that he can be in fulltime business and also continue to be in fulltime practice as per ICAI Rules. The appellant was an Auditor of M/s Gharandaz Builders ("GB" for short), an associate concern of the complainant and taking advantage of his position as such, he in association with partners and relatives of partners of M/s Gharandaz Builders formed a company named Shree Shri Dharkrupa Builders and Realtors Private Limited ("SSBR" for short) and he was involved in its business. He got allotted flats from this Company at lower prices than the market rates and signed commercial transactions like Development Agreement in dual capacity as an Auditor of M/s Gharandaz Builders and as a Director of SSBR. Along with the complaint, the complainant filed documentary proof of the appellant's participation in the affairs of SSBR. After considering the documentary evidence and after hearing both the sides, the Board of Discipline observed that the complainant had brought on record ample evidence to show that the appellant was involved in business activities of SSBR. It was also found that the appellant had not sought permission from ICAI for his indulgence in the business activities.

The Board then awarded punishment as stated in para 1 of this order.

3. The contention of the appellant is that he was merely a Director on the Board of SSBR and he was not engaged in its business activities, which was the requirement of Clause 11 of the Part I of the First Schedule to the Act and he was wrongly held guilty for misconduct. He submitted that the term "engaged in business" was not defined in the 'Act' or 'Code of Ethics' or elsewhere. He relied upon the Institute's Publication and submitted that the intention behind Clause 11 of the First Schedule was to restrain the persons from carrying on any other business in conjunction with the profession of Chartered Accountancy since it was not considered good and proper for the dignity of the profession. It was also the worry of the Institute that if a CA was permitted to enter into all kinds of business activities, he would not be able to do justice to the profession and may take unfair advantage in his professional practice.

4. The appellant did not deny that he occupied the position of a Director of company SSRB from 6th July, 2004 to 10th August, 2007. However, he submitted that being a Director of the company in itself did not tantamount to misconduct more so when Clause 11 of the First Schedule to the Act allows a Chartered Accountant to be a Director of a company. He submitted that whatever documents he had signed during his Directorship as a Director, they do not reflect that he was engaged in the day-to-day business activities of the company and he was, therefore, merely a Director on the Board of the Company.

5. Clause 11 of the First Schedule to the Act (as amended in 2006) reads as under:

   "A Chartered Accountant in practice shall be deemed to be guilty of professional misconduct, if he –

   "(11) engages in any business or occupation other than the profession of chartered accountant unless permitted by the Council so to engage:

   Provided that nothing contained herein shall disentitle a Chartered Accountant from being a Director of a Company (not being a Managing Director or a whole time Director) unless he or any of his partners is interested in such company as an auditor;"

6. A perusal of above provision clearly shows that in case a Chartered Accountant wants to engage in the business simultaneously with the profession of Chartered Accountant, he has to seek permission of the Council. However, proviso to Clause 11 specifies that no approval is required for a Chartered Accountant from being a Director of a company (not being a Managing Director or a whole time Director) unless he or any of his partners is interested in such company as an Auditor. Thus, what we have to examine is under what circumstances, a Director of a company can be said to be engaged in its business and under what circumstances he simply remains a Director without being engaged in the business.

7. The intention of the legislature is reflected from Clause 11 to Part I of First Schedule to the Act itself. While the proviso permits a Chartered Accountant to be a Director of a company without permission of the Council, it specifically provides that such a Director should not

be a Managing Director or a whole-time Director. A Managing Director or a whole-time Director is the one who, on behalf of the company, discharges all day-to-day functions of the company and is authorized by the Board of Directors to act on behalf of the company. Section 269 of Companies Act, 1956 provides for mandatory appointment of a Managing Director or whole-time Director in case of such companies which have a specified paid-up-share-capital. Thus, the Legislature envisaged two kinds of directors; those who were involved in the business of the company and those who were not involved in day-to-day business affairs of the company but were on Board of the company in order to ensure that the company moves in right direction. The Board of Directors collectively have to take decisions for the benefit of the company to be implemented by the Managing Director or whole time Director or other executives of the company. We, therefore, consider that a Director who is not involved in day to day business of the company but who participates in the Board meetings and even receives remuneration for such participation and takes part in policy decisions, financial decisions but does not execute the decisions, is a Director not doing the business of the Company but is a Director simplicitor. Such a Director merely by virtue of signing a balance sheet or by discharging other statutory obligations as a Director without actually participating in the business of company would not be said to be involved in the business of the company. However, a person being a Director of the Company if operates the accounts of the company and executes the business of the company or participates in other activities of the company apart from attending Board Meetings and signing the statutory documents as required to be signed by a Director, then such a Director has to be considered a Director involved in the business of the Company.

8. In the case in hand, SSBR was incorporated with three shareholders including the appellant herein. The appellant was having 20% shareholding in the company. He was appointed director of the company at its inception. The appellant was addressed as Financial Director in the correspondences with the Company. The appellant could operate the accounts of the company as sole signatory. There was no Managing Director or whole-time Director appointed by the company. The documents on record would show that the appellant had issued instructions to the banker for various purposes. He also issued instructions to banks for stopping the payments of the cheques. He appointed Mr. D.V. Kulkarni as his authorized representative under the Bombay Sales Tax Act, 1959. He signed the Memorandum of Association of the company, not as a CA but as business person, despite the fact that he was a CA. He also signed Joint Venture Agreement ("JVA" for short) between SSRB and GB as an Authorized Representative of SSRB and he wrote request letter to the bank for opening current account with the bank. All these documents and connected activities show that the appellant was actively involved in the business activities of the company.

9. It is settled law that what cannot be done directly, cannot be done indirectly. If a CA cannot indulge in business directly he cannot indulge in business indirectly through a company. The sole purpose of prohibiting a CA from indulging in business activities simultaneously with carrying on his profession of CA shall stand defeated if it is considered that a CA can form a company, can become director of a company and can do all activities as a director without being designated as a Managing Director or whole-time Director. If it is held that a director

having authority to operate the accounts, writing letters to Sales Tax Authorities, entering into JVA on behalf of the company was not actively involved in the business of the company, that would be travesty of justice. In that eventuality, any CA can indulge safely into the business by generating and by creating several companies with a paid-up-capital and be a director of such companies and continue to do the business himself without designating anyone as a Managing director or a whole-time director. A line has to be drawn between a director simplicitor and a director actively involved in the business activities of a company and we consider that a Director who attends Board Meetings for taking policy decisions, advising a company on the issue of compliance of laws and even signs only those statutory documents which he is duty bound to sign as a director and charges fee for such work, would not be a director involved in the business of the company but would be a director performing statutory duties but not a Director who has authority to operate accounts of the company; authority to act on behalf of the company as a signatory for JVA or such other agreements resulting into promotion of the business of the company and corresponds with different persons on behalf of the company, would be a director involved in the business affairs of the company, even if he was not a whole time director or managing director. We, therefore, consider that the appellant in this case was actually involved in the business of the company and he formed this company along with other partners of the firm, of which he was a CA, in order to venture into a new business apart from the profession of chartered accountancy. This company might not have been quite successful, that is another aspect of the matter, but the appellant did indulge in the business without the permission of the Council. He was, therefore, rightly held guilty of professional misconduct by the Board of Discipline. We also find that the punishment of suspension of the membership of the appellant from the Register of members of Institute of Chartered Accountants for a period of 7 days was a justified punishment and not a harsh punishment. We, therefore, find no infirmity or perversity in the impugned order. Accordingly, the appeal stands dismissed.

Justice S.N.Dhingra(Retd.)
(Chairperson)

Kamlesh Vikamsey
(Member)

Ashok Haldia
(Member)

New Delhi
January 28, 2012

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 11/ICAI/2011

IN THE MATTER OF

Amresh Kumar Vashisth .....Appellant Through Appellant In person

Versus

Anuj Goyal & Anr. .....Respondent Through Respondent No. 1 in person
Shri J.S.Bakshi, Advocate for ICAI

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE MR. ASHOK HALDIA, MEMBER
HON'BLE MR. KAMLESH VIKAMSEY, MEMBER
HON'BLE MR.T.N. MANOHARAN, MEMBER

Date of hearing:
22th October, 2011

Date of judgment:
28th January, 2012

JUDGEMENT

1. This appeal has been preferred by the Appellant under Section 22G of the Chartered Accountants Act, 1949, praying for quashing of order dated 3rd February 2011 passed by Board of Discipline under Section 21A(3) of the Chartered Accountants Act,1949.

2. The Board of Discipline vide an order dated 3rd December, 2010, had held Respondent herein guilty of professional misconduct within the meaning of Clause 7 of Part-I of the First Schedule to the Chartered Accountants Act, 1949 with respect to the charges regarding misuse of the logo of Institute in contravention of the aforesaid clause. Thereafter, the Board of Discipline, after hearing the respondent on the quantum of punishment, passed order dated 3rd February, 2011 observing that it was not a case for awarding maximum punishment and ends of justice would be met if a warning is issued to the respondent.

3. The appellant i.e. complainant being dissatisfied with the order of punishment dated 3rd February 2011 awarded to the respondent has filed this appeal.

4. Section 21A (3) of the Act prescribes that on finding a member guilty of professional misconduct any one or more of the following actions can be taken by the Board of Discipline - (a) reprimand the member; (b) remove the name of the member from the Register of Members up to a period of three months; (c) impose such fine as it may think fit which may extend to Rupees One Lakh. However, the Board of Discipline has not cared to follow the

provisions as laid down in Section 21A (3) of the Act regarding penalty that can be awarded to a member when found guilty of professional or other misconduct mentioned in the First Schedule. There is no provision in the Act for letting off a member with warning, once the Board of Discipline holds a member guilty of professional misconduct. We, therefore, consider that it is a case where illegality is writ large on the record itself since the Board of Discipline awarded a punishment of warning only, which is no punishment in the eyes of law.

5. The Appellate Authority, in its Order in Appeal No. 04/ICAI/2011 dated 24.09.2011 has held that the statute does not give a right of appeal to the complainant and that right to appeal has been given only to a member of the Institute on whom penalties have been imposed by the Board of Discipline/ Disciplinary Committee under Section 21A(3) or 21B(3) of the Chartered Accountants Act, 1949. In view of this legal position recorded by this Authority, we consider that this appeal filed by the complainant is not maintainable.

6. However, before parting with the order we hope that Board of Discipline shall be more careful and shall strictly abide by the provisions of Act. A copy of this order shall be sent to Board of Discipline and Council of the Institute.

Justice S.N. Dhingra (Retd.)
(Chairperson)

Rakesh Chandra
(Member)

Ashok Haldia
(Member)

Kamlesh Vikamsey
(Member

T.N. Manoharan
(Member)

New Delhi
28th January, 2012

APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 14/ICAI/2011

IN THE MATTER OF

Sanjay Sood .....Appellant Through : None

Versus

Commissioner of Income Tax and ors. . .....Respondent
Through Shri J. S. Bakshi, Advocate for Respondent No. 2

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE MR. T. N. MANOHARAN, MEMBER

Date of hearing: 2nd June, 2012

Date of judgment: 17th July, 2012

ORDER ON ISSUE OF PUNISHMENT

1. The Appellate Authority vide its order dated 14th April 2012 had dismissed the appeal filed by the Appellant and upheld the order of passed by the Disciplinary Committee of The Institute of Chartered Accountants of India ("ICAI" for short) imposing penalty of striking off the name of the Appellant from Member of Register for a period of 10 years. However, while dismissing the Appeal filed by the appellant, the Authority in its order has observed that punishment imposed upon the appellant of removal of his name for a period of 10 years is meager one and keeping in view the grave nature of misconduct of the Appellant, should be enhanced. Accordingly, the Registrar was directed to issue notice to the appellant to appear before the Authority on 5th May 2012.

2. A show cause notice dated 23rd April 2012 was issued to the Appellant as to why the punishment imposed upon him should not be enhanced in exercise of the power of the Appellant Authority under section 22G(2)(b) of The Chartered Accountant Act ('Act' for short) and to appear before the Authority on 5th April 2012. The matter was thereafter listed for hearing on 5th May 2012. However, the Appellant vide his request dated 30th April 2012 sought time to seek legal counsel in the matter. Considering the request of the appellant, the matter was adjourned to 2nd June 2012. The appellant, once again sent a request for adjournment of hearing fixed for 2nd June 2012. However, in support of the reasons mentioned in the said request for adjournment, the appellant has not attached any supporting whatsoever.

   Even, no one appeared on behalf of the appellant to press upon the request or to argue the matter. It is felt that Appellant is trying to delay the proceedings for one reason or the other.

3. We have gone through the records of appeal and heard the learned counsel for Respondent No. 2.

4. The appellant being a Chartered Accountant had engaged into the misconduct of filing of forged income tax returns with the Income Tax Department in fictitious names for continuously three years and with every fictitious Income Tax Return, he filed a forged TDS certificate and claimed refund. He obtained cheques of such refund from the Income Tax personnel as well. He got Bank accounts opened in fictitious name by introducing the accounts himself and later on the refund money was withdrawn immediately from these accounts either through bearer cheque or cash. All these facts were established before Disciplinary Committee beyond any shadow of doubt. The appellant had no explanation on merits about his misconduct and his main arguments were on technical grounds before the Disciplinary Committee as well as before the Authority.

5. The appellant did not show any remorse for his such a grave misconduct, even before the Appellate Authority and rather tried to justify the amounts received by him through fraud from the Income Tax Department stating that he had not granted PAN Nos. to different fictitious persons and PAN Nos. were granted by Income Tax Department and not by him. He also justified receipt of money in his accounts by saying that many clients do not pay fee in advance and want that the fee should adjusted against the refund money.

6. We have considered the matter. Looking at the grave misconduct and the fact that the appellant had no feeling of remorse and had no guilt conscious despite committing such a fraud, the Appellate Authority considered the punishment awarded did not commensurate with the misconduct. In similar circumstances, in the case of 'Council of Institute of Chartered Accounts of India Vis. Mukesh R. Shah', the Hon'ble High Court of Gujrat at Ahmadabad had upheld the punishment awarded to the Chartered Accountant of removal of his name from Register of Members, permanently. The Special Leave Petition No. 6012/2004 filed against the Judgment of the Hon'ble High Court was also dismissed on 5th April, 2004.

7. We consider that keeping in view the gravity of misconduct as well as the judgment of the Hon'ble Gujrat High Court in the case (supra), appropriate punishment for the appellant would be removal of his name permanently from the Member's register of the Institute. Where an individual considers that playing fraud was a right of a Chartered Accountant, such individual is not fit to be a member of the Institute.

8. We, therefore, in exercise of power under Section 22G (2), enhance the punishment awarded to the Appellant. It is directed that the name of the Appellant should be removed from the Register of Members permanently.

Justice S.N. Dhingra (Retd.)
(Chairperson)

Rakesh Chandra
(Member)

T.N. Manoharan
(Member)

New Delhi
Dated this 17th day of July, 2012

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 17/ICAI/2011

IN THE MATTER OF

Rajesh Vasant Dudhwala .....Appellant
Through : Shri C.N. Vaze, Chartered Accountant

Versus

Disciplinary Committee ICAI and anr. .....Respondent
Through : Shri J.S. Bakshi, Advocate for Respondent No. 2

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE MR. ASHOK HALDIA, MEMBER
HON'BLE MR. T.N. MANOHARAN, MEMBER

Date of hearing:
28th January, 2012

Date of judgment:
5th May, 2012

JUDGMENT

1 The appellant has preferred this appeal against the order dated 12th September, 2011 of Disciplinary Committee of ICAI whereby the appellant was awarded the punishment of removal of his name from the Register of Members for a period of one year.

2. Brief facts, relevant for the purpose of deciding this appeal are that the appellant had conducted Tax Audit of M/s. Sumilon Industries Limited. The Excise Department during the course of scrutiny of the documents submitted by this Company found several discrepancies in the figures pertaining to raw material consumption, production, sales and in the annual audited report of the year 2006-07 and Tax Audit Report for financial year 2006-07. The Tax Audit Report was certified by the appellant to be correct. After finding discrepancies in the Tax Audit Report, the Joint Commissioner (Audit) of the Central Excise & Customs sent a communication dated 24th October, 2008 bringing it to the notice of the Institute about the false/wrong Tax Audit Reports having been certified by the appellant and consequent professional misconduct. The said communication was treated as Information by the Director (Discipline) and accordingly, notice was sent to the appellant to submit his reply. The appellant in his reply to Director (Discipline) in response of the said notice has stated that he had thoroughly verified the books of accounts and certified the Audit Report after verification of the books of accounts and there was no single mistake or wrong figure in it. The appellant, however, in the same reply explained the different discrepancies pointed out by the complainant. His explanation was that the discrepancies had occurred either due to

typing error or due to copying & pasting data and mistake in costing and applying formula in excel sheet. He rested the responsibility of wrong figures either on accountant or on the typist.

3. On considering the information and response of the appellant, Director (Discipline) formed a prima facie opinion that the appellant was guilty of professional/other misconduct falling within the meaning of clause (7) of Part I of Second Schedule to the Chartered Accountants Act, 1949 (as amended up to date) (hereinafter referred to as "Act"). The matter was referred to the Disciplinary Committee for taking action as per law and the Disciplinary Committee proceeded with the matter. The Disciplinary Committee considered the reply filed by the appellant and also heard the appellant. The Disciplinary Committee vide its order dated 10th February, 2011 observed as under:-

"15. The Committee noted that in the financial statements of the Company for the years 2005-06 and 2006-07, the sales of finished goods were disclosed inclusive of inter branch transfer whereas as per the Accounting Standard – 9, Revenue Recognition, the Inter Divisional Transfer cannot be recognized as Sales/revenue as in case of inter divisional transfers, risks and rewards remain within the enterprise and also there is no consideration from the point of view of the enterprise as a whole, the recognition criteria for revenue recognition are also not fulfilled in respect of inter divisional transfers. However, in the present matter, the Company in its financial statements for the years 2005-06 and 2006-07 shown the Sales/ Revenue inclusive of Inter Unit/Branch transfer in violation of the provisions of the accounting standard 9.

16. Further, by adding the amount/quantity of Branch Transfer in the financial statements, the accounts were misstated and did not give a true & fair view of the affairs of the Company. In those circumstances, the Respondent ought to have disclosed the said fact in his audit report and/or expressed qualified opinion. But the Respondent failed to do so.

17. The Committee also noted that the financial statements are very important documents for the stakeholders and the general public at large and they rely on the certification of Chartered Accountants for accuracy and the correctness of the same. The Committee also felt that the Respondent should have taken more care in ensuring that correct facts are stated in the financial statements so as to give true and fair view of the affairs/profit or loss of the Company.

18. The Committee though noted the admission of the Respondent of the mistakes in the financial statements, could not accept to his prayer that a lenient view may be taken of the mistakes. The Committee also noted that irrespective of the fact that there is no loss to the Government or anybody due to the above mistakes, the mistakes are very serious resulting in affecting the true and fair view of the financial statements. The Committee also felt that as a prudent professional, the Respondent ought to have exercised due care and caution and due diligence in

certifying the financial statements with correct details."

4. The Disciplinary Committee came to the conclusion that the respondent was guilty of professional conduct falling within the meaning of Clause (7) of Part I of Second Schedule to the Act. The appellant was, therefore, sent a notice for hearing on the quantum of punishment. The appellant did not appear before the Disciplinary Committee on the ground that he was busy and sent a request for adjournment. The Disciplinary Committee did not adjourn the matter and announced the punishment as stated above on 12th September, 2011.

5. The appellant has assailed the order of the Disciplinary Committee on the ground that the mistake pointed out by the Excise & Customs Department in the Tax Audit Report were not such so as to show gross negligence of the appellant. So he could not have been guilty of the professional misconduct under the Chartered Accountants Act.

6. Negligence in normal discourse means a failure to take proper care over something. Gross negligence would mean total absence of proper care, a casual approach towards the duty of being diligent. An Auditor is a professional expert who is trained in not only accountancy but also in laws pertaining to tax, Company Law and other relevant laws so that he ensures that the accounts of a company are maintained not only in accordance with sound standards of accountancy but also in accordance with the relevant certificate to the company accounts without looking into supporting documents relevant for a true and fair view of the affairs of the company. It would be gross negligence on the part of an auditor if he gives unqualified clean audited report without personally verifying the correctness of the same on the basis of supporting documents and vouchers.

7. In the present case, the declared accounting policy of the company whose Tax Audit was conducted by the appellant was as under:-

> *" the sales are accounted exclusive of excise duty and other taxes and exclude inter divisional transfers." (Point no. F of Schedule 19 to Balance Sheet as at 31.03.06).*

8. Despite this declared policy of the company, the inter divisional transfers were shown as sales of finished goods in the Tax Audit Report, certified by the appellant. The appellant's contention is that this was merely a mistake later on explained to the Excise Department and there was no revenue loss.

9. The issue actually is not whether there was a revenue loss to the department or not. The issue under consideration before Disciplinary Committee was whether the appellant was negligent in performing his professional duty/obligation. The negligence is here writ large in view of the fact that the audit report certified by the appellant was contrary to the declared accounting policy of the company.

10. The matter did not rest here only. There were several discrepancies in the figures of Annual Report & Tax Audit Report which are sought to be explained by the appellant in para 5.3 of the appeal as under:-

5.3 Further, the said discrepancies were basically in the nature of typing error of a computer operator. A table showing the reason for mistake for each item is given below:

	Raw material consumption	Production	Sales
Annual Report for FY 2005-06	Difference in the method of working	Total mistake of accountant	Inter branch transfer were included in the sales figures.
Annual Report for FY 2006-07	Oversight and typing error (instead of consumption figure, purchase figure was considered)	Copy-pasting error.	Inter branch transfer were included in the sales figures
Tax Audit Report for FY 2006-07	Typing error.	Typing error.	Typing error.

5.4 As stated in the table above, the discrepancies in raw material consumption in annual report and revised data in FY 2005-06 was due to a different method adopted by the company's staff while giving the figures to the excise department.

5.5 Further, the difference in consumption shown in annual report and revised data n FY 2006-07 was a typing error. Instead consumption of one product plain polyester film (1717.238 MT), the purchase was taken.

5.6 The difference in production of FY 2005-06 was due to a totaling mistake committed by the accountant. The excise department had found difference of only 34.38 MT.

5.7 In the annual report for the year 2006-07, the production in quantity of FY 2005-06 of plain polyester film was copied instead of actual production in quantity. This was merely a typing error.

5.8 As regards sales figures, the difference in the original and revised figures was due to inter branch transfers. The old data included quantity of inter branch transfer which were deducted in revised data."

11. We have considered these explanations and found that the same were absolutely devoid of merit. The question of typographical error did not arise as the appellant in his reply has sought to explain the wrong figures. In fact, the figures of consumption of raw material, the production and sales, all were wrongly stated in the audit report. These wrong figures were explained by the appellant as mere typographical error. In fact the appellant during proceedings before Disciplinary Committee admitted that there were lapses on his part and he should have been careful. He also admitted that despite declared accounting policy of sales being exclusive of inter department transfer, tax audit report certified by him included inter department transfer as sales and did not give true and fair view of financial statements.

12. The appellant took the same stand before Appellant Authority as well and pleaded that the punishment awarded to him of removal of his name from the register of members for one

year was harsh and a lenient view should be taken by the Appellate Authority.

13. We feel that the conduct of the appellant is to be considered in the light of professional duties of a Chartered Accountant. A Chartered Accountant is statutorily authorized to scrutinize the financial statements of a company and after verifying the correctness of the financial statements has to certify the same. Financial statements are very important documents for stakeholders and general public at large who all rely on the certification of Chartered Accountant for accuracy and correctness of the same. In Council of Institute of Chartered Accountant vs. Mukesh R. Shah AIR 2004 Guj 164, High Court held as under:-

> *"20. A Chartered Accountant is statutorily required to undertake and carry out various functions as statutorily prescribed under the Companies Act, 1956. Part VI of the Companies Act deals with management and administration. Chapter I in the said part relates to general provisions and there are separate heads regarding accounts and audit. Section 226(1) of the Companies Act specifically prescribes that a person shall not be qualified for appointment as auditor of a company unless he is a Chartered Accountant within the meaning of the Act. There are various other provisions which prescribe the powers and duties of the Auditors as well as the responsibilities. These provisions are indicative of the extent a Chartered Accountant is looked upon by the society, with special reference to the corporate world, as being competent to discharge various statutory duties and responsibilities as a qualified professional.*
>
> *21. Similarly, under the Income-Tax Act, 1961, Section 288 stipulates as to who can appear as authorized representative of an assesses under the said Act. Section 288(2)(iv) states that an Accountant can be an authorized representative. The Explanation below the said sub-section specifies that in this Section, namely, Section 288 of the said Act, 'Accountant' means a chartered accountant within the meaning of the act. The Income-Tax Act stipulates compulsory audit of accounts in relation to various categories of assesses for different purposes. Section 12A of the said Act stipulates that the accounts have to be audited by a Chartered Accountant in case of a trust or institution seeking registration. Similarly Section 44AB of the said Act provides for audit of accounts of certain persons carrying on business or profession. There are various provisions permitting deductions in respect of certain incomes under Chapter VI-A of the said Act wherein it is necessary to obtain a separate audit report in relation to the specified deduction under a particular provision. Section 142(2A) of the Income-Tax Act empowers the assessing officer to obtain a special audit report from a Chartered Accountant nominated by the Chief Commissioner or Commissioner. It is not necessary to refer to the various provisions in detail, suffice it to state that the revenue authorities rely upon the integrity of a Chartered Accountant to assist the tax authorities by such Chartered Accountant. The decision rendered by the Delhi High Court in the case of Additional Commissioner of income-tax V. Jay Engineering Works Ltd. (1978) 113 ITR 389 : (1978 Tax LR 972) indicates the extent to which the income tax authorities can place reliance upon a report submitted by the auditor at page 974 of Tax LR.*

"It is quite competent for the income-tax authorities not only to accept the auditor's report but also to draw the proper inference from the same. The income-tax authorities can, therefore, come to the conclusion that, since the auditors were required by the statute to find out if the deductions claimed by the assesses in their balance-sheets and profit and loss accounts were supported by the relevant entries in their account books, the auditors must have done so and must have found that the account books supported the claims for deductions.

Where the original account books of the assesse had been destroyed in a fire, it was held that the Appellate Tribunal, in allowing a deduction, could rely upon other material mainly consisting of the auditor's reports from which it could be inferred that the deductions were properly supported by the relevant entries in the account books."

14. Thus, the aforesaid position in law clearly demonstrates faith that various government departments have in the aforesaid qualifications, competency and integrity of a Chartered Accountant and hence the various statutory duties and responsibilities cast upon a Chartered Accountant under various provisions of the Act. There are other statutes like Co-operative Societies Act, Bombay Public Trust Act etc., where also the importance of the report of Chartered Accountant has been statutorily recognized and accepted. It is in the aforesaid context that the conduct of the respondent has to be tested and appreciated in the context of evidence placed on record.

15. In our considered view, the appellant was rightly held guilty of professional misconduct falling within the meaning of clause (7) of Part 1 of Second Schedule to the Chartered Accountants Act, 1949 (as amended by the Chartered Accountants (Amendment) Act, 2006). The appellant had shown gross negligence and carelessness in certifying the Tax Audit Report which did not reflect a true an fair picture of the affairs of the company. It seems that the appellant signed the tax audit report without actually performing audit as required. We consider that a Chartered Accountant cannot allow himself to sign the certificates in a mechanical manner and cannot be so oblivious to his professional duties; nor can he delegate audit work to the accountants of the company and himself only certifying their work. There is no merit in the appeal.

16. We also consider that no leniency should be shown to a Chartered Accountant who considered that his duty was only to certify and not to audit. Removal of his name for a period of one year is not harsh. In view of the aforesaid, the appeal is dismissed.

Justice S.N. Dhingra
(Chairperson)

T.N. Manoharan
(Member)

Rakesh Chandra
(Member)

Ashok Haldia
(Member)

New Delhi
Dated: 5th May, 2012

APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 15/ICAI/2011

IN THE MATTER OF

Rajiv Sharma, (M No. 82378)
E-133, Greater Kailash Part –I, New Delhi -110 048. .....Appellant
(Thorugh Sh. Ashish Makhija, Advocate)

versus

Institute of Chartered Accountants of India, Post Box 7100
Indraprastha Estate, New Delhi-110002. .....Respondent
(through : Sh. J.S.Bakshi, Advocate)

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE DR. ASHOK HALDIA, MEMBER
HON'BLE MR.T.N.MANOHARAN, MEMBER

Date of Hearing:
25th February, 2012

Date of Judgment:
17th July, 2012

ORDER

1. The appellant is aggrieved by the order dated 6th October, 2010 of the Disciplinary Committee whereby the Disciplinary Committee had found the appellant guilty of professional misconduct within the meaning of clause (2) of Part IV of First Schedule of the Chartered Accountants Act as amended in 2006 and is also aggrieved by the order dated 12th September 2011 of the Disciplinary Committee awarding him punishment of removal of his name from the register of members for a period of 3 months and a fine of Rs.1,00,000/-.

2. The brief facts relevant for the purpose of deciding this appeal are that the appellant and one Shri S.L. Mallu (another Chartered Accountant) were close associates. Shri S.L. Mallu was Chairman of a Company namely M/s Websity Infosys Limited (WIL) and appellant was auditor of the said Company. Security & Exchange Board of India (SEBI) found that there were violations and irregularities committed by WIL and there seemed to be rigging of the share prices of the company. SEBI in order to make an inquiry into this, constituted a Committee under Chairmanship of Justice N.N. Goswami (Retd.). This Committee considered the complaints against WIL and found various irregularities including rigging of share prices of the Company. The Committee had given a detailed report about the role of different persons in this operation of rigging of the shares of the Company. It has been found that Shri S.L. Mallu and the appellant both had a role in the rigging of the share prices along with one Shri M.M. Miglani. SEBI had gone into the details of the role played by these persons and after finding that Shri S.L.Mallu and the appellant were Chartered Accountants,

forwarded its report to the Institute of Chartered Accountants for taking action against the two Chartered Accountants. The present appeal is in respect of the action taken by the Disciplinary Committee of the Institute of Chartered Accountants against the appellant Sh. Rajiv Sharma.

3. The appellant was provided the copy of report of SEBI indicting him along with others for shares rigging and the copy of letter written by SEBI and was asked to give his response. After going through his response, a prima facie opinion was formed by Director (Discipline). The Director (Discipline) observed that the appellant was auditor of WIL from 17.8.1998 to 26.5.2000. During this period, Shri M.M. Miglani and his Company M/s Jai Shankar Investment Pvt. Ltd. were involved in manipulation of prices of shares of WIL. The appellant along with Shri Miglani was involved in the rigging of shares and had received payments either from Shri M.M. Miglani or from his company through cheques. The amounts received by him were reflected in the accounts of Shri Miglani and his company. The appellant was involved into unusual price rise in the shares of WIL. The appellant knew Shri M.M. Miglani who was a Director of M/s. J.S. Investment Pvt. Ltd. very well and the appellant had introduced Shri M.M. Miglani to Shri Mallu. Shri M.M. Miglani had used the office of the appellant for two or three weeks before May, 2000. The appellant was inter-alia paid an amount of Rs.8.5 lakhs, as noted by SEBI vide three cheques apart from the other payments as reflected in the accounts of the Shri M.M. Miglani and his company. Though the Appellant had taken a plea that this amount was refund of loan given by him to Shri M.M. Miglani. however, he could not substantiate his stand by cogent evidence. Director (Discipline) found that there was sufficient financial nexus between the appellant and Shri M.M. Miglani which created doubt on the integrity of the appellant. Being auditor of the company, the appellant was associated with a person instrumental in manipulating the share prices of the shares of same company, of which he was the auditor which also raised doubt about the appellant's independence as an auditor of the company. Director (Discipline) was of the opinion that the appellant was guilty of professional misconduct falling under clause (2) of Part IV of the First Schedule and clause (4) of Part I of Second Schedule to the Chartered Accountants (Amendment) Act, 2006. The Director (Discipline) referred the matter to the Disciplinary Committee and the Disciplinary committee found the appellant guilty of only first charge as stated above and awarded punishment.

4. The appellant has assailed the order of the Disciplinary Committee mainly on the following grounds:-

   i) The Disciplinary Committee acted beyond its jurisdiction since under clause (2) of Part IV of Schedule I, it is the Council of the Institute of Chartered Accountants that has to form opinion and not the Disciplinary Committee.

   ii) The Disciplinary Committee has power to conduct inquiry if a member was prima facie guilty of misconduct prescribed under Second Schedule or under both First Schedule and Second Schedule. If the Disciplinary Committee, after conducting an inquiry finds a member guilty of misconduct only under First Schedule, it has no power to award punishment and it should refer the matter to Board of Discipline for awarding punishment. Thus the punishment awarded by Disciplinary Committee was beyond jurisdiction.

iii) The Disciplinary Committee acted beyond jurisdiction since the alleged misconduct pertained to the year 1998 to 2000 and during this period Part IV of the First Schedule was not in existence. Thus holding the appellant guilty under clause (2) of Part IV of First Schedule was illegal.

iv) The Disciplinary Committee ignored and rejected the testimony of Shri M.M. Miglani. Shri Miglani had filed an affidavit dated 11.5.2010 stating that the amount given by him was refund of the amount due to the appellant. Ignoring of this material evidence vitiated the inquiry.

v) The Disciplinary Committee had solely relied on a report of SEBI. The report had no evidentiary value since no one appeared from SEBI to prove the report and to undergo cross examination.

vi) The findings of the Disciplinary Committee were based on doubts. The proceedings of professional misconduct are quasi criminal in nature and the guilt of the member is required to be proved beyond reasonable doubt. Since the guilt of the appellant was not proved beyond reasonable doubt, the report was vitiated.

vii) No law mandates the maintenance of books of account for more than 8 years. The observations of the Disciplinary Committee that the appellant failed to substantiate the giving of loan to Shri Miglani by documentary evidence was incorrect. No documentary evidence should have been expected from the appellant.

viii) The Disciplinary Committee wrongly held the appellant guilty of a conduct unbecoming of a Chartered Accountant and bringing disrepute to the profession of Chartered Accountants and wrongly punished.

5. We have heard the learned counsel for parties at length and our findings are as under:

Clause (2), Part IV of First Schedule reads as under ;-

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

(1) Xxx xxx xxxx

(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. The Counsel for the appellant has submitted that it has to be opinion of the 'Council' whether or not the member brought disrepute to the profession and not of the Disciplinary Committee, in view of the above clause under which he has been held guilty. Since the Council has not given its opinion in this regard, the appellant could not be held guilty under this clause. The counsel for the appellant has relied upon CIT West Bengal vs. Calcutta National Bank in liquidation AIR 1959 SC 928 to press the issue that where the language of the provision was very clear, the Act/provision is to be interpreted as per plain meaning of the words even if the language of the provision take the misdeed clearly outside the purviews. The Court cannot refuse to give effect to clear words because prima facie they seem to be limited by heading of the Schedule.

7. Prior to amendment of Chartered Accountants Act, the Disciplinary Committee used to hold the inquiry and used to submit its report to the Council and only the Council would give a final finding if the member of the Institute was guilty of professional and/or other misconduct or not. The correctness or otherwise of the report of the Disciplinary Committee could be agitated before the Council. The Council was thus acting like an appellate body of the Disciplinary committee. However, in year 2006 The Chartered Accountants Act was amended and all powers of taking disciplinary action against the members got vested in the Board of Discipline and Disciplinary Committee and the role of Council was taken away. Under Section 21 of the amended Act, the Council was to establish a Disciplinary Directorate, constitute a Board of Discipline and Disciplinary Committee to discharge the functions earlier being discharged by the Council. It is specifically provided in section 21A that the Board of Discipline shall award punishment as given under section 21A(3) if a member was found guilty of professional misconduct covered under First Schedule (including part IV of the schedule). Appeal against the findings and award of punishment by Board of Discipline and Disciplinary Committee was provided before an Appellate Authority specifically constituted under the Act for this purpose. Under the amended Act, there is no provision of appeal provided against decision if any of the Council in such matters. It is settled law that if there is some ambiguity or apparent conflict between two provisions, rule of harmonious construction is to be followed. Thus the provision of Clause (2) of Part IV of First Schedule is to be so interpreted that it is in harmony with main provision of the Act i.e. section 21 and 21A. The word 'Council' seems to have gone unnoticed while amending the schedule. The Council's role was altogether taken away in disciplinary proceedings by the amendment of the Act. This is also clear from the Rules made under the Act after amendment These rules are called Chartered Accountants (Procedure of Investigation of Professional and other Misconduct and Conduct of cases) Rules, 2007. In these Rules, Chapter IV, Rule 14(9) provides that Board of Discipline shall arrive at a finding whether the respondent was guilty or not of any other professional misconduct. Obviously the Board of Discipline has to give a finding in respect of all matters under First Schedule including the misconduct for which the appellant was held guilty. If certain power had been reserved for Council, the Act would also have provided for appeal against the decision of the Council. It cannot be that if Council holds a member guilty for misconduct, the member is remediless and no appeal lies to any forum. Thus the word 'Council' seems to be inappropriately/inadvertently used in clause (2) Part IV of First Schedule. The Rules and other provisions of the Act make it clear that in respect of misconduct falling under First Schedule, it is the Board of Discipline who has to decide all the matters and the Council would have no role whatsoever. Similar provision is there in respect of powers of Disciplinary Committee and under Chapter V of the Rules, Disciplinary Committee has been given powers to decide by a majority of the members present and voting, all questions regarding professional misconduct which come before it. The arguments of the appellant on this count, therefore, must fail.

8. The other ground taken by the appellant is that Part IV of the First schedule was not even in existence when the alleged misconduct was stated to have been done by him and if at the relevant time the conduct of the appellant did not amount to misconduct, he could not be held guilty of any misconduct.

Section 22 of the Chartered Accountants Act reads 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 circumstances.

9. A perusal of the above Section would show that the section gives an inclusive definition of professional misconduct and the misconducts enumerated in First and Second Schedule are not exhaustive in nature. The legislature could not have foreseen the different kinds of misconducts of Chartered Accountants and it is not humanly possible to foresee all of them. It is for this purpose that an inclusive definition of misconduct was given by the legislature. In Institute of Chartered Accountants vs. B. Mukerjea (1958) ISCR 371 Supreme Court had occasion to consider the import of section 22 of the Chartered Accountants Act and observed as under :

"The misconduct alleged on the part of a Chartered Accountant may not attract any of the provisions in the schedule and may not therefore, be regarded as falling within the first part of Section 22; but as the definition given by Section 22 itself purports to be an inclusive definition and as the section itself in its latter portion specifically preserves the larger powers and jurisdiction conferred upon the Council to hold inquiries under the Section 21, Sub-section (10, it would not be right to hold that such disciplinary jurisdiction can be invoked only in respect of conduct falling specifically and expressly within the inclusive definition given by Section 22. Section 8, sub-sections (v) and (vi) also support the argument that disciplinary jurisdiction can be exercised against chartered accountants even in respect of conduct which may not fall expressly within the inclusive definition contained in Section 22.

Hence, if a member of the Institute is found, prima facie, guilty of conduct which, in the opinion of the Council, renders him unfit to be a member of the Institute, even though such conduct may not attract any of the provisions of the schedule, it would still be open to the Council to hold an inquiry against the member in respect of such conduct and a finding against him in such an inquiry would justify appropriate action being taken by the High Court…."

10. In Council of Institute of Chartered Accountants of India vs. Mukesh Arsha AIR 2004 Guj.164, Gujarat High Court had observed that even if a member of the Institute is found guilty of a conduct which in the opinion of the Council renders him unfit to be a member of the Institute, it would be a professional misconduct though such conduct may not attract any of the provisions of the schedule. It would be open to the Council to hold an inquiry against the member in respect of such a conduct and give a finding against him after such an inquiry and to take appropriate action.

11. We, therefore, consider that non existence of Part IV prior to amendment would not affect the powers of the Disciplinary Committee to hold inquiry and to return a finding of the appellant being guilty of a conduct which was unbecoming of a member of the Institute. We, therefore, find that this argument of the appellant holds no water.

12. The appellant did not press the plea that the disciplinary committee had no power to punish him under Schedule I, thus this plea is not being discussed.

13. The other plea taken by the appellant is about rejection of affidavit of Shri Miglani. Shri Miglani had faced inquiry along with the appellant and Shri Mallu before SEBI Committee headed by Justice N.N. Goswami (Retd.). The fact of Shri Miglani having paid various amounts to the appellant and the role of the appellant is specifically given in the SEBI inquiry report. These facts were taken from the documented record of Shri Miglani's Company produced before SEBI. It is recorded in the report that the bank account of Shri Miglani showed that many payments were made to Appellant Shri Rajiv Sharma. Some of these payments were enumerated in the report. These payments were made by cheques and only three cheques were enumerated in the report as example totaling to Rs.8.5 lakhs. None of the facts have been disputed by appellant. The appellant did not prefer appeal against SEBI orders. Shri Miglani had not stated before SEBI Inquiry Committee that the payments made to Shri Rajiv Sharma were in respect of personal loan taken by him. In fact his accounts were checked to find out where the sale price of the different shares handed over to him had gone and it is from these records that SEBI found that a large amount had gone to the accounts of appellant Shri Rajiv Sharma. Shri Miglani did not file the kind of affidavit before SEBI as he filed before the Disciplinary Committee of the Institute nor Shri Rajiv Sharma filed an affidavit before SEBI that the amount received by him was in lieu of a personal loan. Shri Miglani had not appeared during the course of inquiry conducted by the Committee as a witness of the appellant nor had appellant asked the Disciplinary Committee to examine Shri Miglani. Mere filing of affidavit by Shri Miglani at such a belated stage to justify the payments to Shri Rajiv Sharma that too without any supportive documents could not have been believed by the Disciplinary Committee. It was rightly considered as an afterthought. The plea of the appellant, that Shri Miglani's affidavit was wrongly ignored has therefore, to be rejected.

13. The other argument advanced by the appellant is that the Disciplinary Committee wrongly relied upon SEBI's report in order to hold him guilty and SEBI's report had no evidentiary value since it was not proved by calling someone from SEBI to prove the report.

14. SEBI had not conducted an unofficial secret inquiry into the matter. The inquiry conducted by SEBI under the Chairmanship of Justice N.N. Goswami (Retd.) was a statutory inquiry (in which appellant & Shri Miglani participated), under sections 11B and 11C of SEBI Act and the findings of the inquiry were appealable under Section 15T of the SEBI Act. The inquiry was conducted as per the procedure laid down under law by a duly constituted Committee. The inquiry report thus is a finding of quasi judicial body and formed a public document. Unless the report was challenged before Appellate Authority and set aside, it attained finality. The copy of the report was sent to Institute by SEBI and its authenticity or correctness has not

been disputed by the appellant. Since the findings of Enquiry Committee had attained finality and are based on cogent evidence, the Disciplinary Committee could legally rely upon the report to see what was the conduct of the appellant.

15. The facts on record reveal that appellant was closely associated with Shri M.M. Miglani in share price rigging. The initial name of Websity Infosys Ltd. was Sunrise Securities Ltd. It was a company engaged in financial services including fund based and non fund based activities. Looking at the way the shares of IT companies were being picked up and were rising, the name of Sunrise Securities Ltd. was changed to Websity Infosys Ltd. on 6.7.1998. Immediately after the change of its name, the share of this company which was selling at Rs.10 on 3.8.1998 rose to Rs.28.90 on 13.10.1998. It declined to Rs. 4 on 1.1.1999 and again went up from Rs.10 to Rs.49.45 on 25.2.2000. Trading in Websity was suspended by BSE on 28.2.2000 due to irregularities but it still continued to trade at BSE where it upped to Rs.81. After general decline in share prices during April, 2000, its share was Rs.27.50. It again increased to Rs.49.50 on 25.2.2000 on thin volumes. Complaints were received by SEBI about manipulations and preliminary investigation was conducted in irregularities in preferential allotment of 41.82 lakh fully paid up equity shares and 4.40 lakh partly paid equity shares to 11 promoter companies of Websity. Websity was also allotted 50 lakh partly paid up shares by Luner Finance Ltd., a promoter group company for consideration other than cash namely acquisition of its running e-commerce website 'Websonplaza.com'. Inquiries showed that this Website was only a registered domain with no contents except a box stating 'under construction'.

16. This shows that Luner Finance did not pay any consideration for allotment of shares of WIL and WIL booked a fictitious sale of Rs.5 crores. WIL also refused to transfer the shares purchased by different companies on the basis of legal opinion received by it from its advocate. RBI wrote a letter to DSE and SEBI stating that WIL had not adhered to repayment schedule of fixed deposits as prescribed by Company Law Board and it sought rescheduling time and again. It was also informed that WIL had kept Rs.350 crores with its sister concern M/s. Luner Finance Ltd. as share application money. The RBI directed that WIL be directed to revert to its earlier name. Statement of Shri Miglani made before SEBI and his written arguments given before SEBI would show that Shri Rajiv Sharma, auditor of WIL used to meet him frequently for delivering shares and collection of cheques. At times when there was downward freeze in shares of WIL, then he (Shri Miglani) and Shri Mallu used to purchase the shares (to raise their price). He categorically stated that WIL was not doing any activity worth its name. It was plain piece of paper for which there was mad rush among the people. The promoters capitalized on the same and tried to sell as many shares as possible. This process of rising share prices started with change in the name of the company from Sunrise Securities Ltd. to Websity Infosys Ltd. (WIL). Initially, there was no trading in the shares. Few shares were given to him (Miglani) to meet his nominal sale. When the software boom started, the sale was made through Shri Miglani and accounts were opened with brokers by Shri Mallu and the appellant and payments were received from brokers by both of them directly. Four jumbo lots of 25,000 shares each in physical form were transferred by Shri Mallu in the name of Shri Miglani to meet exigencies

because there was a compulsory demat trading order already issued. These shares were later dematerialised and credited to the account of Shri Miglani.

17. After considering the entire evidence, the Inquiry Committee of SEBI had come to conclusion that Shri Miglani had rigged share prices at the behest of Shri Mallu and Shri Rajiv Sharma. The deliveries for shares sold were mostly given to Shri Miglani by Shri Rajiv Sharma and Shri Rajiv Sharma had received many payments from Shri Miglani including Rs.8.5 lakhs by way of three cheques as stated above. The appellant who participated in the inquiry before SEBI admitted that it was he who introduced Shri Miglani to Shri Mallu in 1991 and Shri Miglani was given a verbal assignment for creating awareness in the shares of WIL. He also admitted that Shri Miglani used his cabin at 1102, Tolstoy House, Tolstoy Marg for 2-3 weeks before May, 2000. Shri Rajiv Sharma was confronted by Enquiry Committee about the payments received by him. He was not able to explain the reasons for payments by Shri Miglani to him.

18. The inquiry committee of SEBI concluded that on the basis of records gathered and investigations and statements recorded, that Shri Rajiv Sharma was acting in nexus with Shri Miglani in aiding and abetting rigging of share prices of WIL and creation of artificial market and thereby violated regulation 4(a), 4(b), 4(c) and 4(d) of SEBI (Prohibition of Fraudulent and Unfair trade Practices relating to Securities Markets) Regulations, 2003. SEBI directed initiating proceedings under Section 11(b) of SEBI Act read with Regulation 12 of the aforesaid regulations against Shri Rajiv Sharma.

19. The plea taken by the appellant that the report of SEBI carries no evidentiary value is a baseless plea. The report prepared by the statutory Committee was a judicial & public document. An authentic copy of the report can be admitted in evidence per se without formal proof like a judgement of the court. It was a judgement of a quasi judicial body against the appellant. It was a conclusive proof of findings against appellant.

20. One of the fervent pleas taken by the appellant was that it could not have been expected from him to retain the documents regarding loan given by him to Shri Miglani since the documents were about 8 years old. Moreover the appellant had neither given the period and the dates of giving loan to Shri Miglani nor he had stated how this loan was given. Even during arguments, the Counsel for the appellant changed his stand twice, first he stated that the loan was given in cash, then he stated that the loan was given through cheques and then again he changed his statement and stated that he had no instructions to say how the loan was given. The appellant had not filed affidavits stating before SEBI that the amount was received by him from Shri Miglani/his company as repayment of loan. Neither Shri Miglani had taken this stand before SEBI. This stand for the first time was taken before the Disciplinary Committee of the Institute. If the loan had been given by the appellant, it would have been reflected in his income tax returns and his own financial statements. If it had been given by cheque or had been given in cash by withdrawing money from the bank, he could have easily procured his bank account statement and placed the same before the Disciplinary Committee. Banks retain the entire record of transactions in the accounts of its clients for all times to come and the ledgers of the bank in respect of live accounts are

not destroyed. The appellant and Shri Miglani had not been truthful in their statements before the Inquiry Committee of Institute regarding loan transaction, they could have easily produced their financial statements of the relevant years or the bank statements showing giving of loan and receiving back of this amount. The onus to prove the fact that loan was given and received back was on Shri Rajiv Sharma because it was his plea and it was within his special knowledge when he gave the loan and by what mode. He miserably failed in discharging this onus after taking stand. Mere filing of affidavit or oral statement is not sufficient to prove loan transaction.

21. Another plea taken by the appellant is that charge of professional misconduct is in the nature of quasi criminal charge and must be proved beyond reasonable doubt and the Disciplinary committee ignored this crucial aspect and the charge against the appeal was not proved beyond reasonable doubt.

22. The concept of beyond reasonable doubt has been debated for quite long by the Jurists in their academic discussions as well as in Judgments. 'Beyond reasonable doubt' is not something which can be measured on a scale and someone can say that the proof of a particular fact was not as per the scale. The adjudicating authority after considering the evidence before it has to see whether the evidence was convincing enough to consider the existence of a fact. If the evidence was convincing enough of the existence of a fact, the fact is considered proved beyond reasonable doubt. In this case the evidence about the involvement of the appellant in price rigging was convincing enough. During the period when price rigging took place, Shri Miglani had used the office of the appellant.It was appellant who alongwith Shri Mallu had been handing over shares to Shri Miglani and had been receiving cheques from Shri Miglani. The appellant visited alongwith Shri Miglani to the places of various brokers and he also received payments in his accounts out of Shri Miglani's account and his company's account of his share of gains made due to price rigging of shares. There could be no better evidence to show that the appellant who was auditor of the company acted in collusion with Shri Mallu and Shri Miglani to rig the prices of shares of a paper company to play fraud with the investors.

23. In view of our above discussion, we are of the opinion that the appellant was rightly held guilty of professional misconduct by Disciplinary Committee. We therefore, find no merit in this appeal. The appeal is accordingly dismissed.

Justice S.N. Dhingra (Retd.)
Chairperson

T.N. Manoharan
Member

Rakesh Chandra
Member

Dr. Ashok Haldia
Member

New Delhi
Dated this 17th day of July, 2012

APPELLATE AUTHORITY

(Constituted under The Chartered Accountants Act, 1949)

APPEAL NO. 06/ICAI/2012

IN THE MATTER OF

Mahender Kumar Mahajan, (M No.008836) 61/19, Ramjas Road,
Karol Bagh, New Delhi -110 005. .....Appellant
(through: Ms. Vibha Mahajan Seth, Advocate)

versus

1. Institute of Chartered Accountants of India,
   ICAI Bhawan, Indraprastha Estate, New Delhi-110002.

2. Anil Kaushal, Managing Director, ...Respondents
   M/s Indo Rolhard Industries Ltd. (In Liquidation) 1-E/2,
   Jhnadewalan Ext. New Delhi-110 055. Also at:
   A- 259, Meera Bagh, New Delhi – 110 087
   (through: Sh. Rakesh Agarwal, Advocate of Respondent No. 1
   Sh Manoj Kumar Garg, Advocate for Respondent No. 2)

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE Mr. RAKESH CHANDRA, MEMBER
HON'BLE Dr. ASHOK HALDIA, MEMBER
HON'BLE Mr.T.N.MANOHARAN, MEMBER

Date of Hearing:
5th May, 2012

Date of Judgment:
17th July, 2012

ORDER

1. This appeal has been preferred by Appellant Sh. Mahender Kumar Mahajan against the order dated 1st February, 2012 whereby the Disciplinary Committee of the Institute of Chartered Accountants of India ("Institute" for short) awarded a punishment of removal of the name of the appellant from the register of Members for a period of one year. The Disciplinary Committee vide its report dated 17th October, 2011 had held the appellant guilty of professional misconduct falling within the meaning of clause (11) of Part I of First Schedule and clause (4) of Part I of Second Schedule of the Chartered Accountants Act, 1949 as amended in 2006.

2. The facts giving rise to the present appeal are that one Shri Anil Kaushal, Managing Director of Indo Rollhard Industries Ltd. (IRIL) on behalf of the Company filed a complaint against the appellant. In his complaint Shri Kaushal had alleged that the appellant was the senior

partner of the Auditor Firm M/s. Kumar Mahajan & Company, Chartered Accountants ("firm" for short). The other partner in the firm was his younger brother. The appellant was also Director & Chairman of the Company Indo Rollhard Industries Limited (IRIL) since its incorporation on 10th June, 1981 till 26th February, 2000. The firm of the appellant acted as statutory auditor of M/s. IRIL from 10th Jaune, 1981 till 22nd March, 2003 despite appellant being Chairman & Director of IRIL. The other allegation made by the complaint was that M/s. Kumar Mahajan & Company, expressed its opinion on financial statements of IRIL and gave, the auditors' reports of the company till 2001 despite the fact that the appellant, a partner of the firm, had substantial interest in IRIL as he & his family held substantial shares of the Company. It was also alleged that IRIL had property at Vill. Jhakoda Tehsil Bahadurgarh, Distt. Rohtak which was disposed off on 22nd June, 1996 by Power of Attorney of the Company in pursuance of a Board resolution presided over by the appellant as Chairman of IRIL; but this property was continuously shown as assets of the Company by appellant's audit firm in all audited financial statements till 2002-03. This mis-statement was carried over by the firm M/s. Kumar Mahajan & Company, deliberately and was corrected only when new auditors were appointed in 2003-04.

3. As is evident from the report of the Disciplinary Committee, the Disciplinary Committee found the appellant guilty of professional misconduct on first two counts namely that the appellant was doing business, being a director & Chairman of M/s. IRIL simultaneously along with his profession of chartered accountancy and second that despite having substantial interest in M/s. IRIL, the appellant's firm was statutory auditor of M/s. IRIL.

4. We have heard the learned Counsels for the parties and perused the material on record. The appellant has assailed the order of the Disciplinary Committee on various grounds stated below:-

i) The complaint filed against the appellant was time barred. The appellant had resigned from Directorship of M/s. IRIL on 8th July, 1999 and the complaint was made on 19th December, 2007 i.e. after more than 7 years.

ii) The alleged misconduct pertained to a period prior to amendment of the Chartered Accountants Act, 2006 whereas the Disciplinary Committee had considered misconduct alleged against the appellant under the amended Schedules of Chartered Accountants Act. The amendment to the Act was done in 2006. The conduct of the appellant could not have been considered under the amended provisions of the Chartered Accountants Act. The appellant had resigned as Director on 8th July, 1999 and the appellant's firm had stopped conducting the audit after 22nd March, 2003 i.e. the date of its resignation. The alleged misconduct could only have been considered under the un-amended schedules of Chartered Accountants Act, 1949. The cause of action for filing the complaint had ceased to exist because of the resignation of the appellant as well as his firm, more so since the Act itself had been amended, but the Committee erroneously applied the provisions of the Chartered Accountants (Amendment) Act, 2006. The entire proceedings before the Disciplinary Committee, therefore, stood vitiated on account of jurisdictional error.

iii) The removal of the name of the appellant from the register of members for a period of one year was illegal and not in consonance with the provisions of pre amendment Chartered Accountants Act. Thus the punishment awarded to the appellant was not as per law, therefore, was not sustainable in the eyes of law. Under the provisions of old Act, there was no distinction between a Director simplicitor and a Managing Director or whole time Director. The conduct of the appellant would not come in the category of professional misconduct under the old Act even if the appellant continued as Chairman of IRIL.

iv) The Disciplinary Committee committed irregularities while conducting the inquiry and despite specific objections of the appellant, it did not ask for production of original minutes book of Director's meeting and General Body meetings and other records of the company.

v) The Disciplinary Committee erred both in law as well as on facts in including share holding of the Members/relatives of the appellant while arriving at his substantial interests for the purpose of clause (4) of Part I of Second Schedule of the Chartered Accountants Act. The Second Schedule of the Act nowhere specifies the term 'relative' and speaks of only substantial interest of the member, members firm or of partner of members' firm in the business or enterprise. The Disciplinary Committee was, therefore, not justified in including the share holding of relatives of the appellant while considering the substantial interest of the appellant.

vi) The findings of the Disciplinary Committee that the appellant being a signatory to the Memorandum of Association of M/s. IRIL and being the Chairman of the Company was involved in day to day affairs of the company were incorrect and unwarranted. There was no restriction on a Chartered Accountant on being a promoter or signatory to the Memorandum and Articles of Association of any company in terms of Code of Ethics issued by the Institute. The fact of the appellant being Chairman and signatory to the Memorandum of Association of M/s. IRIL would, therefore, not fall within the definition of "professional misconduct" under un-amended Chartered Accountants Act or under amended Chartered Accountants Act. The appellant had sent a query to the Institute about a Chartered Accountant becoming Director and the Institute vide its letter dated 1st July, 1978 had informed him that in pursuance of clause (11) of Part I of First Schedule, permission of the Council was not required in case of a member of the Institute becoming a Director of a Company.

5. It is not disputed that M/s. IRIL was a company started by the Appellant who was already a practicing Chartered Accountant & senior partner of M/s. Kumar Mahajan & Company a Chartered Accountant firm. The office of firm was situated at 1-E/2, Jhandewalan Extension (rear side), New Delhi and M/s. IRIL was incorporated at this very office of the appellant by the appellant and the registered office of M/s. IRIL was also at 1-E/2, Jhandewalan extension (rear side), New Delhi. The appellant in the Memorandum of Association of the Company was shown as Chairman. The appellant constituted this company giving address of his firm not for the purpose of charity but for the purpose of doing business. There is no doubt that a Chartered Account can become Director of a company and can also participate in incorporation of a company. However, a member of the Institute practicing as a Chartered Accountant could not carry on any other business or occupation without permission of the

Council even under Clause (11) of Part I of First Schedule of unamended Act. A Chartered Accountant under unamended schedule could become a Director of a company only if he or his partner had no interest in the company as auditor. It is also undisputed that M/s. Kumar Mahajan & Company, the appellant's firm was Auditor of M/s. IRIL from the very beginning i.e. from the date of its constitution itself. Initially, M/s. IRIL was a Private Limited Company and appellant held 25% shares. However, later on IRIL was converted into a Public Limited company on 8th October, 1994, M/s. Kumar Mahajan & Company, continued to be its statutory auditors and continued auditing the financial accounts and statements as statutory auditor of the company till 22nd March,2003 i.e. date the of their resignation.

6. It is undisputed that the appellant and his relatives were having share holding in M/s. IRIL. However, the extent of their share holding has been a subject matter of different assertions. Before the Disciplinary Committee the appellant had himself stated that his shareholding along with his family members would be around 20% or more. The Disciplinary committee after inquiry came to conclusion that the appellant along with his family members was holding 21.85% share in the company as on 30th September, 1997. However, the winding up order passed by the High Court of Delhi on a petition moved by the appellant, copy of which is relied upon by the appellant, shows that the appellant had claimed shareholding of himself and his family members as 36.7%. Similar finding is given by the Registrar of Companies before whom the appellant and his family members claimed to have 36.7% shares.

7. It is also undisputed that the appellant had filed winding up petition against M/s. IRIL on the ground that M/s. IRIL owed an amount of Rs.59,06,780 to him and various companies under his ownership and control. However, during arguments before High Court with a view to avoid getting into dispute about the amount owed by M/s. IRIL, he highlighted the amount owed by M/s. IRIL to him alone. He claimed that M/s. IRIL was personally indebted to him to the tune of Rs.7,50,000 which was a loan advanced by him and the company was unable to pay.

8. After IRIL had become a public limited company, the authorized share capital of the company was 2 crores divided into 20 lakh shares of Rs.10 each. Paid up capital of the company was Rs.66,36,000, the business of the company had been carried on smoothly up to 1999 where after the company had run into rough weather (as stated in the order of the Delhi High court in Company petition No.136 of 2005 filed by the appellant). Apart from appellant, his son Vikas Mahajan was also a shareholder of the company.

9. The learned counsel for the respondent has vehemently argued that the appellant was running various companies & firms and not only M/s. IRIL. He has specified the names of several firms in his reply. This fact also finds support from the judgment of Delhi High Court on winding up petition filed by the appellant wherein he has given break up of total amount due to him and his other concerns.All these facts show that the appellant had been involved not only with of M/s. IRIL but was actively involved in several other concerns that were having dealings with M/s. IRIL.

10. In the light of these undisputed facts, the grounds of appeal of the appellant are to be considered.

11. The first ground taken by the appellant is that the complaint/information given by the complainant was time barred. This ground must fail. There is no period of limitation prescribed under the Chartered Accountants Act for filing a complaint nor a period of limitation is given under any other Act. Rule 12 of Chapter 2 of Chartered Accountant Procedure for Investigation Rules, relied upon by the appellant does not specify a period of limitation but only gives discretion to the Director (Discipline) not to entertain a complaint after 7 years if there was no possibility of evidence coming forward due to long gap of time. The discretion laid down in Rules cannot over-ride the provisions of the Act where no limitation is laid down. Even otherwise, this discretion has to be exercised judiciously. If there was no lack of evidence and the complainant was in a position to provide sufficient evidence in respect of the professional misconduct of the member of the Institute, the complaint cannot be rejected on the ground of delay or latches. In the present case, the complainant made allegations of a misconduct for which sufficient documentary proof was available with complainant Company. The shareholding of the appellant, his being Chairman/Director of M/s. IRIL, audited balance sheets, various statutory forms mandatorily required to be filed with ROC etc. was sufficient evidence to bring on record by the complainant to substantiate the allegations made by him and there was no reason for the Director (Discipline) not to entertain the complaint on the ground of possible non-availability of the evidence. The Director (Discipline), therefore, rightly entertained the complaint.

12. The next ground on which the appellant assailed the order of Disciplinary Committee is that the alleged misconduct pertained to the period prior to amendment of Chartered Accountants Act, 2006 and therefore could not be gone into by the Disciplinary Committee and in any case the alleged misconduct was to be considered under un-amended provisions of Chartered Accountants Act. But the Disciplinary Committee has considered the misconduct under schedules of Chartered Accountants Act as amended in 2006. The counsel for the appellant relied upon the judgement in the matter of T. Barai Vs. Henry Ah Hoe and Anr. (AIR 1983 SC 150(1). In the cited case, the accused had committed offence on 16.8.1975 under section 16 (1) (a) of Prevention of Adulteration Act when the offence was punishable with imprisonment for life. However, the law was amended by Central Govt. and the offence became punishable with reduced punishment. The Court held that the accused would get benefit of reduced punishment because of the amendment. It was observed by Hon'ble Supreme Court that a person accused of commission of an offence has no right to trial by a particular court or by a particular procedure.

13. It is settled law that an offender has no vested right in the procedure and procedure for trial can be amended by the legislature and offender will have to undergo the trail as per amended procedure. However, the accused has vested right in substantive law. If an act was not an offence at the time when it was committed, but was declared offence later on, he cannot be punished under the amended act due to later declaring the act as an offence. In view of the legal position, it is to be seen whether the misconduct of the appellant was not misconduct under un-amended provisions of the Chartered Accountants Act.

14. The professional misconduct has been defined under Section 22 of the Chartered Account Act as amended. The definition of professional misconduct even prior to 2006 was as under:-

"For the purpose of the Act, the expression "professional misconduct" shall be deemed to include any act or omission specified 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 Council under sub-section (1) of Section 21 to inquire into the conduct of any member of the Institute under any other circumstances"

15. The present definition of misconduct reads as under:-

"For the purpose 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 circumstances."

16. The changes which have been introduced in the amended act were necessitated because of the change in procedure for conducting of enquiries while earlier the duty for taking decisions against the member was of the Council. After amendment this duty was conferred on Director (Discipline) and other authorities created under the Act. However, the substantial definition remained the same. The First Schedule and the Second Schedule of the Act as prescribed before and after the amendment are almost the same. However, the Schedules, whether under amended act or un-amended act, only describe certain conducts as professional misconduct and are not exhaustive as is clear from the definition of professional misconduct given under Section 22. The professional misconduct of a Chartered Account is not limited to conduct specified in two Schedules. This is also clear from the Judgement of Supreme Court in 'Institute of Chartered Accountants Vs B. Mukherjia (1958) I SCR 371' that the name of a Chartered Accountant can be removed from register of members for a professional misconduct not covered in either of the Schedules.

17. The appellant has contended that under the un-amended schedule it was not necessary for him to obtain permission of the Council for becoming a Director or engaging as a Chairman or Managing Director. It will be beneficial to reproduce necessary provisions as contained in First & Second Schedule of un-amended Act regarding professional misconduct. The clause (11) Part-I of First Schedule and Clause (4) of Part-I of Second Schedule read as under:-

"The Chartered Accountant shall be deemed to guilty of professional misconduct if he

Clause 11 of Part-I of first schedule (un-amended) reads:

Engages in any business or occupation other than the profession of chartered accountant unless permitted by the Council so to engage Provided that nothing contained herein shall disentitle a chartered accountant from being a Director of a company unless he or any of his partner is interested in such company as an auditor.

Clause 4 of Part I of Second Schedule reads:

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

18. The professional misconduct for which the accused has been found guilty was very much there in the un-amended Act also. Thus the appellant's contention that his conduct was not 'misconduct' under the un-amended Act is baseless. His other contention that the proceedings before the Disciplinary Committee as well as before Director (Discipline) were vitiated also has no force. As already observed, the appellant had no vested right in the procedure of enquiry in respect of misconduct committed prior to amendment of the Act. The disciplinary proceedings could be initiated under the amended act as per amended procedure.

19. In view of clause (11) of Part-I of First Schedule, the appellant could not have been or continue as a Director or Chairman of IRIL since his firm was the auditor of the company.

20. The appellant right from 1981 had been the Chairman of this company. A perusal of Memorandum of Articles of Association of the Company would show that the management of the company under article 39, 40, 41 and 43 was entrusted to the Chairman, Managing Director and Director of the company. He was the Chairman of the company from day one and continued to be the Chairman of the company till he resigned from the company. Though he claims that he resigned in July, 1999, the complainant claimed that he resigned in 2000. A bare look into the documents filed by the complainant and not denied by the appellant either before the Disciplinary Committee or before the Appellate Authority would show that the appellant had presented the director's report in the Annual General Body meeting held on 2nd September, 1999. His duly signed report was annexure 'A' to the response given by the complainant to his written statement regarding his date of resignation. His signature also appear as Chairman of the meeting on Board resolution dated 27th March, 2000 whereby it was resolved by the Board that current account of IRIL with PNB Swami Nagar be closed. These resolutions signed by him do not support his contention that he had resigned in July, 1999.

21. It is pleaded by the Counsel of the appellant that by just being Chairman, the appellant could not said to be involved in business of the company and it was not a professional misconduct if he was a Director of the company. The Counsel submitted that there was no term as Chairman defined either in company law or anywhere else. Chairman was a person who would chair the meetings and the appellant used to chair the meetings whenever he was present. He was otherwise not involved in the business of the company and merely chairing the meetings does not make him conducting business of the company.

22. Business of the company, whether it is a private limited company or a public limited company, is conducted by the Board of Directors. When the company is a private limited company, the Directors on Board are more closely associated with the business and they

have to take care of day to day business of the company. It is clear from the Memorandum of Articles of Association of the Company IRIL of which the appellant was a Director and Chairman that business of the company was to be looked after by the Chairman (appellant), Managing Director and other Directors. The fact that the appellant was equally involved in the business stands even otherwise proved from the facts brought on record and we have no hesitation in coming to conclusion that the Disciplinary Committee rightly held that the appellant was guilty of professional misconduct under clause 11 of Part-I of First Schedule. The admitted facts disclose that the appellant was not only involved in business of IRIL but actually was running other companies and firms also and was having different business activities. In the petition filed by appellant before the Court, the appellant had categorically stated that M/s. IRIL was indebted to the tune of Rs.59,06,780/- to him personally and to his other concerns and various companies under his ownership and control. This simply shows that the appellant was actually running several companies as a business person. This is also clear from the affidavits and letters filed before the Hon'ble High Court in winding of petition giving details of money owed by IRIL towards him and companies owned by him. The respondent no.2 has placed on record some of the letters written by appellant to IRIL on behalf of these companies wherein he had asked for refund of the amount. One letter has been written on behalf of M/s. Steel and General Mills Company Ltd. as a Director and is signed by the appellant on 26th July, 2001, other letter is written on behalf of M/s Solas Export Private Ltd. wherein the appellant has signed as a Director and demanded the dues and the third letter is on behalf of M/s Parwas Investment Private Ltd. wherein the appellant had again signed as Director and demanded back the money and the fourth letter is written on his own behalf. The appellant had also given his personal guarantee to secure the loan taken by IRIL. In the resolution passed on 5th December, 1998 by IRIL where the appellant had presided as Chairperson, it was resolved that the negotiations with Vijaya Bank for the purpose of availing loan shall be conducted either by the appellant or by other Directors jointly or severely and the terms of loan shall be finalized. This resolution and other documents make it abundantly clear that the appellant was not a Director simplicitor, but was actually involved in the business of IRIL right from day one and he was simultaneously Chartered Accountant of the company.

23. A Chartered Accountant is considered as a professional expert capable of being a financial watchdog of analyzing the financial health of company and auditing the accounts of company so as to bring forth the irregularities, if any, committed by the company. In this case, the appellant was Chairperson of the company, he and his family held about 36% shares in the company and he was also the person responsible for statutory audit of the company. Although in his firm his own brother was also there but when the Institute wrote letter to the firm as to who was responsible for the audit of IRIL, the firm replied that the appellant was responsible for the conduct of the audit. Thus practically the appellant was the auditor of the company in which he was Chairman and also a shareholder. He continued to be the auditor of a public limited company of which he was Director and Chairman and in which he and his family were having substantial share holding.

24. The argument advanced before the Appellate Authority in respect of 2nd charge was that substantial interest should not be defined as per the regulation relied upon the Disciplinary Committee and 20% shareholding was not a substantial interest. This argument must fail in view of the fact that appellant and his family was having more than 36% shares. Despite he and his family having 36% shares in IRIL, he audited the accounts of IRIL (as his CA firm has taken the stand that he was responsible for the audit) and did not disclosed in the audit report about his interest or interest of his family. The Disciplinary Committee rightly held him guilty of misconduct under 2nd charge.

25. The counsel for appellant relied upon certain decisions of the Disciplinary Committee in the cases of professional misconduct. One decision is in respect of CA Ramesh Duggar and the other decision is in respect of CA Mohan Prasad Kala. In Ramesh Duggar case, the member had not taken prior permission of the Institute for engaging himself as full time Director of a company besides holding certificate of practice and in Mohan Prasad Kala Case, the member apart from being in full time practice was Director of several companies and was also proprietor of a firm and he got his other partners of Chartered Accountancy firm, Mr. R. Duggar appointed as Auditor of the company in which he was Director. The Chartered Accountant in first case was held not guilty and in 2nd case was held guilty under clause (4) of Part-I of Second Schedule for not disclosing the interest in the audit report. It is argued that the appellant also should be held guilty only under clause (4) of Part-I of the Second Schedule.

26. A perusal of the proceedings before the Disciplinary Committee in the matter and the decisions of the Disciplinary Committee relied upon by the appellant in support, shows that Disciplinary Committee and Council of the Institute had been acting in a very casual manner and had not been taking professional misconduct of members seriously. It has also been noticed that the punishment(s) awarded have also been very minor or almost no punishment even in cases of serious violations. Further, the Appellate Authority is not bound by the opinion of Disciplinary Committee or Council cited before us.

27. One plea taken by the appellant is that the Disciplinary Committee while conducting enquiry did not ask for production of the original minute books of Director's meetings or AGM. It was for the Disciplinary Committee to consider whether or not calling of any records was necessary for deciding an enquiry before it. If the Disciplinary Committee found that the material already available on record was sufficient to come to a conclusion about the allegations made against the Chartered Accountant, it was not necessary for the Disciplinary Committee to call for all additional evidence.

28. It is also submitted by the appellant that removal of the name of the appellant from the register of members for a period of one year was illegal and was not in consonance of provisions of the old Act 1949. Thus the punishment awarded to the appellant was not as per law and there was not sustainable in the eyes of law. The professional misconduct under clause (11) Part I of First Schedule and clause (4) of Part-I Second Schedule (unamended) attracted punishment of reprimand or removal of the name from the members register for such period not exceeding five years as the Council may think fit. Thus the powers given to

the Council was to award punishment of removal of a person from register of members for a period not exceeding five years and in case the Council thought that the member should be removed more than five years or permanently it was supposed to refer the matter to High Court. Thus to say that the punishment of removal of appellant's name for a period of one year by the Disciplinary Committee was contrary to the provisions of law was not correct.

29. In view of the foregoing discussions, we find no infirmity in the impugned orders passed by the Disciplinary Committee to interfere with. The appeal is accordingly dismissed.

Justice S.N. Dhingra(Retd.)
Chairperson

T.N. Manoharan
Member

Rakesh Chandra Member
Member

Dr. Ashok Haldia
Member

New Delhi
Dated this 17th day of July, 2012

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act 1949)

APPEAL NO. 07/ICAI/2012

IN THE MATTER OF

M. Joseph Louis Aloysius, ...Appellant
23, Pantheon Apartments, Pantheon Road 1 Lane,
Egmore, Chennai - 600 008.
Through : Sh. C.V. Sajan, Chartered Accountant

Versus

1. The Institute of Chartered Accountants of India,
   Indra Prastha Marg, New Delhi.

2. Sh J. J. Mohan, ...Respondent
   'SAKTHI' No. 9/1, New No. 21, Periyapally Street,
   Chennai – 600 028.
   Through : Sh. J. S. Bakshi,
   Advocate for Respondent No. 1

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE MR. T.N. MANOHARAN, MEMBER

Date of Hearing:
09th June, 2012

Date of Judgment:
17th July, 2012

ORDER

1. The Appellant has preferred this appeal against the order dated 1st February, 2012 passed by the Board of Discipline inflicting penalty of removal of the name of the appellant from the Register of Members for a period of three months and a fine of Rs.10,000/- upon him.

2. The brief of the case is that Sh. J.J. Mohan had filed a complaint against the appellant of professional misconduct. Sh. Mohan has alleged that he retired as Assistant General Manager from TNSC Bank in November, 2003 and parked his retirement benefits in the same bank. He came in contact with the Appellant through a relative and the Appellant gained his confidence by borrowing small amounts of money and returning the same promptly. However, later the appellant pleaded urgent financial difficulty citing huge medical expenses for his son's illness and requested complainant to help him. The complainant, out of humanitarian grounds, agreed to give him a loan. The appellant, during that period, sought complainant's help making one or the other excuses and as per the complainant, the

appellant took a loan of Rs.7 lakhs from him out of which Rs.5 lakhs was paid by cheque and 2 lakhs in cash. The appellant executed promissory note and gave post date cheques to ensure refund of the amount and to repay the borrowed amount. However, the appellant despite repeated demands, did not pay the loan back and when the complainant presented the cheques issued by the appellant, the same were dishonored. The appellant did not pay back his hard earned money despite a notice of demand and the complainant had to file a criminal complaint against the appellant for dishonor of the cheques under section 138 of NI Act in the court in Chennai for recovery of the amount. He also filed Summary Suit for recovery of Rs.2.5 lakh in the City Civil Court, Chennai. It was alleged that the Appellant had to pay Rs.7 lakh as principle amount plus interest, which the appellant had taken from the complainant. The appellant taking benefit of his being a chartered accountant frustrated all efforts of the complainant to realize the amount.

3. The Board of Discipline of the Institute has caused an enquiry on the complaint of Sh. Mohan. On inquiry, Board of Discipline came to conclusion that the appellant was guilty of 'other misconduct' falling within the meaning of clause (2) of Part IV of the First Schedule to the Chartered Accounts (Amendment) Act, 2006.

4. At the time of first hearing of the appeal, the appellant appeared before the Appellate Authority, the offered to pay Rs.5 lakhs to the complainant, without prejudice to the rights of the parties.

5. Considering the statement made by the appellant, he was directed to bring Demand Draft of of the said amount of Rs.5 lakh on the next date of hearing i.e. on 9.6.2012 in the name of the complainant, to whom a notice was directed to be sent. When the matter was taken up on 9th June, 2012, the respondent had brought the demand draft of Rs.5 lakh in the name of the complainant. Notice sent to the complainant for his appearance in person on 9th June, 2012, so that the demand draft could be handed over to him, was served on him, However, the complainant by e-mail expressed his inability to come to Delhi. He also asked the Appellant Authority if the proceedings of appeal could be held in Chennai.

6. We find no ground for either granting adjournment of the hearing of appeal at the request of complainant/respondent or holding the hearing of Appellate Authority in Chennai. The Appellant Authority consists of Members who are spread all over India and these Members assemble for the purpose of hearing at Delhi incurring lot expenses. Any adjournment cannot be granted in a casual manner. Sufficient notice was given to the complainant to appear before the Authority and present his case and also to collect the amount of Rs.5 lakh as offered by the appellant without prejudice to his right.

7. The Appellant Authority heard the appellant on the appeal. The appellant at the very outset stated that he does not want to assail the order of Board of Discipline on merits. He only wanted to argue on the issue of punishment awarded to him. He stated that the dispute between the appellant and the complainant was a private dispute and nothing to do with his conduct as a Chartered Accountant. Thus the punishment awarded to him was harsh.

8. Since the appellant had not assailed the order of Board of Discipline on merits, we need not go into the aspect whether the conduct of the appellant amounts to professional misconduct or not. However, as the appellant has shown regrets for his conduct towards the complainant and has also brought a Demand Draft of Rs.5 lakh in favour of the complainant on his own, we consider that it was a fit case where the punishment awarded to the appellant by the Board of Discipline should be modified.

9. Keeping in view of the facts, to meets the ends of justice, we consider to modify the punishment to 'REPRIMAND' and a fine of Rs. 10,000/- (ten thousand only) in place of punishment imposed by Board of Discipline upon the appellant. We direct accordingly.

In terms of the above directions, the appeal is allowed.

Justice S.N. Dhingra (Retd.)
Chairperson

Rakesh Chandra
Member

T.N. Manoharan
Member

New Delhi
Dated this 17th day of July, 2012

APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 08/ICAI/2012

IN THE MATTER OF

Shri Kamal Kumar Grover, ... Appellant
M/s. KSPN & Associates, Chartered Accountants,
137, Garg Plaza, Sant Nagar Road,
Community Centre, Pitam Pura,
NEW DELHI-110 088
(through : Sh. C.V.Sajan, Chartered Accountant)

Versus

1. The Institute of Chartered Accountants of India,
   ICAI Bhawan, I.P. Marg, New Delhi-110 002, ...Respondents

2. Shri Vivek Priyadarshi,
   Addl. Superintendent of Police,
   Office of the Superintendent of Police,
   Anti-Corruption Investigation,
   CGO Complex, Block No.4, Lodhi Road
   NEW DELHI-110 0003
   (through: Sh. J.S.Bakshi for Respondent No.1,
   Respondent No. 2 present in person)

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE MR.T. N. MANOHARAN, MEMBER

Date of Hearing:
2nd June 2012

Date of Judgment:
17th July, 2012

ORDER

1. This appeal has been preferred by the appellant against the order dated 12th September, 2011 of Disciplinary Committee whereby the appellant was awarded a punishment of removal of his name from Register of Members for a period of three years and a fine of Rs.2 lakh for proved misconduct committed by the appellant vide its report dated 6th October, 2010

2. The appellant during the arguments before the Appellate Authority did not challenge the findings of the Disciplinary Committee holding him guilty of professional misconduct. He

only prayed for reduction of the punishment submitting that the punishment was severe and disproportionate to the misconduct proved against him. The financial burden of Rs.2 lac put on him was also too high.

3. We have heard the parties and gone through the records of the appeal. In order to see as to whether the punishment was severe and disproportionate to the misconduct, we need to consider the misconduct proved against the appellant.

4. The appellant's firm M/s. KSPN Associates, New Delhi was auditor of M/s. CKS Engineers Pvt. Ltd. from the year 1993-94 onwards. One Jagram Singh Sharma was Managing Director of this company and Shri Subhash Chandra Sharma was his son. Shri S.C. Sharma in order to procure employment with Govt. Company forged a certificate allegedly issued by his father Jagram Singh Sharma to the following effect:-

> *"TO WHOM IT MAY CONCERN It is certified that Mr. Subhash Chandra Sharma has worked in this company as Executive Director (Projects) from 07.07.88 to 27.09.89 and 16.07.91 to 05.01.95. He was Chief of the Hydroelectric projects and Civil Department of this Company and looking after Planning, Scheduling, Material, Contract & Construction Management and Administration. He is expert in pre and post contract matters. He had successfully fought arbitration cases in favour of this company and recovered the awarded sum through execution of money decree. He was the moving force of this company and this company had benefited due to his technical and administrative skills. We do not want to lose Mr. Sharma but painfully decided to relieve him, as he is immigrating to New Zealand for benefit of his family. He was working Chief Executive of the Company. Mr. Sharma is dynamic, energetic, hard working, competent, technically sound, honest, intelligent and good administrator. We wish him success. MANAGING DIRECTOR CKS ENGINEERS PVT. LTD."*

Shri S.C. Sharma had forged above certificate with a date of 5.1.1995 as his father had died in year 1996.

5. In 2005, Shri S.C. Sharma approached the appellant for making an endorsement on this forged certificate and the appellant made following endorsement on this certificate:-

> *"This Certificate is signed by Shri Jagram Singh Sharma as on 5th Jan, 1995 in my presence and is correct."*

6. The appellant simultaneously issued another certificate to Shri S.C. Sharma on 16th May, 2005 reverifying the contents of aforesaid forged certificate as well as certifying that during the period of his employment with M/s CSK Engineers Pvt. Ltd., Mr. S.C. Sharma was drawing a salary of Rs.4,000/- beside reimbursement of other allowances and his average remuneration was Rs.30,000/- per month. On the basis of this forged certificate and endorsement made by the appellant, M/s. S.K. Sharma procured the job of Chairman & Managing Director with North Eastern Electric Power Corporation, Bhikaji Cama Place, New Delhi. However, after the certificate submitted by Mr. S.C.Sharma was suspected, a

CBI enquiry was conducted. During enquiry, the certificate issued by Mr. S.C. Sharma was sent to Forensic Lab and it was found that signature of Mr. Jagram Singh Sharma was forged by Mr. S.C. Sharma himself and the certificate of experience with M/s. CSK Engineers Pvt. Ltd. was a false certificate. The investigation further revealed that the certificate and endorsement given by the appellant were also false. The Company, M/s. C.S.K. Engineers Pvt. Ltd. remained in losses accumulated over the years throughout the period 1988-89 to 1995-96 except for two years i.e. 1989-90 and 1992-93. Mr. S.C. Sharma had never been Executive Director of this Company. The salaries paid to staff during financial years 92-93, 93-94, 94-95 and 95-96 were nil. No employee of the company received a salary of more than Rs.6,000/- p.m. per month for all these years as salary of more than Rs.6,000/- was required to be reflected by the company in balance sheet under section 217 (2) (a) of Companies Act. The investigation revealed that the company was fully controlled by family members of Mr. S.C. Sharma. The company did some work of digging a canal for UP Irrigation Department, which contract was also suspended by UP Irrigation Department in 1988. The company had not done any civil work on contract basis from 1988-93. In 1994-95, the company was doing some venture into agricultural marketing, when also it remained in losses. During 1994-95, 95-96, the company's receipts contracts were Rs.30,000/- and Rs.35,000/- respectively. All this data was collected by CBI from the company's record and with the help of the appellant. After finding the correct data it became clear that the certificate and endorsement issued by the appellant in favour of Mr. S.C. Sharma about his salary and total remuneration was false.

7. The Disciplinary Committee of the Institute found that the appellant had issued a certificate for the period when he was not even the auditor of the company. The appellant was in possession of documents with actual signature of Mr. Jagram Singh Sharma, still he endorsed a certificate which was having forged signature of Mr. Jagram Singh Sharma. The appellant was very well aware of the financial position and the projects of the company, still he endorsed certificate which contained false claims about employment of Mr. S.C. Sharma in non existing projects. The Disciplinary Committee observed that the conduct of the appellant was unbecoming of a Chartered Accountant and had brought disrepute to the profession of Chartered Accountant. The appellant also carried out his duty in a negligent manner and failed to obtain necessary information before endorsing a forged certificate dated 5.1.1995

8. The appellant's plea before the Appellant Authority was that he was misled by Mr. S.C. Sharma into endorsing a forged certificate and he issued the certificate dated 16.5.2005 bonafidely believing Mr. S.C. Sharma. The appellant's stand before the Disciplinary Committee as well as before the CBI throughout had been that he had issued a correct certificate and the signatures endorsed by him were that of Mr. Jagram Singh Sharma. Thus the contention of the appellant that he was misled by Mr. S.C. Sharma does not seem to be correct. If he was misled by Mr. S.C. Sharma to make an endorsement on a forged certificate, he could not have issued a false certificate himself. When he realized about his mistake he could have at least admitted his fault of issuing a false certificate. The appellant changed his stand only before the Appellate Authority that he was mislead by Mr. S.C. Sharma and he bonafidely believing Mr. S.C. Sharma issued a certificate in his favour.

9. Even this explanation of the appellant about bonafidely issuing certificate dated 16.5.2005 does not stand the scrutiny as he was not Auditor of the company during this period and the returns of the company filed during his period did now show Mr. S.C. Sharma received a salary of Rs.30,000/- per month. The record of the company showed that the salary being paid to the employees was nil. This certificate was false to the knowledge of the appellant.

10. The gravity of the misconduct of the appellant is therefore not less. Issuing a false certificate by a Chartered Account in favour of son of an erstwhile deceased MD to enable him to procure employment at a high position is not something trivial. If the appellant had merely endorsed the certificate issued by Mr. Jagram Singh Sharma, one could have said that he was made to believe that the signature of Mr. Jagram Singh Sharma on certificate were genuine but issuance of a certificate by appellant himself shows that the appellant was very well knew that the certificate issued by him was going to be used by Mr. S.C. Sharma.

11. However, considering the late repentance by the appellant and his long practice, we are of the view that the punishment awarded to appellant is to be reduced. We, therefore, modify the punishment to removal of his name from the Register of Members for a period of one & half year and a penalty of Rs.1.00 lac.. In terms of above directions, the appeal stands partly allowed.

Justice S.N. Dhingra (Retd.)
Chairperson

Rakesh Chandra
Member

T.N. Manoharan
Member

New Delhi
Dated this 17th day of July, 2012

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act 1949)

APPEAL NO. 09/ICAI/2012

IN THE MATTER OF

B.L.N. Phani Kumar, (M No.028391)
No.4-1/882/1/26, Ground Floor, R.B.V.R. Reddy
Hostel Shopping Complex
Tilak Road, Abids, Hyderabad-500 001. .....Appellant
(thorugh Sh. P. Verra Reddy, Advocate)

versus

1. The Board of Discipline constituted under
   Section 21 A of Chartered Accounts Act, 1949
   ICAI Bhavan, Indra Prastha Marg, New Delhi-110002. .....Respondents

2. The Director (Discipline) Constituted under
   Section 21 A of Chartered Accounts Act, 1949
   ICAI Bhavan, Indra Prastha Marg, New Delhi-110002.

3. The General Manager, Reserve Bank of India,
   Department of Non-Banking Supervision,
   Central Office, II Floor, Centre-I, WTC,
   Cuffe Parade, Mumbai-400005

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE MR.T.N. MANOHARAN, MEMBER

Date of Hearing:
9th June 2012

Date of Judgment :
17th July 2012

ORDER

1 By this Appeal, the Appellant had assailed an order of the Board of Discipline communicated to him vide letter dated 9th April, 2012, which read as under:-

"I have been directed to inform you that the above information, written statement submitted by you and additional documents on record along the prima facie opinion formed by the Director (Discipline) under Rule 9(1) of the Chartered Accounts Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules 2007, were considered by the Board of Discipline. The Board of Discipline on consideration of the same did not agree with the prima facie opinion of the Director (Discipline) that you were not guilty of professional and/or other misconduct falling under any of the Schedules to the Chartered

Accounts Act, 1949 (as amended by the Chartered Accounts (Amendment) Act, 2006)

The Board was of the view that you have not reported in your Audit that the Companies were conducting business of Non Banking Financial institution (NBFI) without obtaining Certificate of Registration (COR) and accordingly matter needs to be enquired into further with respect to the role of the Respondent as the auditor of NBFI.

Thus, the Board was of the opinion that you are prima facie guilty of professional misconduct falling within the meeting of Clause (7) of Part I of Second Schedule to the Chartered Accounts (Amendment) Act, 2006 and decided to refer the matter to the Disciplinary Committee to proceed further under Chapter V of these Rules.

Accordingly, in terms of Rule 18(2) of the aforesaid Rules, a copy of the prima facie opinion formed by the Director (Discipline) in the above information along with copy of the documents relied upon by her while formulating the aforesaid prime facie opinion are herewith being forwarded to you."

2. Section 22 (G) of the Chartered Accountant (Amendment) Act, 2006 under which this appeal has been preferred, provides as under:-

"22G (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 21 B, 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 section (3) of section 21 A and sub-section (3) of section 21 B 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 the case; or

(d) Pass such other order as the Authority thinks fit;

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

3. The wordings of section 22 (G) makes it abundantly clear that the Appellate Authority has power to hear appeal of a Member of the Institute, who has suffered an order of punishment either at the hands of the Board of Discipline or at the hands of Disciplinary Committee of the Institute after holding him guilty of professional misconduct. No appeal can be preferred against an interim order or interlocutory order of the Board of Discipline or Disciplinary Committee. There is no provision for 'Revisions' under the Act to enable a Member of the Institute to approach the Appellate Authority to file a Revision against the orders, nor there is a provision for the complainant to approach the Appellate Authority even if his complaint is wrongfully dismissed.

4. It must be remembered that the powers of the Appellate Authority are limited to the extent granted under the Act. The Appellate Authority does not have the powers either under Article 226 or under Article 227 of the Constitution of India as are available to the High Court. The Appellate Authority can exercise powers as conferred on it under the Chartered Account Act and not beyond. In view of the fact that no power has been given to the Appellate Authority to entertain a Revision and powers are there limited to entertain an appeal against the final orders of Board of Discipline or Disciplinary Committee inflicting punishment upon the Member of the Institute, no appeal is maintainable against the impugned order.

5. For the reasons recorded above, the appeal is not maintainable and is accordingly dismissed.

Justice S.N. Dhingra (Retd.)
Chairperson

Rakesh Chandra
Member

T.N. Manoharan
Member

New Delhi
Dated this 17th day of July, 2012

APPELLATE AUTHORITY

(Constituted under The Chartered Accountants Act, 1949)

Appeal No.18/ICAI/2011

IN THE MATTER OF

Jagdish D. Shet, (M No.82378)
Office No. 28, 11th Floor, Navjivan,
Commercial premises Co-operative Society Ltd.
Lamington Road,
Mumbai -400 008. .....Appellant
(thorugh Sh. Bhupendra Shah, Chartered Accountant)

versus

Capt. Percy Master,
Managing Director
of M/s Master Industries Pvt. Ltd.
22/ D,S.A.Brelvi Road, Fort,
Mumbai – 400 001 .....Respondent
(through : Ms. Purti Marwaha with
Ms Varsha Banerjee, Advocates for R-1
Mr. J.S.Bakshi &Mr. S.M.Sinha Advocates for ICAI)

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE DR. ASHOK HALDIA, MEMBER
HON'BLE MR. T. N. MANOHARAN, MEMBER

Date of Hearing:
5th May,2012

Date of Judgment:
4th August,2012

ORDER

1. By this appeal, the appellant has assailed order dated 12th September, 2011 and the report dated 10.2.2011 of Disciplinary Committee of the Institute of Chartered Accounts ('Institute' for short) whereby the appellant was held guilty of "other misconduct" falling within the meaning of Clause (2) of Part IV of First Schedule and of "professional misconduct" within the meaning of Clause (5) & (7) of Part I of Second Schedule and was awarded punishment of removal of his name from Register of Members for a period of one year.

2. The brief facts relevant for deciding this appeal are that the appellant was a statutory Auditor /Chartered Accountant of Unique Agro Processors (India) Ltd. (UAPL). This company had become a sick company and was before BIFR. BIFR sanctioned a scheme on 22nd January, 2003 for its revival and passed an order for induction of funds by strategic investors and

allotment of shares towards induced funds after reduction of the existing share capital. The Board of Directors of UAPL, after the order of BIFR held a meeting on 22nd December, 2003 for implementation of the scheme and accordingly Board decided to reduce the existing equity by 90% i.e. from Rs.312.10 lakh to Rs.31.21 lakh and in terms of the scheme decided to allot 22,37,300 shares of Rs.10 each to Masters Industries (P) Ltd. who invested the funds and whose Managing Director has filed a complaint before the Institute in this case. The share capital was to be increased from Rs.31.21 lakhs to Rs.254.94 lakhs. The Board of Directors of the company UAPL met on 8th September 2004 and passed following resolutions:

"The Chairman informed the Board that in compliance of the Order dated 22nd January, 2003 for effecting reduction of the Share Capital in terms of the rehabilitation scheme the Company has issued and allotted fresh 3,12,100 equity shares of Rs.10/- each to the Registered Holders whose names appeared in the Register of Members as on 8th April, 2004 being the Record date in the ratio of 1 share against 10 shares held bearing Distinctive Numbers from 4000001 to 4312100 in cancellation of the existing 31,21,000 equity shares of Rs.10/- each bearing distinctive numbers from 1 to 3121000. The existing share capital of Rs.312.10 lacs stands reduced to Rs.31.21 lacs.

The Chairman further informed the Board that as per the Rehabilitation Scheme passed by BIFR by Order dated 22nd January 2003 the Paid Up Share Capital of the Company after giving effect to the reduction of Paid Up Share Capital from Rs.312.10 Lacs to Rs.31.21 Lacs is to be increased to Rs.254.94 Lacs by issuing 22,37,300 equity shares of Rs.10/- each at par to the new promoter M/s. Master Industries Pvt. Ltd. The Chairman further informed the Board that the Paid up Share Capital of the Company stands reduced to Rs.31.21 Lacs. The new promoters M/s. Master Industries Pvt. Ltd. have already brought in Rs.223.73 Lacs by way of unsecured loan against their contribution in terms of the said rehabilitation scheme.

The Chairman further informed the Board that the shareholders of the Company in their Meeting held on 30th December 2003 have authorized the Board of Directors of the Company to issue and allot 22,37,300 shares of Rs.10/- each at par to the Company, Master Industries Pvt. Ltd. against Rs.223.73 lakcs to be brought in by the said Company. The Board discussed the matter in detail and resolved as under:-

"RESOLVED THAT 22,37,300 Shares of Rs.10/- each of the Company be issued and allotted at par to M/s. Master Industries Pvt. Ltd. against Rs.223.73 Lacs already brought in by the said Company and lying credited in Share Application Account in the Company.

'RESOLVED FURTHER THAT the Share Certificates in respect of the said 22,37,300 shares be signed by Shri Percy M. Master and S.G. Junghare, the Directors of the Company and Shri K.M. Gedam as an Authorized Signatory.

"RESOLVED FURTHER THAT Shri K.M. Gedam, the Director of the Company be and is hereby authorized to complete all necessary formalities including informing The Stock Exchange, Mumbai about the issue of Shares to Master Industries Pvt. Ltd. as aforesaid and filing Return of Allotment in Form No.2 with the Register of Companies, Maharashtra and to do all such necessary acts, deeds, matters and things as may be required to be done and / or performed to give effect to the said Resolution."

3. The balance sheet giving effect to the BIFR sanctioned scheme and showing the position of finance was prepared and was signed by the complainant and another Director (his son) and was audited and signed by the appellant on 27th August 2005. It was to be filed by the appellant with ROC, Mumbai. However, the complainant smelled a plot on the part of the earlier management to oust him and he applied for certified copy of the balance sheet field by the appellant with ROC. He found that the appellant had not filed the balance sheet approved by the Board and signed by him and another Director but had filed a different and forged balance sheet with ROC. He made a complaint to the Institute regarding the professional misconduct of the appellant giving the difference in two balance sheets as under:-

S. No.	Particulars /Account head	Balance/comment in the forged Balance Sheet as on 31st March, 2005	Balance /comment in the audited Balance Sheet as on 31st March, 2005
1.	Issued, Subscribed and paid up share capital	Rs.3,12,10,000/-	Rs.2,54,94,000/-
2.	Unsecured Loans	Rs.5,11,79,278/-	Rs.2,88,06,278/-
3.	Unsecured Loans from Companies	Rs.4,50,46,635/-	Rs.2,26,73,635/-
4.	Unsecured Loans from Complainant Company	Rs.4,33,56,278/-	Rs.2,09,83,278/-
5.	P&L account	Loss Rs.4,72,96,,017/-	Loss Rs.1,92,07,017/-
6.	Clause 1 of the Notes to Accounts	Omitted	Reduction of share capital by 90% as per the BIFR scheme and thereafter increase in the paid up share capital by issuance of 22,37,300 fresh equity shares of Rs.10 each to the Complainant Company.
7.	Balance Sheet abstract and Company's general business profile	The liabilities and assets of UAPL are reflected Rs.10,56,77,670/-	The liabilities and assets of UAPL are reflected as Rs.7,75,88,670/-

4. The complainant alleged that the forged balance sheet was filed by the appellant at the instance of Mr. K.M. Gedam, one of the founder promoters of UAPL, who manipulated the accounts in collusion with the appellant, without any legal and valid justification.

5. The appellant was given opportunity to respond to the complaint and thereafter the Disciplinary Committee conducted enquiry into allegations and during enquiry recorded statement of Mr. K.M. Gedam and other witnesses produced by the appellant.

6. The appellant submitted before the enquiry committee and also in his written reply that the complainant misrepresented before him at the time of his signing the earlier balance sheet dated 27.8.2005 and he should not be held responsible for signing this balance sheet. He also took the stand that as per guidance notes issued by the Institute of Chartered Accounts, he could always revise the audited accounts and balance sheet and there was no illegality in it. He pleaded that Mr. Percy Master who had signed the balance sheet as second Director was not a Director and complainant wrongly misrepresented that he was also a Director of the Company and that the balance sheet would be signed by the Chairman later. The respondent also took the stand that the existing capital of the company was not permitted to be reduced under law and that BIFR vide a subsequent order had cancelled the earlier scheme. He was therefore within his rights to revise the balance sheet and audited accounts.

7. It is not in dispute that at the time the appellant audited the accounts and signed the balance sheet dated 27.8.2005 in accordance with the scheme of revival of the company as sanctioned by BIFR and as per Board Resolution dated 8.9.2004, the Balance Sheet contained figures showing restructuring of the capital in accordance with the orders of BIFR, which was binding on the company and on the share holders and on appellant in view of section 424D (10) of the Companies Act. The Balance Sheet contained a note about restructuring of share capital enabling the company to wipe off its accumulated losses.

8. The plea taken by the appellant that the share capital could not have been reduced was found untenable by the Disciplinary Committee and it observed that a company could reduce the share capital in terms of Section 100 of the Companies Act.

9. The Disciplinary Committee also found that the appellant had not even followed the guidelines of the Institute for revision of the audited accounts and audited balance sheet. The Committee observed that the guidance notes on the Auditors Report show that a statutory Auditor is bound, and owes a duty to the Members of the company, to make a report along with his comments about revising the audited accounts and why it was necessary to revise the accounts. This report is to be circulated among the members of the Company. The Companies Act does not, normally contemplate the revision of accounts or of giving an additional report by a statutory auditor once the accounts are audited. However, the Board of Directors do have competence to amend the accounts and resubmit the same to the statutory auditors for his report before the accounts are placed before AGM and when a Chartered Accountant is called upon to issue a revised report on such amended accounts for same period, it will be in substitution of the report earlier issued by him. Before issuing amended Balance Sheet and Profit & Loss Account, he is to ensure that all the copies of the original audited accounts are returned to him and unless all originals are not returned to him, issuance of a substitution was not to be done. The Disciplinary Committee found that Mr. K.M. Gedam had, vide a letter dated 7.1.2006 asked the appellant to modify

financial statement and the appellant modified the same and signed it on 9th January, 2006 itself. The order of BIFR was very much in force even at that time and it was binding on all concerned including the appellant. This order had been acted upon by the Board and additional equity was issued in favour of the complainant on his making investment in the company. Despite all these things, the appellant amended the Profit & Loss accounts and Balance Sheet nullifying the effect of Board Resolution dated 8.9.2004 and the allotment of shares to complainant was also annulled. All these changes in Balance Sheet and Profit & Loss account required an in-depth verification at the end of appellant, a statutory auditor. However, the appellant seemed to have just followed the instructions of Mr. Gedam and after his letter dated 7.1.2006, the appellant issued a second and altogether different audit report of the accounts of UAPL on 9.1.2006, without making any note in the balance sheet that this was a revised audited balance sheet and without specifying under which circumstances the revision was necessitated.

10. The Disciplinary Committee found that the contention of the appellant that he signed the annual accounts dated 27.8.2005 under misrepresentation was not convincing in view of the evidence which has come on record. It has come on record in testimony of Mr. Gedam that Mr. Percy Master was appointed as a Director of UAPL and continued to be its Director on 27.8.2005. The Disciplinary Committee concluded that appellant failed to carry out his duty as a statutory auditor and acted in most negligent and unprofessional manner in preparing and signing a second audited balance sheet at the instance of Mr. Gedam. The appellant did not act bonafidely and he so acted at the instance of Mr. Gedam of earlier management. He was found guilty of professional misconduct and conduct unbecoming of a Chartered Accountant and that he had brought disrepute to the profession of Chartered Accountants so he was held guilty under Clause (2) of part IV of First Schedule and also held guilty within the meaning of clause (5) and (7) of part-I of Second Schedule of Chartered Accounts Act. 1949 as amended in 2006.

11. The appellant contention is that the Disciplinary Committee had not interpreted the order of BIFR properly. There was no specific stipulation regarding restructuring of the equity and allotment of shares to M/s. Masters Industries Ltd. by the UAPL. The reduction of equity by 90% was illegal as it was not as per sanctioned scheme and was rejected by AGM dated 22.12.2005. He had filed the balance sheet with ROC as approved by the AGM, after carrying out alterations and corrections as required by AGM by its resolution dated 22.12.2005. The earlier balance sheet was rejected by the General Body on 22.12.2005. This balance sheet filed by him could not be held to be a forged balance sheet. The second balance sheet was communicated to him by letter dated 7.1.2006 informing him about the latest developments and he was asked to do the needful and he therefore had to act in accordance with the directions of the Board of Directors. The Disciplinary Committee wrongly held that he acted contrary to his duties and professional ethics. The action of the appellant could not be termed as malafide but only amounted to a different interpretation of BIFR order. The Disciplinary Committee should have held that the second audit report was based on proper interpretation of the scheme as sanctioned by BIFR. He stated that the balance sheet of 27th August 2005 was not a balance sheet of UAPL as it was rejected by the General Body

and the second balance sheet dated 9th January 2006 was approved by the General Body after carrying out alterations.

12. It is apparent from the contention raised by the appellant that the appellant has not assailed the order on the issues dealt with by the Disciplinary Committee. The appellant had not denied the fact that first balance sheet was also audited by him and signed by him and then he prepared a second audited Balance Sheet and Profit and Loss account at the instance of Mr. Gedam. Whether the first Balance Sheet and Profit & Loss Account was approved by AGM or not, is not the issue. The issue is whether it was professionally and ethically permissible for him to keep changing audit reports at his whims and fancies or at the direction of Chairman or a Director. If the appellant was asked to revise the audited accounts, he was supposed to give his observations on the revised balance sheet itself that this was a revised balance sheet and to give under what circumstances the first balance sheet audited by him was being revised.

13. The appellant's contention that he had differently interpreted the order of BIFR than the interpretation given by the Disciplinary Committee, is also baseless since the interpretation given by the appellant himself in his first audit report on the balance sheet dated 27th August 2005 was same as given by the Board. The Board was very well aware of the order of BIFR at the time of approving the first balance sheet.

14. The audit report of appellant dated 27.8.2005 contained following observation:-

> *"The Company has made preferential allotment of 22,37,300 equity of Rs.10/- each to Master Industries Pvt. Ltd., a Company covered in the register maintained U/s 301 of the Act as per the Rehabilitation Scheme passed by BIFR by Order dated 22nd January, 2003. In our opinion, the price at which shares have been issued is not prejudicial to the Interest of the Company."*

This observation shows interpretation of BIFR order was not an issue.

15. The appellant was statutory auditor of UAPL and not its legal consultant. UAPL was being represented before BIFR by its counsels. If UAPL had any doubt about interpretation of BIFR order, it would have asked the counsels. BIFR order was passed in January, 2003. The Board after considering order for over a year passed resolution on 8.9.2004 (given above). The sudden dawn of wisdom on appellant after letter of Mr. Gedam dated 7.1.2006 and changing of audit report can only be explained by collusion between appellant and Mr. Gedam.

16. The changing of audit report and balance sheet at the instance of Mr. Gedam by appellant has to be dealt with seriously. The appellant's conduct throws doubt about his integrity. If he was convinced that earlier Balance Sheet was based on wrong interpretation of BIFR order, he should have given his comments in audit report and sent a written opinion to UAPL soon after the Board Resolution and should have mentioned the dame in the balance sheet dated 27.8.2005 and he should have also given reasons for his interpretation. The plea taken by appellant is thus false.

17. The Disciplinary Committee rightly came to conclusion that the appellant was guilty of professional misconduct and rightly punished him for the misconduct. Though the appellant was a statutory auditor and a member of the Institute but he acted as a rubber stamp of Mr. K.R. Gedam, instead of acting as an independent auditor. The Chartered Accountant appointed as statutory auditor of a company is not supposed to dance on the tunes of Chairman or a Director but he is there to guard the interests of the shareholders and public interest. If he signs the balance sheets and financial statements in such a casual manner on the basis of misrepresentation or is prepared to revise the balance sheet at the instance of one of the Directors, his professional conduct is not above board. We therefore do not find any reason to interfere with the findings of the Disciplinary Committee. There is no force in the appeal and the same is accordingly dismissed.

Justice S.N. Dhingra (Retd.)
Chairperson

T.N. Manoharan
Member

Rakesh Chandra
Member

Dr. Ashok Haldia
Member

New Delhi
Dated this 4th day of August, 2012

APPELLATEAUTHORITY

(Constituted under the Chartered Accountants Act 1949)

Appeal No.1/ICAI/2012 & Appeal No.2/ICAI/2012

In the matter of:

P. Siva Prasad .....Appellant
Through Shri S. Ganesh Sr. Advocate with Shri Ashish Makhija, Advocate

Versus

The Institute of Chartered Accountants of India ....Respondent
(Through Shri J.S. Bakshi, Advocate)

AND

Inthe matterof: Chintapatla Ravindernath .....Appellant
Through Shri S. Ganesh Sr. Advocate with Shri Ashish Makhija, Advocate

Versus

The Institute of Chartered Accountants of India ....Respondent
(Through Shri J.S. Bakshi, Advocate)

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE DR. ASHOK HALDIA, MEMBER
HON'BLE MR. KAMLESH VIKAMSEY, MEMBER

Date of Hearing:
26th May, 2012

Date of Order:
5th September, 2012

ORDER

1 The appellant P. Siva Prasad has filed Appeal No. 1/ICAI/ 2012 against the order dated 5th December, 2011 and Report dated 6th October, 2010 of Disciplinary Committee of ICAI. Shri Chintpatla Ravindernath has also filed an Appeal No. 2/ICAI/2012 against the order dated 5th December, 2011 passed and Report dated 6th October, 2010 of Disciplinary Committee of ICAI. As the issues involved in the appeals in hand are similar, are therefore taken up together for hearing. The Authority by way of this order dispose of both the appeals.

2. The appellants, vide the aforesaid report of the Disciplinary Committee dated 6th October, 2010 were held guilty of professional misconduct within the meaning of Clause (1) of Part II of the Second Schedule and Clause (7) of Part I of the Second Schedule to the Chartered Accountants Act, 1949 (Act) and vide order dated 5th December, 2011 were awarded a

punishment of removal of their names from Register of Members permanently and a penalty of Rs.5 lakh each.

3. The brief facts relevant for the purpose of deciding these appeals are that Price Waterhouse, Bangalore (PWB) was the statutory auditor of M/s Satyam Computer Services Limited (Satyam) right from year 2000 till the year 2009. On 7th January, 2009, Mr. B. Ramalinga Raju, the then Chairman of Satyam wrote a letter to Board of Directors and sent copies of this letter by e- mail to different regulatory authorities within India and outside India, wherein he inter-alia disclosed that the balance sheet of Satyam did not reflect the true financial state of affairs of Satyam. The balance sheets had been fudged since the year 2000 onwards and had been showing exaggerated figures of revenue, debtors, cash in bank accounts, fixed deposits, TDS, etc. The total fudging was of more than Rs. 6,000 crore. This admission of Mr. Raju sent shock waves among the share holders as well as in the corporate world not only throughout the country but across the globe. Satyam had also written letters to Public Company Accounting Oversight Board, USA (PCAOB) that its financial statements as audited by Price Waterhouse, Bangalore were not trustworthy and should not be relied upon. After this disclosure by Mr. B. Ramalinga Raju, various national and international agencies started proceedings against officials of Satyam and Auditors of Satyam including Securities Exchange Board of India (SEBI), Central Bureau of Investigation (CBI), PCAOB & The Institute of Chartered Accountants of India (ICAI).

4. The Institute of Chartered Accounts of India (ICAI) sent a notice dated 10th January, 2009 to Price Waterhouse, Bangalore asking them to disclose the name of members answerable on their behalf for the audit lapses resulting into fudging of accounts. Price Waterhouse, vide their letter dated 30th January, 2009, informed the names of four members answerable on their behalf to ICAI. Out of the four members, two are the appellants before us.

5. Price Waterhouse India is a network of audit firms in India as is disclosed by the letter dated 26th August 2010 written by Lovelock & Lewes to ICAI. This is also clear from an order passed by PCAOB dated 5th November, 2011 (PCAOB release No. 105-2011-002) wherein the structure of Price Waterhouse is discussed. It is undisputed that Price Waterhouse India was a network of CA firms viz. Price Waterhouse Bangalore, Lovelock & Lewes, Price Waterhouse & Co., Bangalore, Price Waterhouse, Kolkata and Price Waterhouse &Co.,Kolkata alongwith five other India based firms.

6. A copy of the letter of ICAI written to Price Waterhouse, Bangalore was sent by Price Waterhouse, to the four members considered as answerable to the allegations by Price Waterhouse, Bangalore. The ICAI also, after receiving a reply from Price Waterhouse, sent letters to the members answerable informing them that their names have been sent by Price Waterhouse as the members answerable on behalf of Price Waterhouse Bangalore for the audit of Satyam.

7. In the letter written by ICAI, it was brought to the notice of the appellants, the fact that the financial statements audited by Price Waterhouse Bangalore did not represent the true and fair picture of the finances of Satyam and that they were named by Price Waterhouse,

Bangalore to be answerable for the professional lapses and misconduct. The appellants did not refute that they were answerable to the allegations regarding statutory audit and professional misconduct.

8. The Director (Discipline) of ICAI sent notices to both the appellants, alleging therein, that in view of the admissions made by Mr. B. Ramalinga Raju, Chairman of Satyam, it was clear that the accounts of Satyam were being fudged from the year 2000 onwards. The appellant, Mr. P. Siva Prasad was associated with the audit of Satyam and was answerable, as per Price Waterhouse, Bangalore, for the period from April 2000 to March 2005, and the appellant Mr. Chintapatla Ravindernath being associated with the auditing firm Price Waterhouse, Bangalore was answerable for the audit period from 1st April, 2005 to 30th September,2008. The Director (Discipline) separately called upon both the appellants to file their written statements. She, in her letters to the appellants, disclosed the details of the inflated figures and fudged financial statements, as well as referred to the letter of Mr. B.Ramalinga Raju written to Members of the Board as well as to the Regulatory Authorities, on the basis of which an enquiry was being conducted by SEBI, CBI and the local police. The appellants were asked to file their response to the various allegations mentioned therein. The appellants did not file written statements and kept on seeking extension of time on various excuses. The Director (Discipline) kept on extending time from 30th January, 2009 onwards till 30th June, 2009. However, no written statement to the allegations made in the letter of Director (Discipline) was filed by either of them. The Director (Discipline) then formed a prima facie opinion dated 17th September, 2009, on the basis of whatever material was available on record with her and was placed before the Disciplinary Committee for consideration. The Disciplinary Committee in its meeting held on 23rd September, 2009, decided to proceed further and to conduct an enquiry into alleged professional misconduct. Accordingly, the Disciplinary Committee issued a letter dated 8th October, 2009, to the appellants calling upon them to file written statements along with supporting documents, if any and a list of witnesses which the appellant may like to examine. The appellants filed their written statement to the charges before the Disciplinary Committee. The Disciplinary Committee after concluding the proceedings gave its report holding the appellants guilty of professional misconduct falling within the meaning of Clause (1) of Part-II of Second Schedule and Clause (7) of Part I of Second Schedule of the Chartered Accountant Act, 1949 and imposed the penalty of removal of their names permanently and a fine of Rs. 5 lac each.

9. We have heard the learned counsel for the parties at length and perused the records. The appellants, in the present appeal have assailed the report/ order of Disciplinary Committee on various grounds discussed hereunder.

10. The first ground taken by the appellants is that the report of the Disciplinary Committee was vitiated as it was not signed on the date mentioned on it. The report of the Disciplinary Committee dated 6th October, 2010 was received by the appellants sometime in August, 2011. It is submitted that there was a legal presumption that the report was signed in August, 2011 only and not in October, 2010. The Disciplinary Committee had undergone a change in its constitution in January, 2011. The old Disciplinary Committee which heard the matter finally on 8th September, 2010, had no authority to sign the report in August, 2011.

The ICAI had not given any reason for delay in furnishing the report to the appellants if the same was signed in October, 2010. Therefore, the report should be rejected altogether. The appellants have relied upon (a) Commissioner of Income Tax Vs. Shri Tarachand Khusiram (2008) 303 ITR 298 (MP) (b) Usodaya Enterprises Ltd. Vs. Commissioner of Commercial Taxes 1998 (3) ALD 478 (c) M. Ramakrishnaih and Co. Vs. State of Andhra Pradesh (1976) 38 STC 537 (AP) (d) Khetmal Parekh and Company Vs. State of Andhra Pradesh (1976) 38 STC 531 (AP) (e) Umedbhai and Co. and anr. Vs. C.C.T and Ors. (2007) 9 VST 450 (NULL).

11. The cases cited by the appellants pertain to Income Tax. In State of Andhra Pradesh Vs. M. Rama Kishtaiah & Company (1994) 93 STC 406 (SC), the Supreme Court found that the order of the Deputy Commissioner was made on January 06, 1973 but was served upon the assessee on November 21, 1973. There was a prescribed period of four years for passing the order, which had expired on 6.1.1973. Since the order was served by Commissioner of Income Tax after about 10 ½ months of expiry of limitation period, it was presumed that in order to save the period of limitation, the order was pre- dated. Similarly, in CIT Vs. Tarachand Kushiram (Supra), it was found that in order to save limitation, the notices were dated as 30.11.1987 but the date of hearing was mentioned 20.9.1988. It was presumed that notices were pre- dated as 30.11.1987 only to save limitation, which was expired on 30.11.1987. The Income Tax Tribunal in this case had given a finding that the assessment was barred by limitation, and this finding was not disturbed by the Supreme Court.

12. In Umed Bhai & Company Vs. CCT (Supra), again, reliance was placed on State of Andhra Pradesh Vs. N. Rama Kishtaiah & Company. The factual position was that a direction was there of 20th August, 1987 to make fresh assessment, which should have been completed within four years i.e. 19th August, 1991. An ex-parte order dated 19th August, 1991 along with demand notice was served on the petitioner on 21st October, 1994. The delay in sending of notice and assessment order was more than three years and it was considered that the order of reassessment was not passed within period of limitation. Similar are the facts of other cases. Thus, in all the cases relied upon by the appellants, a vested right had to accrue to the petitioner if the order was not made by Commissioner of Income Tax within the period of limitation and in order to show that the order was passed within period of limitation, the order /notices seemed to be pre-dated. This is not the case here. No period of limitation was to expire in the present case and no benefit of saving of period of limitation could be gained by the Institute by pre-dating the enquiry report.

13. The Disciplinary Committee is an independent disciplinary body of the Institute under the Act. It is also a quasi judicial body to look into the allegations of professional misconduct. There is a legal presumption that the official acts by a body are done as per procedure and law. It has to be presumed that the report of Disciplinary Committee was signed on the date mentioned on the report. The Disciplinary Committee was not supposed to send the report to the appellant. The report is to be sent by the Disciplinary Directorate. No motive can be assigned to the Directorate for sending the enquiry report late to the appellants. The appellants were given opportunity to address arguments on the question of quantum of penalty after service of the report. In the present case, no issue of period of limitation was involved.

14. It is settled law that every Judgment of Supreme Court is to be read in the context of facts and circumstances of that case. No Judgment can be read as a statute. It is not a law laid down by the Supreme Court that if an enquiry report is not sent immediately to the delinquent official, the report becomes vitiated. The argument advanced by the appellant,therefore,must fail.

15. The other arguments raised by the appellants are that:

    (i) No specific charges were framed against the appellants and since the disciplinary proceedings were in the nature of quasi criminal proceedings, framing of specific charges was essential.

    (ii) It was submitted that in view of the fact that no specific charges were framed, the entire proceedings stood vitiated and the appellants were not even aware as to what were the charges to be answered by them.

    (iii) Charges must be clear, precise and specific and the grounds on which action is proposed to be taken must be disclosed to the delinquent member of the Institute.

    (iv) The charge sheet must be communicated to the person charged, together with statement of allegations on the basis of which charge is based.

    (v) Since in this case, no charge was communicated, the report of the Disciplinary Committee was, therefore,non-est.

16. It is not disputed that the appellants are members of the Institute of Chartered Accountants of India and are bound by the professional ethics of a Chartered Accountant. In order to consider the above argument of the appellants, one will have to consider the procedure of conducting disciplinary proceedings by the Institute. As per the provisions of the CA Act, the Director (Discipline) has to consider the information received by it and then arrive at a prime facie opinion. In order to arrive at this prime facie opinion, the Director (Discipline) is supposed to send the information of the allegations to the Member and invite his response by way of asking him to file a written statement to the allegations. The jurisdiction of the Director (Discipline), the Disciplinary Committee and the Board of Discipline is in respect of making enquiries into the professional misconduct. After the allegations of professional misconduct are received by the Director (Discipline); in terms of Rule-8, Sub-Rule 3 of Chapter-3 of Procedure of Investigation of Professional and other misconduct and Conduct of cases Rules 2007, a 21 days notice is given to the member asking him to give his written statement. Thus, this is the first information given to the member as to what are the allegations to be answered by him. After going through the reply, if any, of the member of the Institute and the material available on record, the Director (Discipline) forms a prima facie opinion about the professional misconduct of the member. The Director (Discipline) then forwards her opinion to the Board of Discipline or the Disciplinary Committee, as the case may be. The prime facie opinion of the Director (Discipline) specifies the allegations against the Member and the material relied upon by her and her opinion as to whether the allegations prima facie constituted professional misconduct or not. Since, there are two schedules attached to the Act where certain aspects of the professional misconduct have been specified, the

Director (Discipline) gives her opinion as regards under which schedule and which part and clause of the schedule, the member concerned is guilty of professional misconduct. Once this information is received by the Disciplinary Committee, the Disciplinary Committee sends a copy of the prima facie opinion to the member against whom the proceedings are initiated and again his response is sought. Obviously, the member against whom the allegations of professional misconduct are there, is told twice of the allegations which he has to answer, once by the Director (Discipline) and the second time by the Disciplinary Committee.

17. It is true that a formal charge as in a criminal case was not framed in this case. But it is absolutely wrong that the appellant was not aware of the charges to be answered by him. In fact in the disciplinary proceedings of 30th March, 2010 when the matter was taken up, the Disciplinary Committee specifically observed that the office will read out charges and thereafter the proceedings will begin. It is noted in the proceedings that the charges were read out to the appellants and then the appellants were asked if they pleaded guilty. Both the appellants responded that they wanted to defend their case and thereafter the proceedings were continued further.

18. In view of this record of proceedings, to say that the appellants were not made aware of the charges is incorrect. The appellants had been taking this plea at different stages of the proceedings. Whenever they wanted to stall the proceedings before Disciplinary Committee, they would harp upon this plea. This plea was very strongly raised by the appellants' counsel before this Appellate Authority also. But it is surprising that the appellants who had pleaded not guilty and wanted to defend the charges read out to them could have taken this plea. It only seems that the appellants wanted to prolong the proceedings and create hurdles in the proceedings.

19. In any case, it is to be seen as to what were the charges against the appellants and whether the appellants were aware of the charges. In fact, a letter dated 10th January, 2009, written by the appellants to the Institute itself shows that the appellants were very well aware of the charges. The appellants in this letter had written about the letter of Mr. B. Ramalinga Raju and various newspaper reports about the fudging of the accounts of the company, and of serious irregularities in the books of accounts of Satyam and alleged violation of accounting principles, irregularities discovered by investment bankers of the company, viz. DSP Merrill Lynch. It is stated by the appellants in the above letter that it seems that the allegations against them were:-

    (i) they had failed to carry out necessary checks which were required while conducting audit of the financial statements and certifying the quarterly results of the company; and

    (ii) they had allegedly violated accounting principles while auditing certifying the accounts/ quarterly results of the company; and

    (iii) they have failed to disclose the material facts allegedly known to them aspart of the audit team involved in the statutory audit of Satyam; and

(iv) they have failed to report material mis-statements allegedly known to them aspart of the audit team of Satyam and

(v) they did not exercise due diligence;and

(vi) they were grossly negligent in the conduct of professional duty as part of the audit team involved in the statutory audit of Satyam; and

(vii) they failed to obtain sufficient information necessary for expression of opinion;

(viii) they failed to invite the attention of material departure from the generally accepted procedure of audit of such a big company;and

(ix) they were knowing about the fudging of accounts as part of the team involved in the statutory audit of Satyam for all these years as the falsification of accounts was not possible without their knowledge. The appellants in this letter had specifically written that the allegations against them were serious and they would give full cooperation as may be demanded by the Director (Discipline) and took the plea that the allegations were based on newspapers reports and the newspapers report have no evidentiary value. Similarly, they stated that the truth or veracity of admissions made by Mr. B.R. Raju, Chairman was yet to be ascertained.

20. After the Director (Discipline) formed a prima facie opinion, which contained aforesaid charges, this was again sent to the appellants for their written statement and response. In the prime facie opinion, the Director (Discipline) had categorically mentioned about the fudging of accounts, inflated cash and bank balance of Rs. 5040 crore, inflated nonexistent accrued interest of Rs. 376 crore, understated liability of Rs. 123 crore, over stated liability of Rs. 490 crore, overstated quarterly revenue and period margin of the September 2008 quarter and about artificial cash and bank balance as falsely reflected in financial statements of Satyam. The appellants were also told of their period of association with the audit and the professional misconduct was stated in following words:

(i) that you neglected the accounting principles while auditing /certifying the accounts/ quarterly results of the company for the aforesaid period.

(ii) In spite of irregularities and manipulations in the financial statements in the audit reports, you had stated that financial statements together with notice there on gave a true and fair view.

(iii) that you failed to disclose material facts known to you as statutory auditor of the company as the same were not disclosed in financial statements of the company.

(iv) that you failed to file material mis-statement information known to you as statutory auditors, which appeared in the financial statements of the company.

(v) that you did not exercise due diligence and were grossly negligent in conduct of your professional duty as statutory auditor of the company for all these years.

(vi) that you failed to obtain sufficient information which was necessary for expression of opinion.

(vii) that you failed to invite attention to any material departure from generally accepted procedure of audit applicable to the circumstances.

(viii) that manipulation of the accounts of the company for all these years (nine years) was not possible without your knowing about the same as statutory auditors.

21. It is not material under which provision of the First Schedule or Second Schedule, the professional misconduct was covered and whether the provisions were correctly stated or not. What is material is, whether the nature of professional misconduct was brought to the notice of the appellants or not. A charge, even against an accused in a criminal case, does not stand vitiated merely because of wrong insertion of any Section of Indian Penal Code (IPC) or penal law that has been stated. If, after specifying the fact that an accused had committed culpable homicide amounting to murder, the Sessions Judge wrongly quotes Section 304 IPC instead of section 302, the charge of murder will not stand vitiated nor shall the trial stand vitiated. It is also settled law that on a disciplinary enquiry under The Chartered Accountants Act, rules of procedure of either Civil Procedure Code or Criminal Procedure Code (Cr.P.C) are not applicable and only principles of natural justice are to be followed and the delinquent member must be made aware of the nature of professional misconduct which he has to meet. In this case, charges were sufficiently brought to the notice of the appellants repeatedly, once by the Director (Discipline) by sending letters to them, secondly, when the Disciplinary Committee sent the prime facie opinion to them and asked them to respond and thirdly, during proceedings when these allegations were read over to them. We, therefore, consider that this argument raised by the appellants isba se less.

22. The other argument raised by the appellant is that the Disciplinary Committee had agreed to start 'de novo' enquiry and once it was agreed that 'de novo' enquiry was to be started, it would mean that a fresh prima facie opinion was to be formed by the Director (Discipline) and everything was to be started afresh starting from prime facie opinion.

23. The Disciplinary Committee of the Institute is constituted afresh every year and a new disciplinary committee takes over each year. The enquiry against the appellants in this case was initiated in the year 2009 after receipt of prima facie opinion from the Director (Discipline). The first meeting of the then Disciplinary Committee was held on 23rd December, 2009 and after considering the prime facie opinion sent by the Director (Discipline), it decided to proceed further against the appellants under Chapter-5 of the Rules by holding disciplinary proceedings. A letter was sent to the appellants on 8th October, 2009 calling upon them to submit their written statement along with supporting documents, if any and a list of witnesses. In response to this letter, the appellants sent a letter dated 29th October, 2009 to the Institute seeking a copy of the SEBI report and the CBI chargesheet filed against the accused persons facing trial along with Mr. B.R. Raju. The Institute sent a copy of the report vide its letter dated 5th November, 2009 and asked the appellants to file their written

statement within a period of 21 days. After receiving a copy of the SEBI report and the CBI chargesheet, instead of joining the enquiry, the appellants wrote to the Institute that they were heavily preoccupied over past several weeks as they were being enquired by the CBI Hyderabad team for completion of their investigation and filing of supplementary charge sheet. Their statement was recorded before the Magistrate under section 164 Cr. PC on 21st November, 2009 and therefore it was not possible for them to file a reply within the time prescribed, so they wanted a further extension of 21 days for filing a reply. This letter was replied to by the Institute and they were told that the meeting of the Disciplinary Committee was fixed on 14th December,2009 at 12 noon at the Mumbai office of the Institute and their appearance was essential so they should attend the enquiry. It was also informed that the request for extension of time has been not acceded to by the Disciplinary Committee. Vide letters dated 11th December, 2009, the appellants informed the Institute that they were not in a position to give a detailed written statement and asked the Institute to adjourn the meeting of 14th December, 2009, to any other date. It was also told to Institute that Mr. S. Gopalakrishnan and Mr. Srinivas Talluri, the engagement partners, in charge for the audit of Satyam, were in judicial custody and thus were handicapped in preparing a detailed written statement, so they should be granted another three weeks time for filing a detailed written statement. It was also submitted, that they would need to place evidence of various witnesses before the Disciplinary Committee and be permitted to file a list of witnesses before the proceedings are commenced. They would give reasons for examining each of the witnesses, if the Committee so desired.

24. The Disciplinary Committee meeting took place on 14th December, 2009 and vide letters dated 14th December, 2009, the appellants again requested the Disciplinary Committee to adjourn the proceedings for filing written statement along with list of documents and list of witnesses. The letter ran into 7 foolscap sheets wherein the appellant narrated various rules and principles of holding enquiry and also narrated handicap due to the engagement - partners being in jail and their busyness with the CBI and the fact that their statement under Section 164 Cr. PC was recorded. After hearing the counsel on adjournment, the Disciplinary Committee adjourned the meeting to 29th January,2010.

25. The appellants, thereafter, filed a written statement on 25th January, 2010, running into 68 pages. Thereafter when the meeting of the committee took place on 29th January, 2010, the appellants told the Committee that the Committee should not proceed further because the term of the Committee was going to expire very soon. However, the Members of the Committee opined that they cannot stop working simply because their term was going to expire shortly. However, before disciplinary proceedings could be completed, the term of the Committee expired and a new committee was constituted and the new committee started hearing. The new committee on the first hearing asked the appellants whether they should start proceedings where the old committee had left or they should start the proceedings 'de novo'. The appellants told the new committee that they would prefer proceedings to be 'de novo'. On this submission of the appellants, the Committee agreed to start the proceedings "de novo" from the stage of stating charges. The charges were again read over to the appellants and the appellants took the stand that they would like to defend themselves as

has been stated in earlier paragraphs of this order. Now, the issue raised by the appellant is that 'de novo' means that the opinion of the Director (Discipline) also should have been framed 'de novo'.

26. The appellants have relied upon Chairman-cum-Managing Director, Coal India and Ors. vs. Anant Shah and Ors. 2011 (5) SCC 142 and Sq. Ldr. Kashi Nath Singh Vs. Union of India 2003 AD 364. In the Anant Shah case (SUPRA), the Division Bench of the High Court reinstated Mr. Shah but gave liberty to initiate fresh (de novo) disciplinary proceedings. The Supreme Court observed that 'de novo' enquiry would mean the entire proceedings including the charge sheet issued earlier stands quashed and a fresh enquiry could be initiated only after giving a fresh charge sheet. A fresh enquiry could not have been initiated without giving a fresh charge sheet. In Sq. Ldr. Kashi Nath Singh's case, the Delhi High Court observed that 'de novo' trial means trying a matter anew as if it had not been heard before and as if no decision has been referred. Citing these two judgments, the counsel argued that 'de novo' enquiry would, here, means formation of fresh opinion by Director (Discipline) after giving an opportunity to the appellant to file a written statement afresh before the Director (Discipline) and then sending a fresh prima facie opinion by the Director (Discipline) to the Disciplinary Committee and then the Disciplinary Committee proceedings on the basis of fresh prima facie opinion of the Director (Discipline). We consider that this is not what is meant by 'de novo' enquiry in the context of proceedings before the Disciplinary Committee of Institute. The Director (Discipline) does not hold an enquiry against the Members of the Institute. The Director (Discipline) only receives information and thereafter receives the versions of the member of the Institute and after considering the two and considering other material which comes into her knowledge or possession, she forms a prime facie opinion whether there was sufficient ground to proceed further against the member. She sends her prima facie opinion along with material available to her for further proceedings either to the Board of Discipline or to the Disciplinary Committee. The enquiry into professional misconduct starts only when the Board of Discipline or the Disciplinary Committee serves a notice on the member asking him to participate in the enquiry and answer the allegations about the professional misconduct and produce evidence. The 'de novo' enquiry before the Disciplinary Committee would not mean 'de novo' considering the information by Director (Discipline), 'de novo' asking for written statement of the member of the Institute and then forming a fresh prima facie opinion. This argument advanced by the appellant is bereft of any merits and is liable to be rejected.

27. The Appellant has also taken a stand that the Disciplinary Committee did not follow the procedure as laid down in Rule 18. It considered SEBI report and CBI charge sheet as evidence against the appellant. These two reports had no evidentiary value and could at the most be considered as hearsay evidence and hearsay evidence was inadmissible. Another issue raised is that the statement under Section 164 Cr.PC made by the appellants before the Court of the Metropolitan Magistrate in a criminal trial against fellow auditors in respect of offences of criminal charges was not a substantial piece of evidence and could not be relied upon. The contention raised by the Counsel for the appellant is that no evidence was produced before the Disciplinary Committee about the professional misconduct of the

appellant and, therefore, the appellants could not be held guilty of professional misconduct.

28. The counsel for the appellant during arguments also pressed the point that the appellants were not employees of Price Waterhouse but were employees of Lovelock & Lewes and were not Chartered Accountants in practice though they were Members of the audit team. They were only performing work assigned to them by the partners of the audit firm who were responsible for signing the audited balance sheet.

29. Price Waterhouse, the audit firm of Satyam, had in response to the letter of ICAI named the appellants and two others as the members responsible to answer for audit of Satyam. A copy of this letter was sent to the appellant by Price Waterhouse. The Institute also sent a letter to the appellants informing the appellants about the letter received from the Price Waterhouse that the appellants were responsible to answer. The appellants did not refute the position that they were answerable for the Satyam Audit. In none of the letters written by the appellants to the Institute was it stated that they were not answerable or they had been wrongly named by Price Waterhouse. As far as the employment of the appellants with Lovelock & Lewes is concerned, it is an undisputed fact that Lovelock & Lewes is part of the Price Waterhouse group in India and this fact is admitted by Lovelock & Lewes in its correspondence with ICAI as mentioned in para 5 above. Price Waterhouse is a collection of Chartered Accountants firms which have inter se arrangement to share the resources with each other. The appellant P. Siva Prasad was a Sr. Manager with this firm upto April, 2007 and in April, 2007 he had become an Associate Director and continued as such till January, 2010. The other appellant Shri C. Ravindranath was also an associate with Price Waterhouse through Lovelock & Lewes. In view of the written statements and letters written by the appellants not denying their answerability for audit of Satyam, this argument is rejected outrightly.

30. The argument that no evidence was produced regarding their misconduct is an equally baseless argument. The appellants were part of the team of auditors of Satyam and the auditors certified the accounts of Satyam to be true and a fair picture of the financial affairs of Satyam right from 2000 to 2009. The appellants along with two more had the responsibility of ensuring the conduct of audit in an independent, fair and unbiased manner, taking necessary steps for verification of accounts before certifying the accounts to be true and fair. The appellants were in full know of what they had done during audit and what checks and verifications they had done. It is not even the case of the appellants that Shri B.R. Raju's statement made to the Board, which appeared in print, electronic and international media and which shook the corporate world, was a false statement and actually there was no fudging of accounts. Had this been the stand taken by the appellants in their reply to the Director (Discipline) or to the Disciplinary Committee, the things would have been different. Once there is no denial of the fact that all financial statements for last nine years were audited by the Audit team of Satyam and certified by the auditors (of which the appellants were members) as a true and fair picture of financial affairs, were actually wrong & false. The appellants were answerable to the world at large and to ICAI about their conduct as Chartered Accountants. It was within the special knowledge of the appellants as to during audit what was done by the appellants to verify the truthfulness of the accounts,

how verification of different aspects of financial statements was done, what audit plan was followed, what counter checks & physical verifications were done. Only the appellants could have disclosed to the Disciplinary Committee and to the Director (Discipline) as to what were the duties assigned to them.

31. Satyam was a company generating revenue in thousands of crores and having approximately 4000 employees and branch offices at several places in India and abroad. It is not that only the four persons named by the audit firm were in the audit team. During enquiry before the Disciplinary Committee, it was stated by the appellants that there were 8 - 10 persons and the appellants had also named two persons to be produced as witness to prove what were the steps taken by them. However, when the appellants were asked to file affidavits of their witnesses before the Disciplinary Committee, the appellants refused to file the affidavits taking various false pleas. Surprisingly the appellants during arguments before the Appellate Authority and during inquiry before the Disciplinary Committee had taken a stand that they did not remember what was the work assigned to them and what audit work or duties they performed. However, these very appellants admittedly made a statement under section 164 Cr.PC (as a witness) before the Metropolitan Magistrate and in that statement they had specified what was the nature of work they had done as a member of the audit team and what lapses were brought to the notice of the signing partners, etc. It is apparent that the appellants have deliberately taken the stand of not remembering the role played by them in the audit of Satyam. When a person keeps back vital information from the Disciplinary Committee of which he is privy and which is in his special knowledge, a presumption is to be drawn that had he given the information,it would have gone against him.

32. What is admitted is not required to be proved. The Director (Discipline) in letters written to the appellants had brought to the notice of the appellants, the statement made by Shri B.R. Raju regarding the fudging of accounts of Satyam right from the year 2000 onwards for the last nine years. Which heads of accounts were fudged and to what extent fudging was done was brought to the notice of the appellants by the Disciplinary Committee by sending the opinion of the Director (Discipline) wherein details, tables and charts were given about different fudging and the period of fudging. These charts and figures gave the actual state of affairs as well as the state of affairs as reflected in the balance sheet. The appellants were given an opportunity to file a written statement in respect of the allegations of the financial statement not showing correct figures and the correct figures being different. In the written statement filed by the appellants, nowhere did the appellants deny the fact that the balance sheets of Satyam from 2000 onward did not reflect the true financial position. It is not even asserted by the appellants that the statement made by Shri B.R. Raju was a false statement and the balance sheets reflected the true state of financial affairs of Satyam. Once the appellants failed to deny that the balance sheets did not reflect the true financial affairs of Satyam, the truthfulness of the statement of Shri Raju, Chairman of Satyam cannot be denied. The appellants being members of the audit team were supposed to depose and bring it on record of the Disciplinary Committee that as auditors there was no lapse on their part and whatever fraud was played, it was not played by them. But it seems that the appellants were more faithful to Shri B.R. Raju than to their profession and

to the public at large or the society. Had the appellants conducted a true and fair audit, nobody could have prevented them to come clean before the Disciplinary Committee and to enumerate the steps taken by them during audit to verify the cash balances, the debtors, the TDS deductions, revenue receipts and FDRs.

33. One stand taken by the appellants is that the proceedings for professional misconduct are quasi criminal in nature and, therefore, the charge against the appellants has to be proved to the hilt and beyond reasonable doubt. The onus of proving the charge was on the Institute and the appellants could keep silent. It was stated that there was no obligation on the appellants to speak at all. This argument is not tenable. Disciplinary proceedings are not in the nature of criminal proceedings. They are in the nature of fact finding proceedings where the delinquent official or a professional is given full opportunity to place his case before the Disciplinary Committee. The rules and regulations of all disciplinary proceedings require that when a complaint is made, the delinquent person should be given an opportunity to answer the complaint and present his case, and even before the Disciplinary Committee he is given an opportunity to file his written statement. He is also supposed to examine his witnesses before the Disciplinary Committee. The delinquent official is supposed to speak and not to remain silent.

34. The right to silence is a constitutional right which is available only to those who are charged with a criminal offence and this right is not available to persons facing a disciplinary or professional misconduct charge who are subjected to penalty as per rules of service or as per rules of the profession. The Supreme Court in recent judgment Securities & Exchange Board of India vs. Ajay Agarwal (AIR 2010 SC 3466) made a distinction between offences under criminal law and prohibition imposed under SEBI Act. Paragraphs 37 to 41 from the above judgment are reproduced below :-

"37. Even if penalty is imposed after an adjudicatory proceeding, persons on whom such penalty is imposed cannot be called an accused. It has been held that proceedings under section 23(1A) of Foreign exchange Regulation Act, 1947 are adjudicatory in character and not criminal proceedings. See Director of Enforcement v. M.C.T.M. Corporation Pvt. Ltd. and Ors. MANU/SC/0300/1996 : (1996) 2 SCC 471. Persons who are subjected to such penalties are also not entitled to the protection under Article 20(1)of the Constitution.

38. Following the aforesaid ratio, this Court cannot hold that protection under Article 20(1) of the Constitution in respect of ex-post facto laws is available to the respondent in this case.

39. If we look at the legislative intent for enacting the said Act, it transpired that the same was enacted to achieve the twin purposes of promoting orderly and healthy growth of securities market and for protecting the interest of the investors. The requirement of such an enactment was felt in view of substantial growth in the capital market by increasing participation of the investors. In fact such enactment was necessary in order to ensure the confidence of the investors in the capital market by giving them some protection.

40. The said act is pre-eminently a social welfare legislation seeking to protect the interests of common men who are small investors.

41. It is a well known canon of construction that when the Court is called upon to interpret provisions of a social welfare legislation the paramount duty of the Court is to adopt such an interpretation as to further the purposes of law and if possible eschew the one which frustrates it."

35. We, therefore consider that the appellants cannot take the stand that even if they had not denied the facts stated by the Director (Discipline) and by the Disciplinary Committee in the written statements filed by them, they were not supposed to explain their conduct as a Chartered Accountant in conducting audit of Satyam.

36. Before proceeding further, it would be worthwhile to note that under Security Exchange Act of 1934 of United States of America, proceedings were initiated by Security and Exchange Commission of USA against Lovelock & Lewes, PW Bangalore, PW & Co. Bangalore, PW Kolkata, PW & Co. Kolkata (collectively PW India and PW India firms). In anticipation of the institution of the proceedings, PW India and PW India firms submitted an offer of settlement to Security and Exchange Commission of USA which the Commission accepted and on the basis of this offer of settlement, the Commission passed detailed order noting the remedial steps to be taken by PW, Bangalore and the undertaking given by PW, Bangalore. It gave several directions to PW, Bangalore to be complied in future and also directed PW India & Firms to pay a civil alimony and a penalty of 6 million dollars to Security and Exchange Commission of USA. It was a settlement at the instance of PW India itself. The amount was to be paid within 45 days of the order failing which the entire outstanding of civil penalties plus the additional interest was to be imposed on the PW India, Bangalore. It was further observed by Security Exchange Commission of USA that to preserve the determinant effect of civil penalty, PW, Bangalore had agreed that they shall not ask for offset of this penalty nor shall such penalty be offset against any other penalty imposed against them or any of the respondents by any other authority or Court. This order was suffered by PW India willingly. Similarly, an order was passed by PCAOB against the PW firms, which was also suffered by Price Waterhouse willingly. IN PCAOB order, several supervisory and restrictive directions were given to PW, Bangalore.

37. PCAOB proceedings were also initiated against both the appellants, as the appellants seemed to have been associated with PCAOB in their individual capacity as well. PCAOB vide its letter dated 16th March, 2010 observed that in anticipation of the proceedings, each of the appellants had submitted an offer of settlement which the Board had accepted and with the consent of each of the appellant, an order was passed barring each of the appellant from being an associated person of a registered public accounting firm. This sanction was imposed in pursuant to Rule 5300 (b) (1) of PCAOB rules. This order records that Mr. P. Siva Prasad was engaged as Manager for Satyam audit engagement team from April, 2000 until March, 2005. On 7.1.2009, Satyam filed a form K-6 before Security Exchange Commission of USA disclosing that it had inflated key financial results including overstating, cash balance of $ 1 billion. Mr. P. Siva Prasad was a Manager/Sr. Manager with Public Accounting firm

up to April, 2007 and in April, 2007 he became Associate Director with Lovelock & Lewes, Chartered Accountants, a registered public accounting firm and resigned from Lovelock & Lewes on 29th January, 2010. It was ordered that in order to protect the interest of investors and the public interest in preparation of informative and independent audit reports, the Board imposed sanctions agreed to by the respondent in his offer and Mr. P. Siva Prasad was barred from being an associated person of registered accounting firm in terms of the rules of PCAOB. This order was passed on 16th March,2010.

38. The audit firm of which the appellants were a part and employees admitted professional delinquency before the Security & Exchange Commission of USA and suffered penalty of six million dollars. The appellants, on the charge of their professional misconduct before a body similar to ICAI suffered an adverse order by consent. This sufferance of adverse orders by consent by making settlement applications before the PCAOB by the appellants and their employer is an admission before another jurisdiction of their professional misconduct.

39. It is noteworthy that the SEBI Report and the CBI chargesheet were sent to the appellants on demand. Even a copy of the statements under section 164, Cr. PC made by them was handed over to them. The Disciplinary Committee had not relied upon the SEBI report or the CBI chargesheet or the statement under Section 164 of the appellants to come to the conclusion that the appellants were guilty of professional misconduct. The SEBI report and the CBI charge sheet against Mr. Srinivasu and Mr. Talluri, who were facing criminal charges, only fortified the fact that the balance sheet and other financial statements of the company did not reflect the true picture. The CBI chargesheet was in respect of offences made out against other persons and not against the appellants. Rather the appellants were cited as witnesses in the chargesheet to prove the offence against the signing partners and their statements under Section 164 Cr. PC were recorded. Even the signing partner who was summoned by the appellants to depose before the Committee refused to depose anything before the Committee except admitting the fact that the appellants were part of the audit team of Satyam. He refused to depose either in favour of the appellants or against the appellants on the ground that the appellants were witnesses against him in his trial and he categorically stated that he has been advised by his counsel not to answer anything relating to Satyam, although he was told that he was only being questioned about the professional conduct of the appellants.

40. Thus the plea taken by the appellants that the CBI and SEBI reports were wrongly relied upon is a baseless, since these reports were not relied upon by Disciplinary Committee to come to conclusion about the professional misconduct of the appellants.

41. The Disciplinary Committee while giving its findings came to conclusion that the appellants had not exercised due diligence and were grossly negligent in the conduct of their professional duties and were, therefore, guilty of professional misconduct within the meaning of para-2 of Guideline No.1-CA(7)/02/2008 dated 8th August, 2008 and Clause (7) of part –I of Second Schedule to Act. The Disciplinary Committee, therefore, held the appellants guilty of professional misconduct with respect to the charges leveled against him. It is argued by the counsel for the appellants that the reliance placed by the Disciplinary Committee

on guidelines of 2008 was misconceived and legally invalid as these guidelines were not in existence when the alleged misconduct purportedly occurred. Para-13 and 13.1 of the guidelines specified that earlier notifications issued under Clause- (ii) of part- II of the Second Schedule stood repealed from 8th August, 2008, so the earlier notification was not in force when enquiry was being conducted. The enquiry commenced in 2009 long after when the repeal of the notification took place. Thus the Disciplinary Committee had no authority to hold the appellants guilty of non-compliance for para-2 of these guidelines. This argument is absolutely misconceived for the simple reason that the guidelines dated 8th August, 2008 issued by the Council vide aforesaid notification, were in fact nothing but a consolidation of earlier notifications issued by the Council from time to time.

42. The definition of professional misconduct under Section-22 of the Act is only an inclusive and open definition of professional misconduct. The Council of the Institute, had from time to time, been issuing notifications describing different professional misconducts. These notifications are dated 12th November, 1960, 20th November, 1960, 30th May, 1970, 24th October, 1970, 20th March, 1971, etc. and notifications were issued right up to 22nd May, 2004. The act was amended in 2006 and it seems after 2006, the Council thought of consolidating previous notifications and issued guidelines under notification dated 8th August, 2008. The guideline in para-2 reads as under:- "A member of the institute who is an employee, shall exercise due diligence and shall not be grossly negligent in the conduct of hisduty." Earlier notification issued by the institute dated 12th November, 1960 reads asunder:-

> *"A member of the institute whether in practice or not, who is an employee by Chartered Accountant in practice or by a firm of such Chartered Accountant shall be deemed to be guilty of professional misconduct, if he is grossly negligent in the conduct of his duty."*

43. The above notification of 1960 was applicable to all the members of the Institute not holding certificate of practice, but was employed by a firm or a CA. The guidelines issued in 2008 laid down the duty of a CA to be diligent in his professional conduct towards his clients. Even if one believes that the guidelines of 2008 were not in force for the period during which the misconduct was alleged, the earlier notification No. 1-CA/15/60 dated 4th November, 1960 was very much in force and squarely covered the case of appellants. This notification continued to be in operation till it was substituted by the guidelines. It is obvious that the argument raised by the appellant is ignorance of the earlier notification which was very much in force when the new guidelines came into force. However, this is to be kept in mind that First and Second Schedule, guidelines & notifications are illustrative and a reference to them is of little significance.

44. The next argument raised is that the proceedings were initiated against the appellant without jurisdiction. The alleged information which formed the basis of enquiry was not "information" within the meaning of the Act and Rule-7. The element of information was missing and the Disciplinary Committee wrongly relied on Section-22 for expanding scope of information. It was submitted that the Directorate can invoke section 22 only upon receipt

of information or a complaint. The Director (Discipline) does not enjoy a power to begin an enquiry suo moto. It is further submitted that Supreme Court has held newspaper reports were grossly hearsay and therefore inadmissible evidence.

45. Section 21 (2)of the Chartered Accountant Act, 1949 reads as under:-

> *"On receipt of any information or complaint along with the prescribed fee, the Director (Discipline) shall arrive at a prima facie opinion on the occurrence of the alleged misconduct".*

It is apparent that Director (Discipline) has to act when it receives a complaint along with prescribed fee or it receives an information. Section 21 of the Act prescribe that the Council has a duty to establish disciplinary directorate headed by a Director (Discipline) and having other employees for making investigations in respect of any information or complaint received by it (in respect of professional misconduct).

46. The whole Disciplinary Directorate consisting of Director (Discipline) and employees working under him, Board of Discipline and Disciplinary Committee of the Institute are meant to take action in respect of professional misconduct of the Members. This professional misconduct may be brought to the notice of Director (Discipline) either by a complainant or the Director (Discipline) may receive information about the professional misconduct through any other source. Sources of information can be many, including a news report. News items appearing in print media, electronic media or internet media may be either truthful or may be altogether false. Director (Discipline) of the Institute cannot refuse to act on information about professional misconduct of a member, which comes to its notice through media, on the ground that every media report is merely hearsay and therefore cannot be acted upon. The primary role of Director (Discipline) in such a case would be to find out the truthfulness of the information and once Director (Discipline) comes to conclusion that the information which came to it through media was truthful, it has a duty to act on such information. The Director (Discipline) can refuse to act on false informations. However, if the information has substance and is not false information, then the Director (Discipline) has to act on such information. It is not necessary that there has to be an informant to invoke Section 21 and that the Director (Discipline) cannot suo moto take action after coming to know of a serious professional mis-conduct of a CA through news report or media. Clause (1) of part 4 of First Schedule provides that if a Member is held guilty by civil or criminal court for an offence which is punishable with imprisonment for a term not exceeding six months, the Member shall be deemed to be guilty of other misconduct. If a news item appears either in print media or in other media about a Chartered Accountant having been convicted by a court for an offence say of cheating, fraud, Rape, theft etc., it would be obligatory on the part of Director (Discipline) to find out truthfulness of such news item and thereafter issue notice to the Member and verify the facts from him. The Director (Discipline) has to send its prima facie opinion even in respect of information received through media to the Board of Discipline or the Disciplinary Committee as the case may be. The action on the basis of information includes and means the information received from any source, including media. In the present case,the information of the letter written by Mr. Raju to the Members of the

Board of Satyam had appeared in almost all newspapers and all channels of television in India as well as in all important media of foreign country. It would be travesty of justice to say that Director (Discipline) should have kept its hands off because there was no informant in this case.

47. 'Professional misconduct' has been defined in section 22 of the Act, Intendment and object of the Act is to maintain standard of the profession at a high level, and consequently a code of conduct has been prescribed. 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. The profession of Chartered Accountants occupies a place of pride amongst various professions of the world. That makes observance of the professional duties and propriety more imperative. When the conduct of a member of the profession is contrary to honesty, or opposed to good morals, unethical, it is misconduct-warranting consequences indicated in the Statute. A large section of public relies on objectivity and integrity of professional accountants to maintain the orderly functions of commerce. Thus Chartered Accountants hold a position of trust. By betrayal of the trust, the conduct becomes one which is unbecoming of the professional. (Council of Institute of Chartered Accountants of India Vs. B. Ram Goel,2001 (57) DRJ(DB).

48. The test of what constitutes "Grossly improper conduct in the discharge of professional duties has been laid down in many cases. In the case of a Solicitor Ex Parte the Law Society (1912) 1 KB 302, Darling J. adopted the definition of "infamous conduct in a professional respect", on the part of a medical man as stated in Allinson Vs. General Council of Medical Education and Registration (1894) I QB 750, and applied the same professional misconduct on the part of Solicitor, and observed:- "If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council to say that he has been guilty of "infamous conduct in a professional respect" (Council of Institute of CA Vs. Ajay Kumar Gupta date of decision 28.2.2012 (Delhi High Court Division Bench)"

49. The word 'misconduct' in the generic sense envisages breach of discipline, it may not be possible to lay down exhaustively as to what would constitute misconduct or indiscipline. However, in case of Chartered Accountants, it would be wide enough to include wrongful omissions or commission on the part of the Member of ICAI and it would mean improper behavior or violation of a rule of standard or behavior. Misconduct is transgression of an established rule of action, where no discretion is left except what the standard code of conduct demands. Though, it does not mean mere carelessness but it means adhering to professional conduct expected of a privileged class of persons like Chartered Accountants who are bound to conduct themselves in a manner befitting the high and honourable profession to which they belong. Whether there was professional misconduct or not would depend upon the facts and circumstances of each case.

50. The statutory audit of a company is a function to be performed by the auditors in accordance with the law. It is a statutory function and the Companies Act specifically provides for

appointment of auditors, their qualifications etc. Section 226 of Companies Act provides that a person shall not be qualified for appointment as an auditor of a company unless he is a Chartered Accountant within the meaning of The Chartered Accountants Act, 1949. It further provides that a firm all of whose partners practicing in India are qualified for appointment as an auditor may also be appointed as auditor by the firm's name, in which case any partner so practicing may act in the name of the firm. The Act specifies disqualifications as to who cannot be appointed as auditor. The audit function is considered so important that a person indebted to the company even to an amount of Rs.1001/- or who has given any guarantee or provided any security in connection with indebtedness of any third person to the company for an amount exceeding Rs.1000/- cannot be appointed as an auditor (Section 226 of the Companies Act.). Section 227 of the Companies Act provides that every auditor of a company shall have right to access, at all times, to the books and accounts and vouchers of the company whether kept at the Head Office of the Company or elsewhere. It is well known fact that business data of a company is always kept secret and is considered as confidential. The auditor has been given access to business data only because law puts him in fiduciary capacity and that he performs his function impartially without being influenced by the company and has sufficient power to ask for any information and data. This Section also provides that auditor shall be entitled to require from the office of the company such information and explanation as the auditor may think necessary for the performance of his duty. The auditor has to make a report to the Members of the company on Accounts examined by him and on every balance sheet and profit & loss account and on every other document declared by the Companies Act to be a part of or annexed to the balance sheet or profit & loss account. The auditor report is supposed to contain a statement of the auditor that he obtained all information and explanations necessary for performance of his duty. He has to say that in his opinion, the books of accounts, as required by law, had been kept by the company and proper returns, adequate for purpose of audit were received from branches not visited by him and in his opinion the balance sheet and profit and loss accounts complied with accounting standards and represented a true and fair picture of the financial affairs of the company. The audit functions have been considered by the legislature of substantial importance and the auditor has been given a right to attend General Body meetings under section 231 of the Companies Act. An audit report is to be read before the company in general meeting. The law also provides for penalty on auditor in case the auditor fails to act in conformity with the requirement of the provisions of the Companies Act (section 233).

51. The Institute of Chartered Accountants of India from time to time has been issuing Standards /guidance notes for the benefit of its members on different aspects of audit and professional conduct. These have been compiled by the Institute in a handbook of audit pronouncements. This compilation contains detailed standards, advice and guidance for the Chartered Accountants on the principles governing audit, object and scope of audit, and audit procedures to be carried out, quality control in respect of audit work etc. etc. These two volumes together contain above 1900 pages. The very first chapter provides that the independence of auditor has not only to exist in fact but also appears to so exist to all reasonable persons. The auditor's opinion helps determination of the true and fair view of

the financial position and operating results of an enterprise. The idea of independence is instilled in the minds of Chartered Accountants from the commencement of their training and it has to be applied in their day to day work. The auditor should be straight forward, honest and sincere in his approach to his professional work. He must be firm and must not allow prejudice or bias to override his objectivity. For an audit firm, it is prescribed that it should be staffed by personnel who have done and maintained the technical standards and professional competence required to enable them to fulfill their responsibilities. It is impressed upon the members of the Institute that the public should have confidence in the quality of audit and the key fundamental principles of auditors were integrity, objectivity and professional skepticism. If the auditor is unable to fully implement creditable and adequate safeguards, then he must not accept the work. What distinguishes the profession of a Chartered Accountant from the business is that the professional service is not rendered with the sole purpose of a profit motive. Personal gain is one but not main or the only objective. The professional opinion, therefore, frowns upon the methods where payment is made to depend upon the basis of results.

52. For the purpose of verification of debtors loans and advances it has been prescribed by the Institute to the members that they should follow a procedure which should be independent of the company's employees. The statement of accounts should be sent to all the debtors at periodic intervals. These should be dispatched by a person independent of ledger keeper. The debtors should be requested to confirm the balance as per statements with reference to their own records directly to the auditors and the confirmation received should be reviewed by a person independent of the ledger keeper. The same procedure has been provided in respect of verification of cash balances lying in the bank, loans and advances. The Institute has emphasized that in carrying out an audit of debtors loans, advances, the auditor is particularly concerned with obtaining sufficient and appropriate audit evidence to corroborate the management's assertion. Apart from verification to be carried out independently by auditors, the examination of records, direct confirmation procedure and analytical review procedure must be followed. It is specifically provided that the auditor should carry out examination of relevant records personally to satisfy himself about the validity, accuracy etc. It is specified that direct communication with the debtors, bankers, loanees and advancers was the best method of ascertaining the genuineness and accuracy. The guidelines further provide that mere confirmation of balance by debtor does not by itself ensure ultimate recovery. Therefore, any situation where auditors have reasons to believe, based on his past experience, that the debt was unlikely to be recovered, he may limit his reliance on direct confirmation procedures and place greater reliance on other audit procedures. The auditors have been cautioned that there may be situations where the management of entity may not like auditors to seek confirmation directly. In such cases, the auditor should consider whether there were valid grounds for such a request. The guidelines warned the auditor that the cash and bank balances may constitute a significant proportion of the total assets of an entity and these assets are highly prone to misappropriation, misapplication and other forms of fraud. In carrying out an audit, the auditor should be particularly concerned with obtaining sufficient and appropriate data evidence to corroborate the management's assertion regarding cash and bank balances. It is provided that auditor should state and

evaluate the system of internal control of the entity relating to cash and bank balances to determine the nature, timings and extent of other audit procedures. He should particularly review the aspects of internal trial relating to cash and bank balances specifically regarding proper authorization of cash and bank transactions, safeguards and periodic reconciliation of bank balances, reconciliation of cash in hand with book balances on daily basis or at appropriate intervals including surprise checks.

53. The appellants have argued that the Disciplinary Committee and Director (Discipline) were not at all aware of the precise role of the appellants in the audit of Satyam and no evidence was produced to establish the role of the appellants. The appellants were not examined in respect of any material relied upon by the Disciplinary Committee. The facts and figures shown in the report of the Director (Discipline) as well as those which find mention in the report of the Disciplinary Committee were never put across to the appellants in any of the hearings. Thus the entire proceedings of the Disciplinary Committee were vitiated.

54. It has already been observed by us that it was not for the Disciplinary Committee or the Director (Discipline) to find out what was the role played by the appellants in the audit since the appellants were part of the audit team and were admittedly answerable for the audit conducted. It was for the appellants to specify as to what was their role in the entire audit team and in pursuance of their role, how they were not at all liable for false, unfair & fudged statements which passed through the entire audit team for last 9 years as a truthful and fair financial statements. The appellants were made aware of the different facts and figures in the first letter written by the Director (Discipline) to them. The discrepancy in the actual financial state of affairs and the state of affairs shown in the audited balance sheet was brought to their notice repeatedly by giving them copies of SEBI Reports, copies of CBI Charge sheet and other material. The Disciplinary Committee was not to specify as to which of the appellants was responsible for the discrepancy in these figures. The mere fact that these statements were admittedly false put a responsibility on the appellants to show that falsehood of the figures escaped from their notice despite due diligence. It was not for the Disciplinary Committee to examine the appellants on these facts and figures. Actually it was for the appellants to come forward and examine themselves to prove that they had conducted the audit as per the procedure laid down by the Institute of Chartered Accountants of India and by the long practice being followed by the professionals. The appellants were trained to do the audit. Once they admitted to be part of the audit team and answerable on behalf of the audit firm to the share holders and to other authorities, they were supposed to be involved in all processes of audit. If they were not involved in some specific process of audit, it was within their special knowledge and the onus to prove was on them that they were not involved in all processes of audit but were involved in only a particular part of the audit. If the audit firm has named them as the persons responsible to answer about the discrepancies which had come to the notice, they cannot keep on shifting blame on one another and each one of them cannot claim to be clean, which is happening in this case.

55. These two appellants had deliberately kept silent presuming that silence is their shield and defence and they did not speak about their role in the audit team or about anything. Silence

is not the shield of any professional when the result of professional negligence stares in the eyes. In this case the very fact that all vital audit procedures were not followed and the bank balances as reflected in the balance sheet were not there, TDS deducted as reflected in the financial statement was not the TDS mentioned in the Income Tax Returns, the debts as reflected in the financial statements actually were not true and correct, even the revenue earnings were shown highly exaggerated in the financial statements and to show these exaggerated revenue earnings, the entire financial statements were fudged shows that the checks and balances and audit procedures were not adhered to.

56. This Appellate Authority is not concerned as to who fudged the accounts and who was responsible for fudging the accounts but the very fact that fudged accounts were certified as true and fair accounts for 9 long years shows and proves that the conduct of the audit by the auditors was in gross disregard to the audit standards and the procedures laid down by ICAI as well as the warnings given in these standards. The auditors in this case were either grossly negligent or closed their eyes deliberately to ensure that fudged accounts passas fair accounts.

57. It is argued by the counsel for the appellant that the punishment awarded to the appellants was harsh and disproportionate to the misconduct. It has not been proved that they were involved in fudging of the accounts or in any kind of forgery. At the most it can be said that they failed to detect the fraud or were negligent in performance of their obligation. This was not such a serious misconduct that they should be deprived of their membership of the institute and should be deprived for the life time right to be a Chartered Accountant. It is also submitted that the approach of the institute should be reformative rather than retributive.

58. Mercy and leniency cannot be shown to undeserving persons. Misplaced sympathies do more injustice to the society than doing justice to the individual.

59. The appellants throughout the enquiry or before the Appellate Authority did not show an iota of remorse for their professional misconduct. Practically did not cooperate with the Disciplinary Committee and conveniently forgot their role in the audit and did not state what due diligence- precautions and audit standards were followed, while these very appellants in CBI enquiry did remember their role and also remembered the lapses which were there in the audit of Satyam and made statements U/S 164 Cr.PC before the judicialmagistrate. When attention of the counsel was drawn to the fact that appellants were not mere clerks and were members of a respected profession, it was argued that it cannot be expected of an employee to raise voice against employer and write letters and memos of dissent. He cannot be expected to act in a manner so as to lose his job. In view the stand taken by appellants and the conduct of appellants, we do not consider that appellants deserved sympathy. Only he can reform himself who realises that he did a mistake and has a sense of remorse. Neither the appellant had shown a realisation of being on the wrong path nor expressed any kind of remorse. Rather the attitude of the appellants was such as the appellants rightly did not cooperate with the Disciplinary Committee and as if they had no obligation to the society and their obligation was only to Mr. B.R Raju, erstwhile chairman or to the CA firm

that employed them. This attitude was there despite the CA firm admitted its fault before PCAOB, US Security and Exchange Commission and paid a penalty of Six Million Dollars for averting proceedings for fraud in Satyam Audit.

60. The penalty even in professional misconduct must commensurate with the damage to the reputation of profession and damage to the society. The professional misconduct such as of the appellants left indelible dirty markson the reputation of the profession, it gave a feeling as if Charted Accountants can blindly sign any financial results and can certify anything. In total disregard to auditing standards. Any accounting /financial fraud can be played right under their nose or with their help.

61. We consider that looking into the damage caused to the reputation of the profession and irreparable and irreversible loss caused to the reputation of Institute of Chartered Accountants of India, the entire faternity and the shareholders and corporate world, the punishment of removal of name of the appellants from Register of the members for life and fine of Rs. 5 lakh is a just punishment.

62. We, for the reasons recorded, find no merit inthe appeals and the same are accordingly dismissed and interim order dated 25th February, 2012 stands vacated.

Justice S.N. Dhingra (Retd.)
(Chairperson)

Rakesh Chandra
(Member)

Ashok Haldia
(Member)

Kamlesh Vikamsey
(Member)

New Delhi
Dated:__September, 2012

APPELLATEAUTHORITY

(Constituted under The Chartered Accountants Act,1949)

AppealNo. 05/ICAI/2012

In the matter of:

CA. V. Srinivasu .....Appellant
(Through : Shri B. Nalin Kumar and Shri K.S. Rahul, Advocates)

Versus.

The Institute of Chartered Accountants of India ..... Respondent
(Through: Shri J.S. Bakshi, and Shri A.S. Bakshi Advocates)

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESHCHANDRA, MEMBER
HON'BLE DR. ASHOK HALDIA, MEMBER
HON'BLE MR. KAMLESH VIKAMSEY, MEMBER

Date of hearing:
2nd June, 2012

Date of order:
5th September, 2012

ORDER

1. The appellant is a Chartered Accountant and a Member of the Institute of Chartered Accountants of India (ICAI). He was working as Director cum Senior Vice President and Chief Financial Officer (CFO) of M/s Satyam Computers Services Ltd. (SCSL) from year 2002 to 2009. He has been found guilty of professional misconduct by the Disciplinary Committee of ICAI vide its report dated 3rd January, 2012 and has been punished vide order dated 23rd January,2012 with removal of his name from the register of members for life and a monetary fine of Rs.5 lacs. The appellant being aggrieved by the report and order passed by ICAI, has preferred the present appeal.

2. The brief facts relevant for the purpose of deciding this appeal are that on 7th January, 2009, Mr. B. Ramalinga Raju, the then Chairman of SCSL wrote a letter to the Board of Directors and sent copies of this letter by e-mail to different regulatory authorities within & outside India in which inter alia he disclosed that the balance sheet of SCSL as on 30th September, 2008 carried inflated (non-existent) cash and bank balances of Rs. 5040 crores out of Rs. 5361 crores which was reflected in the books and non-existent accrued interest of Rs.376 crore, an under stated liability of Rs.1,230 crore on account of funds arranged by him and an over stated debtors position of Rs.490 crores out of Rs. 2651 crores which was reflected in the books. He hasalso disclosed that for the September quarter, the company had reported a revenue of Rs. 2,700 crore and an operating margin of Rs. 649 crore (24% of revenues) as against the actual revenue of Rs. 2,112 crore and an actual operating margin

of Rs. 61 crore (3% of revenues). This had resulted in artificial cash and bank balances going up by Rs. 588 crore in the second quarter alone. Mr. Raju tendered his resignation as the Chairman of SCSL and stated that he was prepared to subject himself to the laws of the land and face the consequences thereof.

3. The above letter of Shri B. R. Raju sent shock waves throughout the corporate world in India as well as outside India. SCSL was a top Information Technology company of India and its official literature claimed of governance by adhering to sound corporate governance principles. A paragraph of report on corporate governance of SCSL reads as under;-

> "Satyam believes that sound Corporate Governance practices provide an important framework to help the Board of Directors fulfill its responsibilities. The Board is elected by shareholders. It is responsible for setting strategic objectives to management and ensuring that stakeholders' long-term interests are served. It does so by adhering to and enforcing the principles of sound Corporate Governance. Thus the management is responsible to establish and implement policies, procedures and systems to enhance the long term value of the Company and delight all of its stakeholders. The principle of 'delighting stakeholder' is part of everything we do at Satyam and is depicted in our value emblem as a mark of our commitment towards this principle."

4. After the disclosure made by Chairman of SCSL, investigations by Securities and Exchange Board of India (SEBI), Central Bureau of Investigation (CBI) and other agencies started into the affairs of the Company. A multi disciplinary investigation team was constituted at the instance of the CBI and the accounts and financial statements of SCSL were gone into and it was found that from the year 2000 onwards, the Company was fudging its financial statements and cash, bank balances, liabilities and the assets of the company were being wrongly reflected. Similarly, debts and revenues were also not being correctly stated. Even T.D.S. on interest was being differently shown in the balance sheet and differently shown in the income tax returns. Bungling of the financial affairs of SCSL, after disclosure by Mr. B.R. Raju, had appeared in newspapers and business magazines throughout the world. The ICAI also swung into action to book those of its members, who being Chartered Accountants and being financial watchdogs failed in their duty and allowed or were involved in fudging of the financial statements / financial information,.

5. A show cause notice was sent to the appellant on 14th January, 2009 by the Director (Discipline), wherein a reference was made to the letter dated 7th January, 2009 addressed by Mr. B.R. Raju to the Board of Directors of the Company admitting the falsification and fudging of the accounts of the company. The letter stated that various regulatory authorities namely SEBI, Registrar of Companies (ROC), and Andhra Pradesh Police were carrying out the inspection of books of accounts of SCSL. The appellant was the Chief Financial Officer of the Company for past several years and was one of the signatories of the financial statements / financial information of the company for all those years when accounts were fudged. The letter enumerated the following allegations against the appellant:-

"The Management of SCSL manipulated/inflated the profit/revenue/cash/debtors/ bank balances and understated the liabilities (in) the annual financial statements of the company for years 2001-02 till the date of letter written by Shri B.R. Raju and the appellant was one of the signatories in all those financial statements and quarterly results which implies that he had signed the manipulated/fudged statement of accounts knowingly; That he violated the accounting principles while signing the accounts/quarterly results of the company for aforementioned years and quarters. That it was also reported in newspapers that he had made a confessional statement before the police of Andhra Pradesh stating that those accounts were manipulated for years to show fictitious and unreal fixed deposits. The statutory auditors never pointed out any deficiency. He (appellant) used to get the finalized accounts from the department and just signed the same and he endorsed on whatever was audited by Price Waterhouse (auditors). That the appellant failed to carry out his duties and role as CFO of the Company diligently and connived with the management of the company in manipulation of accounts of the company for all the previous years."

6. It was opined by the Director (Discipline) that fudging/falsification of the accounts of the company was not possible without the appellant's knowledge as he was the CFO of the Company and that the acts of the appellant have brought disrepute to the profession and to the Institute. The appellant was asked to reply to the aforesaid letter by filing his written statement within 21 days.

7. The appellant in response to the above letter informed the Director (Discipline) that he was under judicial custody and was not in a position to provide the required clarification; he be given a month's time by when he was confident of getting bail and would be in a better position to explain his case. The Director (Discipline) granted one month's time as requested by the appellant. However, the appellant sought further time on the ground that he had not been granted bail and one month time more was allowed by the Director (Discipline) informing him of this vide a letter dated 18th February, 2009 that he should file a written statement by 9th March, 2009. The appellant vide a letter dated 4th March, 2009, sought more time, which was again granted and he was asked to send his written statement so as to reach the Institute by 9th April, 2009. The appellant was still in judicial custody and had not been granted bail. The Director (Discipline) waited for the written statement for quite some time. Ultimately, she gave her prima facie opinion on 17th September, 2009 and sent the same to the Disciplinary Committee. The Director (Discipline) in her opinion observed that the appellant failed to discharge his duty as a Chartered Accountant while being the Chief Financial Officer of SCSL. He failed to supervise the maintenance of accounts and failed to ensure that actual position and financial health of the company was reflected in financial statements. He did not carry out independent verification of audit related matters at his end and did not bring it on record that he had verified the fixed deposit receipts, cash balances etc. or he had received confirmations in respect of bank balances directly from the banks. He did not follow the internal confirmation procedure and internal guidelines of the company itself. Thus, he has committed professional misconduct under clause (7), (8) and

(9) of part I of Second Schedule of the Chartered Accountants Act and 'other misconduct'.

8. The Disciplinary Committee on receiving the prima facie opinion of Director (Discipline) sent a copy of the report to the appellant and asked him to file his written statement to the Disciplinary committee. By the time the disciplinary proceedings were initiated, charge sheets in the criminal case against the appellant had been filed and SEBI had also completed its investigation and given its report. Supplementary chargesheets had also been filed by the CBI. All these documents were sent to the appellant and the appellant was asked to appear and defend himself.

9. The first meeting of the Disciplinary Committee was held on 14th December, 2009. The Disciplinary Committee noted that the appellant was still in judicial custody, so it adjourned the matter till the time the appellant was in judicial custody. The appellant was released on bail on 20th June, 2010. The Disciplinary Committee, after learning about the appellant having been released on bail, fixed the disciplinary proceedings for 12th August, 2010, and sent a notice to the appellant for appearance on 12th August, 2010. The appellant did not appear before the Disciplinary Committee on the said date i.e on 12th August, 2010. The Disciplinary Committee noted that the appellant on 9th August, 2010 had sent a letter seeking adjournment. His adjournment request was rejected by the Disciplinary Committee and an email to this effect was sent to him but the appellant, despite rejection of his adjournment request, did not appear before the Committee either in person or through his authorized representative. The Disciplinary Committee, despite this, decided to grant one more opportunity to the appellant and fixed the matter for 8th September, 2010. On 8th September, 2010 again neither the appellant appear nor did he send his authorized representative to represent him before the Committee.The Committee continued waiting for the appellant and when the appellant did not turn up, it adjourned the hearing to 15th December, 2010. The hearing of 15th December, 2010 was fixed at Hyderabad i.e. the place of residence of the appellant. The appellant was informed about this. However, on 15th December,2010, also the appellant did not turn up. Neither did he he send in a request for adjournment nor did he send any representative. The Committee learnt that the appellant was in judicial custody as his bail was cancelled on 22nd October, 2010, by the order of the Hon'ble Supreme Court and he was directed to surrender on 8th November, 2010. Noting this fact, the Committee decided to adjourn the case and fixed the next hearing on 18th June, 2011. This meeting of Disciplinary Committee was cancelled due to certain reasons and the next meeting of the Committee was fixed on 9th July, 2011 at Hyderabad. The committee for that day had summoned witnesses as well. The Committee on 9th July, 2011 also kept waiting for the appellant or his representative but the appellant did not send either an adjournment request or his representative. In the absence of the appellant, the matter was again adjourned by the Committee for the sixth time in a row and the next hearing was fixed on 16th October, 2011. On 16th October,2011,the Committee learnt that the appellant was in judicial custody on that day. So the Committee adjourned the matter for 18th December, 2011. The Committee also noted that looking at the facts and circumstances of the case, no witnesses required to be examined in the case. So the Committee dispensed with the examination of witnesses.

10. The appellant was admitted to bail by the order of the Hon'ble Supreme Court on 4th November, 2011. Thus on 18th December, 2011, the appellant was not in judicial custody. The appellant continued to enjoy bail as granted by Hon'ble Supreme Court continuously from 4th November, 2011 onwards. The meeting of the Disciplinary Committee on 18th December, 2011 was fixed at Hyderabad. The appellant, despite being on bail for about more than a month prior to the date of hearing chose not to appear before the Disciplinary Committee either in person or through his representative. He also did not send any letter so as to reach the Disciplinary Committee, before the date of hearing, seeking adjournment. The Committee taking into account the information and evidence available on record decided to conclude the hearing ex parte and gave its report on 3rd January,2012.

11. Vide its report dated 3rd January, 2012, the Disciplinary Committee held the appellant guilty of professional misconduct falling within the meaning of clause 1 of part II of the Second Schedule read with clause 7 of part I of the Second Schedule and other misconduct falling within the meaning of Clause 2 of Part IV of the First Schedule under section 21 read with section 22 of the Chartered Accountants Act, 1949. A copy of this report was sent to the appellant and the appellant was asked to appear and address arguments on quantum of punishment on 12th January, 2012. The appellant vide a letter dated 6th January, 2012 sought adjournment seeking 8 weeks time. The Disciplinary Committee vide a letter dated 12th January, 2012 informed the appellant that keeping in view his request, the matter had been adjourned to 21st January, 2012 at 1115 hours at Hyderabad. The appellant on 21st January, 2012, for the first time appeared before the Committee and gave his written submissions and his counsel made oral submissions before the Disciplinary Committee. The Disciplinary Committee thereafter passed an order dated 23rd January, 2012,directing removal of the name of the appellant from the register of members permanently and also imposed a fine of Rs.5 lacs on him.

12. The appellant by way of present appeal has assailed the order of the Disciplinary Committee on various grounds. The main grounds of attack by the appellant are as under:-

    i) The Disciplinary Committee has not followed the principles of natural justice. He was not given sufficient opportunity to defend himself as he was in judicial custody for most of the time when proceedings were being conducted by the Disciplinary Committee

    ii) The Director (Discipline) had given a prima facie opinion of his being guilty under clauses 7, 8 and 9 of part I of Second Schedule and other misconduct under section 21 and section 22 of the Act. Part I of the Second Schedule applies to Chartered Accountants in practice. The appellant was not a Chartered Accountant in practice. The Disciplinary Committee considered him guilty under clause 1 of Part II of Second Schedule read with clause 7 of part I of Second Schedule and other misconduct. Thus the findings of the Disciplinary Committee were different from the findings of the Director (Discipline) and as the Disciplinary Committee disagreed with the opinion of the Director (Discipline), it should not have issued a show cause notice for professional misconduct and the report of the Disciplinary Committee dated 3rd January, 2012 was illegal and contrary to the

provisions of the Chartered Accountants Act regarding investigation of professional misconduct.

iii) The charge against the appellant was based on statement of the Chairman made to the Board on 7th January, 2009 and on the CBI chargesheet and SEBI investigation team report. No independent investigation was conducted by the Director (Discipline) or Disciplinary Committee.

iv) The disciplinary committee wrongly held that an action could be taken against the appellant under clause 1 of part-II of Second Schedule of the Chartered Accountants Act, 1949 where under, a Member of the Institute, even if an employee, has to exercise due diligence and has not to be grossly negligent in conduct of his duties, since the notification relied upon by the Disciplinary Committee which contained this guideline hadnoforce of law.

v) There was absolutely no material on record to show as to what was the work entrusted to the appellant by SCSL and the details of lack of due diligence and gross negligence in his conduct in discharge of his duty.

vi) The disciplinary authority failed to produce evidence to prove that the appellant was responsible for financial dealings of SCSL and had knowledge of whatever was happening in SCSL. The disciplinary authority held the appellant vicariously liable, without pointing out his job responsibilities and the overt act done by him.

vii) No resolution was ever passed by the Board of SCSL delegating its powers /responsibilities to the appellant as required under Article 51 of the Articles of Association of SCSL. Preparation of the accounts was a job of the Directors of SCSL and not of the appellant. The appellant was not a Director on Board but was merely an employee Director,who was designated as Director and Sr. Vice President. Neither the Managing Director nor Board of SCSL ever gave the appellant anything in writing charging the appellant with the duties of maintenance or preparation of financial statements, balance sheet and Profit & Loss Account. No evidence was produced to show that the appellant had actually given the Chief Financial Officer's certification to financial statements, that too with the knowledge of the alleged fraud. The Disciplinary Committee only presumed the duties of the appellant and since he was a Chartered Accountant presumed that Board of Directors would rely heavily on statement made to them by a person who was Member of the Institute.

viii) The Disciplinary Committee had wrongly shifted the onus of proof on the appellant. The appellant had not to prove anything and it was the Disciplinary Committee that had to prove the misconduct of the appellant.

ix) The Disciplinary Committee was vindictive in its approach and on the pretext that appellant had not sent replies at the earlier stage ignored the submissions made by the appellant in written representations dated 21.1.2012.

x) The Disciplinary Committee wrongly dispensed with the examination of witnesses and wrongly proceeded ex-parte against the appellant just to push forward its predetermined agenda.

xi) The Disciplinary Committee wrongly treated the newspaper reports as information under section 21 (2) of the Chartered Accountant Act. The Disciplinary Committee wrongly came to conclusion that it was the responsibility of the appellant to bring to the notice of the Board of Directors various lapses and frauds and practices in the financial statements and on this assumption wrongly came to the conclusion that the appellant conducted gross negligence in the discharge of his duties or committed professional misconduct.

13. The appellant had taken almost the same grounds in his written statement before the Disciplinary Committee when he was asked to appear and represent himself after the Disciplinary Committee had found him guilty of 'professional misconduct'.

14. We have heard the learned counsel for the parties at length and have perused the material on record. Before considering the grounds of appeal taken by the appellant, it would be necessary to consider as to what is a Chartered Accountant and how a Member of the Institute is looked upon by the society. A Chartered Accountant is a specially trained person capable to undertake various statutory functions under the Companies Act and under various other Acts, in respect of management and administration of companies and in respect of financial affairs of the company. The provisions of the Companies Act are indicative of the extent to which a Chartered Accountant is looked upon by the society with special reference to the corporate world. Even under the Income Tax Act and other Acts, Chartered Accountant has been given a special place. This position of the Chartered Accountant in law demonstrates the faith that various Government departments and the public repose in the professional qualifications, competence and integrity of a Chartered Accountant. That is the reason that the Chartered Accountants in India not only carry independent practice as practicing chartered accountants but are also employed in companies at high positions with the expectation that they shall continue to use their professional acumen and integrity for the benefit of the shareholders and the Board of Directors. The conduct of a Chartered Accountant has to be tested and appreciated in context of the responsible position which the law has given to him, whether as a practicing Chartered Accountant or as an employee Chartered Accountant anda Member of the Institute.

15. The Chartered Accountant whether an internal auditor or external auditor or holding a position of authority in a company, is expected to act in the best interest of the stakeholders and in case he is the chief authority in the financial department, he is supposed to examine the accounts of the Company with a view to inform the shareholders of the true financial position of the company. He is supposed to exercise such 'reasonable care' as would satisfy a man that the accounts were genuine and there was nothing to arouse suspicion on honesty in the accounts. He is under a clear duty to probe into the transactions and tore port the true character of the transactions.

16. There is no dispute about the fact that the financial statements of SCSL were forged continuously from the year 2000-2001 till 7th Jan, 2009, as informed by Mr. B. Ramalinga Raju, the then Chairman of SCSL by his letter to the Board of Directors and to regulators showing his willingness to undergo the punishment for the same.

17. There is no doubt that a company is managed by a Board of Directors but no company is run by the Board of Directors alone. The Board of Directors employ managers and other officials for running the business of the company. These managers and officials of the company are given various designations in the company according to their responsibilities. It is not necessary for the Board of Directors to pass resolutions specifying the powers of each & every employee or official of the company. In case of SCSL, there were about 5000 employees and it was not required that for each employee, the Board of Directors should pass a resolution assigning responsibilities. It is implied that whenever employees are engaged by a company, they are given responsibility to discharge certain functions commensurate with their designations and the pay package.

18. The plea taken by the appellant that he was not a Director on Board of the company is correct. However,he has not denied that he was a high official of the company holding a responsible position of the Director, Sr. Vice President and Chief Financial Officer.

19. SCSL had constituted an audit committee. The document on corporate governance of SCSL claims that the audit committee consisted of 100% independent and non-executive directors which helped the Board of Directors fulfill their oversight responsibilities. The Committee consisted of four persons and it is specifically mentioned in the governance documents that meetings of audit committee were attended by Chief Financial Officer, head of internal audit and statutory auditors as invitees. The appellant was the Chief Financial Officer and had the responsibility of attending the meetings of the audit committee. The appellant was a Chartered Accountant by training and was a member of the ICAI. Obviously, being the CFO, he was to oversee the entire accounts, accounting, principles and procedures being followed by the company. He was not only the Chief Financial Officer but also made a Director and it is admitted by him that he was authorised by the Board to sign the annual financial statements. It is his own case that this power was delegated to him by the Board. When powers are delegated to a person to sign the documents on behalf of another person then the person steps into the shoes of other person and takes upon responsibility to ensure that what he signs is in order and as per law. Power and responsibility go together. He cannot take thea plea that he was merely to sign the documents with no responsibility at all to ensure that the financial statements were correct and credible and this responsibility was of the Board Members who delegated the powers to him.

20. The appellant has extensively relied upon provisions of the Companies Act as well as reported cases under Section 138 of the Negotiable Instruments (NI) Act to press the point that he had no responsibility, as he was not a member of the Board of Directors and he was only an employee Director. He, among many cases has relied upon, SMS Pharmaceuticals Vs. Neeta Bhalla and Anr. (AIR 2005 SC 3512). Even in this case, the Supreme Court held that liability arises from being incharge of and responsible for the conduct of business of

the company at the relevant time and liability depends on the role one plays in the affairs of the company and not on holding a designation or office. It is apparent from this judgment that every person who has the responsibility to play a role in the affairs of the company is to be held responsible for such affairs. The appellant being an employee Director and CFO was delegated the powers of signing the financial statements and of attending the Audit Committee meetings. These powers were not delegated to the appellant because someone in the Board was pleased with the appellant's appearance or he was very close to someone in the Board. These powers were obviously delegated to the appellant because he was made a Director and Chief Financial Officer and Sr. Vice President and was holding a responsible position in the company and he was a Chartered Accountant by qualifications and was a Member of the Institute of Chartered Accountants of India (ICAI), who was specially skilled in overseeing the financial reporting of the company and detecting financial irregularities. If he did not have the qualification of being a Chartered Accountant and member of ICAI and had been simply a B.Com. or a Graduate he would not have reached the post of a Director and Sr. Vice President and Chief Financial Officer which he was occupying. He was occupying such a senior position in the company and drawing handsome remuneration (and also having stock options as is evident from testimony of Shri A. Srinivas Murthy given before (Chief Metropolitan .Magistrate (CMM), Hyderabad on which the appellant has relied) because of his being a Chartered Accountant and Member of ICAI and having the skill which a Chartered Accountant has. Even Mr. A. Srinivas Murthy, who was another employee Director and Sr. Vice President from the engineering side, in his testimony before the CMM stated that the Satyam Associate Trust used to have its accounts prepared, income tax returns filed and he used to sign such statements only after they were signed by financial executives and in this particular case, the finance person was the Chief Financial Officer of the Company, who was one of the trustees viz. the appellant. This very witness further stated that these designations of Director and Sr. Vice President were assigned to persons on the instructions of the Chairman & Managing Director of the company and not by the H.R. department on its own. This witness also stated that the appellant was promoted as Director and Sr. Vice President in October, 2002. From the testimony of this witness, relied upon by appellant, it is clear that since the appellant was the Chief Financial Officer of the Company, the people used to trust him and if his signature were there on the financial statements, they would believe that the statement was true and fair and would sign it. The witness categorically stated that since he was not a man from finance, he used to sign the annual accounts of the Trust after looking at the signature of the Chief Financial Officer i.e. the appellant. So, the argument raised by the appellant that he was delegated the powers by the Board of Directors only to sign the balance sheet and financial statements on behalf of the Board and that he was merely an employee and being CFO did not mean that he became responsible for the financial statements was a baseless argument. In T. Engineers India Ltd. Vs. Naganyara Finance Company, 2000 (1) ALT RL 379, the High Court observed that since the accused was a financial controller of the firm, he was responsible for the conduct of the business of the firm. A finance controller has a definite role to play in the working of the company and is liable for prosecution. Similarly, in Rajesh M. Rama Naik vs. State of Maharashtra, decided by the Bombay High Court on 29th April, 2011, Bombay High

Court observed that a Chief Financial Officer was responsible for conduct of the business of the Company and therefore was liable for prosecution under Section 138, NI Act.

21. The appellant has relied upon Section 209 (6) (a) of Companies Act, 1956 as well as a circular issued by the Ministry of Corporate Affairs to argue that, wherein a company has a Managing Director or a Manager or a Company Secretary, a person who has been charged with job of maintenance and preparation of accounts, such person would be liable for prosecution in case of non compliance of the provisions of the Companies Act. He was not even vicariously liable since he was not a Manager or Company Secretary or Managing Director of SCSL. The reliance of the appellant on Section 209 (6) is misplaced. Section 209 is about keeping proper books of accounts at the registered office of the Company. The posts of President and Vice-President in the context of the company's management only means managerial persons. Similarly, the companies had the practice of designating executives who were not members of the Board as Special Director, Director (Admn.) or Director. The circular No. 2/82 dated 20.1.1983 and the circular No.11/90 dated 23rd May, 1990 of the Ministry of Corporate Affairs (MCA) have specifically advised the companies to desist from giving such designations as of a Director and Director (Admn.) etc. to managerial persons. However, by merely having the designation of Director and Sr. Vice President, the character of the appellant's duty did not change and he continued to be a manager as Chief Financial Officer and was responsible for looking after the financial aspects of the company. Since he was a Chartered Accountant and a Member of ICAI, the ICAI could expect from him the conduct of his duties in a manner that are commensurate with the reputation of ICAI and the reputation of a Chartered Accountant.

22. 'Professional misconduct' has been defined in Section 22 of the Act. Chartered Accountants Act, 1949. Intendment and object of the Act is to maintain standard of the profession at a high level, and consequently a code of conduct has been prescribed. 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. Chartered Accountant's Profession occupies a place of pride amongst various professions of the world. That makes observance of the professional duties and propriety more imperative. When conduct of a member of the profession is contrary to honesty, or opposed to good morals, unethical, it is misconduct-warranting consequences indicated in the Statute. A large section of public relies on objectivity and integrity of professional accountants to maintain the orderly functions of commerce. Thus Chartered Accountants hold a position of trust. By betrayal of the trust, the conduct becomes one which is unbecoming of the professional. (Council of Institute of Chartered Accountants of India Vs. B. Ram Goel, 2001(57) DRJ (DB).

23. The test of what constitutes "Grossly improper conduct in the discharge of professional duties has been laid down in many cases. In the case of a Solicitor Ex Parte the Law Society (1912) 1 KB 302, Darling J. adopted the definition of "infamous conduct in a professional respect", on the part of a medical man as stated in Allinson Vs. General Council of Medical Education and Registration (1894) I QB 750, and applied to the same professional misconduct on the part of Solicitor, and observed:- "If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as

disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council to say that he has been guilty of "infamous conduct in a professional respect" (Council of Institute of CA Vs. Ajay Kumar Gupta date of decision 28.2.2012 (Delhi High Court Division Bench)"

24. The word 'misconduct' in the generic sense envisages breach of discipline. It may not be possible to lay down exhaustively as to what would constitute misconduct or indiscipline. However, in case of Chartered Accountants, it would be wide enough to include wrongful omissions or commission on the part of a the Member of ICAI and it would mean improper behavior or violation of a rule of standard or behavior. Misconduct is transgression of an established rule of action, where no discretion is left except what the standard code of conduct demands. Though, it does not mean mere carelessness but it means adhering to professional conduct expected of a privileged class of persons like Chartered Accountant who are bound to conduct themselves in a manner befitting the high and honourable profession to which they belong. Whether there was professional misconduct or not would depend upon the facts and circumstances of each case.

25. Thus, it is to be seen whether the appellant had any obligation or duty to conduct himself in a manner other than that in which he conducted himself and whether he acted in a manner not befitting the profession of Chartered Accountant.

26. Although the appellant has taken a stand that the statement of Mr. B. Ramalinga Raju, ex-Chairman of SCSL, has not been proved but right from the time notice was served on him when he was in jail, till he filed his reply in January,2012,he has not taken a stand that the statement of Mr.B. Ramalinga Raju made to the Board or to the regulators and the world at large was wrong and in fact there was no fudging of the accounts. If he had taken the stand that there was no fudging and falsification of accounts, the case would have been different. Since he has not taken the stand that there was no fudging of accounts and the cash balances and other things as shown in the financial statements were correct and the deposits shown in the statement of accounts of the company were actually there, the debtors' liability as shown was actually there, the TDS as shown deducted was actually deducted and the revenues generated as shown in the accounts were actually there, this argument has no value. If the CFO of a company does not deny the correctness of the statement made by Chairman that only means that he admits the correctness of the statement made by Chairman to the Board and other regulators and he admitted that the fudging of accounts was there. Had the fudging not been there and had the figures as shown in the balance sheet and financial statements been correct, he and other officials of the company would not have spent so many months in jail which they spent. It is only because the statement of Mr. B. Ramalinga Raju about the fudging of accounts was correct and the financial statements of SCSL were wrong and false that Mr. Raju showed his desire to undergo whatever punishment law would give him. Thus, there is no issue whether the statement made by Mr. Ramalinga Raju was proved or not proved. The only issue is whether the appellant, being the Chief Financial Officer and a signatory to false and fudged financial statements year after year as a Director (employee) acted bona fide or he did he indulge in professional misconduct. It is not denied by him that he was signing these financial statements year after year. What is denied by

him is the knowledge that these statements were fudged. If it is to be believed that a Chief Financial Officer has to sign all the documents with his eyes closed, ears plugged, mind shut, then only it has to be considered that the Chief Financial Officer has done no wrong but if it is to be considered that a Chief Financial Officer, a Chartered Accountant and a Member of ICAI drawing annual salary in crores was to be vigilant enough to ensure that the accounts reflected the true & fair financial position then it is to be believed that the appellant despite being a Chartered Accountant and a Member of ICAI did not exercise due diligence and did not perform his duty of verifying the correctness of the accounts.

27. The appellant has taken the plea that being an employee Director, he was having no duty as a Chartered Accountant and as a Chief Financial Officer, he had no duty towards the members of the Board since it was the responsibility of the Board of Directors to get the financial statements prepared. He was signing the financial statements only as a delegate of the Board. If we accept this argument that an employee professional, employed by a company has no responsibility either towards his profession or towards the common man or towards those to whom he is ultimately answerable, there would be chaos in the society. Assume a 'surgeon' doctor is employed by a hospital company and is given the task of removing kidneys of every patient admitted in the hospital for whatever ailment, so that kidneys can be sold by the management to those who need replacement and the employee doctor says that he had no responsibility to the patients admitted in the hospital and he was only liable to obey the hospital command and given the task of removing kidneys of all patients admitted in the hospital, he kept on removing kidneys, what shall be the situation. Assume an advocate is employed by a company and is given the task of ensuring all illegalities of the company are covered up by forged documents so that they do not come to the knowledge of the authorities and the company keeps on committing illegalities and the advocate keeps creating such documents that illegalities are not easily detected and when caught, the advocate takes the plea that he was merely an employee and had no responsibility towards the society. Take the case of an architect employed by a real estate company constructing flats and the architect is given the task of erecting such flats which are low in quality and which do not have much life so that the company saves a lot of money and cheats and puts the lives of customers in danger and the architect says he was bound by the dictates of company. If the professionals take the plea that they were merely employees and had no responsibility to the society or to the noble profession they belonged and they had only to follow the instructions, the whole system of trust and faith in professionals will collapse. We, therefore, consider that the plea taken by the appellant that since he was merely an employee with powers delegated by the Board of Directors to sign the financial statements, he had no responsibilities of checking the veracity of the statements cannot be accepted.
A Chartered Accountant and a member of ICAI whether he is an employee or a practicing Chartered Accountant has an obligation to ensure that when he signs a financial statement of a company, it reflects the truth and not falsehood. The financial statements of SCSL which he signed as a CFO & employee Director should have been reflective of the true picture of finances. Merely because he was appointed and promoted by the Chairman and Managing Director as Sr. Vice President and Director or he was getting very handsome package, was

not sufficient to throw all norms of a Chartered Accountant and caution to the wind and blindly sign the balance sheet and financial statements.

28. A very strong argument has been made by the counsel for the appellant that the charges of professional misconduct were quasi criminal in nature and the proof must be beyond reasonable doubt. He stated that in this case there was no proof of the professional misconduct of the appellant. No evidence was recorded by the Disciplinary Committee to show that the appellant committed any overt act or omitted to do an act. Since no evidence was recorded, the Disciplinary Committee merely placed reliance on the SEBI report, the CBI report and charge sheet. These documents could not be relied upon.

29. What is admitted is not required to be proved. It is admitted that the appellant was Director and Sr. Vice President of the Company and was working as the Chief Financial Officer. It is admitted that he was given powers of signing the balance sheet and financial statements as a Director by the Board. It is evident from the record that he was attending meetings of Audit Committee as an invitee being the Chief Financial Officer. It is not in dispute that the contents of the statement of Mr. B. Ramalinga Raju have not been denied by him as incorrect and it is not his case that the facts given either in the letter of the Director (Discipline) or in the prima facie opinion or in the report of the Disciplinary Committee about the fudging of accounts, the years for which the accounts were fudged and to the extent to which the accounts were fudged were wrong. Thus it was not required to be proved by any one that the accounts were fudged. The extent of fudging of accounts of SCSL is an undisputed fact. Nothing more was required to be proved. It was for the appellant to prove that he being the Chief Financial Officer and a Chartered Accountant had acted diligently and despite his diligence and despite his taking precautions, he could not detect fudging of the accounts. Only he knew what kind of diligence he had exercised. Only he knew what kind of cross checking he had done. Only he could have thrown light as to how the actual cash in the bank was about 10% of what was being reflected in the balance sheet. The onus to show that his conduct was in accordance with standards required of him was on him. Nobody else could have thrown light on this. It is a settled principle of law that what is in the special knowledge of a person is to be proved by him. If two friends are there in a closed room and one of them is murdered in that closed room, if the other friend takes the plea that he had not murdered his friend, the onus would be on him to show how his friend got murdered in a closed room by someone else, when only he and his friend were in that room. The prosecution has only to show that two friends were there in that room, there was no third person and one friend was found murdered in that room, while the other friend was still there. It is, because it was within the special knowledge of that person who was in the company of the murdered person, as to how he died (if he has not murdered him). We, therefore, consider that it was not for the ICAI to prove what was the conduct of the appellant in view of the proven facts that the financial statements were false and fudged. It was for the appellant to prove the steps taken by him and to show that he had taken all precautions as the Chief Financial Officer. The kind of checks and balances he was applying, the kind of verifications he was performing to ensure that the financial statements reflected

the true & fair picture of the state of affairs of the company was within his knowledge and he ought to have proved the same.

30. The attitude of the appellant throughout the proceedings had been of not saying anything on facts and keeping silent and raising technical objections. He did not bother to attend the proceedings even when he was out on bail. He instead of attending the proceedings wrote a letter to the Disciplinary Committee that he had not been forwarded the material based on which disciplinary action was being taken against him. He took the plea that he was busy in his criminal trial and had no time for the Disciplinary Committee. He did not bother about the disciplinary proceedings. The entire conduct of the appellant shows that he had no intention to submit to the jurisdiction of the Disciplinary Committee and to explain his own conduct as the CFO. In fact, he alone could have appeared as a witness before the Disciplinary Committee and made a statement in respect of his conduct as the CFO concerning verification of financial statements. From the tone and tenor of his arguments that he was only an employee and from his attitude, it only appears that he was more faithful to Mr. B. Ramalinga Raju than to his profession and the members of the Board or shareholders and he was ensuring that he continued to be faith ful to Mr. Raju.

31. Another plea taken by the appellant is that since the Director (Discipline) had given an opinion of his having committed professional misconduct under clauses (7), (8) and (9) of part I of the Second Schedule of the Act and 'other misconduct' under Section 21 read with Section 22 of the Act, this clause was applicable only to the Chartered Accountants in practice. Since the appellant was not a Chartered Accountant in practice, part I of Second Schedule was not attracted. Therefore, the entire proceedings of the Disciplinary Committee based on the report of Director (Discipline) were vitiated and was non est.

32. Professional misconduct of a Chartered Accountant is not merely numbers and provisions mentioned in First & Second Schedule of the Chartered Accountants Act, 1949. Neither is the Disciplinary Committee is bound by the opinion of the Director (Discipline) as to under what provisions of the Schedules the misconduct was covered. First & Second Schedule of the Chartered Accountants Act, 1949, which enlist various forms of professional misconduct are not exhaustive in themselves. Section 22 of the Chartered Accountants 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 circumstances."*

33. A perusal of the above definition would show that the definition of misconduct was only an inclusive definition. The Supreme Court in Vanguard Fire & General Insurance vs. Fraser & Ross & Anr. (AIR 1960 SC 971) had laid down that where a word is defined as "mean" such and such, the definition is prima facie restrictive and exhaustive. In contrast where the word defined is declared to "include" such and such, the definition is prima facie extensive.

This position was further emphasized by the Supreme Court in State of Bombay vs. Hospital Mazdoor Sabha (AIR 1960 SC 610). We consider that even if the misconduct does not fall under any of the provisions given in the Schedules, the Disciplinary Committee can still make an inquiry into the misconduct and hold a Chartered Accountant guilty of professional misconduct and award him an appropriate punishment. Earlier, the Council of the Institute of Chartered Accountants of India was having this power of awarding punishment in case of misconduct. The powers of the Council were conferred on the Disciplinary Committee by amendment of the Chartered Accountants Act, 1949 in 2006. The powers of the Disciplinary Committee are as wide as the powers of the Council of Institute of Chartered Accountants of India were under the unamended Act and the Disciplinary Committee can inquire into any professional misconduct whether it is specifically covered or not covered within the various provisions of the two Schedules. The Act created two forums for disciplinary action, one being the Board of Discipline whose powers are restricted and limited and the other being the Disciplinary Committee whose powers are wide. The Disciplinary Committee can go into all aspects of professional misconduct of the Chartered Accountants. We, therefore, consider that the plea taken by the appellant that the report of the Disciplinary Committee was non est is baseless. It is immaterial whether appellant was a practicing Chartered Accountant or was an employed Chartered Accountant. The Disciplinary Committee had powers to conduct inquiry in respect of professional misconduct of both.

34. The other argument raised is that the proceedings were initiated against the appellant without jurisdiction. The alleged information which formed the basis of enquiry was not information within the meaning of the Act and Rule 7. The element of information was missing and the Disciplinary Committee wrongly relied on Section 22 for expanding the scope of information. It was submitted that the Directorate can invoke Section 22 only upon receipt of an information or a complaint. The Director (Discipline) does not enjoy a power to begin an enquiry suo moto. It was further submitted that the Supreme Court has held newspaper reports were grossly hearsay and therefore inadmissible evidence.

35. Section 21 (2)of the Chartered Accountant Act, 1949 reads as under:-

> *"On receipt of any information or complaint along with the prescribed fee, the Director (Discipline) shall arrive at a prima facie opinion on the occurrence of the alleged misconduct". It is apparent that Director (Discipline) has to act when he receives a complaint along with prescribed fee or she receives information. Section 21 of the Act prescribes that the Council has a duty to establish Disciplinary Directorate headed by a Director (Discipline) and having other employees for making investigations in respect of any information or complaint received by it (in respect of professional misconduct).*

36. The whole Disciplinary Directorate consisting of the Director (Discipline) and employees working under her, the Board of Discipline and the Disciplinary Committee of the Institute are meant to take action in respect of professional misconduct of the Members. This professional misconduct may be brought to the notice of the Director (Discipline) either through a complainant or the Director (Discipline) may receive information about the professional

misconduct through any other source. Sources of information can be many, including a news report. News items appearing in print media, electronic media or internet media may be either truthful or may be altogether false. The Director (Discipline) of the Institute cannot refuse to act on information about professional misconduct of a member, which comes to its his notice through media, on the ground that every media report is merely hearsay and therefore cannot be acted upon. The primary role of the Director (Discipline) in such a case would be to find out the truthfulness of the information and once the Director (Discipline) comes to a conclusion that the information which came through media was truthful, she has a duty to act on such information. The Director (Discipline) can refuse to act on false information. However, if the information has substance and is not false information, then the Director (Discipline) hastoact on such information. It is not necessary that there has to be an informant to invoke Section 21 and the Director (Discipline) can suo moto take action after coming to know of a serious professional misconduct of a Chartered Accountant through news reports or the media. Clause (1) of part IV of the First Schedule provides that if a member is held guilty by a civil or criminal court for an offence which is punishable with imprisonment for a term not exceeding six months, shall deemed to be guilty of 'other misconduct'. If a news item appears either in print media or in other media about a Chartered Accountant having been convicted by a court for an offence say of cheating, fraud, rape, theft etc., it would be obligatory on the part of the Director (Discipline) to find out the truthfulness of such a news item and thereafter issue a notice to the member and verify the facts from him. The Director (Discipline) has to send her prima facie opinion even in respect of information received through the media to the Board of Discipline or the Disciplinary Committee as the case may be. The action on the basis of information includes and means the information received from any source, including media. In the present case, the information of the letter written by Mr. Raju to the Members of the Board of Satyam had appeared in almost all newspapers and all channels of Television in India as well as in all important media of foreign countries.. It would be a travesty of justice to say that the Director (Discipline) should have kept her hands off because there was no informant in this case.

37. The appellant had taken another plea that he did not get sufficient opportunity to defend himself. The principles of natural justice do not require that if a person is not interested in appearing before a Disciplinary Committee and defending himself, the Disciplinary Committee should go to his house, request him and pray to him that he should come and defend himself. The Disciplinary committee or any other forum where the proceedings of a judicial or quasi judicial nature are conducted can only provide an opportunity to a respondent/delinquent to defend himself. It cannot force the delinquent to defend himself. In this case when the appellant was in jail, the Disciplinary Committee adjourned the proceedings and did not conduct the proceedings. However, when the appellant came out of jail and was on bail, he was given due notice of the dates of hearing; he was asked to appear before the Disciplinary Committee. The sitting of the Disciplinary Committee was held in his home town, Hyderabad where it was easier for him to come and appear before the Disciplinary Committee. The Disciplinary Committee could not have done anything more to meet the principles of natural justice. The appellant did not even bother to inform the Disciplinary before the date of

hearing about his intention not to appear before the Disciplinary Committee. Since he was within the same town defending another criminal case, he could have appeared before the Disciplinary Committee also. It is not his case that on the day when Disciplinary Committee fixed its proceedings, he was attending and defending himself in a criminal case, as the date of hearing of the criminal case was the same. We, therefore, consider that this plea of not following the principles of natural justice is a baseless plea.

38. The appellant has also pleaded that the punishment awarded to him by the Disciplinary Committee was too harsh and unjust and he has prayed for a lenient view. It is also submitted that the approach of the Institute should be reformative rather than retributive and there was no proof of his direct involvement in any fraud or fudging of the accounts. The Institute despite this imposed harsh punishment.

39. The Disciplinary Committee was not looking into any aspect of involvement of the appellant into forgery or fudging of the accounts. The institute was merely looking into the aspect of professional misconduct. Thus the absence of elements of criminal offence is not helpful to the appellant. The appellant was CFO and Director in Satyam. He was delegated with powers to sign, on behalf of Satyam Board, the financial statements. He was also attending meetings of the Audit Committees and the external auditors. Being a Chartered Accountant and holding such a senior position in Satyam, he had added responsibility of maintaining professional integrity and ensuring accounting and audit discipline. His stand taken before the Disciplinary Committee and before the Appellate Authority was such as if he had no responsibility excepting that as acting as rubber stamp of the Board of Directors. His defence before the Disciplinary Committee as well as before the Appellate Authority shows that he had thrown professionalism to winds and became subservient to the desires of Chairman of Satyam, Shri B.R. Raju. Instead of exercising due care and disclosing truth as to how continuously for nine years, the fraud of fudging of financial statements was perpetrated and went undetected under his nose he preferred to go to jail. If there is any award to be given for faithfulness to the employer, he deserves the same but he does not deserve any mercy for professional misconduct which he did by not adhering to his duties as a Chartered Accountant being a CFO of the company. Higher you rise higher is the responsibility on your shoulders and higher is the expectations from you of professional integrity by the society. If the people at high posts do not show the professional integrity and do not perform their professional work with due diligence and just become signing machine, they do not deserve the licence to continue the profession. The Counsel for the appellant in fact had argued that it could not have been expected from him to speak against his employer and to lose the job.

40. Neither during disciplinary proceedings nor during proceedings before the Appellate Authority, the appellant showed any remorse for his conduct. He had no realization of any kind regarding damage done to the profession and the disrepute brought to the Institute and profession of Chartered Accountant.

41. We consider that looking at the severity of professional misconduct of the appellant and the fact that he had no feeling of remorse and acted like rubber stamp for all the years when he was CFO, the punishment of removal of his name from the Register of Members of the Institute for life and a fine of Rs.5 lacs was just punishment.

42. In view of the above discussion, we do not find any infirmity with the impugned orders of Disciplinary Committee. The appeal is devoid of any merits and is accordingly dismissed.

Justice S.N. Dhingra(Retd.)
Chairperson

Kamlesh Vikamsey
Member

Rakesh Chandra
Member

Dr. Ashok Haldia
Member

New Delhi
Dated this 5th day of September, 2012

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 12/ICAI/2012

IN THE MATTER OF

C.A. V.S. Prabhakara Gupta ……. Appellant
In Person

Versus

The Institute of Chartered Accountants of India & Ors. ….Respondent
Through: Sh. J.S. Bakshi, Advocate

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE DR. ASHOK HALDIA, MEMBER
HON'BLE MR. KAMLESH VIKAMSEY, MEMBER

Date of Hearing:
27-10-2012

Date of Order :
23-12-2013

ORDER

1. The appellant has preferred this appeal against the order dated 11.5.2012 of the Disciplinary Committee of the Institute of Chartered Accountants of India (ICAI) whereby he was held guilty of professional misconduct under clause 7, 8 and 9 of Part-I and clause 1 of Part-II of the Second Schedule and 'other misconduct' falling within the meaning of clause 2 of Part-IV of the First Schedule under section 21 read with section 22 of the Chartered Accountants Act, 1949.The Disciplinary Committee imposed a penalty of removal of the name of the appellant from the register of members permanently and imposed a fine of Rs. 5 lacs on him.

2. The brief facts leading to this appeal are that the appellant was head of the 'Internal Audit Team' of Satyam Computer Services Ltd. (SCSL) for the years 2000- 01 to 2008-09 till January, 2009. On 7th January, 2009 Shri B. Ramalinga Raju, the Managing Director and CEO of SCSL wrote an e-mail to the Board of Directors of the Company and sent this e-mail to the Chairman of Securities and Exchange Board of India (SEBI). The information spread all over the world immediately. The Board of Directors and SEBI were informed as under:-

    1. The Balance Sheet of SCSL carried as on September 30, 2008

        a) Inflated (non-existent) cash and bank balances of Rs. 5,040 crores (as against Rs. 5,361 crores reflected in the books)

b) An accrued interest of Rs. 376 crores which was non-existent

c) An understated liability of Rs. 1,230 crores on account of funds arranged by me

d) An over stated debtors position of Rs. 490 crores (as against Rs. 2651 crores reflected in the books)

2. For the September quarter (Q2) we reported a revenue of Rs. 2,700 crores and an operating margin of Rs. 649 crores (24% of revenues) as against the actual revenues of Rs. 2,112 crores and an actual operating margin of Rs. 61 crores (3% of revenues). This has resulted in artificial cash and bank balances going up by Rs.588 crores in Q2 alone."

3. He also informed vide this e-mail that an amount of Rs. 1,230 crores was assigned to Satyam though not reflected in the books of accounts of Satyam, to keep the operations of Satyam going on and to ensure prompt payment of salaries to the associates. This e-mail of Shri B.R. Raju sent shock waves throughout the corporate world, not only within India but across the globe, as Satyam was also a listed company in USA's stock exchange and was well known world over.

4. The information sent by Shri B.R. Raju to the Board of Directors and other stakeholders through the e-mail showed that two sets of accounts were being maintained in SCSL under the very nose of Internal Auditors as well as External Auditors. This raised a question mark about the professional conduct (misconduct) of the auditors, internal as well as external, and proceedings were initiated in India by the ICAI against the Internal Auditors as well as External Auditors and in USA by the Public Company Accounting Oversight Board (PCAOB) against the External Auditors. The Director (Discipline) of the ICAI considered the public disclosures made by Shri B.R. Raju 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 (hereinafter called the Rules) and sent the appellant a letter dated 14th January, 2009. Vide this letter, the Director (Discipline) officially brought to the notice of the appellant facts as revealed by Shri Raju regarding the fudging of accounts, stating that an intentional manipulation of accounts had been taking place at SCSL over the years despite an elaborate internal audit being done in the company under the leadership of appellant. The appellant despite being the head of internal audit had not highlighted various untruthful/false financial statements over the years. The Director (Discipline) informed the appellant that there was an apparent misapplication of accounting and auditing standards/ principles on part of the appellant for the entire period when the accounts were being manipulated and the appellant had failed to discharge his professional duty as Head of Internal Audit Cell of the Company and failed to act diligently as a Chartered Accountant (member of the Institute). It was stated that such large scale fudging of accounts was not possible without appellant's knowledge. (He being a Sr. Vice President of the Company and Head of Internal Audit Cell). His, this professional misconduct had brought disrepute to the profession of Chartered Accountants and to the Institute. The appellant was asked to submit his written statements to the allegations made in the letter sent by the Director (Discipline).

The appellant sent his written statement dated 31st January, 2009 denying the allegations of professional misconduct.

5. The Director (Discipline), based on the material available with her, including SEBI investigation report, charge sheet filed by the CBI in the Satyam case against different persons facing criminal charges and after considering the reply filed by the appellant, came to a conclusion that the appellant was prima facie guilty of professional misconduct and she gave a report to this effect on 17th September, 2009. She forwarded her report to the Disciplinary Committee for further action. The Disciplinary Committee in its meeting held on 23rd September, 2009, considered the prima facie opinion and decided to proceed further against the appellant under chapter V of the Rules for professional misconduct.

6. The Disciplinary Committee vide its letter dated 8th October, 2009, forwarded the prima facie opinion made by the Director (Discipline) to the appellant and asked the appellant to submit his written statement along with all supporting documents, if any, and the list of witnesses, if any, which the appellant desired to examine before the Committee. The matter was listed for hearing on 14th December, 2009. On 14th December, 2009, the Disciplinary Committee learnt about a letter dated 1st December, 2009, sent by the appellant informing that he was in judicial custody from 21st September, 2009, and a charge sheet had been filed against him and others by CBI in Satyam case. He requested the Disciplinary Committee to grant him time to file a written statement till he was released on bail. A similar letter was written by his advocate to the Disciplinary Committee. In view of this request made by the appellant and his counsel, the Disciplinary Committee adjourned the matter for about 8 months and fixed the date on 12th August, 2010. On 12th August, 2010, the appellant did not appear before the Disciplinary Committee, neither did his representative/advocate appear nor was written statement filed even though the appellant had already been released on bail. The Disciplinary Committee also came to know that the appellant had filed writ petition No. 27522 of 2009 before the High Court of Andhra Pradesh, seeking stay of proceedings of the Disciplinary Committee and the High Court of Andhra Pradesh by then had not stayed the proceedings. Despite there being no stay, the appellant had not appeared before the Committee. Although the Disciplinary Committee had no reason to adjourn the proceedings, it seems the Disciplinary Committee in its wisdom decided to give one more opportunity to the appellant and adjourned the proceedings to 8th September, 2010. On 8th September, 2010, the appellant again did not appear and sent a letter to the Disciplinary Committee informing that vide order dated 7th September, 2010, the High Court of Andhra Pradesh had stayed the proceedings of the inquiry. In view of this information, the Disciplinary committee adjourned the matter. The stay granted by the High Court of Andhra Pradesh was vacated by the High Court vide its order dated 26th December, 2011. After the vacation of stay over the proceedings, the Disciplinary Committee fixed the next date of hearing as 21st January, 2012 and venue of hearing, for convenience of the appellant was kept as Hyderabad. Notice of this hearing was served upon the appellant. The appellant appeared before the Disciplinary committee on 21st January, 2012 along with his counsel. On 21st January, 2012 the Disciplinary Committee read out charges to him and asked him to plead guilty/not guilty. The appellant pleaded not guilty. The Director (Discipline) told the Disciplinary Committee

that she had not to examine any witness and was relying on the documents and material already on record of the Committee. The Committee thereafter examined the appellant on oath and after examination of the appellant closed the inquiry and gave its report on 8th February, 2012. A copy of the report was sent to the appellant and the appellant was given an opportunity to send his representation he was yet to be heard on the issue of penalty. The appellant sent his written representation and the Disciplinary Committee vide order dated 11th May, 2012 imposed the penalty as aforesaid.

7. The appellant has assailed the order of the Disciplinary Committee on various technical grounds as well as on merits. The grounds of challenge in a nutshell are as under:

a) There was no complainant in this case. The Institute could not have taken suo moto cognizance of the statement of Shri B.R. Raju and proceeded against the appellant.

b) The Disciplinary Committee did not give him adequate opportunity to defend himself.

c) The prima facie opinion formed by the Director (Discipline) was based on documents not in existence at the time of forming prima facie opinion. The opinion was, therefore, vitiated.

d) The order of the Disciplinary Committee was contrary to law and facts and was not based on documents. The Disciplinary Committee failed to apply audit standards applicable to the appellant. The decision was biased, based on conjectures and surmises.

e) The Disciplinary Committee did not give an opportunity to the appellant to produce witnesses and documents.

f) The Disciplinary Committee did not examine necessary witnesses namely team leaders/ team members of the appellant who conducted internal audit of SCSL.

g) The Disciplinary Committee erred in relying on the supplementary charge sheet filed by the CBI in criminal case involving appellant. This charge sheet was not supplied to the appellant by the Institute.

h) The Disciplinary Committee did not consider the defence of the appellant that he was not supposed to reconcile the bank balance as part of the internal audit exercise nor was he supposed to carry out 100% verification of the transactions.

i) The Disciplinary Committee failed to appreciate that detection of fraud was not part of the duty of the auditors and an auditor was entitled to accept records and documents as genuine on their face value.

j) The Disciplinary Committee had not supplied to the appellant the documents collected by SEBI and other authorities relied upon by the Disciplinary Committee.

k) The Disciplinary Committee also failed to appreciate that audit of Oracle Financials was included in the annual audit plan only in the year 2008-09 but could not be conducted

due to manpower shortage.

l) The Disciplinary committee also failed to appreciate that failure of team leaders/ team members to conduct proper audit could not be considered as misconduct of the appellant since team members and team leaders were the eyes and ears of the appellant.

8. There is no denial of the fact by the appellant that the statement made by Shri B.R. Raju, before the Board of Directors (by sending an e-mail to the Directors and SEBI) was correct and there was large scale fudging of accounts going on in SCSL for years together. Rather, the stand taken by the appellant before the Disciplinary Committee and before this Appellate Authority is that he and his audit team had no clue as to how all this happened and how it was executed. The manipulation of accounts was hidden carefully and meticulously from everybody including the appellant and his team. He also stated that in fact he was a victim of said manipulation as he was also a holder of approximately 67,000 shares of SCSL, acquired by him in exercise of stock options.

9. The fudging of accounts, as admitted by Shri B.R. Raju, was gone into by SEBI, CBI & PCAOB etc. and it was found that fudging was taking place right from the year 2000-01 till December, 2008 as admitted by Shri Raju. The actual cash and deposits found with various banks in the form of current accounts, fixed deposits etc. over the years was much short of the amount as shown in the financial statements made public by SCSL since 2001. In the letter dated 14.1.2009 written by the Director (Discipline) to the appellant, this difference in cash and bank balances, sundry debtors, liabilities, gross revenue and net profit between the actual and as reflected in the financial statements was brought to the notice of the appellant. The percentage of excess shown in the financial statements of the company over the actual available in the bank was also brought to the notice of the appellant. The appellant in response to the letter and in response to the prima facie opinion, where also these figures were reproduced, had not denied the correctness of any of these figures. The appellant did not take the stand that the financial statements of SCSL as prepared by the Company for public consumption during his tenure as chief of internal audit were correct and there was no difference between the actual position and the position as reflected in the financial statements. He, however, submitted that these were the allegations made against him in the CBI charge sheet and since they were mere allegations, yet to be proved, the Institute could not act on these allegations.

10. The CBI charge sheet had analyzed and brought forward the role of each accused in playing fraud upon the share holders by fudging of accounts as admitted by Shri B.R. Raju and as verified from various banks and other stake holders. The allegations in the charge sheet in respect of each individual accused had nothing to do with the actual figures of discrepancy as admitted by Shri B.R. Raju and as reflected in the prima facie opinion as well as in the letter written to the appellant by Director (Discipline). The appellant was not supposed to answer the allegations made by CBI in the charge sheet against him or other accused persons. But the appellant deliberately took the stand as if he was being tried by the Institute for fraud and for fudging of accounts and therefore, contended and argued that he cannot be punished

twice for the same offence. He relied upon several Supreme Court and High Court rulings on this issue. This issue had already been settled by this Appellate Authority as well as by the Supreme Court that the disciplinary proceedings about professional misconduct are always independent of criminal proceedings. The subject matter of inquiry before the Disciplinary Committee was professional misconduct of the appellant in conducting the internal audit of Satyam (SCSL) and not his involvement in fudging of the accounts as alleged by CBI or his collusion with the management in allowing forged accounts to pass as genuine accounts which were the subject matter of trial before the criminal court. The appellant from the very beginning tried to confuse the two issues.

11. However, on merits, the appellant's stand was that being the head of the internal audit department of SCSL, his job responsibility was to get the internal audit conducted by his team members as per the annual audit plan approved by Audit Committee of SCSL comprising of four independent directors of SCSL. The internal audit team under him comprised of three team leaders assisted by several team members. Before commencement of each financial year, a draft annual audit plan was prepared by the internal audit team taking into account the past audit history, the requirements of audit department heads, including financial department and having regard to the areas which the company wanted the internal audit department to cover and the processes and systems which required validation in the opinion of the team. The other stand taken was that in the first few years of internal audit under him, the audit was transaction oriented (the appellant did not specify which were these few years). However, after the appointment of Price Waterhouse as statutory auditors and their qualifications on inadequacy of internal audit for two years in their audit reports, the internal audit was shifted to 'process oriented followed. Internal audit' on their advice and since then, the same was being The focus of internal audit was not on transaction audit but on process study and analysis of process with a sample of transactions validation. However, the appellant did not specify in which year the internal audit shifted from 'transaction oriented audit' to 'process oriented audit.'

12. This claim of the appellant has to be examined in respect of the admitted position and admitted documents. The appellant has placed on record the internal audit manual of Satyam and the very first paragraph of this manual specifies that the purpose of the manual was to outline the authority and scope of internal audit functions within SCSL. It was to be a compendium of standards and cohesive guidelines and procedures for internal audit. These guidelines were drafted for consistency in standards of acceptable performance of internal audit circle (IAC) and means of effective coordination of efforts of associates working in IAC. The appellant could not deny that he and his team were bound by this manual and not by directions of external auditor.

13. The Internal Audit Manual of Satyam provided that the scope of work of the Internal Audit Circle (IAC) was to determine whether Company's network of risk management, control and governance processes as designed and represented by the Management, was adequate and functioning in a manner to ensure:

    - Risks are appropriately identified and managed.

- Interaction with the Statutory Auditors and members of the Audit Committee to occur as needed.

- Adequacy and effectiveness of the Company's systems of internal accounting and operating controls.

- Significant financial, managerial, and operating information is accurate, reliable and timely.

- Associates' actions are in compliance with policies, standards, procedures, and applicable laws and regulations.

- Resources are acquired economically, used efficiently, and protected adequately.

- Established plans, policies, and procedures are being complied with.

- Quality and continuous improvement are fostered in the Company's control process.

- Significant legislative or regulatory issues impacting the Company are recognized and addressed appropriately.

- Opportunities for improving management control, profitability, and the Company's image may be identified during audits. They will be communicated to the appropriate level of management.

14. The Internal Audit Manual also makes the Internal Audit Circle (IAC) accountable to the Audit Committee in order to:-

    - Provide periodical assessment of the adequacy and effectiveness of the Company's processes for controlling its activities and management its risks in the areas set forth under the Annual Audit Plan.

    - Report significant issues related to the processes for controlling the activities of the Company and its subsidiaries (as determined in the Annual Audit Plan), including potential improvements to those processes, and provide information concerning such issues through resolution.

    - Periodically provide information on the status and results of the Annual Audit Plan and the sufficiency of Circle resources.

    - Coordinate with external audit and share major audit observations periodically. The Manual also accords total independence to the Internal Audit Circle (IAC) to permit the rendering of impartial and unbiased judgement essential to the proper conduct of audit. The IAC and its associates report to Associate In-charge-Internal Audit (AIC-IA) who reports functionally to the Audit Committee and administratively to the Managing Director (in matters of leave, travel, advances etc.).

15. The Manual also prescribes that no legitimate source of information is to be denied to the auditor. The AIC-IA and the associates of the IAC have responsibility to:

- Develop an Annual Audit Plan using an appropriate risk based methodology, including any risks or control concerns identified by the Management (with required flexibility to be able to attend and carry out need based audits) and submit that plan to the Audit Committee for review and approval as well as periodic updates.

- Implement the Annual Audit Plan, as approved, including, and as appropriate any special tasks or projects requested by the Audit Committee and Management.

- Maintain a professional audit staff with sufficient knowledge, skills, experience, and professional certifications to meet the requirements of this Charter.

- Evaluate and assess significant merging/consolidating functions and new or changing services, processes, operations, and control processes coincident with their development, implementation and/or expansion.

- Issue periodic reports to the Audit Committee and Management, summarizing results of audit activities.

- Keep the Audit Committee informed of emerging trends and successful practices in internal auditing.

- Provide a list of significant measurement goals and results to the Audit Committee.

- Assist in the investigation of significant suspected fraudulent activities within the Company and notify the Audit Committee and Management of the results.

- Report the results of Internal Audit's reviews, the opinions formed and the recommendations made to those members of Management who should be informed or who should take corrective action.

- Evaluate any plans or actions taken to correct reported conditions and, if the corrective actions are considered unsatisfactory, hold further discussions to achieve acceptable disposition.

- Provide adequate follow up to make sure that appropriate and effective corrective action is taken.

- Consider the scope of work of the external auditors and regulators, as appropriate, for the purpose of providing optimal audit coverage to the Company at a reasonable overall cost.

The Manual also provides the required authority to the AIC-IA and associates of the IAC to:

- Have unrestricted access to all functions, records, property, and Associates.

- Review and evaluate all policies, procedures and practices of any organizational activity, program, or function.

- Have full and free access to the Audit Committee.

- Allocate resources, set frequencies, select audit areas, determine scopes of work, and apply the techniques required to accomplish audit objectives.

- Obtain the necessary assistance of Associates in Circles of the Company where they perform audits, as well as other specialized services from within or outside the Company.

16. In addition to the above, the IAC in an advisory capacity participates in the planning, development, implementation and modification of major computer based and manual systems to ensure that:

    1. Adequate controls are incorporated in the system;

    2. A thorough testing of the system is performed at appropriate stages;

    3. System documentation is complete and accurate; and

    4. The intended purpose and objective of the system implementation or modification has been met.

17. It is apparent that the plea taken by the appellant that the scope of his responsibility was very limited and internal audit was to be conducted only as per the annual audit plan approved by Audit Committee was a baseless plea. In fact the preparation of an annual audit plan for internal audit was the responsibility of the appellant and his team members keeping in view the responsibilities & obligations of an internal audit team in conducting internal audit as per the internal audit manual. It need not be emphasized that the bigger the company, the more onerous is the responsibility and more carefully the responsibilities are to be discharged because the stakes of thousands of share holders and the confidence of general public rests on the discharge of these responsibilities by the internal auditors appointed by a company.

18. Every big company has a Finance Department, which is responsible for keeping the financial health of the company in a sound state and to take financial decisions. Every company also has an Accounts Department responsible for maintaining the accounts, preparing various financial statements including balance sheets, profit and loss accounts, keeping invoices, taking care of the debts, interests payments, finance responsibilities etc. The Accounts Department obviously is manned by persons well versed in maintaining accounts. Similarly, the Finance Department is also manned by persons well versed in finance and commerce. If over and above the Accounts Department and Finance Department, the Company engages the services of internal auditors, it is only to check and ensure that the activities of the Finance and Accounts Departments are being conducted in an orderly manner, not on the platform of policy but on the platform of integrity. It is for the internal auditor to test and

check that no irregularity was being done in these departments and no over invoicing, under invoicing, false invoicing or similar activities were being carried out. A perusal of documents would show that in case of Satyam, while the actual cash and bank balances in the year 2000-01 was Rs.27,71,06,381 (Rupees 27 crores plus), the cash and bank balances as shown in the balance sheet was Rs.141,54,58,375 (Rupees 141 crores plus). Thus in the year 2000-01 itself, the difference in the actual and reflected cash was more than Rs. 114 crores. The cash reflected in financial statements was inflated by five times. This difference in 2001-02 became approx. Rs.998 crores. Price Waterhouse was appointed as external auditors sometimes in the year 2000 for the first time and Price Waterhouse conducted external audit from 2001 onwards. Even as per the appellant, for the first two years after appointment of Price Waterhouse, the transaction audit was being done by the appellant and his team, but during these two years itself, the balance sheet was inflated by an artificial cash of around Rs. 998 crores. This phenomenon continued thereafter.

19. It is a fact that 'Oracle Financials', a software which automates the accounting system and generates trial balance, profit & loss account, balance sheet and other financial documents was introduced into the company in the year 2002 itself. It cannot be assumed that the appellant despite being an experienced Chartered Accountant and having risen to such a high post in the management of SCSL as AIC- IA, was not aware of the importance of 'Oracle Financials'. Despite the importance of Oracle Financials, the appellant admittedly did not include Oracle Financials into the annual internal audit plan of the company. Oracle Financials was included in the annual internal audit plan of the company only during the financial year 2008-09 by the appellant. Despite including it in 2008-09 in the internal audit plan, the audit of Oracle Financials was not conducted by the appellant and his team citing manpower shortage. Since fudging of accounts was going on and excess cash balance was being shown in the balance sheet of the company, it is obvious that fake contracts were being entered into the financial system of the company, from which fake revenues were being shown to inflate the cash balances of the company. This process started in the year 2000 and continued till 7th January, 2009 when Shri B.R. Raju informed the Board of Directors and SEBI about non-existing cash to the tune of Rs. 5040 crores. Had audit of Oracle Financials been included in the annual audit plan by the appellant, the fraud being played with share holders would have been laid bare. Non-audit of Oracle Financials by the appellant has to be considered deliberate at the instance of management.

20. The other plea taken by the appellant is that he and his team were supposed to accept the records as genuine unless there was evidence to the contrary. However, non-inclusion of Oracle Financials into the audit was a deliberate act of the appellant. This gains importance since Satyam was following twin mode of invoice generation and the team of the appellant did bring to the notice of the appellant the evidence of malpractices when it pointed out several invoices generated by the parallel system; however, this was ignored by the appellant and after this access to Oracle Financials in the year 2008-09 was also denied to the appellant and his team. This only shows that internal audit and annual audit plan were being tailor made by the appellant to suit Shri B.R. Raju and his clique.

21. The Disciplinary Committee considered the provisions of section 22 of the Chartered Accountants Act, 1949 which defines professional or other misconduct and the schedule to the Act and came to the conclusion that as per the scope of work approved by Internal Audit Committee, the internal auditor was to determine whether company's network of risk management, control and governance process as designed and presented by the management of Satyam was adequate and if the same was functioning in a manner to ensure that the risks were properly identified and managed. The Audit also included adequacy and effectiveness of the company's system of operating controls of internal accounting. The internal audit programme for various areas showed that the appellant was required to carry out 100% bank vouching for Rs.10,000/- and above and the appellant was also required to carry out 100% bank reconciliation of various bank accounts of the company. The Committee also noted that the appellant was required to review the operational process of cash operations as well as bank operations. On perusal of audit plans for year 2005-06, the Committee noted that the appellant and his team were to conduct independent walk through of the process for effectiveness of internal control. The Committee noted that the audit programme and the procedure as laid down in the Audit Manual were not complied with by the appellant, as team members did not carry out any of the checks envisaged in the audit programme. The appellant on the other hand submitted that the bank reconciliation and balance confirmation from the banks were not part of the audit plan. As the internal auditor, the appellant and his team members were also required to cross check the daily statement with the monthly statements maintained by the company. The appellant, as internal auditor, however, pleaded ignorance of the same, on the ground that preparation of daily statement was not within his knowledge. This and the non-inclusion of Oracle Financials in the audit plan and brushing aside irregularities pointed out to him by his team members, speaks volumes about the professional conduct of the appellant.

22. The statement made by the appellant before the Disciplinary Committee and the written response given by the appellant to the Disciplinary Committee as well as to other authorities only shows that the appellant's stand was that he acted like a dignified clerk and not like a vigilant CA. In his testimony he stated that his role was to guide the team as to how audits can be conducted and to finally release the reports and make a presentation to the Audit Committee. Subsequent to saying so, he stated that even the presentations were being prepared by his team leaders and not by him. He only used to follow up with the concerned departments in getting replies and clarifications. However, it is apparent from the record that this function also was also not being carried by him. 13 invoices of large amounts discovered by his team members/leaders (which seemed to be suspicious and false) had no corresponding entries and were brought to his notice. The issue regarding these 13 invoices was subsequently closed by him as 'satisfied'. After discovery of these suspicious invoices sometime in 2008-09, the access to offshore Oracle Financials was denied to him and his team and nothing was done by the appellant except writing some formal letter and then leaving it there. In his testimony he admitted that Oracle Financials was an essential item of audit. He stated he asked his team about this issue and was told that there was some technical problem, which management was not able to attend to. It was reported that they

(the management) will rectify. However, subsequently his team did not bring it to his notice and he thought that the team had audited offshore Oracle Financials.

23. This reflects that the appellant was not only negligent in his duty, but was also not concerned whether the management provided access to offshore Oracle Financials to his team members or not and he was not concerned as to how the discrepancy of those 13 invoices got satisfied. The details of these 13 invoices are given in the charge sheet served upon the appellant by CBI in the criminal case. The reference to these invoices can be made for limited purpose to know as to what was the amount involved in these invoices. As per records, the amount involved in these 13 invoices alone was Rs. 10,16,01,245.10. It was not a negligible amount. These invoices were not included in IMS (Invoice Management System) but have been reflected only in Oracle Financials. Denial of access to Oracle Financials after discovery of these kinds of dubious invoices would have raised an alarm in the mind of any Chartered Accountant as it showed dual invoicing system being followed by the company not matching with each other. The first lesson given to a chartered accountant is that he has to be skeptical and he is supposed to have hawk eyes in order to perform his duties as an auditor. Non-reflection of these 13 invoices in IMS in normal course would have alerted any Chartered Accountant as well as his team. In the present case it appears that when the team of the appellant brought this fact to the notice of the appellant, the team members were told not to press the point. Otherwise there is no reason that the appellant should not have insisted upon audit of the entire Oracle Financials invoices entered therein and compared them with IMS invoices. That would have revealed the whole world of fraud going on in the company about which the appellant says that he was not aware. The appellant perhaps did not want to be aware of the extent of fraud being played upon the shareholders and the company.

24. The debts incurred by the company and the loan taken by the company over the years for running its operations would have raised the eye brows of any chartered accountant since the balance sheets of the company showed that the company was sitting on piles of cash. As admitted by Shri B.R. Raju, the financial condition of the company was bad and he had to inject funds to the tune of Rs. 1,230 crores to enable the company to keep the operations going on. This amount was not reflected in the accounts of the company. It is surprising that the internal auditors i.e. the appellant with a team of 24 chartered accountants working under him could feign ignorance to the financial condition of the Company, more so when the appellant was a Sr. Vice President of the Company. Any presumption about the ignorance of the appellant would belie his holding the post of Sr. Vice President of the Company. If a clerk in the Company had taken the stand that he was not aware of financial condition, one could have believed. But if a Sr. Vice President of the Company and head of the internal audit takes the stand that he was not aware of anything going on in the company, then the charge against him about his not discharging duties in a professional manner and being grossly negligent in performing duties would stick to him.

25. It would not be out of place to mention here that the appellant took a stand that he was a victim, as he was also holding 67,000 shares of the company. This too is a false stand. Although it may not be relevant to his professional misconduct, but the investigation made

by CBI showed that the appellant had sold 87,364 shares of SCSL from time to time through DBS Cholamandalam Securities Ltd. and earned Rs. 4,47,89,668.10. These shares may be apart from the shares he was still holding.

26. The appellant was global head of internal audit of SCSL for more than 10 years. He had not included audit of Oracle financials in the internal audit plan for no explicit reasons. When it was included in internal audit plan, the audit of Oracle Financials was not carried out on the ground of shortage of manpower and when it was carried out, the access to Oracle Financials was denied by the company on discovery of suspicious invoices by the team members. The appellant failed to bring this out in the audit report and failed to get the Oracle Finance audit done. This in itself was sufficient to prove the charge against the appellant regarding professional negligence.

27. The Disciplinary Committee, therefore, rightly came to the conclusion about the professional misconduct of the appellant. An internal auditor as per AAS7 is required to conduct a review of the accounting systems and related internal controls. He was to monitor the operations and recommend improvements thereto. The appellant during the course of hearing admitted that his role as head of the internal audit team was to monitor all the activities of the employees of the company. However, his written statement and defence show that he just relied upon the instructions received from the statutory auditor and the audit committee. He did not adhere to the functions of an internal auditor in actual terms. The appellant had not been able to show to the committee in what manner he exercised his professional expertise in verifying correctness of the cash and bank balances over the period under question when the cash deposits of the Company alone accounted for nearly 50% of the total assets of the company. The Committee observed that it failed to comprehend as to how the appellant, head of internal audit cell, could justify his role despite totally bypassing the audit plan and ignoring checking of cash and bank balance of the company. The Committee observed that all this showed that the appellant did not carry out independent checks to assess the risk of manipulations involved in different areas. The Committee concluded that this conduct of the appellant as head of internal audit agency, amounted to gross negligence in carrying out his professional duties and professional responsibilities as a Chartered Accountant and he brought disrepute to the profession of Chartered Accountancy.

28. The scope of work of the internal audit team headed by the appellant was to determine whether the company's network of risk management, control and governance process was adequate and was functioning in a manner so as to identify the risks and to find out the effectiveness of company's systems of internal accounting and operating controls. The Company was showing huge cash deposits in the form of FDRs and Current Account balances. The appellant had admitted that for the year 2000-01 and 2001-02, transaction audit was being done in full. He also admitted that for two years after appointment of Price Waterhouse as external auditors, he and his team continued transaction audits, so transaction audit was the responsibility of the appellant at least upto the year 2003-04. Had the appellant conducted transaction audit and cross checked from the banks about the deposits of the company, the appellant would have come to know that actual cash deposits were not there in the banks and the financial statements of Satyam reflected a false picture

of deposits of the company. Had the appellant done so even for the two initial years, then the company and the share holders would have been saved and the fraud which continued thereafter could have been prevented. However, the appellant seemed to be happy with his 'share option', a good salary package and a good management position for himself and was not concerned with the audit of the company. Otherwise, there was no reason for the appellant to give a go-bye to the duties as given in the Audit Manual, which specifically prescribed about the responsibility of the appellant regarding risk management. If only audit of the sales/services had been done, the appellant would have come to know that every year fake and inflated sales were being shown in the accounts and fake amount was being credited to the bank accounts, although no amount was going into the banks from these fake sales but in order to show that the amount was there, fake FDRs were being prepared by the company. It is evident that the appellant kept his eyes closed, ears shut out and was not willing to see even the obvious. This itself was a professional misconduct.

29. Every company doing business as an off-shore IT Company, has a systematic invoicing mechanism and when an order is received from a client, an ID number is given to the order and thereafter the client is billed either as per the time consumed in completing the process by the employees (who keep noting the time spent on the project) or for a lump sum (if the contract is a lump sum contract). Invoices are raised from time to time and they are fed into the financial system. The financial system (Oracle Financials) reflects whether the payment for the work has been received and as and when the payment is received, it shows the same as amount received and if amount is not received by due date, it is shown as debt. As is usual with every debtor, debt confirmation is sought from every client by the auditors only to cross check and verify the debts. Similarly, cash confirmations are sought from the bank to cross check the truthfulness of bank deposits. This bare minimum audit work is expected from every auditor. Even this was not done in this case and that is why the company could survive with a balance sheet showing non-existing debts and non-existing cash. The stand of the appellant has been that the failure to discover the fake debts and fake revenue was because of well designed and well executed plan of the management and by denial of access to data, to the internal audit team with clear knowledge of facts that internal audit was conducted only as a process audit and not as a transaction audit. The excuse and the stand of the appellant belies the professional ethics expected from the appellant. Even if the company had denied the access to data, it was obligatory on the appellant, as stated in audit manual, to ensure that the company gives access. In case of denial of access to data, the appellant was obliged to qualify his audit report and put it there in bold letters drawing attention of directors. To a question put to him about non-access to the Oracle Financials system, the response of the appellant was that he could not imagine at that point of time the importance of Oracle Financials and could not visualize the system. The appellant did not even recommend inclusion of Oracle Financial system into the audit plan and this only shows the professional misconduct of the appellant who did not include such an important financial tool of the company into the audit system.

30. The appellant admitted that the invoices audit and expenditure audit were part of the audit work and the bank transactions were to be verified. The appellant was in the organization

since 1998 as head of the internal audit and Internal Audit Circle and admitted that in case of invoice audit, the invoices of an entire quarter were to be audited. Thus there was no way that the appellant or his team could not have detected fake invoices being raised by the company through invoice management system or through oracle financials.

31. The plea of the appellant that it was not the obligation of auditors to prevent fraud or to detect fraud is also a baseless plea. True it is not in the charter of duties of an auditor to prevent fraud or to detect fraud assuming that every company is supposed to commit fraud and it is the duty of an auditor to prevent fraud and detect fraud. However, despite there being a Finance department and an elaborate Accounts department, the very purpose of appointment of internal and external auditors is to ensure that the accounts department and the finance department of the company act fairly and with integrity. Both have to be under a constant check of the agency called 'internal audit' and 'external statutory auditors'. Both the internal auditors and external auditors must use their professional skill to test and verify the financial information as per standards. Had the appellant done so, we have no hesitation in holding that fraud of this magnitude, size and duration would not have gone unnoticed. Otherwise, there is no purpose of having internal auditors and external auditors and the companies can very well do with their Accounts Department and Finance Department. Non-verification of FDRs, non-verification of cash lying with the banks either in the form of FDRs or in the form of current accounts, non-verification of debt from the parties by the internal auditors only show that the appellant did not chalk out the annual audit plan independently with professional efficiency so as to safeguard the assets of the company in a professional and efficient manner and to ensure accuracy and completeness of accounting process.

32. The appellant has put the responsibility of 'annual audit plan' also on Audit Committee. This is factually incorrect. As per Audit Manual, the Audit Committee was only supposed to look into the annual audit plan prepared by the appellant and his team members and then give suggestions. The appellant, as per audit manual was free to reject all such suggestions of the Audit Committee, which were contrary to the interest of the company or shareholders or which hampered the duties of a Chartered Accountant. The final say of accepting or rejecting the suggestions of departments was also with the appellant. As head of Internal Audit and Sr. Vice President of the Company, the appellant was not subservient to different departments or to the Committees of the Company. The appellant being the internal audit head was to work independently according to the audit manual, which gave independence to the appellant and imposed heavy responsibility on the appellant, as noted above. The appellant by preparing the Annual Audit Plan as per the convenience of the management failed to discharge his duties as a member of the Institute.

33. In the balance sheet of Satyam, a huge amount of interest accrued on FDRs was shown and TDS made was also shown. However, TDS actually deducted from income of Satyam and deposited with the Income Tax Department did not match with the TDS shown to have been deducted from its income. This fact also remained unnoticed by the appellant and his team.

34. The appellant has pleaded and argued that in none of the documents relied upon by Director (Discipline), the appellant was cited as an accused. Thus the prima facie opinion by the

Director (Discipline) was baseless. He also took the plea that instead of proving the guilt of the appellant, the appellant was called upon to prove his innocence and the Committee was prejudiced against the appellant and presumed the appellant to be guilty.

35. These pleas of the appellant have no force. In fact it is the appellant's own case that he was not aware as to what was going on in the company. He could not explain as to how the company managed to show in its balance sheet non-existent cash of Rs. 5,040 crores or how the company managed to show non-existing debts, non-existing clients, non-existing revenues, non-existing FDRs, inflated sales, inflated TDS, inflated interest etc. The revelations made by Shri B.R. Raju showed that in all fields of financial activities, the accounts were being manipulated and two sets of accounts, real and fictitious were being maintained. There was no area of finance or accounting in which large scale fudging/ preparation of false accounts had not been going on in the company for at least 9 years. For all these 9 years, the appellant was the head of Internal Audit Team employing 24 C.A.s who were professionally qualified to keep an eye on the accounts of the company through various techniques, for which they are given training by the Institute. If in spite of an internal audit team of so many experts, the accounts of Satyam were being fudged in all areas of accounting for so many years, the onus will then lie on the appellant and his team members to at least justify his presence for all these years, The onus would be on the appellant to come and explain as to what was being done by him and his team during all these years when accounts were being fudged under their very eyes.

36. The fact that the accounts were fudged is an undisputed fact. Therefore, nothing was to be proved in respect of fudging of the accounts. What was to be proved was that a prudent and professional internal audit was done. Who could have proved this? It was within the special knowledge of the appellant as to what he and his team members had done from 2000 to 2009 in Satyam as internal auditors. It was expected of him and him alone to come clean and tell the Disciplinary Committee how the audit was conducted; what were the functions performed by audit team under him and by him, despite which the Company could continue falsification of account from year 2000 to 2008 continuously in all areas of accounting. Thus his plea that onus was wrongly put on him is a baseless plea.

37. The Disciplinary Committee also noted the defence of the appellant that it was not a part of his duty to verify the FDRs, bank balance, etc. and it was not part of the approved annual audit plan. The Committee after considering the entire material came to the conclusion that the appellant as head of the internal audit cell of the company was to assess the internal control systems prevalent in various departments of the company including the accounts and finance departments. The appellant as the head of internal audit team did not chalk out the audit plan independently which he was required to chalk out to safeguard the interest of the company in the efficient conduct of the business of the company, prevention and detection of fraud and error in and accuracy and completeness of the company's accounting records and the timely preparation of reliable financial information. The Committee observed that though the appellant was to take instructions from the audit committee but still as head of the internal audit cell, the appellant was required to use his professional skepticism as warranted under the circumstances. He was required to assess the internal

audit systems prevalent in the company and ought to have suggested stringent checks in different areas, specifically the cash in the banks and bank balance and FDRs, etc. The appellant was supposed to prepare an audit plan comprehensive enough to ensure that it helped in achieving the overall objective of an internal audit and was consistent with the goals of internal audit functions. In the internal audit plan, he was required to continuously review and modify to bring the same in line with the changes in the audit environment. The appellant, as incharge of internal audit did not appear to have modified his plan to look into the manner in which FDRs were kept by the company. In the opinion of Page 25 of 36 the Committee, the appellant did not exercise due diligence. He was required to depute his team for checking the system of maintaining of FDRs and ought to have checked the confirmation received from the banks physically as well as through internet facility. The Committee concluded that the appellant was guilty of professional misconduct within the meaning of clauses 7, 8 and 9 of Part-I and clause 1 of Part-II of the Second Schedule and other misconduct falling within the meaning of clause 2 of Part-IV of the First Schedule under section 21 read with section 22 of Chartered Accountant Act, 1949.

38. There was huge difference between the actual interest which had accrued on FDRs and the interest which was shown in the balance sheet year after year. This difference amounted to a few hundred crores of rupees. Since the interest was shown to have accrued on all bank deposits, a tax deduction was shown to have been made in the balance sheet while in fact there had been no accrual of interest and consequently no tax deduction at source. However, the balance sheet showed tax deduction at source on interest much more than the actual TDS on Fixed Deposits. The balance sheet as on 30th September, 2005 had shown an accrued interest of Rs. 376 crores. The actual interest accrued on FDRs was Rs. 7.43 lakhs. The company had claimed only Rs. 1.53 lakh as TDS in its income tax return, whereas TDS shown in the balance sheet was Rs. 3,050 lakhs. The response of the appellant as usual was that it was not within the scope of his annual audit plan to verify either the accrued interest on FDR or TDS deduction on interest on FDRs. It is apparent from the record that entries for accrued interest were based on the interest calculated on FDRs for the tenure of each FDR maintained in the accounts wing, while most of these FDRs were forged documents and no verifications from the banks were done.

39. The Committee was of the opinion that the appellant was required to provide periodic assessment on adequacy and effectiveness of the company's processes for controlling its activities and managing risks but the working of the company showed that the appellant completely failed to do so even in respect of FDRs and held the appellant guilty of professional misconduct falling within the meaning of clauses 7, 8 and 9 of Part-I and clause 1 of Part-II of the Second Schedule and 'other misconduct' falling within the meaning of clause 2 of Part-IV of the First Schedule under section 21 read with section 22 of the Chartered Accountants Act, 1949.

40. The plea of the appellant that the Disciplinary Committee did not give him adequate opportunity to defend himself and committed procedural irregularities which vitiated the

order of the Disciplinary Committee is palpably untenable. The Disciplinary Committee while conducting inquiries had to follow the broad principles of natural justice. In this case, the Disciplinary Committee gave adequate opportunity to the appellant to defend himself as well as to bring to the notice of the Committee his own version of things and the case. When the appellant was in jail, the Disciplinary Committee kept adjourning the case and fixed the date so that the appellant was out on bail. When the appellant came out on bail, he ensured that the Disciplinary Committee could not proceed and he took recourse to filing a writ petition in the court and obtained a stay against proceedings. When ultimately the stay was vacated, the appellant filed his written statement and showed total ignorance to the fudging of accounts. His only defence had been that fudging and fabricating of the accounts by the Management was done in such a clever manner that he and his team could not come to know of it. His other defence was that he was conducting the audit as per the Annual Audit Plan duly approved by the Audit Committee of the Company. He could not travel beyond that. These two defences of his have been found to be a sham and are discussed above. Thus, his plea that he was not given adequate opportunity to defend himself is a baseless plea.

41. His other plea that his team members were not examined also has no force. The team members were not facing the charge of professional misconduct in these proceedings before the Disciplinary Committee. It was he who was facing the charge of professional misconduct and was to examine himself or his witness about his conduct. In fact the Disciplinary Committee had been writing to him in every notice that he should file the names of witnesses he wanted to examine and should also file the documents he wanted to rely upon. He did not even file the Annual Audit Plan or Audit Manual along with his response nor did he file any other document with the Disciplinary Committee on the issue of his professional conduct. He did not file a list of witnesses to be examined by him. The appellant, being an accused in the criminal case along with other persons, had knowledge of all the information which had been dug out by the investigating agencies in respect of the accounts of the company and he was aware of all the facts. Despite being aware of all the facts and having copies of charge sheets supplied to him by the trial court, he behaved as if he was not aware of anything and kept on asking the Institute about documents and did not spell out his role as internal auditor for all these years. We, therefore, consider that his plea that he was not given adequate opportunity to defend himself is a baseless plea.

42. Another defence raised by the appellant is that the Disciplinary Committee failed to apply standards regarding responsibilities of an auditor as defined in Audit & Assurance Standard 4 (AAS4) and the order of the Disciplinary committee was based on conjectures and surmises.

43. The Disciplinary Committee was bound to weigh the conduct of the appellant on the yardstick of standards laid down in Internal Audit Manual of the Company and the standards to be followed by a prudent CA. This was the standard by which the appellant had bound himself at the time of being appointed as an internal auditor. The norms laid down in Internal Audit Manual of the Company were the responsibilities to be discharged by the appellant irrespective of other standards prescribed by the Institute. The conduct of the appellant was considered by Page 28 of 36 Disciplinary Committee in the light of the Internal Audit

Manual. The Disciplinary Committee as well as this Appellate Authority found his conduct lacking in professional ethics. As discussed above, the appellant not only ignored his duties but preferred to keep his eyes shut even when his juniors and team members brought glaring discrepancies to his notice and the fact of being denied access to an important accounting system namely Oracle Financials.

44. Another plea taken by the appellant is that the Disciplinary Committee turned a blind eye to the fact that the size and volume of transactions of a company like Satyam did not permit hundred per cent verification of transactions and only sample checking could be done which was a rule for such auditing. This argument stares at the face of the appellant as when the team members of the appellant brought to his notice 13 dubious invoices which were not found reflected in the Invoice Management System but were found figuring in Oracle Financials, the appellant did nothing. Not only this, when after this incident, the management of Satyam denied his team members access to Oracle Financials, the appellant recorded his satisfaction about these invoices without verifying the genuineness of these invoices. Since the appellant turned a blind eye to the dubious invoices brought to his notice in sample verification done by his team, his plea that the Disciplinary Committee did not consider that he could not do hundred per cent verification is baseless. In fact the Disciplinary Committee had observed that looking at such huge bank balances shown in the balance sheet, a verification of these bank balances was expected from the Internal Auditors. It is the case of the appellant himself that in the initial internal audit years, his team was doing transaction audit. It is during these years of 2000, 2001 and 2002 that fabrication of accounts had started and if the transaction audit of even one quarter had been done completely, the fake orders, fake accounts, fake TDS deductions, fake accrual of interest would have come to the notice of the appellant and his team members. But the case of the appellant is nothing came to his or his team members notice.

45. The appellant has contended that the Disciplinary Committee erred in making new allegations as part of its findings for which no opportunity was given to the appellant to file written statements and the Disciplinary Committee did not give opportunity to the appellant to cross examine prosecution witnesses. There was no new material before the Disciplinary Committee. The entire material before the Disciplinary committee had been given to the appellant. In fact the only allegation against the appellant was that in all areas of Satyam accounts, a large scale fabrication was going on despite him and his team members being the Internal Auditors. Prima facie, if despite internal auditors being there, large scale fudging of accounts continues for such a long period in all fields of accounts it has to be considered that the internal auditor was not performing his duties. This was the only charge which was framed in technical terms under different heads. There was no new material available before the Disciplinary committee and there was no new charge. Thus the plea that he was not given opportunity to file written statements is false. In fact the appellant had not even bothered to give direct and straightforward answers either to the questions put by the Disciplinary Committee or in the written statement filed by him. He had been trying to twist issues and going around in circles in order to evade the very issue of professional misconduct.

46. The other plea raised by the appellant is that the Disciplinary Committee made roving inquiries quite often without framing the charges and without putting the appellant on notice of the same. The entire examination of the appellant shows that the only effort of the Disciplinary Committee had been to know what kind of audit was being done by him. Whatever inquiry was made by Disciplinary Committee it was made only in respect of his professional duties. Making an inquiry into professional duties of the appellant concerning the audit of Satyam cannot be considered a roving inquiry.

47. The appellant contended that the Disciplinary Committee wrongly relied on the supplementary charge sheet filed by the CBI, which was not in existence at the time of framing prima facie opinion nor was the appellant given an opportunity to file written submissions on the supplementary charge sheet.

48. During the trial of the appellant before the criminal court, the CBI filed two charge sheets, one initial and another supplementary charge sheet. At the time when prima facie opinion was formed, the appellant was handed over by the Director (Discipline) the inquiry report of SEBI and the initial charge sheet filed by CBI as the documents relied upon by Director (Discipline) for forming prima facie opinion. Even from these two documents, the Director (Discipline) had not culled out the specific role played by the appellant as alleged in the charge sheets. The Director (Discipline) had only culled out the gist of fudged accounts brought to the notice of Satyam Board Members by Shri B.R. Raju. While Shri B.R. Raju had given lump sum figures of inflated cash, bank balances, accrued interest, understated liability, etc., the charge sheet issued to appellant only contained details of these figures. While Shri B.R. Raju had stated that there was over statement of cash, the prima facie opinion contained a table showing how much over statement was there year-wise. Similarly, other tables in the charge sheet issued to the appellant showed year-wise/subject wise fudging. The supplementary charge sheet filed by the CBI with the trial court did not give new facts about fudging of accounts. The supplementary charge sheet prescribed the specific role which the accused played all along those years when fudging was going on. Since the Disciplinary Committee was not going into the criminal aspect of the matter, it was not necessary for the Disciplinary Committee to supply the supplementary charge sheet. However, the Disciplinary Committee did supply the supplementary charge sheet and all other documents which the appellant asked on the very opening day of the proceedings and adjourned the case, so that the documents demanded could be supplied to the appellant and it was specifically told to the appellant that he shall file his response as well as list of witnesses and other documents he wanted to rely upon. Therefore, the plea taken by the appellant that he was not given a copy of the supplementary charge sheet is baseless.

49. The appellant has argued that the Disciplinary Committee made sweeping observations against him, contrary to records and found fault with him for not verifying FDRs. It wrongly jumped to the conclusion that the appellant had not assessed internal control systems prevalent in various departments of the company. The Disciplinary Committee failed to appreciate that the audit had not revealed evidence to the contrary. Therefore, the auditor was entitled to accept the records and documents as genuine and on their face value. So

no fault could have been found by the Disciplinary Committee against the appellant as there was no evidence to the contrary.

50. This argument of the appellant is not tenable. In fact the emphasis of the Disciplinary Committee has been that audit was not done in a proper manner by the appellant. The evidence about forged FDRs and other fudging would have come to the notice of the appellant only if the appellant had conducted the Internal Audit as per the Internal Audit Manual and had prepared the annual audit plan as per the size and operations of the company and as per the risks faced by the company. Year after year the Company was shown to be sitting on a pile of cash while actually there was no cash with the Company. A simple verification of cash lying with Banks and of the FDRs by the appellant would have given him enough evidence of fake FDRs.

51. An internal auditor has to act like a friend and guide to an enterprise and as a holding hand in fulfilling the prime objective of maximizing returns on investment by due diligence and by having a hawk's eye to see what was happening in the company. If this due diligence had been applied by the appellant, he would have questioned piling of such huge cash year after year which was lying unutilized, and despite the cash, the company was resorting to borrowing money. These two contradictory situations would have activated the sixth sense in the mind of an auditor, which every auditor is supposed to possess, that there was something wrong and he would have oriented his audit in this direction. The very fact that the appellant prepared an audit plan so as to ignore all these things and did not include Oracle Financials and did not even compare the Invoice Management System with Oracle Financials shows that the appellant did not want relevant evidence to be known to his team members or to come to him in respect of what was going on in the company. This does not mean that the Disciplinary Committee or an authority looking into his conduct could not give its finding about the professional conduct of the appellant. The internal audit would have revealed evidence only if it had been directed and oriented in the right direction. If the internal audit was not oriented in the right direction, no evidence was likely to come to the appellant to trouble his conscience as he seemed to be determined to act according to the wishes of the management. Otherwise, there was no reason that the management could have been maintaining two sets of accounts, one set for the shareholders and world at large and one for a core group. Had this not been so, Shri B.R. Raju in his letter would not have given the exact figures as to what was the difference between the two sets of accounts. The very fact that Shri Raju could give exact figures of difference between the two sets of accounts shows that Shri B.R. Raju and his internal circle members were part of the game. One cannot forget that the appellant was a Sr. Vice President in the Company.

52. The appellant contended that there was no evidence produced before the Disciplinary Committee to prove that he was aware of the alleged fraud being played in the fudging of accounts of the company. He submitted that the awareness of Page 33 of 36 difference between Invoice Management System (IMS) and Oracle Financials (OF,) which are two databases, could not be equated with awareness of the falsification. We think this argument is again a baseless argument. It was neither the case of the Director (Discipline) nor the charge that the appellant was aware of the fraud being played in fudging of accounts.

The charge against the appellant was only that the appellant did not conduct himself in a professional manner and he misconducted himself as a Chartered Accountant. The plea taken by the appellant that awareness of difference between IMS and OF cannot be equated with awareness of falsification is again a misleading plea. Neither had the Disciplinary Committee known nor did the Director (Discipline) know what was the level of awareness of the appellant. The difference between IMS and OF came to the knowledge of the Disciplinary Committee due to the detailed investigation done by the CBI and this difference was put to the appellant. The appellant admitted about this difference being known to him and admitted that he did not pursue this with the company. Whether he was aware of the fraud or not could not have been known by the Disciplinary Committee. The Disciplinary Committee did not come to the conclusion that he was aware of the fraud. The Disciplinary Committee only came to the conclusion that he had misconducted himself.

53. The appellant has stated that no aspersions could be cast on him by the Disciplinary Committee for failure of his team members/team leaders, if any. Team members and team leaders were his eyes and ears and unless an issue was brought before him, he could not have planned an action. This argument is again a baseless argument. In fact whichever material had come before the Disciplinary Committee it only showed that when team members/team leaders brought discrepancies to his notice, admittedly these were not considered by the appellant to be worth attention. The appellant was happy in signing the reports. As already stated, the appellant acted more like a dignified clerk than like an auditor which was not expected of the appellant.

54. The appellant contended that each of the three main ingredients of fraud, namely, motive, opportunity and rationalization were missing and the appellant had no intent to commit a fraud nor did he commit a fraud. The argument is misplaced as it was never an issue before the Disciplinary Committee that the appellant had committed a fraud. As already discussed, the issue before the Disciplinary Committee was that the appellant did not conduct himself in a professional manner, being the head of internal audit of Satyam.

55. The other arguments advanced by the appellant are again not worth attention. The appellant had harped on non-issues which were not before the Disciplinary Committee. We consider that the arguments which are not germane to the issues before the Disciplinary Committee and before this Appellate Authority need not be considered.

56. In view of the above discussion, we considered that the Disciplinary Committee rightly held the appellant guilty of professional misconduct under clauses 7, 8 & 9 of Part-I and clause 1 of Part-II of Second Schedule and 'other misconduct' falling within the meaning of clause 2 of Part-IV of the First Schedule under section 21 read with section 22 of Chartered Accountants Act, 1949.

57. The appellant also argued that the punishment awarded to him was disproportionate to the misconduct alleged/found against him and the removal of his name from the Register of Members permanently shall ruin his career. He also stated that he had a blotless career and this was the first Disciplinary proceedings against him and the Disciplinary Committee should have taken a lenient view.

58. We have considered the facts and circumstances of the case as well as the punishment awarded to the appellant. The facts reveal that for about eight long Page 35 of 36 years when the appellant was head of the internal audit team, responsible for the internal audit of Satyam, he was negligent and misconducted himself all along and did not discharge his professional duties in a diligent and professional manner. He kept his eyes and ears closed to the misdeeds of the management and did not bother to reorient the internal audit plan despite discrepancies being brought to his notice by his team members. He did not ensure that vital information stored in Oracle Financials was available to Members of internal audit team working under him so that effective internal audit could be done. Considering continuous professional negligence over such a long period which resulted into grave disrepute to the members, generally, of the ICAI as well as to the reputation of ICAI itself, we consider that the punishment awarded to the appellant was not excessive. In our opinion, the punishment awarded to the appellant was commensurate with the misconduct on his part.

59. We found no force in the appeal. The appeal is hereby dismissed.

Justice S.N. DHINGRA (Retd.)
CHAIRPERSON

KAMLESH S. VIKAMSEY
MEMBER

RAKESH CHANDRA
MEMBER

ASHOK HALDIA
MEMBER

New Delhi,
Dated this 23rd day of December, 2013.

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 11/ICAI/2012

IN THE MATTER OF

CA S. Gopalakrishnan ..... Appellant
Through: Sh. Vijay Hansaria, Sr. Advocate
with Sh. Ashok Mathur& Sh. Raghavendra M. Bajaj, Advocates

Versus

The Institute of Chartered Accountants of India &Ors. ..... Respondent
Through: Sh. J.S. Bakshi, Advocate

CORAM:
HON'BLE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE MR. ASHOK HALDIA, MEMBER
HON'BLE MR. KAMLESH VIKAMSEY, MEMBER

Date of Hearing:
02-07-2013

Date of Judgement:
14-02-2014

ORDER

1. The appellant aggrieved by the order dated 11th May, 2012 of the Disciplinary Committee penalizing him with fine of Rs. 5 lacs and removal of his name from the register of members of the Institute of Chartered Accountants of India (ICAI) permanently, for his professional misconduct under clauses 5, 6, 7, 8 and 9 of part I of Second Schedule to the Chartered Accountants Act, 1949 (as amended from time to time), has preferred this appeal.

2. The brief facts relevant for the purpose of deciding this appeal are that Price Waterhouse was appointed as a statutory auditor by the shareholders of Satyam Computers Services Ltd. (SCSL) from the year 2000-01 onwards and it continued to be the statutory auditors till 7th January, 2009. On 7th January, 2009, Sh. B. Ramalinga Raju, the then Chairman of Satyam wrote a letter to the Board of Directors of Satyam and sent a copy of this letter to Securities Exchange Board of India (SEBI). In this letter, he inter-alia disclosed that the financial statements of Satyam did not reflect the true financial state of affairs of Satyam. The financial statements had been showing exaggerated figure of cash and bank balances, revenues, debtors, accrued interest, fixed deposits, receivables, etc. The total fudging was of more than Rs. 6,000 crores. This confession of Sh. B. Ramaliga Raju sent shock waves among the shareholders as well as in the corporate world in India and across the globe since Satyam was a well known IT company having contracts across the globe. Satyam wrote letters to the Public Company Accounting Oversight Board (PCAOB) that its financial

statements as audited by Price Waterhouse were not trustworthy and should not be relied upon. After this disclosure by Sh. B. Ramalinga Raju about the financial status of Satyam and fudging of accounts, various national and international agencies started proceedings against officials of Satyam and against auditors of Satyam (internal auditors and statutory auditors). The investigation was done by SEBI, Central Bureau of Investigation (CBI), PCAOB and Institute of Chartered Accountants of India among others.

3. The Institute of Chartered Accountants of India sent a notice dated 10th January, 2009 to Price Waterhouse (PW), statutory auditor of Satyam asking them to disclose the names of Members of the Institute answerable on behalf of the firm for audit lapses resulting into fudging of accounts. Price Waterhouse vide their letter dated 30th January, 2009 informed the names of Members answerable on their behalf to ICAI. The appellant herein was stated to be a partner of the firm from 2000-01 onwards till March, 2007 and he was stated to be answerable for audit lapses, if any, for these years. A copy of this letter written by PW to the Institute was also sent by PW to the appellant. The Institute after receiving the information about the members available on behalf of PW, sent a letter to the appellant informing him about the fact that financial statements of Satyam, as audited by PW (through him) did not represent the true and fair pictures of finances of Satyam and there were audit lapses due to which fudging of accounts to the extent of more than Rs. 6,000 crore went undetected. The appellant was informed that he, being the partner of the firm, had been named as person responsible by the firm for audit of the years 2000-01 to 2006-07.

4. Before proceeding further, it would be worthwhile to have a look into the information given by Sh. B. Ramalinga Raju to the Board of Directors, SEBI and others. Sh. B. Ramalinga Raju gave following information to the Board of Directors:-

"1. The Balance Sheet of SCSL carried as on September 30, 2008

a) Inflated (non-existent) cash and bank balances of Rs. 5,040 crore (as against Rs. 5,361 crore reflected in the books)

b) An accrued interest of Rs. 376 crore which was non- existent

c) An understated liability of Rs. 1,230 crore on account of funds arranged by me

d) An over stated debtors position of Rs. 490 crore (as against Rs. 2,651 reflected in the books)

2. For the September quarter (Q2) we reported a revenue of Rs. 2,700 crore and an operating margin of Rs. 649 crore (24% of revenues) as against the actual revenues of Rs. 2,112 crore and an actual operating margin of Rs. 61 crore (3% of revenues). This has resulted in artificial cash and bank balances going up by Rs. 588 crore in Q2 alone."

5. He also informed vide this e-mail that an amount of Rs. 1,230 crore was assigned to Satyam, though not reflected in the books of accounts of Satyam, to keep the operations of Satyam going on and to ensure prompt payment of salaries to the associates.

6. This confession of Sh. B. Ramalinga Raju sent shock waves throughout the corporate world, not only within India but across the globe, as Satyam was also a listed company in U.S.A. stock exchange and was well known world over.

7. The confession made by Sh. B.R. Raju to the Board of Directors and other stakeholders showed that two sets of accounts were being maintained in SCSL under the very nose of statutory auditors of which the appellant was a partner from 2000-01 to 2007 March.

8. The appellant despite receiving a letter from the Director (Discipline) of the Institute, bringing audit lapses to his notice and the concerns of the Institute about professional misconduct, did not reply to the letter and sought an extension of time for giving reply vide his letter dated 30th January, 2009. The Director (Discipline) extended the time and asked him to file reply by 2.3.2009. No reply came and another request extension was received from the appellant only two days before 2.3.2009 and the time was extended up to 2nd April, 2009 by the Director (Discipline). No reply was received and on 1st April, 2009, another extension request was made. This request was also allowed and time for filing the reply was extended up to 10th May, 2009. The firm PW was asked by the Institute in April, 2009 itself to send all relevant papers to the appellant although no such request was received from the appellant. On 8th May, 2009, the appellant sent another request for extension of time and the time for filing his response was extended up to 30th June, 2009. A further request was sent by appellant for extension of time vide letter dated 30.6.2009. This request was not acceded to by the Director (Discipline) and the appellant was informed that she would proceed on the basis of available documents and information. The Institute sought the report of Serious Fraud Investigation Office (SFIO). It also received a copy of the CBI charge sheet and SEBI investigation Report giving details about fudging of accounts at Satyam. Since the appellant had chosen not to respond to the letter of Director (Discipline), the Director (Discipline) formed a prima facie opinion about the professional misconduct of the appellant on the basis of available material and came to a conclusion that the statutory audit report of Satyam was signed by the appellant for the years 2000-01 to 2006-07. The report was signed by him on behalf of M/s. PW although he was not a partner of PW but was a partner of Price Waterhouse, Banglore, (PW Banglore), a different firm registered independently with ICAI, other than Price Waterhouse. The appellant thus prima facie violated regulations 190(9)(1) and also violated provisions of the Chartered Accountants (Regulations), 1988, and Audit & Assurance Standards. The Director (Discipline) also gave an opinion that the daily balances shown in the books of accounts of Satyam were at great variance with monthly statements and the appellant did not carry out the necessary checks warranted in such circumstances due to which there had been large scale fudging of accounts. The third party confirmation procedure required to be exercised by the appellant was also not exercised and reliance was placed on the confirmations received by the auditors from the employees of Satyam. This amounted to professional negligence. The high percentage of cash and bank balances as compared to total assets of the company definitely warranted verification of cash and bank balances of the company in great depth, which was not done and thus there was dereliction of duty in professional conduct.

9. The letters of confirmation received by the audit firm regarding bank balances were not in the prescribed format and even carried certain startling omissions like omission to mention the account number or name of the company and the letterhead of the bank was also not the usual letterhead. The Director (Discipline) came to a conclusion that non-obtaining of direct communication from the banks of Satyam and obtaining the entire confirmation through the company was an act of compromising with professional conduct.

10. The Director (Discipline) gave opinion that there were serious discrepancies in the balances shown in the balance sheet as compared to what appeared in the confirmation letters received from banks. This itself amounted to professional misconduct. There were two sets of certificates received by the audit firm from the same bank and there appeared to be serious manipulations and the appellant was very well aware that the internal auditor had not conducted verification of bank balances. The Director (Discipline) observed that the audit of Satyam was not done in a prudent manner and the appellant was guilty of professional misconduct within meaning of clauses 5, 6, 7, 8 and 9 of Part I of Second Schedule to the Chartered Accountants Act, 1949. The Director (Discipline) also found that there were significant differences in the fixed deposits and current account balances as stated in the balance sheet and as confirmed by the banks. Moreover, the letters of confirmation received by the appellant's firm were not in prescribed format. They did not carry account number, name of the bank, name of the branch of the bank and the letterhead of the bank itself was in different format. Under AAS30, external confirmation is the process of obtaining and evaluating audit evidence through a direct communication from a third party in response to a request for information about an item affecting assertions made by the management. External confirmations are frequently used in relation to account balances and their components including confirmation of bank balances and other information from banks. Despite discrepancies in the balances and in the confirmations received, due importance was not attached to these factors and the risk of material misstatement creeping in the financial information was not considered. The appellant though was very well aware that the internal auditors did not conduct verification of bank balances despite this and looking into the enormity of cash and bank balances in the balance sheets of the company, the appellant was supposed to carry out independent checks which he completely failed to do. The appellant was thus prima facie guilty of professional misconduct within the meaning of clauses 5, 6, 7, 8 and 9 of Part I of Second Schedule to the Chartered Accountants Act, 1949.

11. The Director (Discipline) found a similar position in respect of accrued interest on FDRs. A sum of Rs. 376 crore interest on FDRs was non-existent. There was huge difference in the TDS on interest appearing in the balance sheet as compared to the figures of TDS, which appeared in the tax assessment orders/ returns of the company. This also showed that the appellant had not carried out independent checks to find out the amount of FDRs and the interest actually received on these FDRs leading to TDS deduction. The appellant failed to verify FDR certificates and non-existing FDRs were shown in the balance sheets. The appellant also did not check Income Tax assessment orders and appeal orders.

12. The Director (Discipline) also highlighted the fact of percentage of sundry debtors shown in the balance sheet to the total assets of the company and that the debtors formed nearly 23% of the total assets of the company. The Director (Discipline) observed that this warranted an extensive checking from the appellant's side as the documents reflected discrepancies in daily and monthly statement of debtors. The appellant failed to carry out detailed checks of these transactions despite discrepancies warranting necessary checks by a prudent firm.

13. The Director (Discipline) made observations in her opinion about different non-existing cash and bank balances, revenues, FDs, debtors, etc., pointed out by Sh. B. Ramalinga Raju in his communications to the Directors, which was subsequently verified and confirmed by the investigating agencies, and observed that the appellant, who was a partner of the statutory audit firm failed to perform his duty diligently in a professional manner and the appellant was, therefore, prima facie guilty of professional misconduct falling with the meaning of clauses 5, 6, 7, 8 and 9 of Part I of Second Schedule to Chartered Accountants Act, 1949.

14. The Director (Discipline) sent her prima facie opinion to the Disciplinary Committee. The Disciplinary Committee, vide its meeting held on 23rd September, 2009, decided to proceed further. The Disciplinary Committee thereafter sent a copy of the prima facie opinion to the appellant and sought a response/ written statement from the appellant. It listed the matter for hearing on 14.12.2009 at Mumbai. The appellant vide letter dated 11th December, 2009 expressed his inability to attend the meeting of Disciplinary Committee or to file written statement on the ground that he was in judicial custody. The Disciplinary Committee adjourned the matter to 23rd July, 2010 on the ground of appellant being in judicial custody. The appellant was granted bail by the High Court of Andhra Pradesh on 24.06.2010. The appellant informed the Disciplinary Committee before 23rd July, 2010, that his bail condition required him to be present before the trial judge in Hyderabad every day; so he would not be able to be present for hearing in Delhi. The Disciplinary Committee adjourned the matter and fixed the next date of hearing as 12th August, 2010 at Hyderabad itself. In the meantime, the appellant had moved Delhi High Court by a writ petition No. 5352/2010 or stay of proceedings with a prayer that disciplinary proceedings commenced by the Institute should await the outcome of criminal trial. The writ petition was admitted and on 9th August, 2010 and the Delhi High Court granted an ex parte stay of the disciplinary proceedings. So the hearing scheduled on 12th August, 2010 could not take place. Ultimately, the writ petition filed by the appellant was dismissed on 22.11.2010 and the interim order staying the disciplinary proceedings was vacated. The Disciplinary Committee fixed next date of hearing as 15.12.2010. The appellant after dismissal of above writ petition by the Single Bench of High Court preferred an LPA No. 885 of 2010 before the Division Bench of Delhi High Court. However, the Division Bench gave directions to the appellant to appear before the Disciplinary Committee on 15.12.2010 and to accept or deny the charges. The appellant appeared before the Disciplinary Committee. In the hearing all the charges were put to him and he denied the charges and pleaded not guilty. The LPA filed by the appellant was dismissed on 30.05.2011 and the High Court gave liberty to the Institute to proceed with its enquiry, fixing dates of enquiry keeping in view the trial of the appellant and affording adequate opportunity to the appellant to put forth this case from

all spectrums. Before dismissal of the LPA filed by the appellant, on an application made by CBI before the Supreme Court, bail of the applicant was cancelled and he was again placed in judicial custody on 30th April, 2011. The Disciplinary Committee had fixed its hearing on 18th June, 2011. The appellant expressed his inability to appear before the Disciplinary Committee on 18.6.2011 vide his letter dated 11th June, 2011. The appellant also requested for supply of relied upon documents to him. On 15th June, 2011, the appellant, through his representative was supplied the 3 charge sheets filed by CBI in the criminal case against him and several other accused persons, and also supplied the SEBI report. The Disciplinary Committee fixed next date of hearing as 9th July, 2011. On 5th July, 2011, the appellant again requested the Disciplinary Committee for adjournment on the ground that his criminal trial was going on daily basis and he would not be in a position to defend himself in disciplinary proceedings. On 9th July, 2011, the Disciplinary Committee adjourned the hearing telling the appellant's counsel that the appellant should request the jail authorities to permit him to appear before the Disciplinary Committee and participate in the proceedings. The next date of hearing was fixed as 16th October, 2011. The appellant was again released on bail by an order dated 12th October, 2011 of the Supreme Court on 14th October, 2011. The hearing of Disciplinary Committee was fixed for 16th October, 2011. The appellant did not appear before the Disciplinary Committee on 16.10.2011. His advocate appeared and sought time to file reply. The Disciplinary Committee gave more time to the appellant to file reply and scheduled the hearing for 18th December, 2011. The Disciplinary Committee had sent notices dated 8.10.2009, 25.11.2009, 6.7.2010, 26.7.2010, 29.11.2010, 1.6.2011, 8.7.2011, 23.9.2011 and 2.12.2011 (nine notices) asking him to file his response along with all documents he wanted to rely and list of his witnesses. The appellant instead of filing reply/ written statement to prima facie opinion, filed a preliminary reply denying allegations of manipulation and falsification of accounts as well as the allegations that the appellant was having a knowledge of the financial statements being forged. He however, did not file his own documents regarding audit. The appellant also sought more documents from the Disciplinary Committee. On date of hearing of the Disciplinary Committee, i.e., 18th December, 2011, the Disciplinary Committee directed the Director (Discipline), tofurnish all the documents asked for by the appellant then and there. The appellant was furnished all the documents on the same date. However, he was also informed that these were not the documents relied upon by the Director (Discipline) but they were being furnished as the appellant had asked for them. The Disciplinary Committee fixed the next hearing on 21.1.2012. The appellant filed an additional reply to the prima facie opinion on 20.1.2012 and in the additional reply he asked for some more documents namely balance sheets of years 2000-01 to 2006-07, breakup of bank wise actual cash and bank balances, the confirmations received from banks, details of daily balances shown in the books of accounts, details of balances as per books of accounts, confirmation letters and other documents based on which observations were made by the Director (Discipline) in her prima facie opinion. He, however, again did not file his own documents or list of witnesses. On 21.1.2012, when hearing was fixed, the Director (Discipline) made a statement that she did not want to examine any witnesses and would only rely upon the material already on record. The committee asked the appellant to give his own version of things and his defense. The appellant had filed no list of witnesses and no documents in his defense along with his replies despite various letters and notices

of the Institute asking him to file his documents in defense and his list of witnesses. The advocate for the appellant raised the plea that he was not supposed to give his defense on that date and wanted the Disciplinary Committee to proceed as per the procedure laid down. The advocate took the stand that he would give documents at an appropriate stage. The Disciplinary Committee found that an effort was being made to scuttle the proceedings and asked the appellant's counsel to clearly state the defense of the appellant. Despite all efforts of the Disciplinary Committee, the appellant was not ready to come up with his defense at all. The Disciplinary Committee closed the proceedings and reserved the order. The Disciplinary Committee gave its order on 23rd January, 2012 holding appellant guilty of professional misconduct. A copy of the findings of the Disciplinary Committee was sent to the appellant as per rules and the appellant was given an opportunity of being heard on the issue of quantum of penalty. On 22nd April, the appellant filed certain documents relating to the audit of Satyam. However, the Disciplinary Committee passed order imposing penalty on the appellant on 11th May, 2012.

15. Against the order of 11th May, 2012, the appellant preferred this appeal and he also filed an application making this authority to take into consideration the material filed by him before the Disciplinary Committee on 22nd April, 2012 i.e., after the passing of the order by the Disciplinary Committee holding him guilty of professional misconduct. This authority considered the request of the appellant and declined the same vide a speaking order dated 4th May, 2013.

16. The appellant has assailed the order of the Disciplinary Committee on the following grounds:-

    1) That there was no evidence whatsoever available with Director (Discipline) in support of forming prima facie opinion dated 17th September, 2009 except CBI charge sheet dated 7th April, 2009 and SEBI show cause notice dated 14th February, 2009. These documents were not independently quoted by the Director (Discipline). Therefore, the prima facie opinion formed by the Director (Discipline) deserved to be set aside. Secondly, the order passed by the Disciplinary Committee was also not liable to be set aside as there was no material or evidence before the committee to arrive at any conclusion against the appellant.

    2) The Disciplinary Committee was an expert body to examine evidence brought before it by the Director (Discipline) and onus to lead evidence was on the Director (Discipline). Since the Director (Discipline) did not lead any evidence before the Committee, the onus was not discharged by the Director (Discipline) and the onus should not have been shifted to the appellant. The Disciplinary Committee erred in shifting onus on the appellant and the order of the Disciplinary Committee was liable to be set aside.

    3) The Director (Discipline) failed to identify the documents filed by her before the Disciplinary Committee charge-wise. In the absence of identifying the documents charge-wise, the order of the Disciplinary Committee was liable to be set aside.

4) The charge sheet filed by CBI was under judicial scrutiny before the Criminal Court. It was merely a report filed by CBI after investigation and the trial court was yet to take a final view. Therefore, reliance on charge sheet in support of prima facie opinion by Director (Discipline) was unlawful and the order was therefore, liable to be set aside.

5) That the Disciplinary Committee, during the conduct of proceedings, violated principles of natural justice. When the disciplinary proceedings were being conducted, the appellant was fighting a most important battle of his life, i.e., a criminal case filed against him because of the disclosure made by the Chairperson of Satyam. The appellant had been in judicial custody for a total of 23 months. The appellant could not have been made to contest disciplinary proceedings simultaneously. Thus the order passed by the Disciplinary Committee was contrary to principles of natural justice.

6) The engagement managers on the audit of Satyam namely Sh. P. Siva Prasad and Sh. Ch. Ravindernath were precluded by a court order from conferring with the appellant. This severely affected the right of the appellant to defend himself. The appellant was not granted adequate opportunity as per the procedure laid down under law. Thus the Disciplinary Committee violated principles of natural justice.

7) The applicant was wrongfully deprived of the right to lead his evidence and make his defense. The order dated 21st January, 2012 prematurely closed the appellant's right despite the fact that no opportunity was given to the appellant to give his defense. Thus the appellant was deprived of his legal right to defend himself and the order was liable to be set aside on this ground.

8) The Disciplinary Committee relied upon oral statements made under section 164 Cr.P.C. before the Court by Sh. P. Siva Prasad and Sh. Ch. Ravindernath who were involved in the audit and were respondents in the criminal case. However, the appellant did not get opportunity to cross examine these two witnesses before the Disciplinary Committee. The Disciplinary Committee selectively used certain documents, which showed pre-conceived mind of the Disciplinary Committee in holding the appellant guilty of professional misconduct.

9) The Disciplinary Committee wrongfully rejected the prayer of the appellant to consider documents filed by him in April, 2012 and the Disciplinary Committee seemed to be in a hurry to punish the appellant ignoring theprinciples of natural justice.

10) That there was institutional bias against the appellant as the Institute's lead office bearers were part of 'Institute of Chartered Accountants of India' group which formed part of the multi-disciplinary investigation team constituted to investigate the fraud played upon the shareholders by the management of Satyam. This Institute acted as a quasi-prosecutor in the criminal matter against the appellant and the report of the Institute dated 5th April, 2009 formed the basis of this charge sheet against the appellant. Moreover, Smt. Vandana Nagpal was also listed as a witness (witness No. 36)

in the criminal trial against the appellant. Thus she was also an interested party and the entire proceedings suffered from institutional bias.

11) The appellant was not supplied basic documents as stated in para (9) above to defend himself. Thus he was deprived of opportunity to defend himself.

17. Apart from assailing the order of the Disciplinary Committee on aforesaid legal/ technical grounds, the appellant also assailed the order on following grounds 'on merits':

a) The Disciplinary Committee overlooked complexity of the fraud. It over simplified the fraud as simple falsification of accounts. It did not examine any director or employee of Satyam having access to documents and knowledge about the company's affairs at the relevant time and the Disciplinary Committee believed that only auditors had a role to play in the entire episode and had the responsibility for detection of fraud.

b) The Disciplinary Committee did not consider the role of an auditor. An auditor, in proper perspective, is only supposed to exercise reasonable care depending upon the circumstances of each case. An auditor is not a bloodhound but only a watch dog. The Disciplinary committee did not appreciate the fact that in this case a reasonable amount of care and skill was exercised by the appellant.

c) The Disciplinary Committee ignored the fact that an auditor has to believe the servants of the company under audit in whom confidence is placed by the company and he is entitled to assume that they were honest and to rely upon their representations. Unless there was something to incite suspicion, he was only to be reasonably cautious and careful.

d) The Disciplinary Committee ignored the fact that it was not the duty of an auditor to detect frauds. The auditor is only to verify the correctness of the books of account and not to detect frauds. All information and explanations have necessarily to come from the management and an auditor is not supposed to doubt the integrity and competence of the employees of the Company unless there was something unusual.

e) The Disciplinary Committee ignored the Auditing Standards set by ICAI itself, more specifically AAS4 wherein the responsibility of Chartered Accountants does not call for prevention and detection of fraud.

f) The Disciplinary Committee also did not take into consideration the inherent limitations of audit and the possibility of an auditor not detecting a material misstatement resulting from fraud or error and the fact that these are unavoidable risks in an audit. The subsequent discovery of a material misstatement of financial statements resulting from fraud does not indicate misconduct on the part of an auditor.

g) The Disciplinary Committee ignored the fact that Satyam was one of the top IT firms in the world, well respected and admired and had an impressive list of clients like the World Bank, Glaxo Smith Kline, General Electric Company, General Motors Corporation,

etc. Even in light of the fraud, it cannot be stated that Satyam was a shell company with absolutely no assets of worth. Because the company had substance to begin with, the management was able to orchestrate the fraud despite the audit team that worked on Satyam engagements having performed appropriate audits of Satyam in accordance with professional standards.

h) The Disciplinary Committee wrongly assumed that the appellant knew or could have been aware of the fact that there were lapses and deficiencies in the accounting/ documentation of Satyam and that internal audit and other procedures were not sufficient. The reputation of Satyam's Management for integrity and transparency of its financial reporting gave the appellant and his team no reason to suspect fraud.

i) There was no violation of Regulation 190(9)(i) of the Chartered Accountants Regulations, 1988, since Price Waterhouse, Banglore could not have been approved by ICAI under its own regulations. But since it was an approved firm by ICAI, it was intended to be only Price Waterhouse and the suffix Banglore in the name was clearly a bona fide inadvertent error on the part of the firm as well as by ICAI. In fact ICAI had approved 7 firms with identical or similar name of PW. These multiple firm names were reported in the Annual report of ICAI for the year 2009-10.

j) The Disciplinary Committee wrongly made certain assumptions in order to hold the appellant guilty of professional misconduct. These assumptions relate to knowledge of serious discrepancies in the balance sheet, awareness of the appellant that the internal auditor was not conducting verification of cash, that confirmations received by the appellant's firm were not in prescribed format, etc. These assumptions were made by the Disciplinary Committee without any basis.

18. Before dealing with the different arguments raised by the appellant, it would be worthwhile to state the undisputed facts available on the record of the appeal. It is an undisputed fact that the appellant's firm, i.e., Price Waterhouse had suffered a consent order dated 5th April, 2011, of PCAOB. Although the appellant has stated that this order has no relevance as it was passed by PCAOB before launch of prosecution and not after the prosecution but we consider that since the order was a consent order, it is a significant order which shows the position of the appellant's firm before another competent authority which was looking into professional misconduct of the firm. This order of PCAOB is not only in respect of Price Waterhouse but in respect of all partnership firms who were involved directly or indirectly into the audit of Satyam in association with PW namely PW Banglore, Lovelock & Lewes, PW Co. Banglore. The order clearly states that the Board was imposing sanctions on the basis of its findings in respect of the appellant's firm Price Waterhouse, Banglore for violations of PCAOB Rules and Auditing Standards and section 10A of Securities Exchange Act, 1934, in auditing the 2005-06, 2006-07, 2007-08 financial statements of Satyam and for violations of Rules of PCAOB Audit Standards in connection with a Board inspection along with PW India's violation of PCAOB Rules and Quality Control Standards. The order was passed for protection of investors and in public interest in preparation of informative, fair and independent audit

reports pursuant to disciplinary proceedings instituted under section 105 (c) of the Act and PCAOB Rules against PW and other firms.

19. This order was passed with the consent of the appellant's firm in pursuance to an offer made by PW. The order though it states that it was not binding on other persons and entities, does not state that it cannot be relied upon by other authorities or quasi-judicial bodies for the sake of what has been decided. Neither does it say that facts stated therein were contravened or disputed by the appellant's firm. The order clearly states that PW Banglore was registered with the ICAI and was also registered with the PCAOB as a member of Price Waterhouse Coopers International Limited (PWCIL). The other firms, namely Price Waterhouse & Co., Banglore (PW Co. Banglore), Price Waterhouse, Calcutta (PW Calcutta), and Price Waterhouse & Co., Calcutta (PW Co. Calcutta) though not involved in Satyam's audit were still considered worth sanctions because they were part of PWCIL.

20. The order of PCAOB states that the Board had issued a formal order of investigation regarding the audits of Satyam and review of Satyam's Financial Statements on 8.1.2009 itself. In the summary of facts, it is categorically stated that the appellant's firm failed to identify the material over-statement of Satyam's assets in part because of flawed audit procedures used to test the existence and valuation of Satyam's reported cash balances. During the material years, Satyam's Management represented to PW Banglore partners (sic appellant) that the company had hundreds of millions of dollars in cash held on deposit at six banks. PW Banglore and its associate firm were required among other things to test the existence and valuation of Satyam's reported cash balances. The audit procedures that PW engagement team performed failed to test the existence and valuation of these assets and the auditors did not comply with PCAOB standards governing confirmation process. The engagement team did not make direct contact with the banks to confirm the bank balances that Satyam reported in its financial statements. Instead, in violation of PCAOB audit standards relating to confirmation of cash the engagement team relied exclusively on information provided by Satyam's management. The engagement team relied on Satyam's Management to make out confirmation requests to Satyam's banks and to return purported confirmation responses to the engagement team. The failures in the cash confirmation process on the Satyam engagement were symptomatic of a larger problem at PW India. Though the auditors had planned to test the existence and valuation of cash balances by performing the confirmations, they failed to control the cash confirmation process by relying on audit clients to send confirmation requests to banks and to return cash confirmation responses to auditors. PW India's quality control systems failed to detect, that for several years and on multiple audit engagements, PW firms were not complying with PCAOB's standards governing the cash confirmation process. Despite annual quality reviews at PW India, the first time PW's quality control management detected this non-compliance was only in October, 2008.

21. The Board also considered the failure of PW Banglore and other firms auditing Satyam's accounts regarding receivable balances. It observed that the auditors relied on company management to send confirmation requests associated with accounts receivable balances. The audit team failed to develop and perform audit procedure adequate to appraise, identify,

and control weaknesses that indicated heightened risks relating to account receivables. The order also shows that PCAOB team had carried out an inspection. The order observed that after learning that the 2007 Satyam audit engagement would be inspected by PCAOB Inspectorate, before the Board inspectors began their field of work and half of a year after documentation completion date, PW India members of the Satyam engagement team added documents to the audit working papers without disclosing the date the documents were added and the person who prepared the documents or the reasons for adding documents in violation of auditing standards of PCAOB. The Satyam engagement team provided these documents to PCAOB inspectors in a misleading manner as if the documents were part of original audit documentation and thus violated PCAOB rules 4406. The order observes that the auditing standards under PCAOB required that due professional care was to be exercised in planning and performance of the audit. Due professional care required the auditors to exercise professional skepticism. Professional skepticism is an attitude that includes a questioning mind and a critical assessment of audit evidence. An auditor can issue an audit report containing an unqualified opinion only if the auditor had conducted the audit in accordance with audit standards of PCAOB and financial statements have been prepared in conformity with GAAP (which was not done in case of Satyam).

22. The order further states that the financial statement of Satyam for the year 2005 reported a cash of $541 million (constituting 61% of total reported assets), in 2006 of $697 million (constituting 59% of total reported assets), in 2007 $920 million (constituting 57% of total reported assets), in 2008 $1.11 billion (constituting 50% of total reported assets). The vast majority of aforesaid cash was purportedly lying deposited at 6 banks. The audit standards provided that the audit programme should set forth in reasonable details the audit procedures that the auditor believed were necessary to accomplish the objectives of the audit. In the course of planning the audits of Satyam for different financial years, the auditors planned to test the existence and valuation of Satyam's reported cash balances by seeking confirmation from third parties, specifically from banks. The audit programme also required the engagement team to maintain control of the processes of sending confirmation requests and receiving confirmation responses. Despite having an audit plan of third party confirmation documented in the working papers that it had confirmed cash, the actual audit performed by the audit team did not comply with PCAOB audit standards, i.e., it had not received third party confirmations in respect of cash. The order observed that confirmation is undertaken to obtain evidence from third parties about financial statement assertions made by management with the presumption that when the evidential matter can be obtained from independent sources outside the entity, it provides greater assurance of reliability for the purpose of an independent audit than that secured solely within the entity. Maintaining control means establishing direct communication between the intended recipient and the auditor to minimize the possibility that the results will be biased because of interception and alteration of confirmation requests and responses. The order observed that the audit team failed to maintain control over the process of sending confirmation requests to the banks for, among other things, confirmation of cash. Instead, members of the engagement team signed the confirmation requests and gave the requests to employees of Satyam and relied on Satyam to send the confirmation requests to the bank. This violated the audit standards

and was violative of PCAOB standards during the audit of Satyam's 2005, 2006, 2007 and 2008 financial statements. The confirmation response process for all these years, adopted by the engagement team, gave the results which the company wanted to be represented. These confirmation responses covered approximately 93% of Satyam's reported cash for each audit year. The engagement team made no attempt to establish direct contact with the banks to confirm the accuracy of the amounts reflected on the confirmation responses even though the vast majority of Satyam reported cash was on deposit at 6 banks. This again violated PCAOB standards, which required the engagement team to maintain control of confirmation responses process by direct communication between the auditor and the banks.

23. The order further observed that the Satyam audit team failed to perform any follow up after receiving potentially conflicting audit evidence. During the 2005, 2006, 2007 and 2008 audits, the engagement team received confirmation responses in requisite form directly from the branches of certain banks. The engagement team also received confirmations purported from other branches of the same bank. These purported confirmations were given to the engagement team by Satyam's Management and were not provided in the requisite format. The bank-provided confirmation responses reflected significantly lesser cash balances than what Satyam's Management represented to be held in FDs at the same bank and significantly lesser cash balances than what was reflected in purported bank confirmations that Satyam provided to the engagement team. The engagement team did not contact the banks directly to attempt to determine the amount that Satyam had on deposit with the banks. The engagement team took no steps to reconcile this potentially conflicting audit evidence. The Satyam engagement team did nothing to ensure that the confirmation procedure relied upon by it in Satyam's audit should be performed in compliance with audit standards of PCAOB.

24. The order also considered the lapses of audit firms in respect of fictitious receivables. The order shows that Satyam's invoicing system allowed for manual entry of customer invoices by the intervention of a super user acting outside the regular controls of the dealing and invoicing process. The Satyam management at that time used this super user function to create thousands of false invoices totaling over $1 billion during the period of fraud. During 2007, PW India's personnel working under supervision of the Satyam engagement team tested the company's internal controls including IT internal controls. This was the first time that Satyam IT controls were tested. This testing revealed 170 deficiencies in the controls including 8 deficiencies that the engagement team determined as significant. These deficiencies should have indicated a heightened risk with respect to receivables. The Satyam audit team was aware of these audit control deficiencies during the year 2007 and 2008 but it failed to recognize the risk they posed and did not modify the nature, timing and extent of procedures in the years 2007 and 2008 to take these risks into consideration.

25. For the year 2006 and 2007 audits, the Satyam audit team did not maintain control of the accounts receivable confirmation request process and instead relied on Satyam's management to send confirmation requests. The Satyam audit team received no responses

to these confirmation requests but still made no attempt to follow up on the responses with second confirmation requests. Although the Satyam engagement team planned to confirm the accounts receivable balances in the balance sheet of 2006 and 2007, the auditors failed to comply with PCAOB audit standards governing the confirmation process. No audit procedures were performed by the audit team to ensure that the subsequent receipts were reconciled to individual invoices outstanding at fiscal year end. Additionally, despite the heightened risks posed by identified internal control deficiencies in year 2007 and 2008, the subsequent cash receipts testing was performed as of a date other than the fiscal year end date. These procedures did not provide the audit team with sufficient competent evidential matter to verify the existence of receivables at fiscal year end. Audit teams ignored the warning signs and did not perform additional audit procedures to address the heightened risk of material misstatement of Satyam's cash and accounts receivable balances.

26. The order of PCAOB states that while PW Banglore released its audit opinion on Satyam's 2007 financial statements on 27th April, 2007, the documentation completion date was June 11, 2007. Thus the report was released 45 days before the documentation was completed. The information available in the documents after April 27, 2007 could not have been added to the working papers for the audit of year 2007. These documents were found added by the inspectors of PCAOB during inspection of 2007 financial statements. The engagement team added these documents to the hard copy of working papers made available to the board inspectors. None of the documents added stated the date the documentation was added, the person who prepared it, or the reasons for adding.

27. The Board observed that in the course of audit the auditors routinely planned to perform confirmations but engaged in a practice that was not reasonably assured to provide sufficient audit evidence and did not comply with audit standards governing cash confirmations. The auditors did not maintain control of the cash confirmation process. At no time did PW India's quality control and monitoring process detect violations relating to cash confirmation process. This general process continued for multiple years on multiple audits in multiple PW India firms. The risk and quality partner knew that on certain of his own audits, his engagement teams were not controlling the cash confirmation process as per audit standards and understood that this failure was not being identified by PW India's quality control system.

28. After discussing the lapses and failures of PW India and its auditing partners, the Board imposed a penalty of $15,00,000 on PW Bangalore and Lovelock & Lewes and made them jointly and severally responsible for payment of this civil monetary penalty. It also put several restraints on PW Bangalore and Lovelock & Lewes and also gave several instructions regarding training and ethical code of conduct, staff training etc.

29. Similarly, the appellant's firm PW Bangalore had also suffered a consent order at the hands of Securities & Exchange Commission of USA [SEC] on 5th April, 2011. In January, 2009, Satyam submitted form 6-K with the SEC indicating that PW's audit reports & opinions in relation to Satyam's financial statements from 1.4.2000 to 30.9.2008 should no longer be relied upon. This order of SEC specifically states that PW Bangalore issued unqualified

opinion on Satyam's 31st March, 2005 to 31st March, 2008 financial statements. Each of these audit reports stated that PW conducted its audits in accordance with generally accepted auditing standards in USA (GAAS) and Satyam's financial statements were presented as conforming to generally accepted accounting principles (GAAP). Each audit report stated that the underlying audit was in conformity with audit standards. However, contrary to this, PW India did not conduct Satyam's audit in accordance with PCAOB Audit Standards and PW India partners and staff on the Satyam engagement team failed to maintain control of the confirmation processes with respect to cash and cash equivalent balances as well as Satyarn's accounts receivables. The failure to properly execute third party confirmation procedures resulted in fraud at Satyam going undetected until the former chairman's public confession in January, 2009. The PW India firms PW Banglore and Lovelock & Lewes violated provisions of U.S.A.'s Securities Exchange Act by failing to conduct procedures chosen to provide reasonable assurance of detecting illegal acts that would have a direct and material effect on determination of financial statements. The order specifically states that among others things PW India departed from applicable PCAOB audit standards by failing to maintain control of the confirmation process with respect to cash, interest bearing deposits and accounts receivable balances. As a result, PW India failed to uncover Satyam's fraud and instead issued unqualified audit opinions in connection with its audits of Satyam's financial statements. This order specifically noted the criminal proceedings pending against the appellant and other partners and team members of PW India in India, as well as proceedings before ICAI. It is specifically recorded that PW India failed to identify material false statements of Satyam's assets, in part, because the engagement team, i.e., the audit team members (including the appellant) failed to carry out the confirmation processes and procedures related to cash and interest bearing deposits in accordance with PCAOB audit standards. The order also observes that the respondents (appellant's firm) failed to make direct contact with the 6 largest banks purportedly holding Satyam's interest bearing deposits to confirm the cash and cash equivalent balances that Satyam reported in its financial statements. The respondents (appellant's firm) never attempted to contact the bank directly at any time during audits. This order also noted the discrepancy between some of the direct confirmations received by the audit team and the confirmations received through the management and observed that despite these discrepancies in confirmations, the audit team failed to contact the bank and had the audit team done so, such an inquiry would have revealed that cash and cash equivalent balances reported in Satyam's financial statements were significantly over stated. Below is the chart in respect of difference in balance confirmations for three years which is part of the SEC order:-

Period ending	Bank	Confirmation PW India received directly from bank (in $ USD)	Confirmation PW India received from Satyam (in $ USD)
9/30/08	BNP Paribas	$1,860,280	$100,753,498
9/30/08	HSBC	No balance identified	$172,000,153
6/30/08	BNP Paribas	$1,919,404	$109,014,675
3/31/08	Citibank	$330,172	$152,923,538
3/31/08	HDFC	No balance identified	$175,952,024

3/31/07	BNP Paribas	$11,192,807	$108,584,687
3/31/06	BNP Paribas	$13,082,509	$96,830,036
3/31/06	HSBC	No balance identified	$53,282,374

30. The order further states that after the fraud was revealed, the members of Satyam audit team indicated that they had ceded control of all confirmation processes to the client and relied on Satyam representations in large part because they believed that Satyam's former Chairman and Sr. Management were honest and they did not suspect that Satyam was fabricating audit documents. Members of the audit team conceded that in hind sight the confirmation process they employed for the Satyam audits was not in compliance with audit standards. The order observes that PW India's staff conceded that they routinely relinquished control of delivery and receipt of cash confirmations, entirely to their audit clients and rarely, if ever, questioned the integrity of the confirmation process. The partner including a partner formerly responsible for audit risk and quality indicated that client involvement in the confirmation process during the relevant period was the norm because bankers rarely, if ever, responded directly to confirmation requests, made by auditors. The order specifically states that the auditors failed to carry out audit of the accounts receivable balances in accordance with audit standards and the cash confirmation process was also not in accordance with audit standards.

31. Paras 40, 42, 44, 46 and 53 of SEC order read as under:-

" *40. For example, from the period March 31, 2006 through August 31, 2007, the Satyam engagement team prepared accounts receivable confirmation requests on five occasions but received few, if any, responses to those requests. During the relevant period, respondents made no attempt to follow up on those non-responses. Further, as part of the 2007 fiscal year audit, the engagement team sent out confirmation requests to 22 customers with outstanding receivables balances on August 31, 2006, including seven that were later exposed as fictitious customers. No customers responded to those requests. Appropriate diligence and follow-up procedures could have exposed the true nature of these customers.*

42. Further, engagement team was aware of factors that increased the potential for fraud at Satyam during at least the fiscal year 2007 audit, but failed to recognize the increased risk, and therefore, did not alter its planning and execution of the Satyam audits to take these risks into account as required under PCAOB standards. In connection with the audit of the company's fiscal year ended March 31, 2007, PW India's Systems and Process Assurance (SPA) personnel tested Satyam's Information Technology (IT) internal controls. This testing revealed over 170 deficiencies in those controls, including eight significant deficiencies identified by the SPA team. The nature of these deficiencies should have alerted the engagement team to a heightened risk with respect to receivables.

44. Respondents failed to adequately plan and perform the 2006-08 audits with respect to accounts receivable in accordance with relevant PCAOB standards. First

the engagement team ignored internal control deficiencies, which should have alerted it to the heightened fraud risk with respect to receivables as required by PCAOB Standards AU 312.16 (an auditor must consider the effect of an assessment of the risk of material misstatement due to fraud on the overall audit strategy). Second, the receivables audit plan failed to address an increased risk of a material misstatement of the receivables balance, as required by PCAOB Standard AU 312.17 (higher risk may cause the auditor to expand or modify the extent or nature of procedures to obtain more persuasive evidence]. Third, the engagement team failed to follow up on confirmation requests that were not returned, which resulted in a failure to comply with several PCAOB Standards including AU 316.28 (describing instances in which audit procedures need to be changed to obtain evidence that is more reliable or to obtain additional corroborative information, including from independent sources) and 330.30 (describing follow up confirmation request process) and 330.32 (describing alternative procedures to be employed in the examination of accounts receivable including the matching of subsequent cash receipts with the actual items being paid). Fourth, respondents did not obtain sufficient competent evidential matter to verify the existence of receivables, as required by PCAOB Standard AU 326.01.

46. PW India acted unreasonably in rendering audit reports containing unqualified opinions for the fiscal year 2005-2008 publicly-filed financial statements. PW India issued audit reports on Satyam's financial statements even though they should have known that Satyam's audit had not been conducted in accordance with PCAOB Standards and that Satyam's financial statements did not present fairly, in all material respects, Satyam's financial position, operating results, and cash flows in conformity with GAAP.

53. In auditing Satyam's accounts receivable and cash and cash equivalent balances, Respondents did not comply with PCAOB Standards by failing to exercise due professional care and skepticism, failing to obtain sufficient competent evidential matter and substituting management's representations for those auditing procedures necessary to afford a reasonable basis for an opinion regarding the financial statements. In fact, the engagement team never insisted on, nor obtained, direct third party confirmations for Satyam's largest cash account, nor did it perform sufficient audit procedures to determine whether Satyam's accounts receivable and cash and cash equivalent balances were not materially misstated. As a result, PW India was a cause of Satyam's failure to file and furnish annual and other reports to the Commission that were complete and accurate in all material respects in violation of section 13(a)."

32. Giving its findings, the Securities & Exchange Commission observed that PW India engaged in improper professional conduct in connection with the 2005-2008 Satyam audits and violated several rules of practice and provisions of Exchange Act. The Commission apart from issuing several sanctions regarding audit, imposed a civil money penalty of $6 milllon on the firm to be paid within 45 days.

33. We shall now consider the challenge made by the appellant to the order of the Disciplinary Committee. It is to be kept in mind that the appellant had not assailed the correctness of the confession made by Sh. B.R Raju. It is not his case that the statement made by Sh. B.R Raju in his letter dated 7th January, 2009 to the shareholders/Board of Directors and others was a wrong statement and there had been no fudging of accounts. The defence taken by the appellant is that the Disciplinary Committee overlooked the complexity of the fraud. It over simplified the fraud as simple falsification of accounts and did not examine any director or employee of Satyam having access to documents and knowledge about company affairs at the relevant time and the Disciplinary Committee did not consider the role of an auditor in proper perspective. The auditor was only to exercise reasonable care depending upon circumstances of each case. An auditor was not a blood hound but only a watch dog and the Disciplinary Committee ignored the fact that an auditor was to speak to the servants of company in whom confidence was placed by the company. He was entitled to assume that servants of the company were honest and reliable. It was not the role of auditors to detect fraud and the auditors were to verify the correctness of books of accounts. The auditor was not supposed to doubt the integrity and competence of members of the management. The standards regarding auditor's performance were given in AAS4 and they did not include prevention and detection of fraud because of inherent limitations of an auditor. The Disciplinary Committee also did not take into account that Satyam was one of the top IT firms in the world, well respected and admired. There was no lapse or deficiency on the part of the auditors and the Disciplinary Committee (DC) wrongly made assumptions about professional misconduct to hold the appellant guilty.

34. It must be kept in mind that the Disciplinary Committee was not to give a finding on who committed how and how fraud was committed. In the wake of admitted fraud the Disciplinary Committee was only to consider the professional conduct of the appellant. 'Professional misconduct' has been defined in section 22 of the Act. Intendment and object of the Act is to maintain standard of the profession at a high level, and consequently a code of conduct has been prescribed. 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. Chartered Accountant's Profession occupies a place of pride amongst various professions of the world. That makes observance of the professional duties and propriety more imperative. When conduct of a member of the profession is contrary to honesty, or opposed to good morals, or is unethical, it is misconduct-warranting consequences indicated in the Statue. A large section of public relies on objectivity and integrity of professional accountants to maintain the orderly functions of commerce. Thus Chartered Accountants hold a position of trust. By betrayal of the trust, the conduct becomes one, which is unbecoming of the professional. (Council of Institute of Chartered Accountants of India Vs. B. Ram Goel, 2001 (57) DRJ (DB).

35. The test of what constitutes "Grossly improper conduct in the discharge of professional duties has been laid down in many cases. In this case of a Solicitor Ex Parte Law Society (1912) 1 KB 302, Darling J. adopted the definition of 'infamous conduct in a professional respect", on the part of a medical man as stated in Allinson Vs. General Council of Medical Education

and Registration (1894) I QB 750, and applied to the same professional misconduct on the part of Solicitor, and observed:- "If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by this professional brethren of good repute and competency, then it is open to the General Medical Council to say that he has been guilty of "infamous misconduct in a professional respect" (Council of Institute of CA Vs. Ajay Kumar Gupta date of decision 28.2.2012 (Delhi High Court Division Bench)".

36. The word 'misconduct' in the generic senses envisages breach of discipline, it may not be possible to lay down exhaustively as to what would constitute misconduct or indiscipline. However, in case of Chartered Accountants, it would be wide enough to include wrongful omission or commission on part of the member of ICAI and it would mean improper behavior or violation of a rule of standard or behavior. Misconduct is transgression of an established rule of action, where no discretion is left except what the standard code of conduct demands. Though, it does not mean mere carelessness, it does mean adhering to professional conduct expected of a privileged class of persons like Chartered Accountants who are bound to conduct themselves in a manner befitting the high and honourable profession to which they belong. Whether there was professional misconduct or not would depend upon the facts and circumstances of each case.

37. The statutory audit of a company is a function to be performed by the auditors in accordance with law. It is a statutory function and the Companies Act, 1956, specifically provides for appointment of auditors, their qualifications, etc. Section 226 of the Companies Act, 1956, provides that a person shall not be qualified for appointment as an auditor of a company unless he is a Chartered Accountant within the meaning of the Chartered Accountants Act, 1949. It further provides that a firm, all of whose partners practicing in India are qualified for appointment as an auditor, may also be appointed as auditor by its firm's name in which case any partner so practicing may act in the name of the firm. The Act specifies disqualifications as to who cannot be appointed as auditor. The audit function is considered so important that a person indebted to the company even to an amount of Rs. 1001/- or who has given any guarantee or provided any security in connection with indebtedness of any third person to the company for an amount exceeding Rs 1000/- cannot be appointed as an auditor (section 226 of the Companies Act, 1956). Section 227 of the Companies Act 1956, provides that every auditor of a company shall have right of access, at all times, to the book and accounts and vouchers of the company whether kept at the head office of the Company or elsewhere. It is a well known fact that business data of a company is always kept secret and is considered confidential. The auditor has been given access to business data only because the law places him in a fiduciary capacity and so that he performs his function impartially without being influenced by the company and has sufficient power to ask for any information and data. This Section also provides that the auditor shall be entitled to require from the office of the company such information and explanation as the auditor may think necessary for the performance of his duty. The auditor has to make a report to the Members of the company on accounts examined by him and on every balance sheet and profit & loss account and on every other document declared by the Companies Act,

1956, to be a part of or annexed to the balance sheet or profit & loss account. The auditor's report is supposed to contain a statement of the auditor that he obtained all information and explanations necessary for performance of his duty. He has to say that in his opinion, the books of accounts, as required by law, had been kept by the company and proper returns, adequate for purpose of audit were received from branches not visited by him and in his opinion the balance sheet and profit and loss accounts complied with accounting standards and represented a true and fair picture of the financial affairs of the company. The audit functions have been considered by the legislature of substantial importance and auditor has been given a right to attend General Body meetings under section 231 of the Companies Act, 1956. The audit report is to be read before the company in general meeting. The law also provides for penalty on auditor in case the auditor fails to act in conformity with the requirement of the provisions of the Companies Act, 1956 (section 233).

38. The Institute of Chartered Accountants of India, from time to time, has been issuing Standards/ Guidance Notes for benefits of its members on different aspects of audit and professional conduct. These Standards/ Guidance Notes have been complied by the Institute in a handbook of audit pronouncements having two volumes. This compilation contains detailed audit procedures and guidelines for Chartered Accountants on the principles governing audit, object and scope of audit and financial statements, quality control in respect of audit work, etc. These two volumes together contain more than 1900 pages. The very first chapter provides that the independence of an auditor has not only to exist in fact but also appear to so exist to all reasonable persons. The auditor's opinion helps determination of a true and fair view of the financial position and operating results of an enterprise. The idea of independence is instilled in the minds of Chartered Accountants from the commencement of their training and it has to be applied in their day to day work. The auditor should be straightforward, honest and sincere in his approach to his professional work. He must be firm and must not allow prejudice or bias to override his objectivity. For an audit firm, it is prescribed that it should be staffed by personnel who have attained and maintained the technical standards and professional competence required to enable them to fulfill their responsibilities. It is impressed upon the members of the Institute that the public should have confidence in the quality of audit and the key fundamental principles of auditors are integrity, objectivity and professional skepticism. If the auditor is unable to fully implement creditable and adequate safeguards, then he must not accept the work. What distinguishes the profession of Chartered Accountants from business is that professional service is not rendered with the sole purpose of a profit motive. Personal gain is one but not main or the only objective. Professional opinion, therefore, frowns upon methods where payment is made to depend on the basis of results.

39. For the purpose of verification of debtors, loans and advances it has been mandated by the Institute to the members that they should follow a procedure which should be independent of the company's employees. The statement of account should be sent to all the debtors at periodic intervals. These should be dispatched by a person independent of the ledger keeper. The debtors should be requested to confirm the balance as per statements with reference to their own records directly to the auditors and the confirmation received should

be reviewed by a person independent of the ledger keeper. The same procedure has been provided in respect of verification of cash balances lying in the bank, loans and advances. The Institute has emphasized that in carrying out an audit of debtors, loans and advances, the auditor is particularly concerned with obtaining sufficient and appropriate audit evidence to corroborate the management's assertion. Apart from verification to be carried out independently by auditors, the examination of records, direct confirmation procedure and analytical review procedure must be followed. It is specifically provided that the auditor should carry out examination of relevant records personally to satisfy himself about the validity, accuracy, etc. It is specified that direct communication with the debtors, bankers, loanees and advancers is the best method of ascertaining genuineness and accuracy. The Standards further provide that mere confirmation of balance by a debtor does not by itself ensure ultimate recovery. Therefore, any situation where an auditor has reasons to believe, based on his past experience, that the debt was unlikely to be recovered, he may limit his reliance on other audit procedures. The auditors have been cautioned that there may be situations where the management of an entity may not like auditors to seek confirmation directly. In such cases, the auditor should consider whether there were valid grounds for such a request. The standards warn the auditor that the cash and bank balances may constitute a significant proportion of the total assets of an entity and these assets are highly prone to misappropriation, misapplication and other forms of fraud. In carrying out an audit, the auditor should be particularly concerned with obtaining sufficient and appropriate audit evidence to corroborate the management's assertion regarding cash and bank balances. It is provided that the auditor should state and evaluate the system of internal control of the entity relating to cash and bank balances to determine the nature, timings and extent of other audit procedures. He should particularly review the aspects of internal control relating to cash and bank balances, specifically regarding proper authorization of cash and bank transactions, safeguards and periodic reconciliation of bank balances, reconciliation of cash in hand with book balances, on daily basis or at appropriate intervals including surprise checks.

40. Every big company has a finance department, which is responsible for keeping the financial health of the company in a sound state and to take financial decisions. Every company also has an accounts department responsible for maintaining the accounts, preparing various financial statements including balance sheets, profit and loss accounts, keeping invoices, taking care of the debts, interest payments, finance responsibilities, etc. The accounts department obviously is manned by persons well versed in maintaining accounts. Similarly, the finance department is also manned by persons we11 versed in finance and commerce. Over and above the accounts Department and finance Department, big companies also engage the services of internal auditors to check and ensure that the activities of the finance and accounts departments are being conducted in an orderly manner, not on the platform of policy but on the platform of integrity. The law requires companies to appoint an external statutory auditor over and above all this to ensure protection of the interest of shareholders and other stakeholders. The statute does not go by the presumption that MDs, directors, accountants and chartered accountants employed by the companies are honest persons and they should be believed. If this had been the presumption under law, the

provisions of statutory audit would not have been there. Rather the presumptions seem to be that in respect of financial statements, there is a possibility of manipulation. So, despite internal auditors, appointment of statutory auditors is must. The word 'audit' itself conveys the meaning 'don't trust, confirm yourself for surety.' The plea of trust in the honesty of employees of Satyam by the appellant must, therefore, fail.

41. The fudging of accounts, as confessed by Shri B.R. Raju, was gone into by SEBI, CBI & PCAOB, etc., and it was found that fudging was taking place right from the year 2000-01 till 7.1.2009 as admitted by Shri Raju. The actual cash and deposits found with various banks in the form of current accounts, fixed deposits, etc., over the years was much short of the amount shown in the financial statements made public by Satyam since 2001. In the letter dated 10.1.2009 written by the Director (Discipline) to the appellant, this difference in cash and bank balances, sundry debtors, liabilities, gross revenue and net profit as reflected in the financial statements and the actual, was brought to the notice of the appellant The percentage of excess shown in financial statements of the company over the actual available in the bank was also brought to the notice of the appellant. The appellant in response to the letter and in response to the prima facie opinion, where also these figures were reproduced, had not denied the correctness of any of these figures. The appellant did not take the stand that the financial statements of SCSL as prepared by the Company for public consumption during his tenure as partner of audit firm PW were correct and there was no difference between the actual position and the position as reflected in the financial statements. He, however, submitted that these were the allegations made against him in the CBI charge sheet and since they were mere allegations, yet to be proved, the Institute could not act on these allegations.

42. The CBI charge sheet had analyzed and brought forward the role of each of the accused in playing fraud upon the shareholders, in fudging of accounts admitted by Shri B.R Raju and as verified from various bank and other stake holders. The allegations in the charge sheet in respect of each individual accused had nothing to do with the actual figures of discrepancy as admitted by Shrj B.R Raju and as reflected in the prima facie opinion, as well as, in the letter written to the appellant by the Director (Discipline). The appellant was not supposed to answer the allegations made by CBI in the charge sheet against him or other accused persons about involvement in the fraud. But the appellant deliberately took the stand as if he was being tried by the Institute for fraud and for fudging of accounts and therefore, contended and argued that he was not supposed to rebut the figures given in the prima facie opinion unless proved. He relied upon several Supreme Court and High Court rulings on this issue. It has already been settled by this Appellate Authority, as well as, by the Supreme Court that disciplinary proceedings regarding professional misconduct are always independent of criminal proceedings. The subject matter of inquiry before the Disciplinary Committee was professional misconduct of the appellant in conducting the statutory audit of Satyam (SCSL) and not his involvement in the fudging of accounts as alleged by CBI or his collusion with the management in allowing forged accounts to pass as genuine accounts which was the subject matter of trial before the criminal court. The appellant from the very beginning tried to evade the real issue.

43. The appellant behaved strangely before the Director (Discipline) and the Disciplinary Committee. The effort of the appellant had been to evade the proceedings and not to give response. He had initially been taking the stand that he was in judicial custody and, therefore, could not defend his case effectively. However, it is to be noted that the appellant was for the first time arrested on 24th January, 2009. He had already received the reply sent by his firm PW to the Director (Discipline) regarding the fact that he was the person answerable, as a copy of this reply was also sent by his firm to him. He remained in judicial custody from 24th January, 2009 till June, 2010. He was released on bail under the orders of Andhra Pradesh High Court on 25th June, 2010. The next date of hearing fixed before the Disciplinary Committee was 23rd July, 2010. He did not appear before the Disciplinary Committee despite the fact that the Disciplinary Committee had been sending him notices all through. He released on bail up to 30th April, 2011 when he was again taken in judicial custody due to cancellation of his bail by Supreme Court. For this entire period of 10 months the only effort of the appellant had been to get the Disciplinary Committee proceedings stalled and he kept on moving judicial forums one after another to ensure that disciplinary proceedings of the Institute do not proceed further. Despite sending notices to him for filing documents, he did not file documents before the Disciplinary Committee regarding audit of the relevant years. It is noteworthy that during the same period, two proceedings; one before PCAOB and the other before Securities & Exchange Commission, USA were being conducted in respect of the appellant's firm concerning audit lapses. The orders of PCAOB and Securities & Exchange Commission show that these authorities were given full cooperation and all necessary audit documents were provided by the appellant's firm concerning audit for the relevant period. The two authorities conducted detailed inquiry into professional misconduct of the appellant on the basis of material supplied by the appellant's firm PW India. The substance of the two orders has been narrated above and it is apparent that the appellant's firm even gave consent for suffering the above adverse orders after inquiry was held. The appellant not only admitted professional negligence in respect of non-verification of cash balances, cash receivables and FDs directly from banks as per audit norms but also willing suffered restraints and penalty at the hands of authorities in foreign jurisdictions. However, during inquiry for the same professional conduct of the appellant in India by ICAI, the appellant ensured that the proceedings do not proceed further and he does not face the music of disciplinary procedure in India. Although it is a sad commentary on our own system, adjudicatory as well as quasi judicial where so much latitude is given to a person that he can assail every order on earth passed by any authority before higher judicial forums and delay the trials/ proceedings, the fact remains that the appellant's firm under the fear of suffering much more severe punishment at the hands of PCAOB and Securities & Exchange Commission, resorted to plea bargaining and admitted the entire guilt.

44. In India, in case of partnership firms, the individual partners are held responsible and are answerable for misdeeds of the firm, in the US, the partnership firm itself is made respondent and held responsible. The financial penalties are to be borne by firm, which practically means the partners. The admissions made by the appellant's firm in the consent orders of PCAOB and Securities & Exchange Commission cannot be brushed aside on the plea taken

by the appellant that the orders passed by PCAOB and Securities & Exchange Commission were in anticipation of prosecution and not after the prosecution. All plea bargaining and consent orders in the US are passed in anticipation of prosecution and not as a result of prosecution. This does not take away the legal sancity of these orders or take the sting out of the orders. The consent order passed by PCAOB and SEC can be relied upon by this authority to infer admissions made by the appellant before these quasi judicial authorities. The orders categorically show that the appellant's firm admitted professional misconduct and negligence and admitted that it had failed to perform its professional duties and it had failed to apply professional skepticism, which it should have applied when discrepancies came to its notice in respect of dual vouchering etc. The standards of audit as prescribed by PCAOB are the same as prescribed by ICAI with minor difference of details. Professional misconduct under PCAOB standards is bound to be professional misconduct under ICAI standards as well.

45. The other issue raised by the appellant is about absence of evidence with the Disciplinary Committee and the Director (Discipline) and the onus of proof. The letter sent by the Director (Discipline), subsequently the prima facie opinion sent by the Disciplinary Committee to the appellant seeking his replies, supplying of documents by the Disciplinary Committee to the appellant, as demanded by him, brought all facts pertaining to fudging of accounts of Satyam to the knowledge of the appellant. Even otherwise, the appellant was having all details of the facts with him as he was facing prosecution for criminal offences before the Criminal Court where he has supplied copies of charge sheets by CBI.

46. It was the appellant who was appointed statutory auditor by Satyam. He was responsible for audit and it was within his special knowledge what audit was done and how it was done. What audit procedure/plan was followed and why. The Director (Discipline) had to find out what was the role played by the appellant in the audit, The appellant was part of the audit team and was admittedly answerable to the Disciplinary Committee for lapses on part of his firm for the audit conducted for the years 2000 to 2007. It was for the appellant to specify as to what was his role in the audit of Satyam and in pursuance of his role, how he was not at all liable for false, unfair and fudged statements which he certified and opined from 2000 to 2007 as truthful and fair financial statements.

47. The appellant was made aware of the undisputed facts and figures in the first letter written by the Director (Discipline) to him. The discrepancy in the actual financial state of affairs and the state of affairs shown in the audited balance sheet was brought to his notice repeatedly by giving him copies of SEBI reports, copies of CBI charge sheets and other material. The Disciplinary Committee was not to specify as to how the appellant was responsible for the discrepancy in these figures. The mere fact that financial statements were admittedly false put a responsibility on the appellant to show the falsehood of the figures escaped his notice despite due diligence. It was not for the Disciplinary Committee to examine witness and prove what was exclusively within the knowledge of appellant alone. Actually, it was for the appellant to come forward and examine himself to prove that he had the conducted audit as per the procedures laid down by the Institute of Chartered Accountants of India. The appellant was trained to conduct the audit and was primarily responsible for the conduct

of audit and answerable on behalf for the audit firm to the shareholders and to other authorities. He was supposed to be involved in all processes of audit. If he was not involved in some specific process of audit, it was within his special knowledge and the onus to prove the same was on him. If the audit firm has named him as the person responsible to answer, regarding the discrepancies which had come to notice, he cannot keep on shifting the blame on others and claim himself to be clear in India and admit to be tainted before the US authorities.

48 The appellant deliberately did not cooperate with the Director (Discipline) and the Disciplinary Committee presuming that non-cooperation was his shield and defence. Non-cooperation is not the shield of any professional when the result of professional negligence stares in the eyes. In this case, the very fact that all vital audit parameters were not followed and the bank balances are reflected in the balance sheet were not there, TDS deducted as reflected in the financial statement was not the TDS mentioned in the income tax returns, the debts as reflected in the financial statements actually were not true and correct, even the revenue earnings were shown highly exaggerated in the financial statements and to show these exaggerated revenue earnings, entire financial statements were fudged, shows that the checks and balances and audit procedures were not adhered to.

49. This Appellate Authority is not concerned as to who fudged the accounts and who was responsible for fudging the accounts but the very fact that fudged accounts were certified as true and fair accounts by the appellant from 2000-01 to 2007 despite various indications of 'cooking' going on in Satyam coming to knowledge of the appellant, as pointed out in the PCAOB order and the SEC order, shows and proves that the conduct of the appellant was in gross disregard to audit requirements and procedures laid down by the Institute, as well as, the warnings given in these Standards. It is apparent that the appellant was either grossly negligent or closed his eyes deliberately to ensure that fudged accounts pass as fair accounts.

50. We also find no force in the appellant's argument that it was not the duty of the appellant to detect fraud. This argument is misplaced. In the present case, Sh. B.R. Raju, who was the Chairman, confessed that the accounts of Satyam were fudged and forged despite there being an internal and external auditor. Both the internal auditor and the external auditor pleaded that they were not aware of anything. It is like the story of a thief and watch dog where the thief says I committed the theft and the watch dog says I was quite a vigilant watch dog and had not been sleeping on duty, I did not see the theft being committed. When it is not disputed that theft was committed, the only thing to be ascertained is whether the watch dog was a vigilant watch dog or a sleeping watch dog. The onus to show that the watch dog had all along been vigilant was on the watch dog and not on a third party.

51. It is true that a statutory auditor is not appointed to detect fraud. However, it is the duty of the auditor to act in such a fashion that commission of fraud becomes highly improbable if not possible. In the present case, the orders of PCAOB and Securities and Exchange Commission, as well as, the conduct of the appellant shows that the appellant had not performed his duties of verifying the cash allegedly lying in the current account and FDs

in the banks, accounts receivable, etc., directly from the source and depended upon the employees of Satyam. We cannot agree with the appellant that as Satyam was a big company having big clients, the appellant was, therefore, supposed to believe in truthfulness of the employees of Satyam. We consider that bigger the company, bigger is the responsibility of the auditor. In all big companies, the audit has to be sample based and in such cases, the auditors have to be very skeptical and careful and the moment lapses come to his notice, he has to go deep into the things. But it is apparent in the present case that the appellant had sleeping over the lapses. Though the lapses were brought to his notice by the team members, the same were brushed under the carpet as is apparent from the orders of PCAOB and Securities and Exchange Commission.

52. It is noteworthy that the appellant's firm was appointed as statutory auditor in 2000-01. No fudging of accounts was going on in Satyam prior to that. Fudging of accounts started only in 2000-01, i.e., when PW took over the statutory audit. Another fact, noteworthy in this case, found out by CBI is that the appellant's firm was being paid exorbitant audit fees by Satyam. CBI made a comparison of the turnover and audit fee paid by peer companies in the IT sector namely WIPRO Ltd., Infosys and Satyam during years 2006 to 2008, and the fee comparison is as under:-

Name of the Company	Turnover of the Company (Rs. in Crores) 2006-07 2007-08		Audit fees paid (Rs. in Crores) 2006-07 2007-08	
M/s SCSL	6228	8137	3.67	3.73
M/s Wipro			0.90	1.10
M/s Infosys	13149	15648	0.55	0.8

53. The story of Satyam's fraud started with induction of PW as external auditor and ended with the confession made by Sh. B.R. Raju. All along, PW alone was the external auditor. Detectives and investigators normally come into picture when fraud comes to light either accidentally or through some disclosure. Detectives and investigators are never engaged by anyone when the fraud does not come to light. They are engaged to find out what cannot be detected and cross checked by a normal intelligent person. But auditors are engaged to keep a watchful eye during the entire year of functioning of the company and they are supposed to be vigilant so that frauds do not take place. If they perform their duties well and despite that no fraud is detected, then the auditors are not found fault with. However, in this case, as the facts show, the auditors did give a go-bye to their duties of directly verifying from the banks the cash and other receivables, FDs, etc. The auditors recorded what Satyam's Management wanted them to record. It is a clear case where auditors failed to exercise due diligence and did not do their duty in a professional manner.

54. An argument raised by the appellant is that he was not given an opportunity to defend himself and the Disciplinary Committee did not adhere to procedure and prematurely closed the evidence of the appellant after the Director (Discipline) had stated that she did not want to examine any witness. The appellant should have been given an adjournment for leading defence. A perusal of the proceedings would show that the appellant was not at

all interested in producing even the audit documents available with him, either before the Disciplinary Committee or before the Director (Discipline). He did not file a list of witnesses or documents despite repeated notices and was reluctant to examine himself. His only effort was to kill the enquiry. The appellant had raised a similar plea in his application for allowing additional evidence before this Authority. This Authority had considered the entire proceedings and the notices issued to the appellant asking him to produce his evidence and documents for his defence. The order is a detailed one and for the sake of brevity is not being reproduced here. However, this authority after considering all notices and the dates on which hearings were fixed by the Disciplinary Committee came to the conclusion that there was willful disregard by the appellant of the opportunities given to him to submit necessary documents and there was no ground made out by the appellant for bringing additional evidence on record. The Authority also discussed the principles of natural justice as applicable in such cases. The order of this Appellate Authority dated 4th May, 2013, however, be read as part of this order.

55. Another argument adduced by the appellant is about institutional bias. This is again a baseless argument. Merely because some members of Institute of Chartered Accountants of India helped CBI in investigation of fraud of Satyam or submitted report to CBI in respect of fudging of accounts by Satyam does not make ICAI a prosecutor of the appellant. Even otherwise, suppose a delinquent employee commits a theft in the office, the office is not only supposed to conduct disciplinary proceedings against the employee but is also duty bound to lodge an FIR and produce all evidence before the competent criminal court so as to bring the criminal case to a logical conclusion. Merely because the person who lodged the FIR is a witness before the criminal court would not prevent him from being a witness or presenter of case before the disciplinary authority or to be associated with disciplinary proceedings in any manner. There is no institutional bias involved in this case. Rather, the institution would have failed in its duty if it did not act against the members of Institute for professional negligence and did not carry out disciplinary proceedings.

56. One argument raised by the appellant is that the Disciplinary Committee relied upon statements under section 164 Cr.P.C. made by P. Siva Prasad and Ch. Ravindernath before the criminal court and these two witnesses were not cross examined by the appellant. It is also submitted that the Institute did not examine any person from Satyam or from the banks to prove the cash balances, etc., and therefore, the enquiry was vitiated.

57. There is no doubt that the Disciplinary Committee in its report has referred to the statements of Shri P. Siva Prasad and Ch. Ravindernath. But this reference has been made only to lend support to facts already known and established. We have to consider whether the non-examination of these two persons caused any prejudice to the appellant or whether their examination was significant for unearthing the facts. We find that even if reference had not been made to the statements under section 164 Cr.P.C. of these two persons, the material available with the Disciplinary Committee was sufficient enough to pass the impugned order against the appellant. The appellant has not shown. in what manner he was prejudiced by non-examination of these two persons or other officers of Satyam. As all the facts necessary to establish the professional negligence and a flawed audit on the part of the appellant's

firm for which the appellant was responsible, stood admitted in the consent orders of PCAOB and SEC passed on the basis of admissions and documents of the appellant's firm, examination of other persons to prove the same things again was not necessary. In Dunlop India vs. Bank of Baroda, a judgment given by Division Bench of Delhi High Court on 29th May, 2012, the Court observed that where the party against whom an order has been passed does not dispute the facts and does not demand the veracity of the version or the credibility of the statements, there was no real prejudice caused to the party aggrieved by absence of a formal opportunity of cross examination per se and this would not invalidate or vitiate the decision arrived at fairly. Same is the law laid down by the Supreme Court in K.L. Tripathi Vs. SBI 1984 1SCC 43 on which the Division Bench of Delhi High Court relied. In the present case, the fact of fudging of accounts of Satyam right from the year 2000-01 to 2008-09 is an admitted fact. It Is admitted that the appellant did not place on record any of the audit papers before the Disciplinary Committee despite several opportunities given to him. He placed on record certain documents only after the Disciplinary Committee had given its report. It is admitted that the appellant's firm consented for passing of an adverse order against it based on admissions and on inquiry conducted by PCAOB and SEC as reproduced above. Under these circumstances, we consider that no prejudice was caused to the appellant in non-examination of Shri P. Siva Prasad and Shri Ch. Ravindernath and material otherwise available on record was sufficient in itself for the Disciplinary Committee to give its findings.

58. It is also settled law that when documentary evidence is already part of the record and copies of the same have been supplied to the delinquent official and the official had sufficient opportunity to give response to the documents, but did not give response deliberately, an adverse inference against the delinquent is to be drawn. Moreover, an auditor is in special knowledge of the facts as to what care he had taken to ensure that the cash balances, FDs, accounts receivable, TDS figures were the same as reflected by the company. The onus is on him to prove before the Disciplinary Committee about the steps taken by him and his conduct of audit as per established standards.

59. One argument is that the Director (Discipline) failed to identify the documents filed by her before the Disciplinary Committee charge-wise and in absence of this, proceedings of the Disciplinary Committee were liable to be set aside. This is another frivolous argument of the appellant. The overall charge against the appellant was about professional misconduct. The appellant knew and understood the charges very well. In fact, when he was asked by the High Court to be present before the Disciplinary Committee and admit or deny the charges, he did not want the Disciplinary Committee to read the charges and told the Disciplinary Committee that he knew what the charges were and denied them. The documents supplied to the appellant by the Institute were the reports of CBI, SEBI, etc., which showed flawed audit and non-adherence to professional standards by the appellant.

60. The appellant submitted that he was made to contest the disciplinary proceedings simultaneously with criminal case pending against him and this was contrary to principles of natural justice. In fact the appellant and his other colleagues had exhausted all judicial forums on this argument alone. The appellant and other auditors of Satyam wanted to

ensure that the Disciplinary Committee proceedings were stailed but they failed up to the Supreme Court. We consider that this argument need not be raised afresh before this Authority.

61. Another plea taken by the appellant is that he was not supplied basic documents like the reports received from the banks during conduct of investigation by CBI, SEBI, etc. This argument is again a frivolous argument. All the documents concerning this matter were made available to him by ICAI and were also with the appellant through different sources. He was supplied copies of CBI reports by the Institute as well as by the prosecution during his criminal trial. The SEBI report which contained all documents and annexures was also supplied. He asked the Disciplinary Committee to duplicate the entire process and for this he wasted several hearings of the Disciplinary Committee. These documents which the appellant is stating to be basic documents, in fact, did not have much relevance in view of the fact that all facts regarding non-existing cash, FDs, interest on FDs, TDS and about false statement of cash receivables, cash in banks, FDs in banks, TDS deductions, debts were admitted facts. However, these documents were supplied to his counsel on 18.12.2011, 21.12.2011 and 22.12.2011. We find no force in this argument.

62. The appellant had signed the balance sheets and financial statements of Satyam for the years 2000-01 to 2006-07 as a partner of PW; while actually he was not a partner of PW but was a partner of PW, Banglore. The firm's name registered with the ICAI was PW Banglore of which the appellant was shown as a partner. He has taken the stand that the Institute had wrongly registered the name PW Banglore since as per the regulations of the Institute, the Institute could not have registered this name. We find this argument surprising. PW Banglore, PW Co. Banglore, PW Kolkata and PW Co. Kolkata, were different firms registered with the Institute. PW was not a firm registered with the Institute. There was no reason for the appellant to sign the financial statements and balance sheet of Satyam as a partner of PW. Any amount of argument whether the Institute had rightly registered the names or not could not absolve the appellant of deliberately signing the balance sheets and financial statements of Satyam as a partner of a firm of which he was not a partner at all. If it did not matter as to which PW firm's partner signed the financial statements of Satyam as official statutory auditor, then he should have signed as a partner of PW Banglore of which he was a partner. Since the name of the audit firm did matter, he misrepresented himself as partner of PW, of which he was not a partner. In fact the shareholders had appointed PW as the audit firm. If he found that the name of the audit firm was wrongly stated by shareholders and it should be changed, he should have told the company to change the name of the audit firm. But misrepresenting himself as a partner of PW was an act of fraud on his part. Two wrongs do not make a right. If the Institute had wrongly registered the name of PW Banglore, which is the plea taken by him, it did not give him a right to commit another wrong and represent himself as a partner of PW instead of representing himself as a partner of PW Banglore, of which he was a partner. We, therefore, consider that he deliberately showed himself as a partner of PW instead of showing himself as a partner of PW Banglore. If this was not a deliberate act, he could have written PW Kolkata or PW Co. Banglore. But the very fact that specific name of PW was mentioned and 'Banglore' was deliberately not mentioned showed

that it was an intentional act. We, therefore, agree with the Disciplinary Committee that he violated Rule 190(9)(i) of the Chartered Accountants Regulations, 1988, which specifies that no member shall practice under a trade or firm which has not been approved by the Institute.

63. After going through the entire material and evidence, we come to the conclusion that the appellant, who being a partner of PW Banglore had conducted audit of Satyam from 2000-01 to 2006-07, represented himself as a partner of an audit firm PW and failed to exercise due diligence as an auditor. Cash and bank balances are those assets, which are highly prone to misappropriation, misapplication and other forms of fraud. Satyam was allegedly having accumulated cash assets amounting to about 50% of its total assets and under these circumstances, the auditor while carrying out the audit was specifically required to obtain sufficient and appropriate audit evidence to corroborate the management assertions with respect to existence of cash and bank balances and completeness of entries in the books of accounts of the company. As per the guidance note on audit issued by ICAI, in respect of all cash and bank balances, the appellant was supposed to evaluate the system of internal control relating to verification of cash and bank balances to determine the timing and extent of his other audit procedures, which the appellant failed to do. We also find that the appellant being the signing partner of the audit firm failed to carry out an independent examination of financial information of the company and took the plea that the company was an honest big size company. This attitude of the appellant by itself is an unprofessional attitude and does not augur well for a statutory auditor. The appellant failed to plan his work to enable him to conduct an effective audit and even failed to take corrective measures when the discrepancies in documentation were brought to his notice. He overlooked the dual system of invoicing and fabrication of thousands of bogus invoices despite the fact that many such invoices were brought to his notice. He did not exercise the expected degree of professional skepticism and ignored the signals of fraud being committed in the company. He merely relied on credit worthiness of the company as an audit strategy, which is contrary to the expected professional conduct of an auditor. We consider that the Disciplinary Committee rightly held the appellant guilty of professional misconduct falling within the meaning of clauses 5, 6, 7, 8 & 9 of Part I of Second Schedule to the Chartered Accountants Act, 1949.

64. The appellant also argued that the punishment so awarded to him by the Disciplinary Committee was not commensurate with the misconduct found against him. He had acted upon bona fide as a chartered accountant and removal of his name from the register of members permanently shall ruin his career. He also stated that he had blotless career and this was the first case of disciplinary proceedings against him. A lenient view should have been taken. We have considered the facts and circumstances of the case and the punishment awarded to the appellant. The facts reveal that for seven long years the appellant who was a partner of the audit firm and responsible for statutory audit of the company enjoying international reputation showed gross negligence in conducting audit and misconducted himself all along. In fact, the fudging of accounts started with the appointment of the appellant's firm as an external auditor and continued till Sh. Raju himself made a confession. The appellant did

not act despite there being indicators of suspicious transactions and generation of invoices through another system. He kept his eyes and ears closed to misdeeds of the management and did not bother to take steps for proper quality control. A comparison of fee charged by the appellant's firm also arouses suspicion that all this was being done for a price. We, therefore, consider that the punishment awarded to the appellant by the Disciplinary Committee was in no manner disproportionate to the misconduct of the appellant.

65. We find no force in the appeal. The appeal is hereby dismissed.

Justice S.N. Dhingra (Retd.)
Chairperson

Dr. Ashok Haldia
Member

Rakesh Chandra
Member

Kamlesh Vikamsey
Member

New Delhi
Dated this 14th Day of February

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 03/ICAI/2014

I N THE MATTER OF

Dr. G. Sucharitha ..... Appellant

Versus

Institute of Chartered Accountants of India ..... Respondent

CORAM

HON'BLETHE CHAIRPERSON HON'BLE Dr. NAVRANG SAINI (MEMBER)

HON'BLE PRAVEEN GARG (MEMBER)

Present: For the Appellant: Sudipto Sircar, Advocate.

ORDER

(Date: 30-01-2016)

It appears that the Appellant, who was the cornplainant before the Board of Discipline had preferred Appeal against the decision taken by the Board of Discipline refusing to take action against the respondent, Mr. P. Jitender Reddy, Chartered Accountant, on his complaint for some misconduct.

It also appears from record that the Registry of Appellate Authority being of the view that Appeal at the instance of a complainant is not maintainable did not register the appeal. The appellant was informed accordingly. Thereafter, as per the telephonic request made to the Registry by the appellant the appeal in original was returned to the appellant as also the initial payment made by her as per the Rules vide Deputy Registrar's letter dated 18.06.2014.

It further appears that since in another appeal preferred by another complainant the Appellate Authority had decided to hear the appellant first before deciding as to whether the complainant can file an appeal or not the registry listed the present matter before the Authority on the basis of photocopy of the appeal which had earlier been returned in original.

The aforesaid background facts, were however not brought to the notice of the Authority when the matter was listed after its constitution and were pending a t the time of constitution of this Authority in November,2015. On receipt of the notice, the Appellant had sent an e-mail seeking clarification as to how her appeal had come to be listed for preliminary hearing before the Authority after its return to her by the Registry as being not maintainable. The Appellant also informed in her e-mail that she has already filed a Writ Petition in the Andhra Pradesh High Court (being Writ Petition no. 20410 of 2014) and which petition stands admitted for hearing.

In view of aforesaid, no further orders are required to be passed by Appellate Authority in this matter as there is no Appeal pending for consideration. The file be now closed.

Justice P.K. Bhasin (Retd.)	**Dr. Navrang Saini**	**Sh. Praveen Garg**
Chairperson	Member	Member

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 03/ICAI/2015

IN THE MATTER OF

A.N. Iyer .... Appellant

Versus

Institute of Chartered Accountants of India ....Respondent

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE Dr. NAVRANG SAINI (MEMBER)

Present: None

ORDER

(01-03-2016)

Today we noticed that there is in fact no Appeal pending consideration and by mistake of the Registry, one old letter dated 18.03.2015 sent by Mr. A. N. Iyer and Mr. R.N. Iyer was placed before the Bench as an Appeal while in fact that letter was not an Appeal. Earlier to that, it appears, these individuals who were the Complainants had filed an Appeal. However, the Registry returned that Appeal vide letter dated 16.04.2015 on the ground that the Appeal was not maintainable by Complainants.

Therefore, in the aforesaid circumstances, this matter needs to be closed as there is no Appeal before the Appellate Authority. This matter accordingly stands closed. Mr. A.N. Iyer and R.N. Iyer be sent a copies of this order for their information.

Justice P.K. Bhasin (Retd.)
Chairperson

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 02/ICAI/201 4

IN THE MATTER OF

Dibakar Chatterjee .... Appellant

Versus

ICAI & S.K. Chatterjee ....Respondent

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE Dr. NAVRANG SAINI (MEMBER)

Present:
For the Appellant: None
For the Respondents: Ms. Vandana Nagpal, Director, ICAI & Ms. Shalini Gulati, Assistant Secretary for ICAI Mr. Sayuj Kumar Banerjee for Respondent No. 2

ORDER

(16-05-2016)

Ms. Vandana Nagpal, Director, ICAI and Ms. Shalini Gulati, Assistant Secretary have filed Authority letter issued by Institute in their favour authorizing then 1 to represent the Institute in the present matter.

Mr. Dibakar Chatterjee, complainant of the case, has not deposited with Appellate Authority the requisite fee of Rs.5000/- (Rupees Five Thousand) which as per the procedure Rules framed by the Appellate Authority is required to be paid along with the Appeal and which he was directed to pay vide our earlier order which was duly communicated to him by the Registry. He was given two opportunities to comply with our direction to that effect but he has neither complied with that direction.

In these circumstance, we dismiss this matter for non-prosecution without going into any other aspects raised on behalf of the Respondents including the very maintainability of an appeal at the instance of an unsuccessful complainant.

Mr. Dibakar Chatterjee be communicated this order.

Justice P.K. Bhasin (Retd.) **Dr. Navrang Saini**
Chairperson Member

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 04/ICAI/2014

Date of pronouncement of order 27th JUNE 2016

IN THE MATTER OF

Umed Raj Singhvi .....Appellant

Versus

1) Institute of Chartered Accountants of India &
2) Mr. K. Ramachandra Murthy .....Respondents

Appearances: Ms. Vandana Nagpal, Director, ICAI
Ms. Shalini K Gulati, A.S., ICAI
Mr. C. V. Sajan for Mr. K. Ramachandra Murthy

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE Dr. NAVRANG SAINI (MEMBER)

ORDER

The appellant, a chartered accountant, is the complainant who had lodged a complaint against respondent no.2, who also happens to be a chartered accountant by profession, with the Disciplinary Directorate of the Institute of Chartered Accountants of India for having committed professional misconduct falling under Clauses 5,6, 7 and 8 Part I of Second Schedule to the Chartered Accountants Act, 1949('Act of 1949' in short). The complaint was filed under Section 21 of the Act of 1949 and was examined by the Director (Discipline) for the purpose of formation of a prima facie opinion as to whether on the basis of the complaint, response thereto of the chartered accountant against whom complaint was lodged and other material brought on record during the enquiry any case of professional or other misconduct falling in Schedule 1 or 2 or both was made out. The

Director (Discipline) vide his order dated 3rd February, 2014 did not find prima facie case of misconduct made out against the respondent no,. 2 herein. The Board of Discipline constituted by the Institute under Section 21A of the Act of 1949 and before whom the matter was placed by the Director (Discipline) alongwith the prima facie opinion as required under Section 21A(4) of the Act of 1949 examined the matter and it also concurred with the prima facie opinion of the Director (Discipline) vide its order dated 6th February, 2014 and so the matter was closed.

The complainant felt aggrieved with the rejection of his complaint and so approached this Appellate Authority constituted under Section 22A of the Act of 1949 by filing this appeal with a prayer for setting aside of the aforesaid orders of the Director (Discipline) and the Board of Discipline and for ordering initiation of disciplinary action against respondent no. 2. Both the

respondents entered appearance upon receipt of notice of the appeal issued by this Authority. The appellant however expressed his inability to come to Delhi from Bangalore to appear before this Authority to pursue his appeal being a senior citizen and requested the Authority to dispose of the appeal on the basis of whatever he had pleaded in his appeal.

The respondent no.2 filed detailed written submissions and his representative made oral submissions also. On behalf of the Institute its Director Ms. Vandana Nagpal argued.

From the side of the respondents a preliminary objection was raised that this appeal at the instance of the complainant is not maintainable since under Section 22G of the Act of 1949 only a member of the Institute of Chartered Accountants of India who has been found guilty of some misconduct and awarded any of the punishments provided under Section 21A(3) or 21B(3) of the Act of 1949 is entitled to file an appeal before this Appellate Authority. As requested the representatives of this preliminary objection is being decided first as in case this objection is accepted then there would be no need of going into the merits of the case.

Section 22G reads like this:

"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 authorised 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 the case; or

(d) pass such other order as the Authority thinks fit:

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

This Section clearly supports the respondents' objection that only that member of the Institute can file an appeal before the Appellate Authority who has been awarded any of the punishments as provided under Section 21A(3) or 21B(3) of the Act of 1949. Those punishments have obviously to be awarded after some chartered accountant has been held guilty of professional or some other misconduct falling under any of the two Schedules or under both. If a complainant is aggrieved by the rejection of his complaint then he has to knock the doors of some other forum which according to the respondents could be High Court by filing a writ petition. In the present case the complaint of the appellant was rejected meaning thereby none was punished for any misconduct. Therefore, the appellant cannot be said to an aggrieved member of the Institute having a right to file an appeal before this Authority and so the appeal is liable to be rejected on this ground alone without going into the merits of the case.

This appeal is accordingly dismissed as being not maintainable.

Justice P.K. Bhasin (Retd.)
Chairperson

Dr. Navrang Saini
Member

27th June, 2016

BEFORE THE APPELLATE AUTHORITY

(Constituted Under The Chartered Accountants Act, 1949)

APPEAL NO. 15/ICAI/2014

IN THE MATTER OF:

Dinesh Kumar Agarwal .....Appellant

Versus

Institute of Chartered Accountants of India
and others .....Respondents

CORAM:

Hon'ble Mr. Justice M.C. Garg (Retd.)	Chairperson
Hon'ble Dr. Navrang Saini	Member
Hon'ble Mr. Praveen Garg	Member
Hon'ble Mr. Kamlesh S. Vikamsey	Member

PRESENT:

For the Appellant

1. Mr. Kunal Sharma, Advocate

For the Respondents:

1. Ms. Harleen Bhalla, Assistant Secretary, ICAI

ORDER

Date: 08.02.2017

1. Being aggrieved of the order dated 13.01.2014 passed by the Board of Discipline under Section 21A (3) of the Chartered Accountants Act, 1949 as amended by the Chartered Accountants (Amendment) Act, 2006 (hereinafter referred to as the "Act"), CA. Dinesh Kumar Agarwal, a Chartered Accountant appellant herein has filed this appeal against the Institute of Chartered Accountants of India challenging the Impugned Order dated 13.01.2014 wherein the Board of Discipline awarded punishment of removal of appellant's name from the Register of members for a period of three (3) months. The said order reads as under:-

   "In terms of clause (b) of sub rule (2) of rule 9 of the Chartered Accountant (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 the Board of Discipline has decided to proceed further in the above matter".

2. According to the respondent the said order was communicated to the appellant vide letter dated 16th April, 2014 through speed post A.D. However, the appellant states that the said letter was received by him on 20th May, 2013.

3. The appellant further submits that from the perusal of the said letter, it transpires that the Director (Discipline) had formed a 'Prima Facie Opinion' against him without sending the particulars of the complaint to him as required under clause (a) of sub rule (1) of Rule (8) read with Rule (11) of chapter III of the Chartered Accountants (Procedure of Investigations of Professional and other Misconduct and Conduct of Cases) Rules, 2007 (hereinafter referred to as 'the Rules'). The failure of not sending the particulars of the complaint on the part of Director (Discipline) deprived him of his right to file a statement of defence as provided under sub-rule (3) of Rule (8) of the Rules.

4. It is also stated by the appellant that the procedure which ought to have been adopted in this case for the purpose of forming a 'Prima Facie Opinion' by the Director (Discipline) has not been followed. Moreover, it is in violation of the Principles of Natural Justice. It is further submitted that the notice of the complaint was never received by the appellant. He had no knowledge regarding any adverse opinion formed against him and made a request for supplying of documents so that he could file a proper written statement.

5. From a reading of the documents, the appellant came to know that the respondent had received information from Shri S.K. Kashyap, SP/CBI/EOW, New Delhi vide letter dated 25.07.2008 in the matter related to case no. (RC No. 6(E)/2005/EOW-I/DLI) which was registered by CBI, EOW-1, New Delhi on 28/06/2005, wherein various allegations were made against the appellant inter-alia that the Indian Medical Scientific Research Foundation has opened fake accounts in various banks and deposited donation money in these accounts and withdrew the donation money immediately and transferred them in cash to various accounts of fake trusts and returned them back to company after deducted the commission, for which the Central Bureau of Investigation filed the case against appellant which is yet to be tried.

6. The appellant further submits that the contention that no notice was served before framing of the 'Prima Facie Opinion' against him by the Director (Discipline) has been upheld by the Board of Discipline as appearing at paragraph (10) of the report of the Board of Discipline dated 22.08.2013 which read as under:-

> *"With respect to allegation mentioned clause (2) of Part III of the First Schedule to the Chartered Accountants (Amendment) Act, 2006 from the perusal of the Proof of Delivery (POD) the Board observed that the letters were never received by the Respondent as the signature of the recipient is not there. Moreover the respondent has given an affidavit claiming that he has not received the documents. Hence, the Board is inclined to give benefit of doubt to the respondent with respect of this charge".*

7. The appellant further contends that as he was not served upon any notice with respect to any information received by the Director (Discipline). Under such circumstances, the 'Prima Facie Opinion' is not sustainable as neither he was provided with a copy of the information received against him in terms of clause (a) of sub rule (1) of Rule (8) read with Rules (10) and (11) of Chapter III of the Rules nor he was given any opportunity to file a written

statement to the information dated 25.07.2008 and was also not granted an opportunity of being heard, before framing of 'Prima Facie Opinion' by the Director (Discipline). Since the 'Prima Facie Opinion' was itself formed illegally, therefore the entire proceedings carried out before the Board of Discipline stood vitiated due to want of adhering to the proper procedure in the matter as required. Rules (8), (10) and (11) of Chapter III of the Rules are reproduced as hereunder:

"Rule 8: Procedure to be followed by Director on a complaint"

(1) The Director or an officer or officers authorized by the Director, within sixty days of the receipt of a complaint under rule 3, shall,-

(a) If the complaint is against an individual member, send particulars of the act of commission or omission alleged or a copy of the complaint, as the case may be, to that member at his Professional address;

Rule 10: Mode of sending Notice:

1. Every notice or letter issued by the Director, Board of Discipline, or the Committee under these rules shall be sent to the member or the firm or any other person, by registered post with acknowledgement due or speed post, expect where specified otherwise in any rule.

2. If any notice or letter is returned unserved with an endorsement to the effect that the addressee had refused to accept the notice or letter, the notice or letter shall be deemed to have been served.

3. If the notice or letter is retuned with an endorsement to the effect that the addressee cannot be found at the address given, the Director shall ask the complainant or any other person who may be in a position to provide another address of the member or firm or person whose address is found to be not correct, and on production of the correct address, a fresh notice or letter shall be issued at such address.

4. Where the notice or letter is returned under sub-rule (3), it may be served by fixing a copy thereof in some conspicuous place at the professional address or residence of the respondent which was last registered with the Institute or in such other manner as the Board of Discipline may think fit and such service shall be deemed to be sufficient service for the purpose of these rules.

Rule 11: Certain provisions relating to complaint also to be applicable for information relating to misconduct of members

The procedure laid down for dealing with complaints in sub-rule (6) of rule 3, sub-rules (1), (2), (3) and (4) of rule 5, sub- rules (1), (2), (3) and (5) of rule 8, rule 9 and rule 10 shall also apply to information received by the Director relating to misconduct of members".

8. Ms. Harleen Bhalla, Assistant Secretary appearing for the respondent Institute submitted that the notice with respect to the complaint was sent to the appellant by Registered Post

vide letter dated 16th April, 2014 and vide letter dated 26th August, 2014 while replying to the letter of the respondent dated 13th July, 2014. She, on behalf of the Institute further submitted that the appellant was given an opportunity of hearing by the Board of Discipline and the appellant did participate in those proceedings and also filed a reply to the order, therefore, the decision of the Board of Discipline cannot be considered as perverse.

9. Ms. Harleen Bhalla vehemently contended that the appearance of the appellant before the Board of Discipline after being served with copy of the order apparently indicates that the principles of Natural Justice were adhered to by the Board of Discipline and takes care of notice having not been served upon the appellant in respect of the complaint received by the Director (Discipline) through Central Bureau of Investigation which shows that the conduct of the appellant was sufficient enough to form a 'Prima Facie Opinion' against him as formed by the Director (Discipline) and as such, the decision taken by the Board of Discipline in this case cannot be said to be faulty.

10. We have heard the learned counsel Mr. Kunal Sharma, Advocate for the appellant and Ms. Harleen Bhalla, Assistant Secretary for the respondents and based upon the submissions/ arguments advanced by the parties and materials available on record, we are of the considered view that the basic submission made on behalf of the appellant in this case is that he was never served upon any notice by the Director (Discipline). Therefore, he could not have any opportunity to reply. The fact of issuance and service of notice was also discussed by the Board of Discipline while passing the order of removal of appellant's name from the Register of Members and admitted in paragraph (10) of the report of the Board of Discipline that the notice about the information as required to have been sent to the appellant under Rule (8) of the procedure prescribed was never received by the complainant.

11. Undoubtedly, the Board of Discipline has given an opportunity of hearing to the appellant and the appellant has filed a reply but the said reply was based upon the order only. The reply was not in respect of the complaint received from the Central Bureau of Investigation which according to the appellant is yet to be tried. It is undisputed that the Board of Discipline did sent the notice to the complainant along with the order of the Director (Discipline) to which a reply was sent by the appellant who further participated in the proceedings. The said notice read as under:-

> *"Sub: In the matter of "Information" treated against you, under Section 21 of the Chartered Accountants (Amendment) Act, 2006*
>
> This has reference to opportunity of hearing afforded to you in the captioned matter by the Board of Discipline at its meeting held on 13th January, 2014 at New Delhi.
>
> Please find enclosed herewith a copy of the Order of the Board of Discipline dated 13th January, 2014 in the aforesaid matter.
>
> We would like to inform you that in terms of the punishment as contained in the aforesaid Order a Notification for the removal for your name from the Register of Members for the stipulated period would be issued shortly. A separate communication to this effect along-

with the copy of aforesaid Notification would also be sent to you immediately upon its issuance.

You are requested to take note of the above order and acknowledge receipt".

12. From the perusal of these aforesaid documents, it is clearly manifested that it was a case which was initiated only based upon the case no. (RC No. 6(E)/2005/EOW-I/DLI) registered by CBI, EOW-1, New Delhi on 28th June, 2005 and the charge sheet filed in the Hon'ble High Court of Judicature at Delhi under Sections 120B, 420, 467, 468 and 471 of the Indian Penal Code, 1860 against the appellant which is pending for trail before the concerned Magistrate and in which neither any evidence was recorded by the court concerned nor any findings have been recorded. Yet, the Board of Discipline only based on the information sent by the Central Bureau of Investigation and without having any corroborative evidences in the instant matter, concluded that the appellant was guilty of other misconduct which required removal of his name from the Register of Members. Certain observations made by Board of Discipline in its Report dated 22.08.2013 is reproduced as here under:-

"3. As per the 'information' letter dated 22nd December, 2008 the allegations in brief were as under:-

3.1 The investigation made by the CBI in case no. RC 6 (E)/2005/EOW I/DLI had received that fake Bank A/c in the name of M/s Indian Medical Scientific Research Foundation (hereinafter referred as IMSRF) had opened in different banks. Various amounts received as donations were deposited in said accounts and withdrawn immediately through a network of accounts of bogus/fake trusts in cash and returned back to the Company making donation after deducting a hefty commission. Further, investigation revealed that there exists an original trust by name IMSRF in Rajkot and that they have not been granted exemption for the donation after 31.03.2003. Investigation further revealed that funds so received as donations during 2003-05 (total of Rs. 3, 25, 51,000/-) were transferred to various other trust's account and siphoned off and part of donated funds had been returned to original donors.

3.2 During course of investigation, it came to light that the Respondent was one of mastermind in above said transactions. From amount so received as donation, it was seen that a percentage/part of same had been transferred from account of IMSRF to secondary trusts and later to other accounts and finally to accounts, which were under control of the Respondent as commission.

3.3 The Respondent was arrested on 25.01.2008 and later released on bail. A charge sheet had been filed in Hon'ble Court in Delhi against the Respondent and others u/s 120 B r/w 420,467,468 & 471 of IPC.

3.4 The aforesaid charges, if proved, would render the Respondent guilty of 'Professional and Other Misconduct' falling within the meaning of Clause(2) of Part III and Clause (2) of Part IV of First Schedule to the Chartered Accountants (Amendment) Act, 2006".

13. We have also noted that the Board of Discipline further relied upon the 'Prime Facie Opinion' formed by the Director (Discipline) and thereafter being in agreement with the said opinion passed the impugned order. The relevant paragraph (4) of the report read as under:-

"4. The prima facie opinion formed by the Director (Discipline) (enclosed without its enclosures as Annexure 'A') on the information (in the absence of written statement of the Respondent) was considered by the Board of Discipline at its meeting held in November, 2011 at New Delhi".

"4.1 The Board on consideration of the same agreed with the prima facie opinion of the Director (Discipline) and decided to proceed further under Chapter IV of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007. The Board also directed the Directorate that in terms of the provisions of sub-rule (2) of Rule 14 read with Rule 11, the prima facie opinion formed by the Director be sent to the Respondent and he be asked to submit his Written Statement within 21 days in accordance with the provisions of these rules".

14. At this stage, it will be appropriate to note the provision contained under Section 21C of the Act and the new mechanism established and incorporated by way of amendment in the Chartered Accountants Act, 1949 in 2006. Section 21C of the Act reads as under:-

"21C. Authority, Disciplinary Committee, Board of Discipline and Director (Discipline) to have powers of civil court

For the purposes of an inquiry under the provisions of this Act, the Authority, the Disciplinary Committee, Board of Discipline and the Director (Discipline) shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, in respect of the following matters, namely:-

a) summoning and enforcing the attendance of any person and examining him on oath;

b) the discovery and production of any document; and

c) receiving evidence on affidavit.

Explanation- for the purposes of Sections 21, 21A, 21B, 21C and 22, "member of the Institute" includes a person who was a member of the Institute on the date of the alleged misconduct although he has ceased to be a member of the Institute at the time of the inquiry".

15. Further, we are also inclined to refer the new mechanism established by way of amendment in the Chartered Accountants Act, 1949 in 2006 in respect of the procedure to be followed in the complaints of the professional or other misconducts against the members of the Institute or any information to this effect received by the disciplinary directorate for the purpose of guidance to all concerned as under:

The Chartered Accountants Act, 1949 was amended in the year 2006 by the Chartered Accountants (Amendment) Act, 2006 (hereinafter referred to as the "Amendment Act"), whereby various provisions of the Act were amended and certain new provisions were inserted therein. The affairs of the Institute of Chartered Accountants of India are being managed and controlled by its Council constituted in accordance with Section 9 of the Act.

Section 21(1) of the Act requires the Council to establish by Notification a 'Disciplinary Directorate' headed by an officer of the Institute designated as 'Director Discipline' for making investigations in respect of any information or complaint received by it against the members of the Institute.

Section 21A requires the Council to constitute a Board of Discipline and Section 21B requires the Council to constitute a Disciplinary Committee.

By the Amendment Act 2006, a new disciplinary mechanism has been introduced in the Act. In exercise of the powers conferred by Clauses (c) and (d) of Section 29A(2) read with Sections 21(4), 21B(2) and 21B(4) of the Act, the Central Government has notified the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007. The said Rules came into force with effect from 28th February, 2007, the date of publication in the Official Gazette.

Rule 3(1) of the said rules provides that a complaint under Section 21 of the Act against a member or a firm shall be filed in Form I in triplicate before the Director in person or by post or courier. Rule 3(6) provides that every complaint received by the Disciplinary Directorate (hereinafter referred to as Directorate) shall be acknowledged by ordinary post with an acknowledgement number. Rule 4 provides the fee for filing the complaint.

Rule 5 deals with registration of complaint. Rule 5(3) provides that if on scrutiny, the complaint is found in order, it is required to be registered and allotted a unique number which has to be quoted in all future correspondence. Once a complaint is registered, it has to be dealt with in the manner as prescribed in Chapter III of the Rules. If the subject matter of the complaint is in the opinion of the Director, substantially the same as or has been covered by any previous complaint or information received and is under process or has already been dealt with, the Director (Discipline) is required to take any of the action as mentioned in clause (4) of Rule 5.

Rule 6 provides for withdrawal of a complaint in the manner prescribed therein. Rule 7 makes the provision for dealing with written information containing allegation(s) against a member or a firm received in person or by post or courier by the Directorate, which is not in Form I under Rule 3(1). Rule 7(3) provides that anonymous information received by the Directorate will not be entertained by the Directorate.

Chapter III of the Rules provides procedure for investigation. Rules 8 and 9 provide the procedure to be followed by the Director (Discipline) on receipt of complaint and for examination of the same respectively. As per the Rule 8(a), the Director (Discipline) or the

officer authorized by Director (Discipline) within 60 days of the receipt of the complaint has to send a copy of the complaint to the concerned member where after as per the Rule 8 (3) the said member within 21 days of the service of the said complaint or within such additional time not exceeding 30 days, as allowed by the Director (Discipline), has to forward a Written Statement in his defence. If the member files his written statement, the same will be forwarded to the Complainant for submission of his Rejoinder within 21 days or within such additional time not exceeding 30 days. The Director (Discipline) examines the complaint, written statement (if any), Rejoinder (if any) and in case of requirement may call for additional documents/ particulars. Thereafter, the Director (Discipline) examines the complaint/written statement (if any) along with Rejoinder (if any) of the Complainant and other particulars (if any) and forms the prima facie opinion as to whether the member is guilty or not of any professional or other misconduct or both, under the First Schedule or the Second Schedule or both.

If a member is prima facie found guilty, the matter is forwarded by the Director (Discipline) as prescribed in Rule 9 of the 'Rules' to the Board of Discipline or the Disciplinary Committee as the case may be. It is stated that as per Rule 9(2) (a), if the Director (Discipline) is of the Prima facie opinion that the member is guilty under the First Schedule, he shall place his opinion before the Board of Discipline and if the member is prima facie found guilty under the Second Schedule or both the Schedules, he shall place his opinion before the Disciplinary Committee. Thereafter if the Board of Discipline or the Disciplinary Committee, as the case may be, agrees with the Prima facie opinion of the Director(Discipline) then the Board of Discipline or the Disciplinary Committee shall proceed under chapter IV or V of the 'Rules' respectively and an opportunity to file written statement shall be provided to the member concerned. However, when the Director (Discipline) is of the Prima facie opinion that the member is not guilty of any misconduct either under the First Schedule or the Second Schedule, then as per Rule 9(3) of the 'Rules' the matter shall be placed before the Board of Discipline and if the Board of Discipline agrees with the opinion of the Director (Discipline), it shall pass the order for closure. However, if the Board of Discipline disagrees with the Prima Facie opinion, then it may either proceed under Chapter IV of the 'Rules' if the matter pertains to the First Schedule or refer the matter to the Disciplinary Committee to proceed under Chapter V of the 'Rules', if the matter pertains to the Second Schedule or both the Schedule or may advise the Director (Discipline) to further investigate the matter.

In the event, the Board of Discipline or the Disciplinary Committee conducts enquiry under Chapter IV & V of the 'Rules', as the case may be and find that the member is guilty of Professional misconduct then another opportunity of being heard is granted to the member and thereafter the member is punished in accordance with law. Where after the said member has an opportunity for filing a statutory appeal under Section 22 G of the Act before the Appellate Authority constituted under Section 22A of the Act.

16. Subsequent to the submission of the arguments by the parties, perusing the materials on record and referring to the above provisions of the Act and Rules, it is manifested and clear that for the purpose of carrying out the investigation the Director (Discipline) has all the powers to call for necessary information and even record evidence to satisfy himself about

existence of 'Prima Facie Opinion' against the appellant before referring the matter to the Board of Discipline for further action or the Disciplinary Committee, if need be, which has not been done in this case.

17. In view of the foregoing discussion, we do not agree with the submissions of Ms. Harleen Bhalla, Assistant Secretary, ICAI appearing on behalf of the Institute of Chartered Accountants of India and tend to inclined with the submissions of learned counsel appearing on behalf of the appellant in this case. The entire proceedings undertaken are not in accordance with the Rules prescribed for the purpose and is in violation of the Principles of Natural Justice, more so, in as much, as per the decision of the Board of Discipline itself, available on record, shows that no notice was served upon by the Director (Discipline) to the appellant in respect of the complaint received from the Central Bureau of Investigation, which is sine qua non for taking any further step into the matter by anyone before forming a 'Prima Facie Opinion' against him.

18. We, accordingly are therefore of the considered view that this appeal requires to be partly allowed by setting aside the Impugned Order and requires remanding back to the Director (Discipline) for the purpose of holding investigation in accordance with the statutory provisions of the Act and the Rules prescribed for the purpose, before forming the 'Prima Facie Opinion' against the appellant. Needless to mention here that the procedure to be followed in the case in hand as well as in future will depend upon the Director (Discipline) to obtain such material which may justify for forming the 'Prima Facie Opinion' as it thinks fit such as calling of information from bank/Institutions concerned or examining the witnesses or taking any other step permitted in law. We further direct that the needful be done by the Director (Discipline) in this case within a period of six months from the date of receipt of this order by him.

19. Further, the appellant is also hereby directed to present himself either personally or through his counsel before the Director (Discipline) as and when called for by the Director (Discipline).

20. For the reasons given above, this appeal stands disposed of. The parties have to bear their own cost.

21. The Registrar of the Authority is hereby directed to communicate a copy of this order to the Secretaries and the Directors (Discipline) of all the three Institutes i.e. the Institute of Chartered Accountants of India, the Institute of Company Secretaries of India and the Institute of Cost Accountants of India for their information for the reason that the procedure discussed in this order is the same for all the three professional Institutions.

Justice M. C. Garg (Retd.)
Chairperson

Dr. Navrang Saini
Member

Praveen Garg
Member

Kamlesh S. Vikamsey
Member

Dated 24.09.2011

BEFORE THE APPELLATE AUTHORITY

(Constituted Under Section 22A of The Chartered Accountants Act, 1949)

APPEAL NO. 05/ICAI/2015

IN THE MATTER OF:

Navneet Jain .....Appellant

Versus

The Institute of Chartered Accountants of India and others

.....Respondents

CORAM:

Hon'ble Mr. Justice M.C. Garg (Retd.)	Chairperson
Hon'ble Mr. Sunil Goyal	Member
Hon'ble Mr. Praveen Garg	Member
Hon'ble Dr. Navrang Saini	Member

PRESENT:

For the Appellant

1. Mr. Attin Shankar Rastogi, Advocate
2. Mr. Navneet Jain, Appellant in person

For the Respondents:

1. Mr. Amit Kishore Jain, Respondent Number 4 in person
2. Mr. R. Venkatraman, Advocate, appearing on behalf of Respondent number 4
3. Ms. Pooja M. Saigal, Advocate, appearing on behalf of ICAI
4. Ms. Harleen Bhalla, Assistant Secretary, appearing on behalf of ICAI

ORDER

1. Being aggrieved of the Order dated 10th February, 2014 and 8th August, 2014 (Impugned Orders) passed by the Board of Discipline under Section 21A (3) of the Chartered Accountants Act, 1949 as amended by the Chartered Accountants (Amendment) Act, 2006, CA. Navneet Jain, a Chartered Accountant, Appellant herein, has filed this appeal against the Institute of Chartered Accountants of India and others challenging the Impugned Orders whereby, the Board of Discipline awarded punishment of 'reprimand' to him for violation of clause (11) of the First Schedule to the Act. The said clause 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- (11) engages in any business or occupation other than the profession of chartered accountant unless permitted by the council so to engage:*

Provided that nothing contained herein shall disentitle a chartered accountant from being a director of a company (not being a managing director or a whole time director) unless he or any of his partners is interested in such company as an auditor".

2. At the outset we have noted that this appeal is filed belated. However, a request for condonation of delay is received from the Appellant, accordingly, taking consideration of all the facts involved, we condone the delay.

3. We have noted the allegations made by the complainant against the appellant inter-alia that:-

   I. The appellant is serving Bansal Group of Companies (consisting more than 25 Companies / Firm / Societies) as a full time employee, despite having full time 'Certificate of Practice (CoP)' status registered with ICAI, which is not allowed under the provisions of the Act, with designation 'Chief Financial Controller' for more than 7 years. The main Company is Pacific Development Corporation Limited having its Corporate Office at 3rd Floor, Pacific Mall, Site IV, Sahibabad Industrial Area, Ghaziabad-201 010 and registered office at 1st and 4th Floor, Plot No. 5, Sagar Complex, New Rajdhani Enclave, Main Vikas Marg, New Delhi-110092.

   II. The Appellant is a full time employee of the Bansal Group of Companies as a 'Chief Financial Controller' and drawing his salary in the shape of professional fees (from different Companies of Bansal Group of Companies) thus fraudulently misguiding ICAI and Income Tax Authorities.

   III. The Appellant is the whole time Director of M/s Friends Hospitality Services Pvt. Ltd and M/s GHJ Special Foods Pvt. Ltd. Thus, engaging himself in business other than the profession of Chartered Accountancy.

   IV. The Appellant had taken bail in the case of Mr Ashish Sharma in a criminal case FIR No. 241/09 State Vs Ashish Sharma under Sections 323,354,427,452, 504 & 506 of the Indian Penal Code, 1860 registered by the Link Road Police Station, Ghaziabad (U.P) on 18th May, 2009. Mr Ashish Sharma is an employee of the same Bansal Group of Companies.

   V. On Visiting Card of the Appellant's employer i.e., Pacific Development Corporation Ltd/ Bansal Group of Companies, the appellant had printed his designation as CFC (Chief Financial Controller).

   The Board of Discipline further noted that the documents submitted before the Hon'ble Board on 8th August 2013 state that he works for 3 additional companies of Pacific Group of Companies, namely:-

   i. Delhi Public School((Assessment Year 2011-12)

ii. Bansal Corporation Limited (Assessment Year 2009-10)

iii. Naman Buildcon Limited (Assessment Year 2007-08)

4. We have noted that the allegations against the Appellant that he was engaged in the employment of many companies while holding full time Certificate of Practice (CoP), which is not allowed under the provisions of the Chartered Accountants Act, 1949. One of such companies was said to be M/s Pacific Development Corporation Ltd / Bansal group of companies, for which also the appellant printed his visiting card as 'Chief Financial Officer (CFO)'. Such kind of functioning by a Member of Institute of Chartered Accountants of India holding a full time CoP is violative of Clause (11) of Part-I of the First Schedule to the Act.

5. The Appellant, in response to the allegations, tried to explain that his relationship with M/s 'Pacific Development Corporation Ltd' was only of a consultant and he produced before the Board of Discipline a consultancy agreement dated 3rd April, 2007 executed between himself and M/s 'Naman Buildcon Limited' [whose name was later on changed to M/s 'Pacific Development Corporation Ltd" on 4th May, 2007]. The appellant further submitted the following reply for the allegations of the complainant:

I. That as regards the copy of the insurance quote, it is only a working paper and does not indicate that the approval was granted by him.

II. That as regards the copy of the correction deed, the Respondent has signed as a witness and this does not establish the allegation as sought to be proved by the complaint. On the other hand, it establishes the defence of the Respondent.

III. That as regards various e-mails, the same do not establish the allegations as made out by the complainant.

IV. That as regards the letter addressed to the Registrar of Societies, the same has been signed on behalf of Saket Education Society which is a public charitable institution registered under the Societies Registration Act. In any case, this letter also does not indicate much less establishment that the Respondent was in employment of M/s Pacific Development Corporation Limited or any other company/firm/entity whatsoever.

V. The Word 'Chief Finance Controller' has been sued as a matter of convenience. The word 'CFC' does not per se denote any employer-employee relationship unless the same is established. These words had been used by the Respondent in the capacity as a Consultant and advisor for which he was duly authorized by the Management. In discharge of his duties as Legal Advisor, the Respondent was assigned the responsibility to look after legal matters and in the process, the companies' staff was reporting to him. The Respondent at no point of time was involved in the appointment of staff or their service matters. The Respondent requires support from the regularly employed staff of the organization. It is for this reason that couple of employees was placed under his guidance.

VI. The expression made on the visiting card, the two letters address to District Magistrate on the letter-head of Pacific Maintenance and Welfare Society-Bansal Group of Co-operative Society cannot be used as an evidence to conclude the employment of the Respondent with M/s Pacific Development Corporation Limited in the manner as prohibited under the Regulations. These two letters do not mention name of the Respondent at all and have no relevance. The Newspaper cuttings are really no piece of evidence in as such as the Respondent has no control over the false and inaccurate reporting by the media.

6. We have also noted that meanwhile, the complainant file a certificate of ICICI Bank dated 28th July, 2007 stating that the Pacific Development Corporation Ltd was maintaining the bank account with them since 8th December, 2005. Relying upon the said certificate of ICICI Bank and in the absence of any counter evidence by the Appellant, the Board of Discipline doubted the genuineness of the consultancy agreement with Naman Buildcon Ltd dated 3rd April, 2007 on the ground that when the Pacific Development Corporation has the account in ICICI Bank since 8th December, 2005, therefore, it means the said Naman Buildcon was not in existent on 3rd April, 2007, i.e., the date when the consultancy agreement is said to be executed. Hence, the Board of Discipline gave the findings in Para 18 of the Order, which reads as hereunder:

> *"The Board noted that the said fact certified by ICICI Bank goes to establish that M/s Naman Buildcon Limited was not existent on 8/12/2005, the date as mentioned in the Certificate given by the Bank on 28th July 2007. The Company is currently known by the name M/s Pacific Development Corporation itself corroborates that its name has changed from M/s Naman Buildcon Limited before that and M/s Naman Buildcon Limited was not existing as on 3/4/2007 as per the facts certified by the Bank. The Board is thus of the view that the said consultancy agreement dated 3rd April 2007 as submitted before the Board is not only a clear afterthought of the Appellant to save himself but also seems to be a fabricated documents (Bold and underlined by this Authority) prepared in connivance with the Company to establish false contentions before it. The Board takes serious view of the attitude of the Appellant in trying to mislead/misguide this quasi-judicial forum".*

7. The Appellant before us has vehemently argued that in addition to the finding of guilt, the finding of the Board of Discipline accusing him of fabricating documents as per Para 18 (supra) is wrong and not borne out of the facts. We have also noted that the complainant in the original complaint namely Shri Amit Kishore Jain had filed a petition before the Hon'ble High Court of Delhi and vide Order dated 26th November, 2015, the Hon'ble High Court directed that he shall also be heard while disposing of the present appeal. Accordingly, his counsel's arguments were also heard. The learned counsel for the said complainant Shri Amit Kishore Jain vehemently submitted that the Board of Discipline has given its finding after giving all opportunity to both the parties and rightly adjudicated him guilty and found the consultancy agreement fabricated on the basis of ICICI statement as the said company did not exist on the date of issue of bank statement. He further emphasized that the punishment was less and should be increased.

8. We have also heard the learned counsel Mr. Attin Shankar Rastogi, appearing on behalf of the Appellant and CA. Navneet Jain appearing in person too and learned counsel Mr. R. Venkatraman, appearing on behalf of Respondent number (4) i.e., Mr. Amit Kishore Jain as well as learned counsel Ms. Pooja M. Saigal appearing on behalf of the Respondent number (1), i.e., the Institute of Chartered Accountants of India and noted as hereunder:

8.1 While the learned counsel appearing on behalf of the Appellant was not much aggrieved of the punishment of reprimand but he was concerned with respect to the findings of the Board of Discipline regarding commission of offence of fabrication of documents which according to him was neither warranted nor are based on the facts and accordingly, he submitted that the Board of Discipline has committed grave error while not appreciating that the current account with ICICI Bank was opened on 8th December, 2005 under the name and style 'Naman Buildcon Limited'. Thereafter, with effect from 4th May, 2007 there was change of name of the Company from Naman Buildcon Ltd to Pacific Development Corporation Ltd. Accordingly, the same account continued while effecting only the change of name of the Company. Further, he contended that it is also pertinent to point out that the consultancy agreement is dated 3rd April, 2007, i.e., before the change of name and therefore, could not be in the name of Pacific Development Corporation Ltd, which change was only with effect from 4th May, 2007.

8.2 The counsel for Appellant further submitted that reliance of the Board of Discipline on letter of ICICI Bank dated 28th July, 2013 is completely misplaced firstly as the Appellant was not provided the copy of the same prior in time to refute/clarify the same; Secondly the letter of Bank primarily verifies the running of current account and nothing else.

8.3 It was further contended by him that the Appellant without loss of time and soon after the receipt of findings dated 10th February, 2014 placed on record a certificate issued by ICICI Bank No. ICICI/09/05/2014 clarifying that current account was opened by the company Naman Buildcon Limited on 8th December, 2005 and subsequently on company request, the name of the account was changed from Naman Buildcon Limited to Pacific Development Corporation Limited w.e.f. 7th June, 2007. This fact is also demonstrated from the fresh certificate of Incorporation dated 4th May, 2007 issued by the Registrar of Companies, NCT of Delhi and Haryana. It is, therefore, clear that the name of the Company was changed from Naman Buildcon limited to Pacific Development Corporation Limited w.e.f. 4th May, 2007 and thereafter, the company made application to the Bank for change of name in their records, which was done on 7th June, 2007. He also submitted that the Bankers issue such certificate as a matter of routine on the basis of updated computer records. In the present case, the bank had updated its records by noting the change of name on company's request and hence issued the certificate in the new name mentioning that account is being operated since 8th December, 2005, as entity has remained the same, so does the account number, only name was changed. A certified copy of change brought in the Register by Registrar of Companies has been placed by the Learned Counsel on record before us during the course of hearing on 18th March, 2017.

8.4 The counsel for Appellant also submitted that the revised certificate of ICICI Bank and the certificate of Registrar of Companies were submitted before the Board of Discipline before passing the order of punishment u/s 21A(3) of the Chartered Accountants Act, 1949 and considering the fact, the Board of Discipline awarded him minimum punishment. Thus, he pleaded that the Appellant was not considered as guilty of any fabrication of documents.

8.5 The complainant in the original complaint namely Shri Amit Kishore Jain had filed a petition before the Hon'ble High Court of Delhi and vide Order dated 26th November, 2015, the Hon'ble High Court directed that he shall also be heard while disposing of the present appeal. Accordingly, his arguments were also heard. The learned counsel for the said complainant Shri Amit Kishore Jain vehemently submitted that the Board of Discipline has given its finding after giving all opportunity to both the parties and rightly adjudicated; found the consultancy agreement fabricated on the basis of ICICI statement as the said company did not exist on the date of issue of bank statement.

8.6 The learned counsel appearing on behalf of the complainant further submitted that it is an afterthought and Appellant obtained a fresh statement from the said ICICI bank dated 9/5/2014 only to circumvent the statement of the same bank dated 28th July, 2007 whose validity too has been in fact authenticated as 'True Copy' by the co-conspirator Mr Abhishek Bansal.

8.7 Ms. Pooja M. Saigal, Learned Counsel appearing on behalf of the Institute of Chartered Accountants of India argued in support of the Order passed by the Board of Discipline and submitted that the Appellant was not held guilty on account of fabrication of any document but for violation of clause (11) of Part-I of First Schedule to the Act.

8.8 The Appellant vehemently objected the findings of the Board of Discipline as contained in Para-18 (supra) of the report, charging him with fabrication of document as the same without any basis.

9. We have heard the rival submissions of the parties and perused all documents and evidences filed by all concerned during the 'Prima Facie Opinion' stage, Disciplinary Enquiry stage, and before awarding the punishment as well as all oral and written submissions made before us.

10. Having considered the above, we are of the view that the most important evidence about the change of name of any company is the certificate of Registrar of Companies which was not filed before the Board of Discipline before its Order holding the Appellant guilty and has been placed before us only at the time of hearing arguments in this appeal. Therefore, a proper examination is necessary as to whether the consultancy agreement was genuine or not. The appellant furnished the same along with the revised certificate from ICICI Bank before the Board of Discipline before passing order u/s 21A (3) of the Act, however by that time he was already held guilty as per previous Order of the Board of Discipline dated 10th February, 2014. The Board of Discipline as per its Order dated 8th August, 2014 considered the same and awarded minimum punishment to the appellant.

11. Based on the above, in our view the findings of Para 18 [supra] of the Board of Discipline Order dated 10th February, 2014 requires re-examination in the light of further evidence produced, before us, later by the Appellant. Thus, we are inclined to remove the findings of the Board of Discipline to the effect of fabrication of any documents submitted by the appellant before the Board of Discipline to the extent that the said finding is no more on record. However, the punishment awarded for violation of clause (11) of the First Schedule to the Act is sustained as there is sufficient material on record showing that the appellant had been working as a full time employee of the Bansal Group of Companies irrespective of holding full time CoP. The facts stated in Paragraph number 3 need not be repeated here.

12. All interim stay orders, if any, are vacated. No order as to cost and accordingly the Appeal is disposed of.

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Praveen Garg
Member

Dr. Navrang Saini
Member

New Delhi
Dated this 13th day of May, 2017

BEFORE THE APPELLATE AUTHORITY

(Constituted Under The Chartered Accountants Act, 1949)

APPEAL NO. 07/ICAI/2016

IN THE MATTER OF:

Bipin Arora .....Appellant

Versus

Institute of Chartered Accountants of India and others ....Respondents

CORAM

Hon'ble Mr. Justice M.C. Garg (Retd.)	Chairperson
Hon'ble Mr. Kamlesh S. Vikamsey	Member
Hon'ble Dr. Navrang Saini	Member

PRESENT:
For the Appellant
Mr. Kaliash Jain, Advocate

For the Respondents:
i. Mr. C. V. Sajan, Advocate
ii. Ms. A. Aruna Sharma, Senior Executive Officer, ICAI

ORDER

Date: 17.04.2017

1. This Appeal has been filed by Mr. Bipin Arora 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."

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 Chartered Accountant Act, 1949.

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

i. Umed Raj Singhvi Vs. ICAI and CA K Ramachandra Murthy, Order dated 27th June, 2016

ii. A.N. Kulkarni Vs. May & Company and Ajit Ji Pemdse, Order dated 24th September, 2011

iii. Savitri Devi Kabra Vs. N L Maheshwari, Order dated 24th September, 2011

iv. B L N Phani Kumar Vs. Board of Disicpline, Order dated 17th July, 2012

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 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.

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

Justice M. C. Garg
Chairperson

Kamlesh S. Vikamsey
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY

(Constituted under The Chartered Accountants Act, 1949)

APPEAL NO. 01/ICAI/2016

IN THE MATTER OF:

S. Vasudevan .....Appellant

Versus

Institute of Chartered Accountants of India and others ....Respondents

CORAM

Hon'ble Mr. Justice M.C. Garg (Retd.)	Chairperson
Hon'ble Mr. Sunil Goyal	Member
Hon'ble Mr. Praveen Garg	Member

PRESENT:

For the Appellant: 1. Mr. K. Ravi, Advocate

For the Respondents:

1. Mr. Anurag Sharma, ICAI and 2. Ms. Pooja M. Saigal, Advocate

ORDER

Date: 18 .04.2017

1. This appeal has been filed by the Appellant against the Order dated 8th February, 2015 passed by the Disciplinary Committee of the Institute of Chartered Accountants of India holding him guilty within the meaning of Clause (7) of Part- I of the Second Schedule to the Chartered Accountants Act, 1949 and punishment awarded vide Order dated 5th July, 2015 for removal of his name from the Register of Members for a period of three (3) months and a fine of Rs 10,000/- (Rupees Ten Thousand Only). The said clause 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."

2. The facts involved in the matter are that the CBI had complained to the Institute of Chartered Accountants of India vide a letter dated 22nd September, 2011 leveling various allegations inter-alia that he had certified false and bogus 'Financial Statements' in respect of a firm certifying huge turnover and profits for the years 2004-05, 2005-06 and 2006-07 from the business of the firm and thus facilitated Shri R. Manoharan in committing fraud. It was noted that the Appellant has audited the Financial Statements of the firm for financial years 2005-06, 2006-07 and 2007-08 (provisional) certifying the turnover of the firm as

Rs.29,89,63,658.00, Rs.44,96,82,586.00 & Rs.75,20,81,119.00 respectively for those years.

3. The Disciplinary Committee observed that the Appellant has admitted that he has gone through only the 'Trial balance' and 'Books of Accounts' but did not go through other supporting documents as the same were not produced before him for verification. Further, in respect of certification of huge turnover of the firm, the Appellant admitted that he did not verify the 'Sale Tax Return' of the firm and admitted his mistake that he has signed these Financial Statements without verifying the supporting documents. On perusal of the 'Tax Audit Report(s)' certified by the Appellant, the Committee also observed that the Appellant has certified that the firm has maintained Cash Book, Bank Book, General Ledger and the same has been examined by him. However, on the other hand, before Central Bureau of Investigation, the Appellant has admitted that such documents were not produced before him.

4. Further, the Disciplinary Committee also observed that in the statement of Shri R. Govindraju, Commercial Tax Officer, Udumalpet, he stated that the firm has made an application on 22nd May, 2008, wherein, it has been stated that the business is 'yet to be started' and has filed its 'Annual Returns' for the year 2008-09 as 'NIL'. Therefore, the firm has not done any business while being in existence from 22nd May, 2008 to 31st March, 2010 as per records.

5. Furthermore, the Disciplinary Committee also observed that the Appellant in his Written Statement dated 20th December, 2011 has stated that during the course of audit, he called for the invoices raised by the firm and 'Annual Sales Returns' filed with the Sales Tax Authorities and same were produced before him and based upon Sales Tax Returns submitted by the firm, the sales admitted in the Sales Tax Returns were tallied with the 'Books of Accounts' produced. The Committee further observed as under:-

   "Registration Certificate of Value Added Tax and Central Sales Tax were issued by the respective authorities on 23rd May, 2008. Furthermore, the Commercial Tax Department vide its letter dated 25th February, 2010 has confirmed that the firm has not filed any return for the years 2006-07 and 2007-08. This confirmation by the Tax Department, therefore, directly contradicts the certified financial statements of the firm on 26th August, 2006, 2nd September, 2007 and on 22nd April, 2008 by the Appellant wherein it is stated that he has tallied the sales / turnover of the firm with Sales Tax Returns filed with the Department. It is, therefore evident that the Appellant has audited the financial statements of the firm without applying due diligence expected from a professional performing his duties as a Chartered Accountant".

6. The Disciplinary Committee also observed that while the Income Tax Department vide its letter dated 29th June, 2011 has confirmed that Permanent Account Number (PAN No) AOFPM8570A of the assesses (i.e Mr R. Manoharan, Prop. of M/s Bhagwati Textile Mills) was issued on 27th October, 2006. However, on perusal of the Tax Audit Report for Financial Year 2005-06, it is seen that the Appellant has certified the same on 26th August, 2006 showing the above PAN of the firm. In view of such apparent contradictions, the Committee is of the opinion that the Appellant has certified Financial Statements of the Firm without fully

verifying the details and not following due diligence and discharged his duties in a rather casual and careless manner.

7. The Disciplinary Committee also did not accept the contention of Appellant that no Value Added Tax (VAT) Return was required to be filed by the auditee as he was dealing in exempted Goods in absence of any proper evidence on the part of the Appellant.

8. The Disciplinary Committee, therefore, found him guilty within the meaning of Clause (7) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949 and awarded punishment to him to remove his name from the Register of Members for a period of three (3) Months and a fine of Rs 10,000/- (Rupees Ten Thousand Only) was also imposed.

9. Being aggrieved against the Orders dated 8th February, 2015 and dated 5th July, 2015 passed by the Disciplinary Committee, the Appellant has come in appeal before us. The Learned Counsel appearing on behalf of the Appellant vehemently challenged the findings of the Disciplinary Committee and punishment awarded to him.

10. It was contended by the Appellant that he has applied due diligence while conducting the audit. Thus, there was no negligence on his part in doing the audit. He placed great reliance on the fact that the Statement of the Appellant recorded by the CBI u/s 161 of the Criminal Procedure Code, 1973 can't be considered as evidence by the Committee. He also pleaded that the punishment awarded was very heavy and harsh in the facts and circumstances of the case and the same was not warranted at all.

11. Ms. Pooja M. Saigal, the Learned Counsel appearing on behalf of the Institute of Chartered Accountants of India argued in support of the Orders passed by the Disciplinary Committee.

12. We have heard the rival arguments advanced and also examined all the relevant documents, evidences and Written Submissions produced by the parties before us and observed that the Committee has given clear findings that VAT registration was obtained on 23rd May, 2008 and the auditee firm has not filed any Return for 2006-07 and 2007-08. Thus, the contention of the Appellant that he has examined all invoices and Sales Tax Returns as mentioned in his Written Statement dated 20th December, 2011, is not correct. The Learned Counsel appearing on behalf of the Appellant has submitted that the Statement recorded under Section 161 of the Criminal Procedure Code, 1973 can't be relied upon.

13. Under the above facts and circumstances, we are of the view that the Order of the Disciplinary Committee is not based on the statement recorded by the CBI alone but the Disciplinary Committee has considered all the relevant documents brought on record. Moreover, the Appellate Authority also observed that as per Auditing and Assurance Standards Three (AAS-3) pertaining to 'Documentation' (As it was then prevailing) a Chartered Accountant is obliged to keep proper working papers for any attestation work carried out by him. This includes Planning and Audit evidence (AAS-5) as well as documentation of risk assessment (AAS-6) in the suitable manner as prescribed under these 'Auditing Standards Pronouncements'. Whereas, no such convincing working papers were produced by the Appellant either before the Committee below or before this Authority. Furthermore, on enquiring as to whether he

has examined that these large volume of turnover were either in 'Cash' or through Bank, no reply was given by him. It appears that these entire huge turnovers were in 'Cash' which should have itself raised a scope of being more vigilant while auditing by the Appellant in this matter, which was not done by him in a professional manner. The risk of relying on such huge turnover, in cash, was not properly examined.

14. Similarly, no convincing response/reply was given by the Appellant in respect of as to how the PAN No, which was though issued on 27th October, 2006 by the Income Tax Department, is mentioned in the Tax Audit Report of the Financial Year 2005-06, dated 26th August, 2006. This indicates contradiction and antedating of the Audit Report.

15. Further, on enquiry by the Appellate Authority as to how it is possible that, 'Profit after Tax' and 'Profit before Tax', is shown same in the accounts verified for 31st March, 2007 audited by the Appellant, no satisfactory response/ reply was given by him. The only defense argued by the Appellant was that statement recorded by CBI under Section 161 of Cr. P.C can't be relied upon. However, the Appellant is unable to explain various contradictions as observed/ pointed out by the Disciplinary Committee for which no statement under Section 161 of Cr. P. C was required. The Appellant is also not able to produce any suitable working papers even before us so as to justify that he has exercised due care, due diligence and proper judgment while conducting audit and performing his professional duties. Therefore, we don't find any defect in the Orders passed by the Disciplinary Committee holding the Appellant as guilty of the said misconduct.

16. The Learned Counsel appearing on behalf of the Appellant also pleaded that there were mitigating circumstances as the Appellant was a fresh Chartered Accountant and perhaps did not understand the full level of knowledge, due diligence and judgments required for audit under the circumstances involved in the matter.

17. Pursuant to hearing of the submissions and arguments advanced by the parties, taking note of all the facts and circumstances involved and perusing the relevant records available, we find no merit in the instant appeal and are therefore, dismiss the same. Further, we are of the considered view that the Government, Shareholders, Financial Institutions, General Public and other Stakeholders place very high degree of reliance on the statements audited by the Chartered Accountants. This naturally necessitates high degree of knowledge, integrity and performance of due diligence and taking appropriate judgmental calls to prevent stakeholders from any loss, which, we have noted that the same has not adhered to by the Appellant in this case.

18. Accordingly the Appeal is dismissed and the punishment awarded by the Disciplinary Committee is sustained. All interim Stay Orders, if any, are vacated. No order as to cost.

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Praveen Garg
Member

BEFORE THE APPELLATE AUTHORITY

(Constituted Under The Chartered Accountants Act, 1949)

APPEAL NO. 02/ICAI/2016

IN THE MATTER OF:

M. Ganesan .....Appellant

Versus

Institute of Chartered Accountants of India
and others

.....Respondents

CORAM:

Hon'ble Mr. Justice M.C. Garg (Retd.)	Chairperson
Hon'ble Mr. Sunil Goyal	Member
Hon'ble Mr. Praveen Garg	Member

PRESENT:

For the Appellant: 1. Mr. K. Ravi, Advocate

For the Respondents:

1. Mr. Suneel Kumar, ICAI and 2. Ms. Pooja M. Saigal, Advocate

ORDER

Date: 18.04.2017

1. This appeal has been filed by the Appellant against the Order dated 8th February, 2015 passed by the Disciplinary Committee of the Institute of Chartered Accountants of India holding him guilty within the meaning of Clause (7) of Part- I of the Second Schedule to the Chartered Accountants Act, 1949 and punishment awarded vide Order dated 6th July, 2015 for removal of his name from the Register of Members for a period of three (3) months and a fine of Rs 25,000/- (Rupees Twenty Five Thousand Only). The said clause 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."*

2. The facts involved in the matter are that the Central Bureau of Investigation (CBI) had filed a complaint to the Institute of Chartered Accountants of India in Form 'I' dated 31st January, 2012 against CA. M. Ganesan (Membership No. 201898), the Appellant herein, alleging inter-alia that the Appellant under his status as a Chartered Accountant committed fraud by certifying the financial statement Facilitating M/s Shri Lakshmi Textiles Mills without carrying

out the Audit for the Financial Years 2004-05 and 2005-06 to procure loan from United Bank of India, on the basis of forged documents, the originals of which were not available at all with the company.

3. The CBI has further alleged that when the stock auditor of the United Bank of India (Bank) demanded the audited financial statements of the auditee, then only provisional balance sheet was given and no audited financial statements were provided to him.

4. It is further alleged by the CBI that in pursuance of conspiracy, Shri Ramamoorthy approached for obtaining audited balance sheet in the prescribed Form 3CB and 3CD. In turn, the Appellant knowing fully well that the firm suffered loss during the relevant years and there were no Books of Accounts prepared & audited balance sheet for the years 2004-05 and 2005-06 and issued reports in the prescribed forms 3 CB and 3CD which were submitted to Bank.

5. The said complaint received from the CBI by the Institute of Chartered Accountants of India was referred to the Director (Discipline). The Director (Discipline) after following the due procedure as provided in the Chartered Accountants Act,1949 and the Chartered Accountants (Procedure of Investigations of Professional and other Misconduct and Conduct of Cases) Rules, 2007 formed the 'Prima Facie Opinion' (PFO) dated 28th January, 2014 wherein he has opined that CA M. Ganesan prepared and signed the Audited Balance Sheet of M/s Shri Lakshmi Textiles Mills, Somanur for the Financial Year 2004-05 and 2005-06 on the request of Mr. Ramamoorthy, even after being aware about the fact that the Company was suffering loss and it had no Books of Accounts. The Director (Discipline) while forming PFO also mentioned that CA M. Ganesan had also filed Income Tax Audit Report of the Company. Further, during Investigation, it was revealed that he approached for sanction of Forex Loan from United Bank of India while the Company was suffering loss which resulted loss to the Bank and gain to the Company. The Partners of the Company did not produce Audited Balance Sheet of the Company for the Financial Year 2001-02 to 2004-05 as objected by the Panel Auditor at the time of Stock Audit. Therefore, the Audited Statements were not available with the Bank for the period when the loan was sanctioned. The Company had not disclosed details about Income or Loss, Previous Year Balance Sheet was also not there in the records.

6. The Director (Discipline) placed the matter along-with the PFO before the Disciplinary Committee. During enquiry the Disciplinary Committee observed that the allegations against the Appellant are that he had issued Tax Audit Report to the firm for Financial Years 2004-05 & 2005-06 knowing fully well that the firm has suffered losses during the relevant financial years and no Books of Accounts were prepared and maintained by the firm. It was also submitted by the Appellant before the Disciplinary Committee that as far as the statement of the Appellant recorded by the CBI is concerned, the same was dictated to him and he had been compelled to sign the same. Further, he was threatened with dire consequences if he does not append his signature to the statement recorded by CBI.

7. We have noted that the Disciplinary Committee further observed that vide office letter dated 12th September, 2012 and various times had asked the Appellant to produce the Books of

Account and other relevant papers/documents based upon which he had issued Tax Audit Report for Financial Years 2004-05 & 2005-06. However, the Appellant was not able to bring on record the same before the Committee. The Disciplinary Committee also observed that despite directions of the Committee, the Appellant never brought on record audited Balance Sheet of the firm for year ending 31st March, 2004, which is the basic document for verification of opening balance sheet for the subsequent year 2004-2005. It shows non exercise of the due diligence and a careless approach on the part of the Appellant in the performance of his professional duties and the Committee also observed that the Appellant failed to bring on record his working papers related to the audit like bank certificate and debtors/creditors balance confirmations etc so as to disprove the allegations.

8. We have also noted that the Disciplinary Committee further observed, with concerns, the submissions of Mr Ramamoorthy made before it and vide letter dated 6th February, 2004, whereby, it was mentioned that only soft copy of Books of Accounts were produced to the Appellant for audit and further he is unable to produce Balance Sheet for year ending 31st March, 2004 and Stock Statement submitted to the Bank. In view of this, the Disciplinary Committee opined that the firm had not prepared any books of accounts till such time the queries from the Bank had materialized. The Disciplinary Committee, therefore, found him guilty within the meaning of Clause (7) Part-I of Second Schedule to Chartered Accountants Act, 1949 and awarded punishment to him to remove his name from the Register of members for a period of three (3) Months and a fine of Rs 25,000/- was also imposed upon him.

9. Being aggrieved against the above, the Appellant has come in Appeal before the Appellate Authority. Mr. K. Ravi, the Learned Counsel appearing on behalf of the Appellant vehemently challenged the findings of the Disciplinary Committee and the punishment awarded to him. On behalf of the Appellant, it was contended that the Appellant has applied due diligence while conducting the audit. Thus, there was no negligence on his part in doing the audit. He placed great reliance on the fact that the statement of the Appellant recorded by CBI u/s 161 of the Criminal Procedure Code, 1973 (Cr.P.C) can't be considered as evidence by the Committee. He also pleaded that the punishment awarded was very harsh and the same was not warranted under the facts and circumstances of the case.

10. On the other hand, Ms. Pooja M. Saigal, Advocate, appearing on behalf of the respondent Institute of Chartered Accountants of India supported the Orders passed by the Disciplinary Committee.

11. We have heard the rival submissions and arguments advanced by the parties. The relevant documents and evidences have also been examined by us. Further, we have also noted that the Learned Counsel for the Appellant has submitted that the Statement recorded under section 161 of Cr.P.C. cannot be relied upon. However, we have observed that the Order of the Disciplinary Committee is not only based upon that Statement alone but the Committee has also brought on record various deficiencies in the audit done in this case.

12. We also noted that as per the Auditing & Assurance Standards Three (AAS-3) pertaining to 'Documentation' (As it was then prevailing) a Chartered Accountant is obliged to keep proper working papers for any attestation work carried out by him. This includes Planning and Audit

evidences (AAS-5) as well as documentation of Risk Assessment (AAS-6) in the suitable manner as prescribed under these 'Auditing Standards Pronouncements'. Whereas, no such convincing working papers were produced by the Appellant either before the Committee below or before this Authority.

13. Further, we have also noted that the Disciplinary Committee has observed that the Appellant has not explained any reasons as to wherefrom he has verified the opening balances. No Audited Balance Sheet of opening balance was produced before the Committee or before us. No explanatory note or qualification was given in the audited accounts in this regard. No details were given as to whether he has performed additional procedures as set out in the Standards. Therefore, we are of the view that he has failed to exercise due care and diligence while doing the Audit as per the established rules of Auditing and Assurance Standards. (AAS-22).

14. Furthermore, we are concerned that the main defense of the Appellant was only that the Statement recorded under section 161 of Cr.P.C cannot be relied upon. However, he was unable to explain various contradictions as pointed out by the Committee for which no Statement under section 161 of Cr.P.C is required. Thus, we have seen that the Committee has not found him guilty solely on the basis of the said Statement. He was also not able to produce any suitable working papers even before us to justify that he has exercised due care, due diligence and proper judgment while conducting audit. Thus, we find that there is no defect in the Order of the Disciplinary Committee holding the Appellant as guilty of the said misconduct. Accordingly, there is no merit in this Appeal and therefore, we dismiss the same.

15. At this point, it is relevant to record that the Learned Counsel for the Appellant also pleaded that there were mitigating circumstances as the Appellant was a fresh Chartered Accountant and perhaps did not possess the level of knowledge, due diligence and Judgments required for audit. However, conversely, we are of the considered view that the Government, Shareholders, Financial Institutions and General Public and other Stake holders place very high degree of reliance on the statements audited by the Professionals like Chartered Accountants. This naturally necessitates high degree of knowledge, integrity and due diligence and taking appropriate judgmental calls to prevent stake holders from loss. We found that this has not been adhered to.

16. The appeal is accordingly dismissed and the punishment awarded to the Appellant by the Disciplinary Committee is sustained. All interim stay orders, if any, are vacated. No order as to cost.

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Praveen Garg
Member

BEFORE THE APPELLATE AUTHORITY

(Constituted Under Section 22A of The Chartered Accountants Act, 1949)

APPEAL NO. 08/ICAI/2014

IN THE MATTER OF:

Gyan Prakash Agarwal .....Appellant

Versus

Institute of Chartered Accountants of India
and others .....Respondents

APPEAL NO. 05/ICAI/2014

IN THE MATTER OF:

Rajiv Maheshwari .....Appellant

Versus

Institute of Chartered Accountants of India
and others .....Respondents

APPEAL NO. 07/ICAI/2014

IN THE MATTER OF:

Sameer Kumar Singh .....Appellant

Versus

Institute of Chartered Accountants of India
and others .....Respondents

CORAM:

Hon'ble Mr. Justice M.C. Garg (Retd.)	Chairperson
Hon'ble Mr. Sunil Goyal	Member
Hon'ble Mr. Kamlesh S. Vikamsey	Member
Hon'ble Dr. Navrang Saini	Member

PRESENT:

For the Appellant

Mr. Sandeep Manaktala, Advocate

For the Respondents:

1. Shri V. Sagar, Secretary, appearing on behalf of Respondent the Institute of Chartered Accountants of India (ICAI)
2. CS. Dinesh C. Arora, Secretary appearing on behalf of the Institute of Company Secretaries of India (ICSI)

3. Shri Kaushik Banerjee, Secretary appearing on behalf of the Institute of Cost Accountants of India (ICoAI)
4. Ms. Vibha Gupta, Joint Secretary, ICAI
5. Ms. Meenakshi Gupta, Joint Secretary & Director (Discipline),ICSI
6. Shri C.S. Ravi, Joint Secretary & Director (Discipline),ICAI
7. Shri Rajendra Bose, Director (Discipline), ICoAI
8. Ms. Aruna Sharma, Senior Executive Officer, ICAI
9. Ms. Harleen Bhalla, Assistant Secretary, ICAI
10. Shri R.D. Makheeja, Advocate, ICSI

ORDER

1. In all the above mentioned appeals, the appellants herein, have raised a preliminarily submission regarding the veracity of the punishment awarded to them on the plea that the said punishment could not have been imposed by holding them guilty of **'other misconduct'** as the same was not dealt with in accordance with clause (2) of Part-IV of the First Schedule of the Chartered Accountants Act, 1949 under which they have been found guilty by the Board of Discipline of the Institute of Chartered Accountants of India as no such opinion has been sought from the Council of the Institute as mandated by the said clause. The said clause (2) of Part-IV of the First Schedule of the Chartered Accountants Act, 1949 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) xxxxx

   (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. In the light of the objections raised by the appellants and considering the importance of the aforesaid clause being available in all the three statutes and it being a common issue which arises for consideration in all the appeals pertaining to the Institute of Chartered Accountants of India, the Institute of Company Secretaries of India and the Institute of Cost Accountants of India, the Bench thought it appropriate to dispose of the preliminary objection before final decisions in the aforementioned appeals and for the purpose, we thought it appropriate to have an interactive meeting with the Secretaries and the Directors (Discipline) of all the three respective Institutes for understanding their respective view point in respect of the following:

"the interpretation, applicability and compliance of Clause (2) of Part-IV of the First Schedule of the Act by all the three Professional Institutes and as to how the powers of the Director (Discipline) as envisaged under Section 21 read with Section 22 of the Chartered Accountants Act, 1949 and the power of Board of Discipline and that of the Disciplinary Committee as given under Section 21A & 21B respectively along-with the powers of the Council under clause (2) Part-IV of the First Schedule of the Act are being reconciled and acted upon by them".

3. Accordingly, a joint hearing was held on 4th March, 2017 at ICAI Bhawan, I. P. Marg, New Delhi, wherein Shri V. Sagar, Secretary, ICAI appeared in person along with Ms. Vibha Gupta, Joint Secretary, Legal and Mr. C. S. Ravi, Director (Discipline) on behalf of the Institute of Chartered Accountants of India, Shri Dinesh Chandra Arora, Secretary, ICSI appeared in person along with Ms. Meenakshi Gupta, Director (Discipline) and Shri R.D. Makheeja, Advocate on behalf of the Institute of Company Secretaries of India. Shri Kaushik Banerjee, Secretary, ICoAI and Shri Rajendra Bose, Director (Discipline) also caused appearance on behalf of the Institute of Cost Accountants of India.

4. The Secretaries and the authorized representatives of all the three above named Institutes explained before us the entire procedure as laid down by the Central Government in exercise of the powers conferred under Section 29A of the Chartered Accountants Act, 1949, to be followed in the matters of complaints/information received against the Members thereof for the alleged Professional or Other misconduct. Shri V. Sagar, Secretary, ICAI appearing on behalf of the Institute of Chartered Accountants of India has submitted before us the following:

"That after the amendment of the Statute in 2006, in place of Council which was to form a 'Prima Facie Opinion (PFO)' in the pre-amended mechanism, the amended provisions have entrusted the statutory function of forming a Prima Facie Opinion (PFO) on the Director (Discipline). The manner in which the Director (Discipline), Disciplinary Committee and the Board of Discipline shall carry out the disciplinary matters is also specified in Chapter III (Rules 8 to 12) , Chapter IV (Rules 13 to 15) and Chapter V (Rules 16 to 19) of the Rules".

Further, he submitted that the Board of Discipline and Disciplinary Committee are disciplinary authorities constituted under the Amended enactment and are statutory in nature. The disciplinary proceedings functions which were being discharged by the Council in the pre-amended era have now been entrusted by the Act itself to the Director (Discipline), Board of Discipline and/or Disciplinary Committee, as the case may be.

Furthermore, it was submitted by him before the Authority that the Rules do not specify the manner in which the Council would conduct the disciplinary matters. Now the Council by itself does not conduct the disciplinary matters and the same is

clear from the bare perusal of the amended Act and the Rules. The word 'Council' in clause (2) of Part IV to the First Schedule of the Chartered Accountants Act, 1949 as amended by the Chartered Accountants (Amendment) Act, 2006 should therefore be read as `Board of Discipline or 'Disciplinary Committee, as the case may be' and therefore, Opinion formed by the Director (Discipline) is to be considered as the Opinion of the Council as provided in clause (2) of Part-IV of the First Schedule of the enactment on the ground that after the amendment of the Statute, the 'Prima Facie Opinion' (PFO) to be formed in such complaints has been entrusted by the Parliament of India on the Director (Discipline) and the same is not required to be formed by the Council separately.

5. Other representatives appearing in the matter also made similar submissions except that a different view was expressed by Shri R. D. Makheeja, Advocate, appearing on behalf of the Institute of Company Secretaries of India to the effect that there may be certain situations which may arise sometime where the council itself is required to consider the conduct of its members under such circumstances. Therefore, there can be circumstances where on the basis of information with it, the Council may act suo-moto and form its opinion about any action of any member as to whether the same has caused disrepute to the profession or the Institute or not. In such cases the Council may, through an officer of the Institute, file a complaint in Form-'I' before the Director (Discipline) who shall thereafter proceed further as per the procedure laid down in the Act and the Rules framed thereunder, i.e., to say exercise similar procedure as is being done in other matters.

6. The detailed submissions made on behalf of the Institute of Cost Accountants of India are as under:-

"The interpretation and implication of the above mentioned clause (2) of Part-IV of the First Schedule, after the amendment of the Act in 2006, is that it is the Director (Discipline) only who shall form an opinion about a member whether or not in practice is guilty of professional or other misconduct. As on date, the words "In the opinion of the Council" appear to be redundant and uncalled for and needs to be deleted from the statute book with immediate effect. These words "In the opinion of the Council" as on date are not only redundant but they do not serve the basic objective of the legislature which is to dispose complaints expeditiously".

7. Taking into consideration the submissions made orally by the parties concerned regarding clause (2) of Part-IV of the First Schedule of the Act more particularly in the light of the amendments made in the year 2006 by the Parliament of India whereby a completely new procedure mechanism was brought into existence in the form of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 for dealing with the complaints / information of misconduct and for taking further necessary action therein, the Bench thought it appropriate to call for written submissions on record from all the above named three Institutes. Accordingly, written submission in detail has been submitted by all the three Institutes reiterating therein their oral submissions as discussed above.

8. We observe that on behalf of the Institute of Chartered Accountants of India, through a well drafted note, the scheme of the Act, reasons and objects of the amendments brought by the Parliament of India in the year 2006 i.e., to have expeditious disposal of the cases relating to misconduct, the procedure which was being followed prior to the amendments in the Act and consequent procedure which was provided through the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 post amendments, now in existence, is explained in detail. The relevant Para of the written submission made on behalf of ICAI are reproduced hereunder for a proper and accurate understanding and appreciation for the issue under consideration:

Relevant Para of the written submissions as regards the Interpretation and Applicability of Clause (2) of Part IV of the First Schedule of the Chartered Accountants Act, 1949 on behalf of ICAI

1. "It is respectfully submitted that The Institute of Chartered Accountants of India (hereinafter referred to as 'the Institute'), is a statutory body created by an Act of Parliament i.e. The Chartered Accountants Act, 1949 (hereinafter referred to as the 'Principal Act'). The Chartered Accountants Act, 1949 (Principal Act) was last amended by the Chartered Accountants (Amendment) Act 2006. The Amendment Act provides for a new disciplinary mechanism / framework in place of the one provided under the Principal Act. The amended provisions relating to the new disciplinary mechanism have been made effective from 17.11.2006 by the Central Government. The Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 (hereinafter referred to as "Rules") framed by the Central Government in exercise of the powers given in Section 29A of the Amended Act came into effect only from 28th February 2007.

2. LEGAL POSITION PRIOR TO AMENDMENT

   (i) In accordance with the Section 9 of the Principal Act, the management and the affairs of the Institute are vested in the Central Council, which at the relevant time consisted of 30 members i.e. 24 elected members of the Institute and 6 members nominated by the Central Government. There were three 3 different standing committees of the Council constituted under Section 17 of the Principal Act and various other Committees. One of the Standing Committees of the Institute was Disciplinary Committee. It is stated that the function of the Institute is to regulate the profession of Chartered Accountants and is also empowered to take action against its members for any misconduct as contemplated in the Act and the Regulations framed thereunder. Functions of the Council have been provided in Section 15 of the Principal Act. One of the functions of the Council in accordance with Section 15 (2) (l) of the Principal Act was to exercise of Disciplinary powers conferred by the Act.

   (ii) Section 21 of the Principal Act prescribed procedures to be followed in regard to the enquiries relating to misconduct of members of the Institute. Section 22

of the Principal Act defines "professional misconduct" as well as the conduct of any member of the Institute under any other circumstances called as "other misconduct". Two schedules to the Principal Act namely, the First Schedule and the Second Schedule specify the various clauses under which a member may be found guilty of "professional misconduct". Part-III of the First Schedule to the Principal Act of 1949 deals with professional misconduct in relation to the members of the Institute generally. Any member of the Institute, whether in practice or not, is required to comply with the provisions of the Principal Act or the Regulations framed there under. The Regulations in respect of the Principal Act are called the Chartered Accountants Regulations, 1988 (hereinafter referred to as 'Regulation').

(iii) Section 21 of the Principal Act, interalia, provides for forming of prima facie opinion by the Council regarding the member of the Institute against whom a complaint or information has been received under Section 21 of the Principal Act. Regulation 12 and 13 lays down the procedure to be followed before forming the prima facie opinion and other steps relating to the enquiry to be held in respect of any complaint or information respectively.

(iv) It is submitted that Section 21(1) of the Principal Act, envisages two stages. At the first stage, the council of the Institute has to form its prima facie opinion that a member of the Institute is guilty of professional and/or other misconduct and only thereafter the second stage i.e. holding of enquiry into the allegations, by the Disciplinary Committee starts. As per the procedure prescribed in the Regulation 12 of the Chartered Accountants Regulations, 1988, once the complaint is received in proper form, it has to be sent to the member concerned for his written statement. After the receipt of the written statement from the member concerned, the said written statement is sent to the complainant for his rejoinder. After the receipt of the rejoinder the same is sent for the comment of the member concerned and any additional particulars or documents, considered relevant are also called for from the parties. Thereafter, along with written statement, rejoinder and comments, if any, the complainant is placed before the Council along with written statement, rejoinder etc. The Council then considers the complaint under regulation 12 (11) of the Regulations along with written statement, rejoinder, comments and other documents, if any, received from the parties and forms its prima facie opinion. In the event, the Council is prima facie of the opinion that the member concerned is guilty of any professional and/or other misconduct, the complaint or the information is referred to the Disciplinary Committee for enquiry. However, if the Council is prima facie is of the opinion that the member concerned is not guilty of the any professional misconduct, it filed the complaint or the information and the parties are informed accordingly.

(v) The Disciplinary Committee conducts the enquiry as per Regulation 15 and required to submit its report to the Council in term of Regulation 16 of the Chartered Accountants Regulations, 1988. It may be added that the Disciplinary Committee has only to give a report to the Council which thereupon has to give it findings.

At the time of consideration of the report of the Disciplinary Committee by the Council, adequate opportunity of hearing is provided to the parties concerned.

(vi) The Council on consideration of the material available on record as well as the submission of the parties give its findings.

(vii) On consideration, if the Council is of the opinion that the member is guilty under the First Schedule of the Act, it gives an opportunity of hearing to the member and thereafter, an order under Section 21(4) of the said Act is passed. Section 22A provides that any member aggrieved by the decision of the Council passed under Section 21(4) can file an appeal to the Hon'ble High Court. However, if the Council is of the opinion that the member is guilty of misconduct other than the misconduct as referred to in Section 21(4), his case has to be forwarded by the Council with its recommendations to the Hon'ble High Court. The Hon'ble High Court after giving an opportunity of being heard would decide the matter in accordance with the Section 21(6) of the Act. However, if the Council after consideration of the entire aforesaid material comes to the conclusion that the member concerned is not guilty of any professional or other misconduct, it files the complaint or the information and the parties are informed accordingly.

3. As stated above, a new Disciplinary mechanism have been introduced in the statute by amendment in the Chartered Accountants Act, 1949 in the year 2006 for expeditious disposal of the complaint received against members for professional or other misconduct. The necessity to bring out amendments in the Chartered Accountants Act, 1949 has been mentioned in the statement of objects and reasons attached to the Chartered Accountants (Amendment) Bill, 2005. The relevant portion of the Statement of objects and reasons are give here under:

"The necessity to bring out amendments in the Chartered Accountants Act, 1949 (The CA Act) arose on account of the changes in the economic and corporate environment in the country over the years. These changes include inter-alia, the developments in the capital market, their growth and dismantling of the system of economic controls. The economy also witnessed two major securities scams in 1992 and 2001, which has brought out the significance of the role of accounting professionals, in particular those associated with preparation of accounts of companies and audit of the same.

Moreover, changes in the CA Act were necessitated by the need to bring about systematic changes in the Institutions governed by the Act, including disciplinary procedures to deal with cases of professional misconduct; to ensure quality instructions in the related disciplines and to enable institutional growth and professional development of its members.

The proposals to bring out amendments in the Act have been prepared on the basis of experience gained in administration of the Act, the recommendations of the Joint

Parliamentary Committee, which enquire into the stock market scams and of other Committees including, the High Level Committee "on Corporate Audit and Governance "set up under the Chairmanship of Shri Naresh Chandra which inter alia, examined the Auditor-Company relationship and the Disciplinary mechanism for the auditors.

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4. Some of the main amendments proposed in the Bill are as follows:

a) Provision for an institutionalized Disciplinary Mechanism within the framework of the Institute of Chartered Accountants of India, which would ensure well considered yet expeditious disposal of the complaints against members of the Institute, on professional or other misconduct and ensuring faster delivery of justice. The proposals provide for appointment of a Director (Discipline), establishment of a Disciplinary Directorate to investigate complaints, constitution of a Board of Discipline to deal with the cases of minor offences, Disciplinary Committee(s) to deal with cases of major offences within the institutional framework of the Institute.

b) Providing for an Appellate Authority headed by a person, who is or has been a Judge of a High Court, to deal with Appeals arising from decisions of the Disciplinary Authorities."

5. Legal Position after Amendment

(i) Section 21(1) of the Act requires the Council to establish by Notification a 'Disciplinary Directorate' headed by an officer of the Institute designated as 'Director (Discipline)' for making investigations in respect of any information or complaint received by it against the member of the Institute. Section 21A requires the Council to constitute a Board of Discipline and Section 21 B requires the Council to constitute a Disciplinary Committee.

(ii) By the Amendment Act a new disciplinary mechanism has been introduced in the Act. In exercise of the powers conferred by Clauses (c) and (d) of Section 29A(2) read with Sections 21(4), 21B(2) and 21B(4) of the Act, the Central Government has made the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007. The said Rules came into force with effect from 28th February, 2007, the date of publication in the Official Gazette.

(iii) Rule 3(1) of the said rules provides that a complaint under Section 21 of the Act against a member or a firm shall be filed in Form I in triplicate before the Director in person or by post or courier. Rule 3(6) provides that every complaint received by the Disciplinary Directorate (hereinafter referred to as Directorate) shall be acknowledged by ordinary post with an acknowledgement number. Rule 4 provides the fee for filing the complaint.

(iv) Rule 5 deals with registration of complaint. Rule 5(3) provides that if on scrutiny, the complaint is found in order, it is required to be registered and allotted a unique number which has to be quoted in all future correspondence. Once a complaint is registered, it has to be dealt with in the manner as prescribed in Chapter III of the Rules. If the subject matter of the complaint is in the opinion of the Director, substantially the same as or has been covered by any previous complaint or information received and is under process or has already been dealt with, the Director (Discipline) is required to take any of the action as mentioned in clause (4) of Rule 5.

(v) Rule 6 provides for withdrawal of a complaint in the manner prescribed therein.

(vi) Rule 7 makes the provision for dealing with written information containing allegation(s) against a member or a firm received in person or by post or courier by the Directorate, which is not in Form I under Rule 3(1). Rule 7(3) provides that anonymous information received by the Directorate will not be entertained by the Directorate.

(vii) Chapter III of the Rules provides procedure for investigation. Rules 8 and 9 provide the procedure to be followed by the Director (Discipline) on receipt of complaint and for examination of the same respectively.

(viii) As per the Rule 8(a) of the 'Rules' the Director (Discipline) or the officer authorized by Director (Discipline) within 60 days of the receipt of the complaint has to send a copy of the complaint to the concerned member where after as per the Rule 8 (3) the said member within 21 days of the service of the said complaint or within such additional time not exceeding 30 days, as allowed by the Director (Discipline), has to forward a Written Statement in his defence. It is submitted that as per Rule 8(5), if no Written Statement is filed within the prescribed time the Director (Discipline) takes further action in accordance to law.

(ix) If the member files his written statement then the Director (Discipline) examines the complaint/written statement (if any) along with Rejoinder (if any) of the Complainant and other particulars (if any) and forms the prima facie opinion as to whether the member is guilty or not of any professional or other misconduct or both, under the First Schedule or the Second Schedule or both.

(x) If a member is prima facie found guilty, the matter is forwarded by the Director (Discipline) as prescribed in Rule 9 of the 'Rules' to the Board of Discipline or the Disciplinary Committee as the case may be. It is stated that as per Rule 9(2)(a), if the Director (Discipline) is of the Prima facie opinion that the member is guilty under the First Schedule, he shall place his opinion before the Board of Discipline and if the member is prima facie found guilty under the Second Schedule or both the Schedules, he shall place his opinion before the Disciplinary Committee.

(xi) Thereafter if the Board of Discipline or the Disciplinary Committee, as the case may be, agrees with the Prima facie opinion of the Director(Discipline) then the Board of Discipline or the Disciplinary Committee shall proceed under chapter IV or V of the 'Rules' respectively and an opportunity to file written statement shall be provided to the member concerned.

(xii) However, when the Director (Discipline) is of the Prima facie opinion that the member is not guilty of any misconduct either under the First Schedule or the Second Schedule, then as per Rule 9(3) of the 'Rules' the matter shall be placed before the Board of Discipline and if the Board of Discipline agrees with the opinion of the Director (Discipline), it shall pass the order for closure. However, if the Board of Discipline disagrees with the Prima Facie opinion, then it may either proceed under Chapter IV of the 'Rules' if the matter pertains to the First Schedule or refer the matter to the Disciplinary Committee to proceed under Chapter V of the 'Rules', if the matter pertains to the Second Schedule or both the Schedule or may advise the Director (Discipline) to further investigate the matter.

(xiii) Chapter V of the Rules provides for the Constituting and functioning of the Committee, procedure to be followed by the Committee and orders of the Committee etc. Rule 16 deals with the Constitution and Functioning of the Committee.

(xiv) In the event, the Board of Discipline or the Disciplinary Committee conducts enquiry under Chapter IV & V of the 'Rules' respectively and finds that the member is guilty of Professional misconduct then another opportunity of being heard is granted to the member and thereafter the member is punished in accordance with law. Where after the said member has an opportunity for filing a statutory appeal under Section 22 G of the Act before the Appellate Authority constituted under section 22A of the Act.

6. That the major changes effected by the amendment are as under:

(i) A Disciplinary Directorate headed by an officer designated as Director (Discipline) has been established in accordance with Section 21 of the Amended Act for making investigations in respect of any 'information' or 'complaint' received by it;

(ii) In accordance with Section 21(2) of the Amended Act, a prima-facie opinion is now to be arrived at by the Director (Discipline) and not by the Council on the occurrence of the alleged misconduct;

(iii) In the event the Director (Discipline) is of the opinion that the member is guilty of any professional or other misconduct mentioned in the Fist Schedule, he shall place the matter before the Board of Discipline and where the Director (Discipline) is of the opinion that the member is guilty of any professional or other misconduct mentioned in the Second Schedule or in both the Schedules, he shall place the matter before the Disciplinary Committee as provided in Section 21 (3) of the Amended Act;

(iv) The Disciplinary Committee is constituted by the Council in accordance with Section 21(B) of the Amended Act which consisting of the President or the Vice President as the presiding officer and two members to be elected from amongst the members of the Council and two members shall be nominated by the Central Government from amongst the persons of eminence having experience in the field of law, economics, business, finance or accountancy;

(v) Where the Disciplinary Committee is of the opinion that the member is guilty of any professional or other misconduct mentioned in Second Schedule or in both the Schedules it shall, after affording an opportunity of being heard, take any or more of the following actions against the member as provided in Section 21B(3) of the Amended Act:

1. reprimand the member;

2. remove the name of the member from the Register permanently or for such period, as it thinks fit;

3. impose such fine as it may think fit, which may extend to rupees five lakhs.

(vi) In the event the Director (Discipline) is of the opinion that the member is guilty of any professional or other misconduct mentioned in First Schedule, he shall place the matter before the Board of Discipline;

(vii) The Board of Discipline is constituted by the Council in accordance with Section 21A of the Amended Act and consists of a person with experience in law and having knowledge of disciplinary matters and the profession, to be its presiding officer and two members one of whom shall be a member of the Council elected by the Council and the other member shall be nominated by the Central Government from amongst the persons of eminence having experience in the field of law, economics, business, finance or accountancy;

(viii) Where the Board of Discipline is of the opinion that the member is guilty of any professional or other misconduct mentioned in First Schedule it shall, after affording an opportunity of being heard, take any or more of the following actions against the member as provided in Section 21A (3) of the Amended Act:

a. reprimand the member;

b. remove the name of the member from the Register up to a period of three months;

c. impose such fine as it may think fit, which may extend to rupees one lakh.

(ix) Earlier the Council had recommendatory power and the High Court alone had the power to punish the member concerned, if he found guilty under the Second Schedule or for other misconduct and now the Disciplinary Committee, itself has

the punishing power and the punishment becomes effective immediately.

(x) Earlier there was no power to impose fine and now fine upto rupees one lack and five lacs can be imposed by the Board of Discipline and Disciplinary Committee respectively and the punishment becomes effective forthwith.

(xi) Earlier there was four tier system viz Council, Disciplinary Committee, again Council and then reference to Hon'ble High Court in the cases where the member found guilty under Second Schedule or for other misconduct whereas now there is three tier system viz: Director (Discipline), Board of Discipline or Disciplinary Committee (with power to punish) and the Appeal to the Appellate Authority under Section 22 G of the Amended Act.

(xii) That as per the provisions of Section 22 G of the Amended Act any member of the Institute aggrieved by the Orders of the Board of Discipline or the Disciplinary Committee, as the case may be can prefer an Appeal to the Appellate Authority constituted under Section 22 A of the Amended Act.

(xiv)There have been amendments in the Schedules of the Act as well. Clause (2) was inserted in Part IV of the First Schedule amongst others which 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—

xxx xxx 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.

In view of the aforesaid clause, the question has been arisen that if and when any complaint and' information' is received wherein the alleged misconduct appears to fall under the provision, whether the Director (Discipline) is empowered to act on such complaint or 'information' so as to initiate the proceedings against the member for violation of the said clause without invoking the attention of the Council as to whether such an Act in the opinion of the council bring disrepute to the profession as envisaged under the relevant clause of the First Schedule.

7. It is respectfully submitted that it is apparent that after the amendment there is an absolutely changed mechanism for dealing with the disciplinary cases. In place of the Council which was to form a prima facie opinion in the pre-amended mechanism, the amended provisions have entrusted the statutory function of forming a prima facie opinion on the Director (Discipline). The manner in which the Director (Discipline), Disciplinary Committee and the Board of Discipline shall carry out the disciplinary matters is also specified in Chapter III (Rules 8 to 12), Chapter IV (Rules 13 to 15) and Chapter V (Rules 16 to 19) of the Rules.

The Board of Discipline and Disciplinary Committee are disciplinary authorities constituted under the Amended enactment and are statutory in nature. The disciplinary proceedings functions which were being discharged by the Council in the pre-amended era have now been entrusted by the Act itself to the Director (Discipline), Board of Discipline and/or Disciplinary Committee, as the case may be. The Rules do not specify the manner in which the Council would conduct the disciplinary matters. Now the Council by itself does not conduct the disciplinary matters and the same is clear from the bare perusal of the Amended Act and the Rules. The word 'Council' in the clause (2) of Part IV to the First Schedule of the Chartered Accountants Act, 1949 as amended by the Chartered Accountants (Amendment) Act, 2006 should therefore be read as `Board of Discipline or 'Disciplinary Committee, as the case may be', 'A statute is an edict of the legislature and the conventional way of interpreting or construing the statute is to seek the intention of its' makers. A statute is to be construed "according to the intent of them that make it" (Page 3 of G.P. Singh's Principles of Statutory Interpretation, 11th Edition, 2008). The words used by the legislature have to be interpreted with guidance furnished by the accepted principles of interpretation.

8. It is submitted that under Section 15 (2) (m) of the Act, it is one of the functions of the Council to enable the functioning of the Director (Discipline), the Board of Discipline, the Disciplinary Committee and the Appellate Authority. In terms of Section 21A of the Chartered Accountants Act, 1949; the Council while constituting the Board of Discipline is empowered to nominate the Presiding Officer and elect one member amongst its members whereas one member is nominated by Central Government. Similarly, in terms of Section 21B of the Chartered Accountants Act, 1949; the Council while constituting Disciplinary Committee is empowered to nominates the President or the Vice-President of the Council as the Presiding Officer and elect two members amongst its members whereas two members are nominated by Central Government. It is submitted that under the new disciplinary mechanism, the disciplinary functions of the Council have been assumed by the Board of Discipline and Disciplinary Committee.

9. It is further submitted that the Hon'ble Division Bench of Delhi High Court in the case of The Institute of Chartered Accountants of India & Ors. vs. P. Ramakrishna [2011] 167 CompCas 244(Delhi) observed that when two interpretations are possible, the Court is to choose that interpretation which represents the true intention of the legislature and give a true meaning to the statutory provisions. The Court in the aforesaid case further observed as under:-

"In G.P. Singh's `Principles of Statutory Interpretation' at page 3, 11th Edition, 2008, it has been observed as under: -

"…The task is often not an easy one and the difficulties arise because of various reasons. To mention a few of them: Words in any language are not scientific symbols having any precise or definite meaning, and language is but an imperfect medium to convey one's thought, much less of a large assembly consisting of persons of various shades of opinion. It is impossible even for the most imaginative Legislature to forestall exhaustively situations and circumstances that may emerge after enacting a statute where its application may be called for. The function of the

courts is only to expound and not to legislate. The numerous rules of interpretation or construction formulated by courts are expressed differently by different judges and support may be found in these formulations for apparently contradictory propositions.

The problem of interpretation is a problem of meaning of words and their effectiveness as medium of expression to communicate a particular thought. A word is used to refer to some object or situation in the real world and this object or situation has been assigned a technical name referent. "Words and phrases are symbols that stimulate mental references to referents." But words of any language are capable of referring to different referents in different contexts and times……"

33. *In State of Rajasthan Vs. Babu Ram AIR 2007 SC 2018 it was observed that words of the statute are to be first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context or in the object of the Statute to suggest the contrary. In this context, we have referred both the absurdity as well as the object and context in which the word 'complaint' has been used to hold that the word 'complaint' includes 'information', which is pending before the Council and on which the Council has applied its mind i.e. initial cognizance has been taken.*

34. *Similarly, in M/s Girnar Traders Vs. State of Maharashtra (2007) 7 SCC 555 it has been held that if plain interpretation of a word apparently leads to some injustice or is at variance or is not required by the scope and object of the legislation, the Courts should not hesitate to interpret the word so as to achieve the intention of the legislature and to produce a rational construction. In paragraph 39 it has been held as follows:-*

    "39. Where the legislature has used words in an Act which if generally construed, must lead to palpable injustice and consequences revolting to the mind of any reasonable man, the court will always endeavour to place on such words a reasonable limitation, on the ground that the legislature could not have intended such consequence to ensue, unless the express language in the Act or binding authority prevents such limitation being interpolated into the Act. In construing an Act, a construction ought not be put that would work injustice, or even hardship or inconvenience, unless it is clear that such was the intention of the legislature. It is also settled that where the language of the legislature admits of two constructions and if construction in one way would lead to obvious injustice, the courts act upon the view that such a result could not have been intended, unless the intention had been manifested in express words. Out of the two interpretations, that language of the statute should be preferred to that interpretation which would frustrate it. It is a cardinal rule governing the interpretation of the statutes that when the

language of the legislature admits of two constructions, the court should not adopt the construction which would lead to an absurdity or obvious injustice. It is equally well settled that within two constructions that alternative is to be chosen which would be consistent with the smooth working of the system which the statute purported to be regulating and that alternative is to be rejected which will introduce uncertainty, friction or confusion in the working of the system. (See Collector of Customs v. Digvijaysinhji Spg. & Wvg. Mills Ltd., at p. 899 and Kesavananda Bharati v. State of Kerala.) The court must always lean to the interpretation which is a reasonable one, and discard the literal interpretation which does not fit in with the scheme of the Act under consideration."

35. *In M/s. P. Vaikunta Shenoy & Co. Vs. P. Hari Sharma AIR 2008 SC 416, it was held that purposive interpretation should be given to harmonize and effectuate the effect of the legislation. The Courts must always lean to the interpretation which is a reasonable one and discard the literal interpretation which does not fit in with the scheme of an enactment.*

36. *In Bihar State Council of Ayurvedic and Unani Medicine Vs. State of Bihar & Others (2007) 12 SCC 728, it has been observed and held as follows:-*

    "51. In our opinion, where the legislature has used words in an Act which if generally construed, must lead to palpable injustice and consequences revolting to the mind of any reasonable man, the court will always endeavour to place on such words a reasonable limitation, on the ground that the legislature could not have intended such consequence to ensue, unless the express language in the Act or binding authority prevents such limitation being interpolated into the Act. In construing an Act, a construction ought not be put that would work injustice, or even hardship or inconvenience, unless it is clear that such was the intention of the legislature. It is also settled that where the language of the legislature admits of two constructions and if construction in one way would lead to obvious injustice, the courts act upon the view that such a result could not have been intended, unless the intention had been manifested in express words. Out of the two interpretations, that language of the statute should be preferred to that interpretation which would frustrate it. It is a cardinal rule governing the interpretation of the statutes that when the language of the legislature admits of two constructions, the court should not adopt the construction which would lead to an absurdity or obvious injustice. It is equally well settled that within two constructions that alternative is to be chosen which would be consistent with the smooth working of the system which the statute purported to be regulating and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system. (See Collector of Customs v. Digvijaysinhji Spg. & Wvg. Mills Ltd., SCR at p. 899 and Kesavananda Bharati v. State of Kerala.)"

53. In series of judgments of this Court, these exceptional situations have been provided for. In Narashimaha Murthy v. Susheelabai (SCC at p. 658, para 20), it was held that:

"20 …. the purpose of law is to prevent brooding sense of injustice. It is not the words of the law but the spirit and internal sense of it that makes the law meaningful."

54. In American Home Products Corpn. v. Mac Laboratories (P) Ltd. (AIR at p. 166, para 66), it was held that: (SCC p. 508,para 66)

"66. It is a well-known principle of interpretation of statutes that a construction should not be put upon a statutory provision which would lead to manifest absurdity or futility, palpable injustice, or absurd inconvenience or anomaly…."

55. Further, in State v. Sat Ram Dass, the Punjab High Court held that: (AIR p. 498, para 4)

"4. … To avoid absurdity or incongruity even grammatical and ordinary sense of the words can in certain circumstances be avoided;"

10. In Union of India & Ors. vs. Hansoli Devi & Ors. and State of Tripura & Anr. vs. Roop Chand Das & Ors. (2002)7SCC 273, the Hon'ble Supreme Court while inquiring the correct interpretation of Section 28A of Land Acquisition Act, 1894 observed as under: -

"4. Before we embark upon an enquiry as to what would be the correct interpretation of Section 28A, we think it appropriate to bear in mind certain basic principles of interpretation of Statute. The rule stated by Tindal, CJ in Sussex Pearage case, (1844)11 Cl & F-85, still holds the field. The aforesaid rule is to the effect:

`If the words of the Statue are in themselves precise and unambiguous, then no more than can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver.'

----- In Quebec Railway, Lightheat & Power Co. v. Vandray AIR 1920 PC 181, it has been observed that the Legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. Similarly, it is not permissile to add words to a statute which are not there unless on a literal construction being given a part of the statute becomes meaningless. But before any words are read to repair an omission in the Act, it should be possible to state with certainty that these words would have been inserted by the draftsman and approved by the legislature had their attention been drawn to the omission before the Bill had passed into a law. At times, the intention of the legislature is found to be clear but the un-skillfulness of the draftsman in introducing certain words in the statute results in apparent ineffectiveness of the language and in such a situation, it may be permissible for the Court to reject the surplus words, so as to make the statute effective. (Emphasis

provided by ICAI)

11. It is respectfully submitted that as per the Scheme of the Act, the Board of Discipline has to deal with all the professional or other misconduct mentioned in the First Schedule. The Hon'ble Authority may also refer to the provisions of Section 22 of the Act, 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 circumstances."

19. On the conjoint reading of Section 21 and 22 of the Amended Act it would be clear that after the forming of the prima facie opinion, the disciplinary authorities in respect of all the professional and other misconducts, (not limiting to the Schedules) are Board of Discipline or Disciplinary Committee only and both of whom now have punishing powers alone.

20. The answering respondent submitting its written submissions at present only on the issue of interpretation and applicability of Clause (2) of Part IV of the First Schedule and reserves its right to file the written submission, if any, on the merits of the case subsequently.

It is therefore submitted that as per 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 First Schedule has to be given a purposive meaning and has to be read in consonance with the letter and scheme of enactment. Viewed from the said perspective the indisputable conclusion has to be that the term "council" appearing in clause 2 of Part IV of First Schedule has to refer to opinion of Director (Discipline) alone. (Bold and underlined by the Authority).

9. Similar views have been expressed by the other Institutes except that the Institute of Company Secretaries of India tried to make a different submission that there can be different circumstances/situations where a member may brought disrepute to the Institute or to the Profession and the Council may require to take disciplinary action against the errant member suo-moto. We have also taken note of a case referred in the written submission made on behalf of the Institute of Company Secretaries of India vide Paragraph 17 of the written submissions, which is reproduced hereunder:

"17. In the case of the Institute of Chartered Accountants of India & Ors. Vs P.

Ramakrishna[2011] 167 CompCas 244 (Delhi) the Hon'ble High Court of Delhi has observed that when two interpretations are possible, the Court is to choose that interpretation which represents the true intention of the legislature and give a true meaning to the statutory interpretations. The Hon'ble Court observed as under:

"The task is often not an easy one and the difficulties arise because of various reasons. To mention a few of them: Words in any language are not scientific symbols having any precise or definite meaning, and language is but an imperfect medium to convey one's thought, much less of a large assembly consisting of persons of various shades of opinion. It is impossible even for the most imaginative Legislature to forestall exhaustively situations and circumstances that may emerge after enacting a statute where its application may be called for. The function of the courts is only to expound and not legislate. The numerous rules of interpretation or construction formulated by courts are expressed differently by different judges and support may be found in these formulations for apparently contradictory propositions.

The problem of interpretation is a problem of meaning of words and their effectiveness as medium of expression to communicate a particular thought. A word is used to refer to some object or situation in the real world and that object or situation has been assigned a technical name referent. "Words and phrases are symbols that stimulate mental references to referents". But words of any language are capable of referring to different referents in different contexts and times….."

10. Having considered the oral as well as written submissions placed before us by the three Institutes, i.e., The Institute of Chartered Accountants of India, The Institute of Company Secretaries of India and the Institute of Cost Accountants of India, we are of the opinion that the submissions made on behalf of the Institute of Company Secretaries of India that there can be circumstances where a member can bring disrepute to the profession or to the Institute and the Council suo-moto may require to form opinion as regards the guilt of the member as provided in clause (2) of Part-IV of the First Schedule of the Act, is not sustainable in the light of the amended provisions incorporated/brought in the 'Statute Books' as discussed by the Institute of Chartered Accountants of India (supra) and noting that the similar provisions for dealing with the complaints/information in respect of any Professional or Other Misconduct by the Members of the Profession are available in the enactments establishing other two Professional Institutes.

11. Further, we have also taken note 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 circumstances."

12. Pursuant to noting of the above referred section, it is clear that this definition does not make out any difference about a misconduct which brings disrepute to the profession or to the Institute from other acts of misconducts of the members.

13. The office has also brought to my notice an order dated 17th July, 2012 passed by the earlier Bench of the Appellate Authority under the Chairmanship of Justice S.N. Dhingra (Retd.) in Appeal no 15/ICAI/2011 in the matter of Rajeev Sharma Vs. the Institute of Chartered Accountants of India relevant to clause (2) of Part-IV of the First Schedule of the Chartered Accountants Act, 1949. The relevant paragraph number 7 of the said order is reproduced hereunder:-

"Prior to amendment of Chartered Accountants Act, the Disciplinary Committee used to hold the inquiry and used to submit its report to the Council and only the Council would give a final finding if the member of the Institute was guilty of professional and/or other misconduct or not. The correctness or otherwise of the report of the Disciplinary Committee could be agitated before the Council. The Council was thus acting like an appellate body of the Disciplinary Committee. However, in year 2006 the Chartered Accountants Act was amended and all powers of taking disciplinary action against the members got vested in the Board of Discipline and Disciplinary Committee and the role of Council was taken away. Under Section 21 of the amended Act, the Council was to establish a Disciplinary Directorate, constitute a Board of Discipline and Disciplinary Committee to discharge the functions earlier being discharged by the Council. It is specifically provided in section 21A that the Board of Discipline shall award punishment as given under section 21A(3) if a member was found guilty of professional misconduct covered under First Schedule (including part IV of the schedule). Appeal against the findings and award of punishment by Board of Discipline and Disciplinary Committee was provided before an Appellate Authority specifically constituted under the Act for this purpose. Under the amended Act, there is no provision of appeal provided against decision, if any, of the Council in such matters. It is settled law that if there is some ambiguity or apparent conflict between two provisions, rule of harmonious construction is to be followed. Thus the provision of Clause (2) of Part IV of First Schedule is to be so interpreted that it is in harmony with main provision of the Act i.e. section 21 and 21A. The word 'Council' seems to have gone unnoticed while amending the schedule. The Council's role was altogether taken away in disciplinary proceedings by the amendment of the Act. This is also clear from the Rules made under the Act after amendment. These rules are called Chartered Accountants (Procedure of Investigations of Professional and other misconduct and Conduct of Cases) Rules, 2007. In these rules, Chapter IV, Rule 14(9) provides that Board of Discipline

shall arrive at a finding whether the respondent was guilty or not of any other professional misconduct. Obviously the Board of Discipline has to give a finding in respect of all matters under First Schedule including the misconduct for which the appellant was held guilty. If certain power had been reserved for Council, the Act would also have provided for appeal against the decision of the Council. It cannot be that if Council holds a member of guilty for misconduct, the member is remediless and no appeal lies to any forum. Thus the word 'Council' seems to be inappropriately/inadvertently used in clause (2) Part IV of First Schedule. The Rules and other provisions of the Act make it clear that in respect of misconduct falling under First Schedule, it is the Board of Discipline who has to decide all the matters and the Council would have no role whatsoever. Similar provision is there in respect of power of Disciplinary Committee and under Chapter V of the Rules, Disciplinary Committee has been given powers to decide by a majority of the members present and voting, all questions regarding professional misconduct which come before it. The arguments of the appellant on this count, therefore, must fail.

14. Consequent upon the noting of the above judgment of the Appellate Authority, we have no hesitation but to say that the Bench presided over by Hon'ble Mr. Justice S. N. Dhingra (Retd.) has correctly interpreted the amended provisions of the Statue. The submission made by Shri V. Sagar, Secretary appearing on behalf of the Institute of Chartered Accountants of India are thus on the same line and needs to be accepted in toto.

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.

16. However, further, we do agree with the submission made on behalf of the Institute of Cost Accountants of India that the use of the words "in the Opinion of the Council" as appearing in Clause (2) of Part-IV of the First Schedule to the respective Acts are causing hardships and interpretational issues. In this regard, all the three Institutions may move for an amendment and in such case the legislature may take an appropriate action for amending these six words or deletion thereof from the statute, as an abandon caution.

17. Accordingly, we direct the Registrar of the Appellate Authority to list the above mentioned appeals before the Bench for the hearing thereof on merit by intimating the dates of hearing through issuing a notice to all concerned atleast 14 days before the date of hearing therein.

18. A copy of this Order be sent to all concerned parties of the above mentioned appeals as well as to all the three Professional Institutions for their information and records with a rider that the directions given in Appeal no. 02/ICSI/2015 namely Subramanyam S. Vs the Institute of Companies Secretaries of India and others are superseded.

19. Before parting with, the Appellate Authority record appreciation to the Secretaries of all the three Institutes and Shri Ravindra Singh Pundhir, the Registrar, Appellate Authority for assisting us in arriving at the conclusion.

Justice M. C. Garg
Chairperson

Dr. Navrang Saini
Member

Sunil Goyal
Member

Kamlesh S. Vikamsey
Member

New Delhi
Dated this 13th day of May, 2017

BEFORE THE APPELLATE AUTHORITY

(Constituted Under Section 22A of The Chartered Accountants Act, 1949)

APPEAL NO. 03/ICAI/2016

IN THE MATTER OF:

V. Balakrishnan .....Appellant

Versus

Institute of Chartered Accountants of India and others .....Respondents

CORAM:

Hon'ble Mr. Justice M.C. Garg (Retd.)	Chairperson
Hon'ble Mr. Sunil Goyal	Member
Hon'ble Dr. Navrang Saini	Member

PRESENT:

For the Appellant:

1. Mr. K Ravi, Advocate

For the Respondents:

1. Ms. Pooja M. Saigal, Advocate appearing on behalf of ICAI
2. Mr. Sunil Kumar, Assistant Secretary appearing on behalf of ICAI
3. Ms. A. Aruna Sharma, Senior Executive Officer appearing on behalf of ICAI

ORDER

1. Being aggrieved of the Orders dated 8th February, 2015 and 5th October, 2015 (Impugned Orders) passed by the Disciplinary Committee under Section 21B of the Chartered Accountants Act, 1949 as amended by the Chartered Accountants (Amendment) Act, 2006, CA. V. Balakrishnan, (Membership No. 200039), Udumalpet, a practicing Chartered Accountant, Appellant herein, has filed this appeal against the Institute of Chartered Accountants of India and others challenging the Impugned Orders, whereby, the Disciplinary Committee awarded punishment of holding him guilty under Clause (7) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949, as amended from time to time and awarded punishment for **'removal of name'** of the Appellant from the Register of Membership for a period of one year. The said clause (7) 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."

2. We have noted the facts of the matter inter-alia that the complainant Mr. C. Ramachandran had filed a complaint before the Director (Discipline) of the Institute of Chartered Accountants of India, against the Respondent (Appellant herein), alleging various charges as hereunder, that:

2.1 The Respondent (Appellant herein) has falsely certified the Form No.2 of M/s Sreenivasa Balaji papers Pvt. Ltd (hereinafter referred to as the "Company) which was filed with the Registrar of Companies for the purported allotment of shares in the Board meeting held on 5th March, 2009 by stating that the shares were fully paid though accounting records (i.e. ledger printout of allottees, details whereof have been given below, would show that the shares were not indeed fully paid up.

Name of the Allottees	Amount to be received as per allotment (approved by the board) (in Rs)	Actual money received on the date of allotment (In Rs)	Money not received as on the date of allotment (In Rs)
Mr. C Velusamy	55,00,000	54,01,000	99,000
Mrs. V. Amrithaveni	45,00,000	42,00,000	3,00,000
Mr S Selvaraj	5,00,000	4,50,000	50,000

2.2 The Respondent (Appellant herein) organized an investor for raising funds for his paper mill project and for which a Memorandum of Understanding (MoU) was signed. The Respondent (Appellant herein) is one of the two witnesses to the MoU. As per the MoU, the understanding was that between the promoters and investors, the equity holding will be 50:50. The Respondent (Appellant herein) had issued a certified of his net worth and which was instrumental in organizing this MoU. However the turn of events thereafter would indicate clearly that the Respondent (Appellant herein) had act against the complainant's interest. By virtue of the allotment of shares, the Complainant's stake has been reduce to a mere 9% holder as a result of which he was reduced into a minority leading to his filing a petition before the Company Law board. A perusal of the accounting statement would prove that the Respondent (Appellant herein) has taken his professional fees for rendering the said services.

2.3 The Respondent (Appellant herein) had colluded with the investors who have deep pockets and had engaged in false certification and manipulation of the books accounts and records of the company. A perusal of the ledger printout containing the financial statement of the Company as at 31st March, 2009 given to the Complainant which had been verified by the Respondent (Appellant herein) and with the records produced by the Company before the Company Law Board would show the material deviations between the two set of accounts showing clearly the extent of manipulation of records. Even for the impugned allotment, the records would show that the receipt of money

by the allottees is nothing but a simple journal entry transferring the credit balance in one or more accounts to the respective allottees to whom shares are allotted as per the said Form No.2. Further all the money he had brought and credit relating thereto in his favour have vanished.

2.4 The Respondent (Appellant herein) kept in his custody the Complainant's share certificate, digital signature certificate kit, minute books and books of accounts of the Company. A perusal of the original minutes books and share certificates would show that previously shares were allotted to the Complainant and presently when a police complaint was filed against him he stated that he had delivered the books (Appellant herein) and records to the Registered Office of the Company. Till today he has not returned the Digital Signature Kit which cannot be lying with the Company. However, the Complainant had de-activated the same.

2.5 The Respondent (Appellant herein) had also colluded with the investors and had assisted them in organizing a false resignation letter. The Respondent (Appellant herein) had sent a scanned electronic copy of the impugned resignation letter to the Company Secretary in practice who had certified the Form No. 32 filed with the Registrar of Companies. A perusal of the Complainant's resignation letter attached to the Form No. 32 filed with the Registrar of Companies and resignation letter purported to be the original produced by the Respondent (Appellant herein) to the petition to the Company Law Board will clearly demonstrate the role played by the practicing member of the ICAI disregarding his professional duties.

3. As per the Complainant, the aforesaid charges, if proved, would render the Respondent (Appellant herein) guilty of Professional and/or other misconduct failing within the meaning of Clauses (7) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949.

4. We have noted that the **'Prima Facie Opinion (PFO)'** formed by the Director (Discipline) dated 28th January, 2012, written statement of the Respondent (Appellant herein) and the rejoinder of the Complainant were considered by the Disciplinary Committee. Pursuant to the same, the Committee on consideration agreed with the **'Prima Facie Opinion'** of the Director that the Respondent (Appellant herein) was Prima-Facie guilty of Professional and/or other misconduct falling within the meaning of Clause (7) of Part-I of Second Schedule to the Chartered Accountants Act, 1949 and decided to proceed further under Chapter-V (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007. The Committee directed the Directorate that in terms of the provisions of sub-rule (2) of Rule 18, that the **'Prima Facie Opinion'** formed by the Director be sent to the parties and the Respondent (Appellant herein) be asked to submit his Written Statement within 21 days, in accordance with the provisions of these Rules.

5. In response to the above notice, the Respondent (Appellant herein) submitted his further written statement duly verified on 9th May, 2012. The Complainant, thereafter, submitted his rejoinder duly verified on 2nd June, 2012.

6. We have further noted that on perusal of the documents on record, viz. the complaint, the written statement, the rejoinder, the **'Prima Facie Opinion'** of the Director (Discipline), further written statement, further rejoinder and upon recording the written and oral submission of the Respondent (Appellant herein)/ his Counsel and the Counsel for the Complainant, the Disciplinary Committee submitted its findings as under:

6.1 The Disciplinary Committee noted the Respondent (Appellant herein) vide his letter dated 9th May, 2012 had in the form of further written statement inter-alia stated as under:-

a) He had verified the ledger accounts, Board resolutions submitted by the company before digitally signing the Form 2 of the Company. The Company was in receipt of Rs. 123.63 Lacs (excluding application money of the Complainant) as share application money against the allotment value of Rs. 105 lakhs and all such contributions were received from the allottees and their relatives/friends.

b) He was informed by the company vide its letter dated 5th March, 2009 that consent letter have been received from some the applicants to transfer the funds lying in the name of allottees of shares of the Company. He had instructed the Company to pass necessary Journal entries.

c) Annexure 6B is prepared by the Complainant himself. The respondent (Appellant herein) had no role to play in preparation of accounts of the Company. The statement of accounts is prepared by the accountants of the Company and is not audited by him.

d) The digital signature kit was not left with him and hence there is no question of returning the same to the complainant. The same was also mentioned by him before the Police.

e) The original resignation letter was with Mr. R. Mahalingam, Company Secretary for filing Form 32. He had no possession of the resignation letter at any point of time and had not prepared the scanned copy. Any difference in original and scanned copy can be answered by the Company Secretary only. The Company in Para 71.1 of the sub rejoinder filed before CLB confirmed about having of original resignation with the Company Secretary.

f) The Complaint is motivated against him because before the CLB he had stated that there is siphoning of funds by the Complainant.

6.2 The Disciplinary Committee further noted that the Respondent (Appellant herein) vides his letter dated 19th June 2012 had further submitted as under:-

a) There is a documentary proof produced by the Company that even earlier to the allotment, the Company had received consideration of Rs.123.63 Lakh and the allotment is made against the receipts, for which there is authorization.

b) He had acted bonafide on the basis of ledger accounts made available to him and none of the parties, who had given consent letters have repudiated their consent or questioned the set or any of credits in their account to the consideration for the allotments of shares.

c) The statement of accounts cannot be attributed to him and he had not audited the statements. The complainant as the director had access to the books of accounts and the complainant remained as Director even after the transfer of the management.

d) The MoU is a disputed document and he had not witnessed the said MoU.

6.3 The Committee furthermore noted that the Complainant vide his letter dated 2nd June, 2012 had submitted his duly verified Rejoinder wherein he has inter-alia stated as under:-

a) The respondent (Appellant herein) had not clarified as to whether the Company has received the full consideration of shares.

b) The journal entry of transfer of amounts was passed prior to the date of the consent letter.

c) The consent letter does not tally with the transfer of funds in the ledger account. In case of transfer of funds to Mr. S. Selvaraj, the ledger accounts of Mr. S. Selvaraj shows that the entire amount was transferred from Mr. C. Subramanian towards the consent letter, **whereas the consent letter was transferred from Mr. C. Subramanian for transfer of Rs. 50,000/- only and for remaining Rs.50, 000/- his son Mr. S. Selvarakumar has given consent**.

d) Further as per letter dated 5th March, 2009, there was transfer of funds from Mr. K.Kathiersan to Mr. C. Velusamy; from Mr. K.Kathiersan and Mr. A. Rajendran to Mr. Amrithaveni. But no such name was appearing in the ledger account of the respective allottees.

e) **A perusal of all the papers, ledgers accounts, vouchers and other documents will clearly show that many such parties have not at all given their consent. For instance, Journal No.72 will show transfer of Rs.25,00,000 on 1st March, 2009 from the account of Mr. Mudhurai kannan to Mr. C. Veluswamy. Similar is case of Journal nos. 74 and 76.**

f) It is very surprising that the Respondent (Appellant herein) had submitted that another set of accounts was prepared by the Complainant, when the Complainant was not having access to books of accounts of the Company.

g) The Respondent (Appellant herein) was having his digital signature kit. The same has been reported with Police Station, Palini. The case has now been taken up for enquiry and proceedings are in process.

h) The Company Secretary had already given a statement that certification work was entrusted to him by the Respondent (Appellant herein) and the respondent (Appellant herein) has sent him scanned copy of the resignation letter.

6.4 The Disciplinary Committee further noted that the Respondent (Appellant herein) vide his letter dated 26th April, 2014 had further submitted as under:-

a) The resignation letter was sent by Company Law Board to forensic Department to verify the claim as to whether the complainant signatures are forged. As per his understanding, the Forensic Department held that the signatures are original and is not forged.

b) The Complainant had filed petition before CLB seeking independent audit to verify matters. The consequences of the CLB order will obviously have its impact on the complaint before the Committee. If the CLB holds the complaint to be false, then the case against him before the ICAI must necessarily fail.

c) The police Department closed this case as one of "Mistake of Facts"

6.5 The Disciplinary Committee noted that as per the 'Prima-Facie Opinion' of Director (Discipline) dated 28th January, 2012 the Respondent (Appellant herein) had been Prima-Facie held guilty for following charges:-

a) The Respondent (Appellant herein) had falsely certified Form No.2 of the Company for the purported allotment of shares in the Board Meeting held on 5th March, 2009 by stating that the shares were fully paid up though accounting records (i.e. ledger printout of allottees) would show that the shares were not indeed fully paid up.

b) Deviation in the two set of accounts.

c) Not returning of digital signature Kit of the complainant.

d) False resignation letter.

7. We have noted that that the respondent (i.e., Appellant herein) / his Counsel made following submission before the Disciplinary Committee:

i. All the three promoters of the Company have mutually agreed among themselves to induct the other parties onto the Board of the Company and accordingly, Mr. C. Velusamy, Mr. S. Selvaraj, Mr. A. Selvarajan and Mr. K. Kathiresan were appointed as Directors of the Company and allotted shares. One of the First Promoter, Mr. M.R. Madurai Kannan sent him a letter along with copy of resolution passed at a Board Meeting, list of allottees, ledger account, letter from parties for allotment of shares etc. to certify and file Form No.2 .The Directors were on good terms and also had visited abroad together for identifying machines for the Company.

ii. The allotment of shares to new directors was made in 2009. The Complaint was filed in 2010. The Complainant challenged allotment after one year from the date of allotment despite the allotments was made only on his account.

iii. An application was filed under section 403 of the Companies Act, 1956 seeking permission to increase the paid up capital to Rs. 4.00 crores. By order dated 09.03.2010 the Company law Board directed the applicants to maintain status regarding shareholding pattern in the Company. There was urgent need to bring in money since funds were required for working capital and towards machinery purchase from aboard. It is pointed out that the bank sanctioned loan to the Company with a condition that the Share capital is to be increased to Rs. 4.00 crores.

iv. He had never signed even as a witness any MOU. The Complainant along with Shri K. Balsamy has signed the MOU. But signatures of Shri C. Velusamy were not on the MOU. His Signature is appearing as a witness, but he had not signed the MOU. The other witness is Shri Selvaraj. The Complainant had forged his signature.

v. As regards, certifying of Form 2, the Balance Sheet as on 31.03.2009 signed by Vardaman & Venketesh on 09.03.2013 is referred.

vi. He was never appointed as statutory auditor. He is no way connected with the audit of the Firm. The signature on the balance sheet is not done by him.

vii. He was not in the custody of digital signatures. The Complainant had reported this issue to the Police station. The Police Department closed this case as one of "Mistake of facts".

viii. The Company Secretary had sent an email on 15.04.2010 to him wherein the Company Secretary had attached the original letter for filing Form 32. He was never the statutory auditor of the Company.

8. Thereafter, the Counsel of the complainant has also made the following submission:

i. The Respondent (Appellant herein) had certified Form 2 posing that the shares are fully paid up whereas as per the records, no money had come. The paid up capital must have to come into the Company on the date of allotment i.e. on 05.03.2009. It cannot be said as fully paid up if the money was to be received subsequently. The Company had received Rs. 4.49 lakhs subsequently.

ii. The Respondent (Appellant herein) relied on a letter allegedly given by those parties on whose account debit has been made and credited to three persons. The amount is not brought in to the Company; it was pulled from different voucher entries. One resignation letter is without letterhead, header and footer. It was fabricated because a matter was moves in the Company Law Board. The letter is simply organized.

iii. The Company Secretary (of the entity) in an enquiry against him by Institute of Company Secretaries of India admitted that he received the scanned copy from the Respondent

(Appellant herein). The respondent assisted in incorporation of the Company and filed all the Forms. There was no other audit than the previous auditor.

9. We have observed that as regard the first charge relating to false certification of Form 2, the Disciplinary Committee noted that the Respondent (Appellant herein) had certified Form No. 2 of the Company for the allotment of shares in the Board Meeting held on 5th March, 2009 by stating that the shares were fully paid up. It is observed from Form No. 2 that the Respondent (Appellant herein) had certified that he had verified the attachments with the record and found them to be true and correct. In the said Form it was certified that all the money is paid on application and no money is due and payable on allotment. However, on perusal of the annexure with the statement of account it is clear that the entire money on application as certified by the Respondent (Appellant herein) had not been received as on 5th March, 2009.

10. We have also observed that on perusal of statement of accounts, the Disciplinary Committee noted as under:-

Name of the Allottees	Amount to be received as per allotment (approved by the board) (in Rs)	Actual money received on the date of allotment (In Rs)	Money not received as on the date of allotment (In Rs)
Mr. C Velusamy	55,00,000	54,01,000	99,000
Mrs. V Amrithaveni	45,00,000	42,00,000	2,50,000
Mr. S Selvaraj	5,00,000	5,50,000	0

11. Further, we have noted that the Disciplinary Committee opined that in case of Mr C. Velusamy the balance amount was received on 7th March, 2009 whereas in the case of Mrs V. Amirthaveni balance of Rs 1, 50,000.00 and Rs. 1, 00,000.00 were received on 9th March, 2009 and 12th March, 2009 respectively and in view of the same, the Disciplinary Committee held that the Respondent's (Appellant herein) defence fails on evidentiary value and thus stands overruled and the Committee further stated that it is clear that an amount of Rs 3.49 lakhs out of the Rs 105.00 lakhs were received after the date of allotment. The Respondent (Appellant herein) was required to check the ledger accounts before certifying the contents of Form 2. Hence, the Committee is of the considered view that the Respondent (Appellant herein) has not followed due diligence required of him in the performance of his duties and accordingly is guilty of professional misconduct falling within the meaning of Clause (7) of Part I of the Second Schedule to the Chartered Accountants Act, 1949. However, the Disciplinary Committee exonerated him from all other charges.

12. We have heard the submissions made on behalf of all the parties and perused all the records available. We have also gone through all written submissions and arguments given by the parties from time to time. The Learned Counsel appearing on behalf of the Appellant vehemently submitted that the Appellant was not guilty. The main defence of the Appellant before the Disciplinary Committee and before us was that the full money had been received by the company before allotment of shares by way of transfer of following amounts to the

account of allottees from the money of other depositors which was lying with the company:

1	K. Kathiresan A/c to Mr C. Velusamy	Rs 0.99 Lakh
2	K. Kathiresan A/c V. Amirthaveni	Rs 1.00 Lakh
3	A. Rajendran A/c to V. Amirthaveni	Rs 2.00 Lakh

13. The Learned Counsel appearing on behalf of the Appellant drew our attention towards the consent letter given by the said depositors being Mr. K. Kathiresan and Mr. A. Rajendran for this transfer. He, therefore, explained that the said deficiency, as found by the Disciplinary Committee, for the non receipt of allotment money before allotment was not there and the same has been fulfilled as per law as the full money was received by the Company before the allotment of the shares. Thus, the appellant has rightly certified Form no 2 as filed before the Registrar of the Companies and there was no negligence on his part.

14. The authorized representatives appearing on behalf of the Institute of Chartered Accountants of India, however, argued in support of the order of the Disciplinary Committee on the basis of various reasons given therein. It was also pointed out by them before us that the Appellant has not been able to substantiate the contention that full money was received before the allotment of shares. Further, it was submitted on behalf of the Institute of Chartered Accountants of India that the Appellant had filed the ledger accounts of depositors in which the money was lying which was transferred to shareholders, the veracity of which is challenged by the complainant, and he has alleged that it is the afterthought and that these entries were not there earlier.

15. In our view the Appellant has not been able to substantiate his contention that the money was transferred to accounts of shareholders to whom shares were allotted, before allotment and as such the shares were fully paid before the allotment. We have perused the consent letters as available on record. They are very routine and do not give any reason as to why the money was transferred, what are the terms and conditions and what was the relations between the parties. No evidence was produced that the transaction was at "Arms Length". Even as per the copies of ledger accounts filed by appellant, veracity of which is challenged by complainant, we have noted that whatever amount was transferred to the shareholders have been shown as received back after 4-5 days. All transactions of transfer are book entries only and it was not produced as to whether any bank transfer was made or even cash was available for the same. The same appear to be the 'accommodation consent letters' obtained to support the claim of Appellant. No convincing evidence was produced by the Appellant to support his contention.

16. Based on the above, we therefore, uphold the order of Disciplinary Committee. However, on the ground of punishment, as the Learned Counsel appearing on behalf of the Appellant pleaded before us that the punishment given is very harsh and is un-proportionate by drawing our attention to the background, experience, family and financial conditions of the Appellant. He also submitted that his family will be in a great trouble, if the said order of punishment is executed as it is.

17. Having Considered all submissions and after examination of all material on record, under the circumstances as above, we are of the considered view that the ends of justice would be adequately met out by giving him the punishment of removal of the name of the Appellant from the Register of Membership for a period of three months instead of one year. The punishment given to the Appellant by the Disciplinary Committee, therefore, stands modified accordingly.

18. All interim stay orders, if any, are vacated. No order as to cost. The appeal stands disposed off accordingly.

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Dr. Navrang Saini
Member

New Delhi
Dated this 13th day of May, 2017

BEFORE THE APPELLATE AUTHORITY

(Constituted under Section 22A of the Chartered Accountants Act, 1949)

APPEAL NO. 06/ICAI/2014

IN THE MATTER OF:

M. Rajkumar .....Appellant

Versus

The Institute of Chartered Accountants of India and V. Ayyadurai ...Respondents

CORAM:

Hon'ble Mr. Justice M.C. Garg (Retd.)	Chairperson
Hon'ble Mr. Sunil Goyal	Member
Hon'ble Dr. Navrang Saini	Member

PRESENT:

For the Appellant

1. Mr. Sandeep Manaktala, Advocate

For the Respondents:

1. CA Sanjay Kumar Goel, Deputy Secretary
2. CA Sunil Kumar, Assistant Secretary, ICAI
3. Ms. A. Aruna Sharma, Senior Executive Officer, ICAI

ORDER

1. The present appeal has been filed by the Appellant against the Order of the Disciplinary Committee dated 12th September, 2011 holding the Appellant guilty of professional misconduct within the meaning of Clause (7) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949 and Order dated 10th December, 2013 awarding punishment of 'removal of the name' of Appellant for a period of six months from the Register of Members. The said clause (7) of Part-I of the second schedule 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"*

2. Brief facts of the case, which we have noted, are that the complainant Mr. V. Ayyadurai, Managing Director, Millennium Software Productions India Pvt Ltd had filed a complaint before the Director (Discipline) of the Institute of Chartered Accountants of India making various allegations of misconduct against the Appellant. Out of all alleged allegations, the Appellant was held guilty on the following allegations:-

   i. The complainant Company is registered with STPI as 100% Export Oriented Unit (EOU) and the Appellant was the statutory auditor of the Company. In the statements of Total Income prepared by the Appellant for assessment years 2004-05 and 2005-06, he has claimed income tax exemptions for 90% only whereas under section 10A of the Income Tax Act, 1961 the unit is eligible for 100% exemption.

   ii. The Appellant has signed the report for the financial year 2001-02 probably unaware of the changes in the auditor's report modelled by the Institute of Chartered Accountants of India (ICAI). After having come to know about this new audit report model, he prepared another audit report and submitted the same to the Company. His audit report for subsequent years remained the same as per the old model. Neither the audit reports not any of the accounts signed by him bear any date.

   iii. Despite several reminders, the Appellant failed to complete the audit of the company for the financial year 2006-07 and thus, has put the complainant company in great difficulty in complying with the statutory formalities.

3. The Disciplinary Committee vide its aforesaid Order found the Appellant guilty of professional misconduct within the meaning of Clause (7) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949. However, as regard various other charges the Appellant was held not guilty by the Committee, against which no objection has been raised by the complainant.

4. We have noted that as regard to charge No. 1 against the Respondent (Appellant herein), being allegation of negligence shown by the Appellant in the matter of claiming exemption under section 10 A of the Income Tax Act, 1961 for the complainant company, the Disciplinary Committee has given finding that the Appellant while issuing the certificate did not carry out the necessary checks as to whether proper books of accounts were maintained in this context. The Appellant did not check as to whether the export done by the entity is entitled to exemption and if yes, to what extent. The Appellant was unable to offer any satisfactory explanations as to why the amount of deduction was restricted to 90%.

5. Before us the Learned Counsels appearing on behalf of the Appellant and Respondent reiterated their submissions and arguments and also filed written submissions. We have also considered all the documents filed before us as well as before the Disciplinary Committee and have also considered all the submissions, oral and written of all the parties made before us.

6. Pursuant to the above, in respect of this charge, without going into repetitive arguments of the parties, we find that vide letter dated 13th October,2011 the Appellant has already

admitted the mistake and has mentioned that it was a benign error on his part and he immediately sought to rectify it by writing letter to the complainant. He further prayed that it was not a negligence which may tantamount to misconduct. However he has made some allegations against the complaint about fabricating documents which prevented rectification of the mistake by him.

7. We find that whatever may be the reason of non rectification, the fact remains that the appellant has not made proper claim of deduction under section 10A of Income Tax Act and not applied due diligence in this regard. Therefore, we find him guilty of professional negligence and uphold order of Disciplinary Committee holding him guilty under the said clause.

8. As regards second charge of issuing two undated audit reports for the financial year 2001-02, the Disciplinary Committee has given finding that it is an admitted fact that the Appellant had given two audit reports for the period ended 31st March, 2002 and both the reports were undated. Further, the Appellant also did not give any explanations with regard to the said allegation. The Committee noted that all the Audit Report(s) were not in line with the standards as prescribed by the ICAI from time to time and also did not contain the basic explanations especially with regard to the responsibility of the preparation of the financial statements. As regard giving two different audit reports, the Committee observed the view that if the Appellant was changing/revising his audit reports, he should have given a reference to the old report and the circumstances under which a revised audit report is being issued and ought to have ensured that all compliances prescribed in the Auditing Standards have been complied with.

9. The Learned Counsel Mr. Sandeep Manaktala, Advocate appearing on behalf of the Appellant who appeared before us, vehemently submitted that the Appellant is not guilty of any misconduct. He reiterated his submissions made before the Disciplinary Committee. We find that the Appellant has been giving evasive reply to this allegation. He also tried to raise objections before the Disciplinary Committee that this charge was not originally framed which objection was rejected by the Disciplinary Committee. We also find that he has denied about issuing two audit reports for the year ended on 31st March, 2002. He also tried to argue that the Registrar of Companies has not objected to any of the audit reports and as such there is no default.

10. We have considered the arguments and find that there are two audit reports on record issued by the Appellant. Both pertains to the year ended on 31st March, 2002 and were filed by the complainant before the Disciplinary Committee and Appellant was fully aware of the same. A perusal of both the audit reports shows that none of them is dated. It is not known which one was issued first and which was issued later. However a plain reading of both the audit reports clearly prove that they have not been issued as per Auditing and Assurance Standards prescribed by the Institute of Chartered Accountants of India.

11. As regards the third charge that the appellant failed to complete the audit of the company for the financial year 2006-07 in time which has put the complainant company in great difficulty

in complying with the statutory formalities, the Disciplinary Committee has found that it was an admitted fact that the Appellant delayed the audit of the company for the financial year 2006-07. The reason cited by the Appellant was that since there was an Income tax raid on the company and on account of sworn statement given by the complainant, he required certain details from the company which were not provided to him and same lead to delay in carrying out and completing the audit. The Committee also noted that the company filed a petition before the Regional Director, Ministry of Corporate Affairs, under section 224 (7) of the Companies Act for the removal of statutory auditor. The Regional director vide Order dated 7th December, 2007 ordered for the removal of the appellant as statutory auditor of the company.

12. Before us also the learned counsel for the Appellant submitted that the Appellant was not given proper opportunity by the Regional director for presenting his case. He again reiterated the same reasons for delay in the audit. However, we are not convinced with the submissions of the Appellant. As Disciplinary Committee has also observed that if Appellant required further details / documents during the audit, he should have clearly informed the company in writing and if the company did not provide further details, he should have issued the audit report giving qualification, disclaimer or negative opinion, as the case may be, on account of non sharing of information. No such material has been produced by the Appellant before the Disciplinary Committee or before us. We have noted that in response to the charges of delay in audit by the complainant company, the Regional Director has observed that the relationship between company and auditor have strained on account of non co-operative attitude of the auditor. He further observed that the Auditor -Appellant has apparently been involving himself in various other activities apart from audit resulting in financial losses for the company. We have further noted that no appeal against the findings given in the order of Regional Director was preferred by the Appellant and thus his findings have become final.

13. It also appears to us that the Appellant does not have proper knowledge about the Auditing and Assurance Standards which prescribes various options and course of action for the auditor, in such situation in which he claims that he was in. Under the circumstances, we therefore find that the Appellant was negligent in performance of his professional duty without proper checking and due diligence and therefore, the Disciplinary Committee rightly held him guilty under clause (7) of Part-I of the Second Schedule of the Chartered Accountants Act, 1949.

14. Further, on the issue of the punishment awarded to the Appellant, the learned counsel appearing on behalf of the appellant narrated the circumstances which have led to these lapses. He also narrated that the parties are having disputes before various authorities and the Appellant has reasonable cause for his conduct. He also submitted that the appellant always co-operated in the inquiry and has been truthful in his conduct and also has suffered a lot in the protracted litigation. He has been ruined mentally, financially and professionally in the process.

15. Considering all the facts and circumstances, we are of the view that the ends of justice would meet if the name of the Appellant is removed from the registrar of members for a period of three months in place of Six months. Therefore, the punishment of removal of the name of the Appellant for a period of six months from the register of Members is reduced to three months.

16. All interim stay orders, if any, are vacated. No order as to cost and accordingly the Appeal is disposed of.

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Dr. Navrang Saini
Member

New Delhi
Dated this 20th day of June, 2017

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 11/ICAI/2014

IN THE MATTER OF:

Gajendra Shah .....Appellant

Versus

Nilesh Kumar Saraiya and Institute of Chartered Accountants of India .....Respondents

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:

1. Mr. Gajendra Shah, Appellant in person
2. Mr. Vijay Kumar Shah
3. Dr. S. Kumar, Advocate

For the Respondents:

1. CA Harleen Bhalla, Assistant Secretary, ICAI

ORDER

Date: 31.07.2017

1. Being aggrieved of the Order dated 19th December, 2013 (Impugned Order) passed by the Board of Discipline of the Institute of Chartered Accountants of India, in case No. PR-101/10-DD/111/10/BOD/95/2013 under Section 21A (3) of the Chartered Accountants Act, 1949 as amended by the Chartered Accountants (Amendment) Act, 2006, CA. Gajendra Dhanalal Shah, (Membership No. 113159), 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 by holding the Appellant guilty of other misconduct under clause (2) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949, awarded punishment of **'reprimand'**. The said clause (2) 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 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."

2. At the outset, as regards the issue raised and submission made by the learned Counsel (Late) Dr. S. Kumar appearing on behalf of the Appellant that the **'Prima Facie Opinion (PFO)'** which ought to have been formed by the Council in terms of clause (2) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949, in the present case, is not on record, therefore, the impugned Order needs to be quashed by this Authority, we are of the view that since this issue of not forming of **'Prima Facie Opinion'** by the Council of the Institute separately has already been addressed and dealt with by this Authority in ***Appeal Nos. 05/ICAI/2014 namely Rajiv Maheshwari vs the Institute of Chartered Accountants of India and others; Appeal No. 07/ICAI/2014 namely Sameer Kumar Singh vs the Institute of Chartered Accountants of India and others; and Appeal No. 08/ICAI/2014 namely Gyan Prakash Agarwal vs the Institute of Chartered Accountants of India and others*** and decided that pursuant to the amendment made to the Chartered Accountants Act, 1949, in the year 2006, and considering the object and reasons of the said amendment to be the expeditious disposal of the complaints to provide justice, no specific 'PFO' of the Council is required to be formed separately, so as to enable the Disciplinary Directorate to proceed against any member of the Institute on the basis of the information or complaint received by the Disciplinary Directorate for the commission of Professional and other misconduct and thus, this issue is also addressed by the Authority in the same manner for the purpose of disposing of the present issue. The relevant extract of the order dated 13th May,2017 passed by the Appellate Authority in the above appeals, a copy of which has already been communicated to the Appellant through Dr. S. Kumar, learned Counsel appearing for him, addressing the present issue is reproduced 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.

3. In view of the above, the aforesaid issue raised by the learned Counsel appearing on behalf of the Appellant is also addressed and dealt with in the same manner as aforesaid for the purpose of deciding the exact issue in the present Appeal.

4. Now, we are inclined to decide another issue raised by the learned Counsel appearing on behalf of the Appellant in this Appeal, on merits, as regards returning of the documents/files available with the Appellant to the Respondent.

5. The learned Counsel appearing on behalf of the Appellant submitted that the Appellant is always ready to return whatever the documents/files are left with him to the Respondent, as the certified copies of all the documents/files, which were seized by the CBI, were already provided to the Respondent by the CBI itself in compliance of the Order dated 3rd August, 2010 passed by the Special Judge, CBI Court No. 3 Mizapur, Ahmedabad in Criminal Misc. Application No. 134 of 2010. The Appellant, who was present in person, also submitted a self-attested paper/declaration containing description of certain documents /files, marking thereon and the relevant pages thereof, before us.

6. We have noted the facts of the matter inter-alia that the complainant Mr. Nilesh Kumar Hasmukhlal Saraiya filed a complaint before the Director (Discipline) of the Institute of Chartered Accountants of India, alleging that CA Gajendra Shah, Appellant herein, was caught red-handed along with his accomplice, Mr. Bharat Shah, by the Central Bureau of Investigation in a bribery case and arrested and prisoned him for more than two (2) months. The complainant further alleged that CA. Gajendra Shah forced the complainant to withdraw the criminal case filed against him, in lieu of returning his books of accounts, copies of IT return and audit report, which according to the complainant, CA. Gajendra Shah was withholding, and said that failing which nothing would be given to the complainant.

7. The Director (Discipline) formed the **'Prima Facie Opinion (PFO)'** dated 26th April, 2012 and the same along with complaint, written statement and the rejoinder were placed before the Board of Discipline for consideration and further enquiry in the matter. The Board of Discipline on consideration found CA. Gajendra Shah guilty of other misconduct falling within the meaning of clause (2) of Part-IV of First Schedule to the Chartered Accountants Act, 1949 and after following the due procedure in accordance with the Chartered Accountants (Procedure of Investigation of Professional and other Misconduct and Conduct of Cases) Rules, 2007, awarded the punishment of 'reprimand' to CA. Gajendra Shah.

8. Therefore, being aggrieved from the impugned order, this appeal has been filed by the Appellant requesting us to quash the said Impugned Order dated 19th December, 2013, whereas, Mr. Nilesh Kumar Saraiya, the original complainant before the Board of Discipline and the Respondent No.2 herein, requested that under the facts and circumstances involved in the present matter, the punishment given to the appellant be enhanced suitably.

9. We have heard the oral arguments made on behalf of the both the parties. Both the parties were also given liberty to file their written submissions. We have also noted that the Appellant has submitted on record before us a list of the documents available with him, duly

self-endorsed dated 30th April, 2017, that *'except these files, he doesn't have any other documents or files with him and is ready to handover these files,' as hereunder:-*

Sr. No.	Particulars (File Name)	Marking on File	Remarks	Page No.
1.	J.M. Morgan Stanely Financial Ltd	Share Sale - Purchase File	FY 2006-07	1 to 341
2.	J.M. Morgan Stanely Financial Ltd	Margin Funding File	FY 2006-07	1 to 151
3.	Kunverjee Finstock Pvt. Ltd	Share Sale - Purchase File	FY 2006-07	1 to 132
4.	Kunverjee Commodities Brokers Pvt. Ltd	Commodity File	FY 2006-07	1 to 198
5.	Kunverjee Finstock Pvt. Ltd	F&O File No. 1	(1-4-2006 to 30-9-2006)	1 to 214
6.	Kunverjee Finstock Pvt. Ltd	F&O File No. 2	(1-10-2006 to 31-3-2007)	1 to 222
7.	Jhaveri Securities Pvt. Ltd	1-4-06 to	FY 2006-07	1 to 53
8.	Voucher File	1-4-06 To 31-3-07	FY 2006-07	1 to 656

10. Having considered the arguments advanced by both the parties and perusing all materials on record, we are of the considered view that irrespective of the submission made on behalf of the Appellant that he is and has always been ready to handover whatever the documents/files are lying with him to Shri Nilesh Kumar Saraiya, the fact remains on record that certain documents/files, as is clear from the above list of documents/files submitted by the Appellant, are still lying with the Appellant, which itself is admitted by him by giving this self-attested list before us, as to what are those documents which required to be returned to Shri Nilesh Kumar Saraiya, the Respondent No.2 herein by the Appellant. Therefore, we do not find any reason to interfere with the Impugned order passed by the Board of Discipline or to alter/amend or modify the punishment of 'reprimand' as rightly awarded to the Appellant in this case.

11. With this the present appeal is disposed of accordingly.

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY

(Constituted Under The Chartered Accountants Act, 1949)

APPEAL NO. 06/ICAI/2016

IN THE MATTER OF:

Subhash Chandra R. Pal ....Appellant

Versus

Dilip Arora ....Respondent No. 1
Institute of Chartered Accountants of India ....Respondent No. 2

CORAM

Hon'ble Mr. Justice M.C. Garg — Chairperson
Hon'ble Dr. Navrang Saini — Member

PRESENT:

For the Appellant: None

For the Respondents:

1. Mr. Amit Sharma Advocate appearing on behalf of the ICAI
2. Ms. Aruna Sarma, Senior Executive Officer, Disciplinary Directorate appearing on behalf of ICAI
3. Dr. Rakesh Sharma, Assistant Secretary, Legal Section appearing on behalf of ICAI
4. Mr. Anurag Sharma, Assistant Secretary, appearing on behalf of ICAI

ORDER

Date: 25.08.2017

1. This Appeal has been filed by Mr. Subhash Chandra R. Pal 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."

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 Chartered Accountant Act, 1949.

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

i. Umed Raj Singhvi Vs. ICAI and CA K Ramachandra Murthy, Order dated 27th June, 2016

ii. A.N. Kulkarni Vs. May & Company and Ajit Ji Pemdse, Order dated 24th September, 2011

iii. Savitri Devi Kabra Vs. N L Maheshwari, Order dated 24th September, 2011

iv. B L N Phani Kumar Vs. Board of Disicpline, Order dated 17th July, 2012

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 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.

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

Justice M.C. Garg
Chairperson

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY

(Constituted Under The Chartered Accountants Act, 1949)

Appeal No. 06/ICAI/2014

IN THE MATTER OF:

Rajiv Maheshwari ....Appellant

Versus

Dr. Arun Agarwal ....Respondent No. 1

Board of Discipline of the Institute of Chartered Accountants of India ....Respondent 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:

1. Mr. Sandeep Manaktala, Advocate appearing on behalf of the Appellant

For the Respondents:

1. Ms. Pooja M. Saigal, Advocate appearing on behalf of the ICAI
2. Ms. Aruna Sharma, Senior Executive Officer, Disciplinary Directorate appearing on behalf of the ICAI
3. Ms. Harleen Bhalla , Assistant Secretary, appearing on behalf of the ICAI

ORDER

Date: 25.09.2017

1. Being aggrieved of the Order dated 9th October, 2013 (Impugned Order) passed by the Board of Discipline in case No. DD/129/08/BOD/57/2010 under Section 21A (3) of the Chartered Accountants Act, 1949 as amended by the Chartered Accountants (Amendment) Act, 2006, CA. Rajiv Maheshwari (M. No. 085743), 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 15** (fifteen) days' 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 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, which we have noted are that Dr. Arun Agarwal (complainant) has filed a complaint in Form No. 'I' dated 9th June, 2008 against CA. Rajiv Maheshwari (M. No. 085743), the Appellant herein, before the Institute, inter-alia alleging as under:-

2.1 That CA. Rajiv Maheshwari came in contact with Dr. Arun Agarwal in the year 1991 in his individual capacity seeking assignment of tax consultancy, preparation and filing of tax return, assessment etc. When Dr. Arun Agarwal assigned to him his personal tax cases, he used to deal with them individually but the invoice were raised in the name of his firm, Mahaeswari Rajiv and company.

2.2 For the purpose of preparing and filing Dr. Arun Agarwal returns. CA. Rajiv Maheshwari used to ask for and keep his bank statements every year on the pretext that the same were required by him to verify the particulars of his income. Dr. Arun Agarwal used to provide the same to him on an unqualified understanding that the same would be retained by him in confidence in his record file maintained by him. There was no question of the same being disclosed to anyone. No copies thereof were to be made.

2.3 CA. Rajiv Maheshwari disclosed Dr. Arun Agarwal personal bank statements to Shri Gyan Parkash Agarwal, Chartered Accountant functioning as Secretary General (Acting) dismissed on 17th January, 2008 for misconduct refusing to hand over charge as a result of legal manipulations) on the World Associate for small and Medium Enterprises. (WASME), a Society registered in Delhi. Part of his personal Bank statements for the period 1st June, 2002 to 30th June, 2002, 2nd September, 2002 to 30th September, 2002, 1st December, 2003 to 31st December, 2003, 1st January, 2004 to 1st February, 2004 and 1st December, 2004 to 31st March, 2005 have been used by Shri Gyan Parkash Aggarwal, Chartered Accountant to oust the Dr. Arun Agarwal from the Associate as Executive Director and to entrench himself in the said Association for ulterior motives. These Bank Statements from part of charge sheet issued against Dr. Arun Agarwal in FIR No. 591/07 registered at the behest of Shri Gyan Parkash Agarwal, Chartered Accountant in police Station Sector – 20, Noida District Gautam Budh Nagar, U.P. Case No. 6773/07 under trial in the court of CJM. District Gautam Budh Nagar, U.P.

2.4 Dr. Arun Agarwal did not give his private Bank Statements to anyone except CA. Rajiv Maheshwari, that too for the sole purpose of preparing and filing his Income tax Returns. CA. Rajiv Maheshwari is a Close aide of Shri Gyan Parkash Agarwal, Chartered Accountant

and has been reported in the media and criminal cases registered in Indirapuram police station, District Ghaziabad, U.P against the said Shri Gyan Parkash Agarwal Chartered Accountant to anyone especially Shri Gyan Parkash Agarwal Chartered Accountant as his accomplice. These cases are presently under trill. There is no other avenue for any especially Shri Gyan Parkash Agarwal Chartered Accountant to gain access to his personal Bank Statement and income particulars. Both the Respondent and Shri Gyan Parkash Agarwal, Chartered Accountant live in the same house and their Chartered Accountant Firms are located at Flat No. 207 and 206 respectively at Wadhwa Complex, Laxmi Nagar, Delhi – 110092.

2.5 CA. Rajiv Maheshwari along with some other Chartered Accountant was imprisoned for month before being released on bail in a cooperative housing society scam.

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 Investigation of Professional and other Misconduct and Conduct of Cases) Rules 2007 and on consideration, the Director (Discipline) formed his ***'Prima Facie-Opinion'*** (PFO) that CA. Rajiv Maheshwari is guilty of other misconduct falling within the meaning of 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, on perusal of the documents on record, viz., the complaint, the ***'Prima Facie-Opinion'*** (PFO) of the Director (Discipline), written statement and after hearing the submissions of both the parties, the Board of Discipline observed as under:-

4.1 The Board noted that the present complaint was a result of the dispute between the Complainant and World Association of Small and Medium Enterprises (WASME). The dispute, as also admitted by the Dr. Arun Agarwal, was settled between him and WASME. Thereafter, in terms of the settlement terms, a sole Arbitrator was appointed by Hon'ble Chief Justice of Allahabad High Court in Misc. Application No. 54 of 2009. It was stated in the order of the Hon'ble Court that any dispute between the parties shall be subject to the decision of the Arbitrator, which shall be binding on both the parties i.e. Dr. Arun Agarwal and WASME.

4.2 Further, Dr. Arun Agarwal filed an affidavit on 14th May 2011 wherein he withdrew the complaint against CA. Rajiv Maheshwari. However, the withdrawal was not accepted by the erstwhile Board.

4.3 The Board also noted from the submissions of CA. Rajiv Maheshwari that he was ordinary member in one society namely M/s Jiwan Bima Rashiriya Sahakari Awas Samiti Limited (wherein Mr. G.P. Agarwal happened to be the Honorary Secretary), Where Administration Committee was headed by Government official. Due to cancellation of the flats of the members due to non-payments of society's dues, the Administrative committee headed by Government officials cancelled the allotment of flats by taking

prior approval of U.P. Awas Evam Vikas Prished, the Governing body of the Housing Societies in Uttar Pradesh.

4.4 The Board also took into view the submission of CA. Rajiv Maheshwari that as per U.P. Cooperative Societies Act, 1965, the Secretary & Administrator worked subject to the control and supervision of the bye laws and U.P. Cooperative Societies Act, 1965 and Rules 1968 and that all these matters were civil in nature whose adjuration (Arbitration Proceedings) was available u/s 70 of the U.P. Co-operative Societies Act,1965 which states:

"Disputes which may be referred to Arbitration-

1. Notwithstanding anything contained in any law for the time being in force, if any dispute relating to the constitution, management or the business of a co-operative society-

1(b) between a member, past member or any person claiming through a member, past member or deceased member, and the society, its committee of management or any office, agent or employee of the society, including any past officer, agent or employee"

The Board noted that CA. Rajiv Maheshwari had further submitted that the aforesaid view was endorsed by the Hon'ble Allahabad High Court at the time of delivering orders dated 14th November, 2005 and 7th November, 2005 in writ petition No. 69260/2005 & 69171/2005, respectively. The Court viewed while dismissing both the petitions that the writ petitions regarding allotment/ cancellation of flats would not be maintainable and the petitioners may avail of remedy u/s 70 of the U.P. Co-operative Societies Act, 1965."

The Board also took in view the submission of CA. Rajiv Maheshwari that almost all the personal whose flats were cancelled filed cases u/s 70 f the U.P. Co-operative Societies Act, 1965 but did not succeed in getting the order in their favor. But in this Society, there were some member who were politically connected with the present regime of state of Uttar Pradesh, lodged frivolous/bogus FIR's against CA. Rajiv Maheshwari and other persons who were totally related to the above matters. Even the local police admitted that these are civil matters. But they are under political pressure to continue with the investigation. All the matters are sub-judice. In all the cases, the Hon'ble Allahabad High Court has stayed the proceeding of lower court till the matter is decided by Hon'ble High Court. Till today, CA. Rajiv Maheshwari is not convicted either by the Hon'ble Allahabad High Court or lower Court.

4.5 The Board also noted that the entire process of adjudication of complaints is under stay of Allahabad High Court. The Board further noted that six FIRs have been filed against CA. Rajiv Maheshwari and in fact he was in jail for a period of three months. The Board also noted that FIRs had been filed against CA. Rajiv Maheshwari along with Shri G.P Agarwal and others and a separate case against Shri G.P Agarwal has also been initiated by the Institute and has been enquired by the Board.

4.6 The Board also noted that CA. Rajiv Maheshwari in his defiance has submitted that the criminal Proceedings have been stayed. The Board clearly opined that criminal proceedings and disciplinary proceedings are distinct and separate whereat the standard of proof is very different and specifically in the Disciplinary proceedings, the conduct of the member is examined in his professional or any other capacity. Thus, the stay cannot be a bar on the continuation of the disciplinary proceedings. The Board also noted that from the various documents brought on record that the conduct of CA Rajiv Maheshwari as member of the Society is under question. When a chartered accountant holds any position in any of the Forums, he by accepting the said position holds out to the Society at large a posting of trust and integrity. However, in the instant matter, the alleged involvement of the Respondent in a cooperative scam and consequent filling of subsequent criminal cases speaks volumes about his conduct. The Board further noted that Criminal proceedings have only been kept in abeyance till the next date of listing.

5. We have noted that in view of all the above, the Board of Discipline opined that the manner in which CA. Rajiv Maheshwari has conducted himself in the aforesaid activities is unbecoming of a Chartered Accountant and has brought disrepute to the profession, therefore, he is guilty of other misconduct falling within the meaning of clause (2) of Part-IV of the First Schedule of the Chartered Accountants Act, 1949 and thus awarded him punishment as aforementioned in Para (1) of this order.

6. We have heard the rival submissions of the parties. Both the parties were also given liberty to file their respective written submissions, if any. Accordingly, both the parties have submitted their respective written submissions.

7. Learned Counsel Mr. Sandeep Manaktala appearing on behalf of the Appellant inter-alia submitted as under:-

7.1 That as regards pending litigation against the Appellant, it is stated that those cases have no connection or any relation whatsoever to the present Respondent. The Appellant was made ordinary member (Member simpliciter) of Administrative Committee of M/S Jiwan Bima Rashtriya Sahakari Awas Samiti Limited after the earlier Administrative committee of Society was reconstituted by the Asstt Housing Commissioner /Asstt Registrar U.P.Awas Evam Vikas Parishad, Lucknow, vide order No 2541 dated 18-11-2004. Shri Sushil Kumar, Shri Narinder Kumar, Shri Lalta Prasad, Shri R.N Tiwari and Shri V.P Upadhaya were administrators of the Society in various periods. These Administrators were employees (Cooperative officers) of U.P. Awas Evam Vikas Parishad and were appointed by Govt. of U.P. The Administrator of the Society play a pivotal role in the society, rest members are for mere formality/mere spectator. The Appellant was not responsible for looking after day to day functioning /working of the Society. The decision of the Administrator, being a Govt nominee, is supreme. That the Administrative Committee proceeded to cancel the allotment of flats of the members after obtaining prior approval of U.P. Awas Evam Vikas Parishad, the Governing Body of the Housing Societies in Uttar Pradesh due to non-payment of Society's dues.

7.2 That some of the members whose allotment of flats was cancelled filed writ petitions before Allahabad High Court challenging these cancellations. The Allahabad High Court while dismissing writ petitions noted that 'the writ petitions regarding allotment/ cancellation of flats would not be maintainable and the petitioners may avail of remedy of arbitration under section 70 of the U.P. Cooperative Societies Act, 1965'. The arbitration proceedings were also against majority of the allottees whose allotment of flat was cancelled. Presently, the entire process of adjudication of complaints is under stay of Allahabad High Court. Hence, on the basis of mere press reports, the Appellant cannot be presumed to be guilty of any misconduct under the Act.

7.3 The Board of Discipline cannot draw inferences on the basis of surmises. The onus to prove the charge lies on the Respondent (Complainant) and he has not submitted any evidence in this regard. Hence the averments made are not supported by any proof. The matter was not examined either by Director Discipline nor by Board of Discipline till pronounce of Punishment. No reason has been recorded by the Complainant and even the Prima Facie opinion is without reason and /or evidence. No evidence is on record arising out from FIR's and even the analysis of contents of FIR was not done by Director Discipline. It is the duty of Complainant or Director Discipline to prove the charge. In other words the Director Discipline did not pass reasoned Prima facie opinion. The Director Discipline failed to observe that for these kinds of matters there is separate provision in the Act to deal these kinds of cases.

7.4 That The Appellant prays that the order dated 09th October,2013 in which the Appellant was held guilty of Other Misconduct falling within the meaning of Clause (2) of Part IV of the First Schedule to the Chartered Accountants Act, 1949, based upon Prima Facie Opinion dated 06th May,2010 and Findings of Board of Discipline dated 22nd August,2013 be quashed more particularly in view of that the Hon'ble Allahabad High Court has already quashed five Charge Sheets which were made the very basis of the Guilt of the Appellant.

8. Adversely, the Learned Counsel Ms. Pooja M. Saigal appearing on behalf of the Respondent No. 2 highlighting the submissions that the proceedings before Board of Discipline are of the summary nature and making the reference to the amendments made in the Chartered Accountants Act, 1949, and having discussed the mechanism as framed under the Act, after amendments in the year 2006 in the said Act, submitted as under:-

8.1 That vesting of powers of summoning and enforcing the attendance of any person and examining him on oath, as has been mandated under Section 21C of the Act does not mean that such powers have to be exercised by the named authorities in every case thereby converting proceedings before the Director (Discipline), the proceedings before the Board of Discipline as also the proceedings before the Disciplinary Committee into a quasi-criminal proceedings envisaging a quasi-criminal trial to be conducted at every such stage. If the provision of Section 21C of the Act are read/interpreted to place a mandate on the Director (Discipline) and the Board of Discipline to exercise such powers at every stage, it will not only render the scheme of investigation and conduct

of cases unworkable but would subject the member answerable to a quasi-criminal trial at every stage of the proceedings thereby rendering the provision violative of the protection of rights of an accused vested under the Constitution of India.

8.2 That the Hon'ble Supreme Court in the matter of ***Nahar Industrial Enterprises Ltd. Vs. Hongkong and Shanghai Banking Corp.,*** while interpreting the similar provision, i.e., Section 22 of the Recovery of Debt due to Bank and Financial Institutions Act, held as under:-

"concededly in the proceeding before the Debt Recovery Tribunal detailed examination; cross-examinations, provisions of the Evidence Act as also application of other provisions of the Code of Civil Procedure like interrogatories, discoveries of documents and admission need not be gone into. Taking recourse to such proceedings would be an exception."

8.3 That the Board of Discipline has the discretion to exercise such powers in an appropriate case depending on the need and the necessity for the same. The present however was not one such case as lodging of 6(six) FIRs was not in dispute and the Board of Discipline was evaluating the conduct of the member answerable against the charge of "other misconduct" under clause (2) of part IV of First Schedule which intends to punish such a conduct which brings disrepute to the Institute. Furthermore, the allegations stated in the FIRs which were not emanating from a private dispute but were in the nature of a financial scam affecting a large section of the society, the exercise of powers by the Board of Discipline to examine the case and punish the Member answerable could not be faulted. The conduct complained of and also being investigated by the police was a financial scam alleged to have been carried out by Chartered Accountants thereby putting at peril the trust and confidence that the public at large places on a Chartered Accountant. If a Chartered Accountant uses his position in society and abuses the faith that the public places in him as a Chartered Accountant then even if the acts complained of do not fall within the ambit of professional misconduct, can always be examined from the perspective of "other misconduct".

8.4 That the prima facie opinion and the proceedings before the Board of Discipline may have been guided by the allegations recorded in the FIR, however, merely because 5 (five) FIRs out of 6(six) has been quashed for the reason that no criminal offence is made out, cannot itself be a ground to close the disciplinary proceedings against the member answerable, since the conduct of such Member has to be viewed from the perspective of whether such conduct brings disrepute to the Institute. It is further noteworthy that the Hon'ble High Court while exercising the powers for quashing has categorically observed that the conduct of the accused (member answerable) may be fraudulent but that by itself will not constitute the offence under IPC.

8.5 It is trite that Disciplinary proceedings and criminal proceedings stand on a different footing and the proof of guilt beyond all reasonable doubt which is the requisite under criminal law is not applicable to disciplinary proceedings which proceed on preponderance

of probabilities. The newspaper reports that had been published indicating that about 46 FIRs had been lodged against various persons for the financial scam of cooperative societies including against the Appellant herein. It is also a matter of record that the Appellant was arrested and was in custody for a total of 10 months or more. The Appellant had been the propagator of these cooperative societies which had been established for the benefit of Chartered Accountants.

9. Ms. Pooja M. Saigal Learned Counsel further submitted that the Order passed by the Hon'ble High Court quashes 5 out the 6 FIRs which had been taken note of by the Board of Discipline. The High Court does not absolve the Appellant of wrong doing but merely returns a finding that the acts complained of may not be an offence under IPC. The order passed by the Hon'ble High court in fact does not absolve the Appellant at all. There is therefore, no infirmity in the Order passed by the Board of Discipline which deserves to be upheld and is prayed accordingly.

10. 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, we are of the considered view that mere registration of FIRs against a person is not sufficient to hold him guilty under the provisions of the Chartered Accountants Act, 1949 and the Rules framed thereunder, unless, the specific charges are framed and the person is convicted by the competent Court or the same is otherwise corroborated with appropriate evidences and / or examination of relevant witnesses, as merely registration of FIRs is no proof of guilt and no action can be taken without order of guilt by the Criminal Court as held by the Hon'ble Supreme Court in ***M. V Bijlani Vs. Union of India & Ors (2006) 5 SCC 88.*** The relevant paragraph of the said judgment are reproduced hereunder:-

"....Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e., beyond all reasonable doubts, we cannot lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

Again in Jasbir Singh vs. Punjab and Sind Bank & Ors (2007) 1 SCC 566, the Hon'ble Supreme Court stated as under:-

Furthermore, the orders of the disciplinary authority as also the appellate authority are not supported by any reason. As the orders passed by them have severe civil consequences, appropriate reasons should have been assigned. If the enquiry officer had relied upon the confession made by the appellant, there was no reason as to

why the order of discharge passed by the Criminal Court on the basis of self-same evidence should not have been taken into consideration. The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the Enquiry Officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the Enquiry Officer apparently were not supported by any evidence.

Therefore, in such cases, if the Disciplinary Authorities want to proceed further only on the basis of the registration of FIRs against a member, then, certainly, the same requires to be corroborated first and for this the Director (Discipline), Board of Discipline or the Disciplinary Committee, as the case may be, may have recourse of Section 21C of the Chartered Accountants Act, 1949, which reads as under:

"Section 21C: Authority, Disciplinary Committee, Board of Discipline and Director (Discipline) to have powers of civil court

For the purposes of an inquiry under the provisions of this Act, the Authority, the Disciplinary Committee, Board of Discipline and the Director (Discipline) shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, in respect of the following matters, namely:-

a. Summoning and enforcing the attendance of any person and examining him on oath;
b. The discovery and production of any document; and
c. Receiving evidence on affidavit.

Explanation- For the purposes of Sections 21, 21A, 21B, 21C and 22, "member of the Institute" includes a person who was a member of the Institute on the date of the alleged misconduct although he has ceased to be a member of the Institute at the time of the inquiry.

11. The submissions made on behalf of the Respondent that they are statutorily bound to up hold the Code of Ethics which accepts its members to follow it and accordingly, since the acts of the Appellant become a subject matter of the Investigation, which fall short of standards expecting from the Members of ICAI, is again a vaguest possible argument for two reasons i.e.;

    i. They have not even made a mentioned in the order of the Board of Discipline regarding the relevant provision of the violation of the Code of Ethics by the Appellant; and

    ii. Which Statute supports the submissions merely because a member of the of the ICAI is subjected to an investigation, wherein the Hon'ble High Court as well as the other competent Tribunals are seized of with the matter and proceedings therein have been stayed? Yet, it will be in the mouth of respondent that it was a case of violation of the Code of Ethics enabling the Board of Discipline to award the punishment, as has been done in this case.

12. Even otherwise, in the written submissions filed on behalf of the Respondents, they themselves have stated that they were persuaded only because six FIRs have been registered but without adding anything as to what other material was considered for supporting the 'Prima–Facie Opinion' which seems to be the only basis of the Impugned Order. Having gone through the order passed by the Board of Discipline, we do not find even discussion of the contents of the said FIRs what to talk of the facts of these allegations and more so when five out of six have already been quashed by the Hon'ble Allahabad High Court.

13. Further, we may also observe that no evidence has been taken on records in this case either by the Director (Discipline) or by the Board of Discipline, this fact has also been admitted by the Respondent in the written submissions filed by them. Therefore, we don't agree with the decision taken by the Board of Discipline in the present matter merely on the basis of registration of certain FIRs against the Appellant, more so, when five out of six FIRs have already been quashed by the Hon'ble High Court of Judicature at Allahabad in exercise of the powers under Section 482 of the Criminal Procedure Code, 1973.

14. Moreover, the reasoning of the Board of Discipline, in holding that conduct of the Appellant was unbecoming of a Chartered Accountant only because he had some fight with Dr. Arun Agarwal and the matter had to be referred to in arbitration by the Hon'ble High Court of Allahabad, which is still pending, would be ignoring Judicial Proceedings which were undergoing between the parties and which may have their own results on the final outcome of the matter. For that reasoning also, the Board of Discipline ought to have waited for the findings of judicial proceedings and the outcome of the FIRs stated above, as we cannot ignore clause (1) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949, which might have been available if at all the conviction would have taken place of the Appellant in those proceedings but this is not the situation before us.

15. In addition, we have also noted the submissions made by the Respondent that the Board of Discipline is required to follow the summary procedure as per the statutory Rules in contradistinction with the procedure mandated by the same rules to be followed and adhered to by the Disciplinary Committee in Chapter-V, Rule (18) which mandates framing of charge, charges being read out and examination of witness. Therefore, the recording of evidence and examination of witness is not contemplated as a procedure to be adopted by Board of Discipline in conduct of cases before it as the procedure mandated by Law is one of the summary disposal and it is trite that where law stipulates a particular procedure to be adopted while exercising powers under the Act, then the act being the exercise of power can be performed only in the manner as stipulated /envisaged for it to be regarded as a valid exercise of power.

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 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. Thus, in this case, Director (Discipline) / Board of Discipline, could have verified the allegations by calling the complainant to file an Affidavit in support of his allegations, which itself becomes an evidence and gives an opportunity to the Respondent to file a counter Affidavit, if so required. The analyses of the Affidavit of the complainant and any other witness including the reply of the respondents would meet the ends of justice for the purpose of opining upon the allegations regarding their truthfulness and yet such procedure may come within the definition of summary disposal but this has also not been done in the present case. In fact, even the allegations made in FIR have also not been considered to substantiate either with the Prima Facie Opinion or the Impugned Order, as to how the Appellant can be held guilty of other misconduct in this case.

17. In the above background, therefore, we are of the considered view that summary disposal of the complaints by the Board of Discipline of the Institute of Chartered Accountants of India does not mean to decide such complaints simply in equivalence of forming the 'Prima Facie Opinion' of the guilt, more so when the allegations of the complainant requires effective corroboration of evidences or examination/cross examination of witness so as to provide adequate opportunity of defence to the Respondent. The same can be done by way of taking an affidavit from the parties to be considered as an evidence of a particular fact as against the technical rules of the Indian Evidence Act in this regard.

18. However, in this case, when one of the FIRs is yet to be gone into by the Hon'ble High Court under section 482 and other proceedings are stayed besides the aggrieved flat owners are already before the Competent Authority under the U.P. Cooperative Societies Act, 1965, we cannot sustain the Impugned Order and therefore, set aside the same and remand back the present matter to the Board of Discipline for its re-consideration and taking decision thereon within six months from the date of receipt of this Order and to communicate the decision taken by the Board of Discipline in the matter to the member concerned preferably through Registered Post as well as through email within next 30 days thereafter by the Institute, in the light of the observations made above by us and the applicable provisions of the Chartered Accountants Act, 1949 and the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 as well as in the light of the fact of quashing of FIRs by the Hon'ble High Court of Allahabad, on which the Appellant was hold guilty by the Board of Discipline of the Institute.

19. With this, the present Appeal is 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. 08/ICAI/2014

IN THE MATTER OF:

Gyan Parkash Agarwal ....Appellant

Versus

Dr. Arun Agarwal ....Respondent No. 1

Board of Discipline of the Institute of Chartered Accountants of India ....Respondent 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:

1. Mr. Sandeep Manaktala, Advocate appearing on behalf of the Appellant

For the Respondents:

1. Ms. Pooja M. Saigal, Advocate appearing on behalf of the ICAI
2. Ms. Aruna Sharma, Senior Executive Officer, Disciplinary Directorate appearing on behalf of the ICAI
3. Ms. Harleen Bhalla , Assistant Secretary, appearing on behalf of the ICAI

ORDER

Date: 25.09.2017

1. Being aggrieved of the Order dated 9th October, 2013 (Impugned Order) passed by the Board of Discipline in case No. DD/105/09/BOD/56/2010 under Section 21A (3) of the Chartered Accountants Act, 1949 as amended by the Chartered Accountants (Amendment) Act, 2006, CA. Gyan Parkash Agarwal (M. No. 086296), 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 15 (fifteen) days'** 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, which we have noted are that Dr. Arun Agarwal (complainant) has filed a complaint in Form No. 'I' dated 3rd June, 2009 against CA. Gyan Parkash Agarwal (M. No. 086296), the Appellant herein, before the Institute, inter-alia alleging as under:-

2.1 That the complainant, who was the Secretary General of the World Assembly of Small and Medium Enterprises (later named as World Association for Small and Medium Enterprises hereinafter referred to as "WASME"), resigned from the post at the 41st Session of the Governing Body of WASME held in Noida on 1st April, 2006. However, he was prevailed upon to serve as the Executive Director of WASME for a year term w.e.f.1st April, 2006, a post sans financial and legal responsibilities, in order to maintain continuity.

2.2 That CA. Gyan Parkash, Agarwal was the statutory auditor of WASME for the Financial Year 2003-04, 2004-05 and 2005-06. He resigned as its auditor in January, 2006. He applied for the membership of WASME sometime in February 2006 representing himself as Mr. Gyan Parkash, Secretary General of CA Thrift and Credit cooperative Society Ltd., New Delhi. He did not disclose the fact that he was the same G.P. Agarwal who was the statutory auditor of WASME in earlier years. Had he disclosed his identity that he had functioned as the statutory auditors of WASME in earlier years, he would not have been allowed the membership of WASME at all in view of the allegations made against his professional conduct as statutory auditor of WASME by a former President of WASME at the 40th Session of the Governing Body of the Association held in London, UK on 9th September, 2005. Upon resignation of Dr. Arun Agarwal, the Complainant, CA. Gyan Parkash Agarwal volunteered his services as the Secretary General of WASME on an honorary basis again without formal disclosure that he had served as its statutory auditor for the years 2003-06. CA. Gyan Parkash Agarwal was appointed as a full term Secretary General and was required to work on a full time basis. He claimed substantial amounts on conveyance, communications and foreign travels which included his personal expenses as well.

2.3 That the role/functions, powers and responsibilities of the Secretary General of WASME have been defined in its Memorandum of rules and Regulations of the Association (WASME). The job/post of Secretary General of a World organization like WASME is a full time assignment. In that sense, the post of the Secretary General of WASME is akin to that of a MD of a Company carrying onerous responsibilities and full time

engagement, a responsibility that CA. Gyan Parkash Agarwal couldn't have taken up without prior approval of ICAI in writing.

2.4 That CA. Gyan Parkash Agarwal was engaged in real estate business in NCT-particularly Ghaziabad-along with a few other Chartered Accountants, viz. Shri Rajiv Maheshwari and was managing/controlling several cooperative housing societies along with these CAs with the sole intent behind joining WASME was obviously to gain complete control of the Association and siphon off its funds.

2.5 That in furtherance of his malafide intent, CA. Gyan Parkash Agarwal manipulated induction of several other association Chartered Accountants, viz. Dr. S. Gulati, Mr. Manoj Jain and Mr. Sandeep Kumar (Manktalla) in the Governing body of WASME by misrepresenting to the Complainant-then Secretary General that they were small business owners although in actual they were full time practicing Chartered Accountants holding COP issued by ICAI.

2.6 That the nexus between CA. Gyan Parkash Agarwal and Dr. S. Gultai, CA is established from the fact that Dr. S. Gulati in his capacity as Partner of M/s Dewan and Gulati, Chartered Accountants, New Delhi is the statutory auditor of CA Thrift and credit and Cooperative Society Ltd. New Delhi of which CA. Gyan Parkash Agarwal had been the Secretary/Vice President/Member etc. by rotation during the years 2001-2006.

2.7 That at the 40th Session of the Governing body of WASME held in London, U.K. on 9th September, 2005, Audit report for the Financial Years 2003-04 signed by CA. Gyan Parkash Agarwal did not present a true and fair view of the state of financial affairs of WASME. Therefore, Shri Shasi K. Garg, partner of M/s Shashi K. Garg & co; Chartered Accountants, New Delhi was appointed as a Special Auditor for the Financial Years 2003-04 and 2004-05. Later on, it transpired that Shri Shashi K. Garg, Partner, M/s Shashi K. Garg and Co., Chartered Accountants, was an ally of CA. Gyan Parkash Agarwal over 2 decades and there was a close nexus between them.

2.8 That the Letter engaging M/s Shashi K. Garg & Co. Chartered Accountants, New Delhi along with the Terms of Reference was issued by CA. Gyan Parkash Agarwal in his capacity as Secretary General (Acting) of WASME in indecent haste on 19th June, 2006 as the empowered Monitoring Committee was due to meet for this purpose on the very next day, i.e. 20th June, 2006.

2.9 That CA. Gyan Parkash Agarwal committed professional misconduct by not disclosing the fact that Shri Sashi K. Garg was known to him for 2 decades and had been associated with him in the past, since in terms of the relevant resolution passed by the Governing body, the special audit had to be conducted by an independent external auditor. CA. Gyan Parkash Agarwal connived with the Special Auditors, M/s Shashi K. Garg & Co. to extend the scope of the Special Audit arbitrarily to cover earlier FY 2002-03 as well as subsequent FY 2005-06, although as per Terms of Reference, the Special Audit was to be carried out for the FYs 2003-04 and 2004-05 only.

2.10 That the connivance between CA. Gyan Parkash Agarwal and M/s Shashi K. Garg & Co was subsequently confirmed by the fact that even after termination of the assignment entrusted to M/s. Shashi K. Garg & Co. on 24th March, 2007 they were permitted by CA. Gyan Parkash Agarwal to submit their report after more than 2 months of such termination. The said "Special Audit Report" was accepted by him in toto, the Report was circulated directly to the members of the Governing body of WASME and placed at the 44th Session of the Governing body held in Seoul South Korea on 10th August, 2007 without referring it first to the empowered Monitoring Committee which had entrusted this assignment to M/s. Shashi K. Garg & Co.

2.11 That based on a representation made by Dr. Arun Agarwal, the Governing Body of WASME in its 45th Session held on 17th January, 2008 in Seoul, S. Korea, headed by the President of WASME, reviewed the case. It then expressed its reservation on the correctness/bonafides of the said "Special Audit Report" and constituted a 3-Member Committee to go into details. At this Session, the services of CA. Gyan Parkash Agarwal as Secretary General (Acting) were also dispensed with on account of Professional misconduct but he refused to hand over charge to the newly appointed Secretary General Dr. J.S. Juneja when he went to the WASME Secretariat in Noida on 23rd January, 2008 for this purpose with some respected businessman and a lawyer. Dr. Charlie Chan submitted his detailed comments disapproving the Special Audit Report and recommending its rejection.

2.12 That CA. Gyan Parkash Agarwal, without any authority and without taking into account response dated 27th July, 2007 by Dr. Arun Agarwal to the unauthorized Show Cause notice dated 20th July, 2007 issued by CA. Gyan Parkash Agarwal to him, terminated his services as Executive Director on 6th August, 2007. CA. Gyan Parkash Agarwal deliberately withheld the payment of the salary of Dr. Arun Agarwal w.e.f.1st April, 2007 for services rendered by him in his capacity as the Executive Director appointed as such for a 3 year term until 31st March, 2009 by the Governing body at its 41st Session held in Noida, U.P. on 1st April, 2006. CA. Gyan Parkash Agarwal, in his capacity as the Secretary General (Acting) of WASME was also instrumental in letting out a major part of WASME House premises located in Noida, U.P. in violation of land use norms to a private commercial company at a low price not commensurate with prevailing market prices indicating underhand dealings (no competitive bids were invited by him violating the decision taken in the First meeting of the Monitoring Committee held on 20th April, 2006).

2.13 That CA. Gyan Parkash Agarwal also permitted expenditure to be incurred from WASME's funds on International travel (2 times to Seoul and once to Hong Kong during 2006-07) of his business associate Mr. Rajiv Maheshwari, Chartered Accountant who was not even ordinary member or associated with WASME during that period in any capacity whatsoever. During September, 2007, several illegal and criminal activities of CA. Gyan Parkash Agarwal came to light after the U.P. Police unearthed a land scam in Ghaziabad running into at least Rs.500 Crores and finally arrested him on 5th July, 2008 with the assistance of the Crime Branch of Delhi Police, by then, over 50 cases of

cheating, forgery and criminal conspiracy had been registered against him. CA. Gyan Parkash Agarwal was also booked under Sections 2/3 of Gangster Act 1986 along with his ally Mr. Sandeep Kumar (Mankatalla), in Ghaziabad and several FIRs for cheating and forgery were also registered against him and his associates.

2.14 That CA. Gyan Parkash Agarwal, being a practicing Chartered Accountant holding Certificate of Practice issued by ICAI, had been indulging himself in other business activities controlling cooperative housing societies in District Ghaziabad, viz; Jeewan Bima, Uplabdhi, Bank Sahyog, Vishal, Apja parishad apart from full time engagement with WASME until the time of his arrest by Delhi Police Crime Branch on 5th July, 2008 and his subsequent incarceration in Dasna Jail, Ghaziabad for nearly 7 months before being finally granted bail by the Allahabad High Court. CA. Gyan Parkash Agarwal along with his CA colleagues, Shri Manoj Jain, Dr. S. Gulati and Shri Sandeep Kumar (Manaktalla) together with other associates is also facing contempt of court proceeding in CPC No. 102/2008 filed by a member of the Governing Body of WASME, Mr. Gupta in Civil Petition No. 1107/2007 before the Hon'ble Delhi High Court for willfully disobeying its orders passed on 31st May, 2007, 8th August, 2007 and 18th March, 2008.

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) that CA. Gyan Parkash Agarwal is guilty of other misconduct falling within the meaning of 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, on perusal of the documents on record, viz., the complaint, the 'Prima Facie-Opinion' (PFO) of the Director (Discipline), written statement and after hearing the submissions of both the parties, the Board of Discipline observed as under:-

4.1 The Board of Discipline on perusal of the Summary Record of the 1st meeting of the newly constituted Governing Body of WASME held on 1st April, 2006 noted that CA. Gyan Parkash Agarwal had been appointed as the Secretary General (Acting) of WASME in place of Dr. Arun Agarwal, but, he did not draw any remuneration for the same.

4.2 The Board further noted that the President-WASME vide his letter dated 17th January, 2008 disengaged CA. Gyan Parkash Agarwal as the Secretary General-Acting of WASME due to his alleged involvement in a housing scam and several criminal proceedings instituted against him. The Board also noted from the Summary Record of the 46th Session of the Governing Body of WASME held on 24th March 2008 that CA. Gyan Parkash Agarwal prevented the newly appointed Secretary General from exercising his rights and duties due to which he resigned from the said post and CA. Gyan Parkash Agarwal was also expelled from the membership of WASME due to his alleged involvement in a cooperative housing scam.

4.3 The Board further noted from the documents on record that the present complaint was a result of the dispute between Dr. Arun Agarwal and the World Association of Small and Medium Enterprises (WASME) which had been initiated by CA. Gyan Parkash Agarwal in his capacity as the Secretary General(Acting)-WASME. The disputes, as also admitted by Dr. Arun Agarwal were settled between him and WASME. Thereafter, in terms of the settlement terms, a sole Arbitrator was appointed by Hon'ble Chief Justice of Allahabad High Court in Misc. Application No. 54 of 2009. It was stated in the order of the Hon'ble Court that any dispute between the parties shall be subject of the decision of the Arbitrator, which shall be binding on both the parties i.e. Dr. Arun Agarwal and WASME. Further, Dr. Arun Agarwal filed an affidavit on 14th May, 2011 wherein he withdrew the complaint against CA. Gyan Parkash Agarwal. However, the withdrawal was not accepted by the erstwhile Board.

4.4 The Board also noted from the submissions of CA. Gyan Parkash Agarwal that he was an honorary Secretary of M/s. Jiwans Bima Rashtriya Sahakari Awas Samiti Limited from 19th August, 2000 to 27th April, 2005. During this period, an Administrative Committee superseded the Committee of management of the aforesaid Society and was responsible for the functioning of the Society. These Administrators were employees (Co-operative officers) of UP Awas Evam Vikas Parishad and were appointed by Govt. of UP. CA. Gyan Parkash Agarwal worked under the instructions of the Administrative Committee.

4.5 The Administrative Committee proceeded to cancel the allotment of flats of the member after obtaining prior approval of UP Awas Evam Vikas Parishad, the Governing Body of the Housing Societies in UP due to non-payment of Society's dues. Some of the members whose allotment of flats was cancelled filed Writ Petitions before Allahabad High Court challenging these cancellations. The Allahabad High Court while dismissing Writ Petitions, noted that the Writ Petitions regarding allotment/cancellation of flats would not be maintainable and the petitioners may avail of remedy of arbitration under Section 70 of the UP Co-operative Societies Act, 1965.

4.6 The Arbitration proceedings were also against majority of the allottees whose allotment of flat was cancelled. The Board also noted that the entire process of adjudication of complaints is under stay of Allahabad High Court. The Board further noted that FIRs have been filed against CA. Gyan Parkash Agarwal and in fact he was in jail for a period of 10 months in total. The Board also noted that CA. Gyan Parkash Agarwal in his defence has merely submitted that the criminal proceedings have been stayed. The Board clearly opined that criminal proceedings and disciplinary proceedings are distinct and separate, whereat the standard of proof is very different and specifically in the Disciplinary proceedings, the conduct of the member is examined in his professional or any other capacity. Thus, the stay cannot be a bar on the continuation of the disciplinary proceedings before the Board of Discipline.

4.7 The Board also noted that from the various documents brought on record, it is noted that the conduct of CA. Gyan Parkash Agarwal as honorary Secretary of the Society is

under question. When a Chartered Accountant holds any public office, he by accepting the said position holds out to the society at large a position of trust and integrity. However, in the instant matter, the alleged involvement of CA. Gyan Parkash Agarwal in a cooperative cam and consequent filing of subsequent criminal cases against him speaks volumes about his conduct. The Board further noted that the Criminal proceedings have only been kept in abeyance till the next date of listing.

5. We have noted that in view of all the above, the Board of Discipline opined that the manner in which CA. Gyan Parkash Agarwal has conducted himself in the aforesaid activities is unbecoming of a Chartered Accountant and has brought disrepute to the profession, therefore, he is guilty of other misconduct falling within the meaning of clause (2) of Part-IV of the First Schedule of the Chartered Accountants Act, 1949 and thus awarded him the punishment as aforementioned in Para(1) of this order.

6. We have heard the rival submissions of the parties. Both the parties were also given liberty to file their respective written submissions, if any. Accordingly, both the parties have submitted their respective written submissions.

7. Learned Counsel Mr. Sandeep Manaktala appearing on behalf of the Appellant inter-alia submitted as under:-

7.1 That as regards pending litigation against the Appellant, it is stated that those cases have no connection or any relation whatsoever to the present Respondent. The Appellant was made ordinary member (Member simpliciter) of Administrative Committee of M/s Jiwan Bima Rashtriya Sahakari Awas Samiti Limited after the earlier Administrative committee of Society was reconstituted by the Asstt Housing Commissioner /Asstt Registrar U.P.Awas Evam Vikas Parishad, Lucknow, vide order no 2541 dated 18th November, 2004. Shri Sushil Kumar, Shri Narinder Kumar, Shri Lalta Prasad, Shri R.N Tiwari and Shri V.P Upadhaya were administrators of the society in various periods. These Administrators were employees (Cooperative officers) of U.P. Awas Evam Vikas Parishad and were appointed by Govt. of U.P. The Administrator of the Society play a pivotal role in the society, rest members including Secretary are for mere formality/ mere spectator. The Respondent was honorary secretary of M/s Jiwan Bima Rashtriya Sahakari Awas Samiti Limited from 19th August, 2000 to 27th April, 2005. The Appellant was discharging the directions and decision of the Administrator, being a Govt nominee. The Administrative Committee proceeded to cancel the allotment of flats of the members after obtaining prior approval of U.P. Awas Evam Vikas Parishad, the Governing Body of the Housing Societies in Uttar Pradesh due to non-payment of society's dues.

7.2 That some of the members whose allotment of flats was cancelled filed writ petitions before Allahabad High Court challenging these cancellations. The Allahabad High Court while dismissing writ petitions noted that 'the writ petitions regarding allotment/ cancellation of flats would not be maintainable and the petitioners may avail of remedy of arbitration under section 70 of the U.P. Cooperative Societies Act, 1965'. The

arbitration proceedings were also against majority of the allottees whose allotment of flat was cancelled. Presently, the entire process of adjudication of complaints is under stay of Allahabad High Court. Hence, on the basis of mere press reports, the Appellant cannot be presumed to be guilty of any misconduct under the Act.

7.3 The Board of Discipline cannot draw inferences on the basis of surmises. The onus to prove the charge lies on the Respondent (Complainant) and he has not submitted any evidence in this regard. Hence the averments made are not supported by any proof. The matter was not examined either by Director Discipline nor by Board of Discipline till pronounce of Punishment. No reason has been recorded by the Complainant and even the Prima Facie opinion is without reason and /or evidence. No evidence is on record arising out from FIR's and even the analysis of contents of FIR was not done by Director Discipline. It is the duty of Complainant or Director Discipline to prove the charge. In other words the Director Discipline did not pass reasoned Prima facie opinion. The Director Discipline failed to observe that for these kinds of matters there is separate provision in the Act to deal these kinds of cases.

7.4 That the Appellant prays that the order dated 9th October,2013 in which the Appellant was held guilty of Other Misconduct falling within the meaning of Clause (2) of Part IV of the First Schedule to the Chartered Accountants Act, 1949, based upon Prima Facie Opinion dated 7th May,2010 and Findings of Board of Discipline dated 22nd August,2013 be quashed more particularly in view of that the Hon'ble Allahabad High Court has already quashed five Charge Sheets which were made the very basis of the Guilt of the Appellant.

8. Adversely, the Learned Counsel Ms. Pooja M. Saigal appearing on behalf of the Respondent No. 2 highlighting the submissions that the proceedings before Board of Discipline are of the summary nature and making the reference to the amendments made in the Chartered Accountants Act, 1949, and having discussed the mechanism as framed under the Act, after amendments in the year 2006 in the said Act, submitted as under:-

8.1 That vesting of powers of summoning and enforcing the attendance of any person and examining him on oath, as has been mandated under Section 21C of the Act does not mean that such powers have to be exercised by the named authorities in every case thereby converting proceedings before the Director (Discipline), the proceedings before the Board of Discipline as also the proceedings before the Disciplinary Committee into a quasi-criminal proceedings envisaging a quasi-criminal trial to be conducted at every such stage. If the provision of Section 21C of the Act are read/interpreted to place a mandate on the Director (Discipline) and the Board of Discipline to exercise such powers at every stage, it will not only render the scheme of investigation and conduct of cases unworkable but would subject the member answerable to a quasi-criminal trial at every stage of the proceedings thereby rendering the provision violative of the protection of rights of an accused vested under the Constitution of India.

8.2 That the Hon'ble Supreme Court in the matter of Nahar Industrial Enterprises Ltd. Vs. Hongkong and Shanghai Banking Corp., while interpreting the similar provision, i.e., Section 22 of the Recovery of Debt due to Bank and Financial Institutions Act, held as under:-

> *"concededly in the proceeding before the Debt Recovery Tribunal detailed examination; cross-examinations, provisions of the Evidence Act as also application of other provisions of the Code of Civil Procedure like interrogatories, discoveries of documents and admission need not be gone into. Taking recourse to such proceedings would be an exception."*

8.3 That the Board of Discipline has the discretion to exercise such powers in an appropriate case depending on the need and the necessity for the same. The present however was not one such case as lodging of 6(six) FIRs was not in dispute and the Board of Discipline was evaluating the conduct of the member answerable against the charge of "other misconduct" under clause (2) of part IV of First Schedule which intends to punish such a conduct which brings disrepute to the Institute. Furthermore, the allegations stated in the FIRs which were not emanating from a private dispute but were in the nature of a financial scam affecting a large section of the society, the exercise of powers by the Board of Discipline to examine the case and punish the Member answerable could not be faulted. The conduct complained of and also being investigated by the police was a financial scam alleged to have been carried out by Chartered Accountants thereby putting at peril the trust and confidence that the public at large places on a Chartered Accountant. If a Chartered Accountant uses his position in society and abuses the faith that the public places in him as a Chartered Accountant then even if the acts complained of do not fall within the ambit of professional misconduct, can always be examined from the perspective of "other misconduct".

8.4 That the prima facie opinion and the proceedings before the Board of Discipline may have been guided by the allegations recorded in the FIR, however, merely because 5 (five) FIRs out of 6(six) has been quashed for the reason that no criminal offence is made out, cannot itself be a ground to close the disciplinary proceedings against the member answerable, since the conduct of such Member has to be viewed from the perspective of whether such conduct brings disrepute to the Institute. It is further noteworthy that the Hon'ble High Court while exercising the powers for quashing has categorically observed that the conduct of the accused (member answerable) may be fraudulent but that by itself will not constitute the offence under IPC.

8.5 It is trite that Disciplinary proceedings and criminal proceedings stand on a different footing and the proof of guilt beyond all reasonable doubt which is the requisite under criminal law is not applicable to disciplinary proceedings which proceed on preponderance of probabilities. The newspaper reports that had been published indicating that about 46 FIRs had been lodged against various persons for the financial scam of cooperative societies including against the Appellant herein. It is also a matter of record that the Appellant was arrested and was in custody for a total of 10 months or more. The

Appellant had been the propagator of these cooperative societies which had been established for the benefit of Chartered Accountants.

9. Ms. Pooja M. Saigal Learned Counsel further submitted that the Order passed by the Hon'ble High Court quashes 5 out the 6 FIRs which had been taken note of by the Board of Discipline. The High court does not absolve the Appellant of wrong doing but merely returns a finding that the acts complained of may not be an offence under IPC. The order passed by the Hon'ble High court in fact does not absolve the Appellant at all. There is therefore no infirmity in the Order passed by the Board of Discipline which deserves to be upheld and is prayed accordingly.

10. 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 including written submissions, we are of the considered view that mere registration of FIRs against a person is not sufficient to hold him guilty under the provisions of the Chartered Accountants Act, 1949 and the Rules framed thereunder, unless, the specific charges are framed and the person is convicted by the competent Court or the same is otherwise corroborated with appropriate evidences and / or examination of relevant witnesses, as merely registration of FIRs is no proof of guilt and no action can be taken without order of guilt by the Criminal Court as held by the Hon'ble Supreme Court in **M. V Bijlani Vs. Union of India & Ors (2006) 5 SCC 88**. The relevant paragraph of the said judgment are reproduced hereunder:-

> *"....Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e., beyond all reasonable doubts, we cannot lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."*

Again in **Jasbir Singh vs. Punjab and Sind Bank & Ors (2007) 1 SCC 566,** the Hon'ble Supreme Court stated as under:-

Furthermore, the orders of the disciplinary authority as also the appellate authority are not supported by any reason. As the orders passed by them have severe civil consequences, appropriate reasons should have been assigned. If the enquiry officer had relied upon the confession made by the appellant, there was no reason as to why the order of discharge passed by the Criminal Court on the basis of self-same evidence should not have been taken into consideration. The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The

provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the Enquiry Officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the Enquiry Officer apparently were not supported by any evidence.

Therefore, in such cases, if the Disciplinary Authorities want to proceed further only on the basis of the registration of FIRs against a member, then, certainly, the same requires to be corroborated first and for this the Director (Discipline), Board of Discipline or the Disciplinary Committee, as the case may be, may have recourse of Section 21C of the Chartered Accountants Act, 1949, which reads as under:

> ***"Section 21C: Authority, Disciplinary Committee, Board of Discipline and Director (Discipline) to have powers of civil court***
>
> *For the purposes of an inquiry under the provisions of this Act, the Authority, the Disciplinary Committee, Board of Discipline and the Director (Discipline) shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, in respect of the following matters, namely:-*
>
> *a. Summoning and enforcing the attendance of any person and examining him on oath;*
>
> *b. The discovery and production of any document; and*
>
> *c. Receiving evidence on affidavit.*
>
> *Explanation- For the purposes of Sections 21, 21A, 21B, 21C and 22, "member of the Institute" includes a person who was a member of the Institute on the date of the alleged misconduct although he has ceased to be a member of the Institute at the time of the inquiry.*

11. The submissions made on behalf of the Respondent that they are statutorily bound to up hold the Code of Ethics which accepts its members to follow it and accordingly, since the acts of the Appellant become a subject matter of the Investigation, which fall short of standards expecting from the members of ICAI, is again a vaguest possible argument for two reasons i.e.;

    (i) They have not even made a mention in the order of the Board of Discipline regarding the relevant provision of the violation of the Code of Ethics by the Appellant; and

    (ii) Which Statute supports the submissions merely because a member of the ICAI is subjected to an investigation, wherein the Hon'ble High Court as well as the other competent Tribunals are seized of with the matter and proceedings therein have been stayed? Yet, it will be in the mouth of Respondent that it was a case of violation of the Code of Ethics enabling the Board of Discipline to award the punishment, as has been done in this case.

12. Even otherwise, in the written submissions filed on behalf of the Respondents, they themselves have stated that they were persuaded only because six FIRs have been registered but without adding anything as to what other material was considered for supporting the 'Prima–Facie Opinion' which seems to be the only basis of the Impugned Order. Having gone through the order passed by the Board of Discipline, we do not find even discussion of the contents of the said FIRs what to talk of the facts of these allegations and more so when five out of six have already been quashed by the Hon'ble Allahabad High Court.

13. Further, we may also observe that no evidence has been taken on records in this case either by the Director (Discipline) or by the Board of Discipline, this fact has also been admitted by the Respondent in the written submissions filed by them. Therefore, we don't agree with the decision taken by the Board of Discipline in the present matter merely on the basis of registration of certain FIRs against the Appellant, more so, when five out of six FIRs have already been quashed by the Hon'ble High Court of Judicature at Allahabad in exercise of the powers under Section 482 of the Criminal Procedure Code, 1973.

14. Moreover, the reasoning of the Board of Discipline, in holding that conduct of the Appellant was unbecoming of a Chartered Accountant only because he had some fight with Dr. Arun Agarwal and the matter had to be referred to in arbitration by the Hon'ble High Court of Allahabad, which is still pending, would be ignoring Judicial Proceedings which were undergoing between the parties and which may have their own results on the final outcome of the matter. For that reasoning also, the Board of Discipline ought to have waited for the findings of judicial proceedings and the outcome of the FIRs stated above, as we cannot ignore clause (1) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949, which might have been available if at all the conviction would have taken place of the Appellant in those proceedings but this is not the situation before us.

15. In addition, we have also noted the submissions made by the Respondent that the Board of Discipline is required to follow the summary procedure as per the statutory Rules in contradistinction with the procedure mandated by the same rules to be followed and adhered to by the Disciplinary Committee in Chapter-V, Rule (18) which mandates framing of charge, charges being read out and examination of witness. Therefore, the recording of evidence and examination of witness is not contemplated as a procedure to be adopted by Board of Discipline in conduct of cases before it as the procedure mandated by Law is one of the summary disposal and it is trite that where law stipulates a particular procedure to be adopted while exercising powers under the Act, then the act being the exercise of power can be performed only in the manner as stipulated /envisaged for it to be regarded as a valid exercise of power.

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 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. Thus, in this case, Director (Discipline) / Board of Discipline, could have verified the allegations by calling the complainant to file an Affidavit in support of his allegations, which itself becomes an evidence and gives an opportunity to the Respondent to file a counter Affidavit, if so required. The analyses of the Affidavit of the complainant and any other witness including the reply of the respondents would meet the ends of justice for the purpose of opining upon the allegations regarding their truthfulness and yet such procedure may come within the definition of summary disposal but this has also not been done in the present case. In fact, even the allegations made in FIR have also not been considered to substantiate either with the Prima Facie Opinion or the Impugned Order, as to how the Appellant can be held guilty of other misconduct in this case.

17. In the above background, therefore, we are of the considered view that summary disposal of the complaints by the Board of Discipline of the Institute of Chartered Accountants of India does not mean to decide such complaints simply in equivalence of forming the 'Prima Facie Opinion' of the guilt, more so when the allegations of the complainant requires effective corroboration of evidences or examination/cross examination of witness so as to provide adequate opportunity of defence to the Respondent. The same can be done by way of taking an affidavit from the parties to be considered as an evidence of a particular fact as against the technical rules of the Indian Evidence Act in this regard.

18. However, in this case, when one of the FIRs is yet to be gone into by the Hon'ble High Court under section 482 and other proceedings are stayed besides the aggrieved flat owners are already before the Competent Authority under the U.P. Cooperative Societies Act, 1965, we cannot sustain the Impugned Order and therefore, set aside the same and remand back the present matter to the Board of Discipline for its re-consideration and taking decision thereon within six months from the date of receipt of this Order and to communicate the decision taken by the Board of Discipline in the matter to the member concerned preferably through Registered Post as well as through email within next 30 days thereafter by the Institute, in the light of the observations made above by us and the applicable provisions of the Chartered Accountants Act, 1949 and the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 as well as in the light of the fact of quashing of FIRs by the Hon'ble High Court of Allahabad, on which the Appellant was hold guilty by the Board of Discipline of the Institute.

19. With this, the present Appeal is 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/2014

IN THE MATTER OF:

Sameer Kumar Singh ....Appellant

Versus

Institute of Chartered Accountants of India ....Respondent No. 1

Central Bureau of Investigation ....Respondent 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:

1. Mr. Manish Yadav, Advocate appearing on behalf of Appellant

For the Respondents:

1. Ms. Pooja M. Saigal, Advocate appearing on behalf of ICAI Respondent No.1
2. Ms. Harleen Bhalla, Assistant Secretary, Disciplinary Directorate appearing on behalf of ICAI Respondent No.1

ORDER

1. Being aggrieved of the Order dated 13th January, 2014 passed by the Board of Discipline in reference case No. PPR/3/C/07/DD/1/C/INF/08/ BOD/77/11 under Section 21A (3) of the Chartered Accountants Act, 1949 as amended by the Chartered Accountants (Amendment) Act, 2006, CA. Sameer Kumar Singh (M.No.077928), 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 15 (fifteen) days'** for committing 'Other Misconduct' falling 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 –

1. x 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, which we have noted are that a letter dated 26th October, 2007 was received from Shri Alok Kumar Pateria, Dy. Inspector General of Police, Central Bureau of Investigation (hereinafter referred to as "CBI") containing allegations against CA. Sameer Kumar Singh (hereinafter referred to as "Respondent"). On receiving the aforesaid letter, the CBI was requested vide letter dated 16th November, 2007 by the Institute of Chartered Accountants of India (ICAI) to file the complaint in prescribed Form 'I'. But the CBI vide letter dated 22nd February, 2008, had requested the Institute of Chartered Accountants of India to initiate action against the said member as per Rules of the ICAI. Accordingly, after overall examination of the allegations, ICAI treated it 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.

3. As per the aforesaid letter, the allegations in brief were as under:-

3.1 The Respondent along-with his firm, M/s Sameer Singh & Associates, Chartered Accountant is also running another firm, M/s Excel Investigation Agencies. The Income Tax Returns of the Respondent (individual and HUF) were seized during Investigation by the Central Bureau of Investigation (CBI) and following discrepancies in the Income Tax Returns of the Respondent (HUF) were surfaced during investigation:-

a. In the capital account of the Respondent (HUF, the opening balance of capital as on 1st April, 2002 was Rs. 35, 49,670/- income from interest was Rs. 34,706/- and by the sale of stock of agriculture income was nil. After considering the loss of Rs.300/- on sale of share and cash withdrawal of Rs. 19,000/-, the closing balance to be carried forward was Rs.35, 65,077/- as on 31st March, 2003. The respondent had not enclosed the documents regarding opening capital for the A.Y.2003-04 to the tune of Rs. 35, 49,670/-. Therefore, he had fudged the Income Tax Returns.

b. In the balance Sheet for the A.Y. 2003-04, the Respondent had shown loan and advance for Rs.26,00,000/- out of which Ms. Anvesha Singh was given Rs. 6,50,000/- Ms. Garima Singh was given Rs. 8,50,000/-, Ms. Kiran Singh was given Rs.5,50,000/-, M/s Excel Drugs and Surgical and Rs. 1,25,000/- and M/s Holkas Enterprises and Rs.4,25,000/- but the Respondent has not enclosed any documentary proof/evidence in this regard.

c. Further, it has been noted that Ms. Garima Singh, Ms. Anvesh Singh and Ms. Kiran Singh have not filed Income Tax Returns in the context of receipt of money from

the Respondent to the tune of Rs. 20.5 lakhs as furnished by the Respondent in his Income Tax Return.

d. The Respondent had his saving bank account with Dena Bank only. The other bank accounts maintained with SBI were not maintained in the name of the Respondent. Therefore, the accounts with other banks were fictitious and the transactions in these saving bank accounts were due to the malafide intention of the Respondent to hide his real identity for ulterior motives.

e. The Respondent sold his agricultural land at Rs. 30 lakhs, but he had not produced any documents regarding the sale deed of the land, rather, he had shown his agricultural land for the value of Rs. 1,00,000/- only in Income Tax Returns.

f. Further, during investigation, it has been observed that the Respondent (HUF) had shown the date of formation of the HUF as 19th March, 2003 in the Income Tax Returns of HUF, but in the Income tax Returns of the Respondent for the AY 2003-04, it has been observed that overwriting/alteration have been made in column date of information of HUF as 31st March, 1999 instead of 19th March, 2003.

g. The Respondent HUF has submitted the Income Tax Returns for the first time in the AY 2003-04 declaring the formation of HUF on 19th March, 2003. It means that there was no HUF in the parlance of Income Tax and therefore, the income shown by him before 19th March, 2003 may come under the category of concealment of income

h. In the seized Income Tax Returns on 19th January, 2006 of AY 2003-04, the Respondent had shown the enclosures like case history and partition deed of 6 pages and Trial Balance of previous years consisting of 5 pages. He had shown falsely total 30 enclosures with overwriting, but had had not provided the enclosures of case history, partition deed and Trail Balance of previous years with Income Tax Returns.

i. In the Income Tax Returns of the Respondent, he had enclosed form 16A in connection with M/s Excel Drugs & Surgicals and the contractual receipt of M/s Excel Investigation Agency relating to M/s Chola Mandalam Investment and Finance Co Ltd., but he had not enclosed form 16A relating to other loans and advances as depicted in the Balance Sheet for the AY 20003-04.

j. The STDR worth Rs. 20.5 lakhs in the name of Respondent's wife and daughters of accused Shri J.P. Singh and another STDR of Rs. 10,000/- in the name of Shri Satish Singh were seized from the residence of Shri J.P. Singh (father in law of the Respondent). These STDRs were transferred from various accounts of the Respondent maintained in the fictitious name like Shri Sudhir Singh, Shri Santosh Singh, Shri Sanjay Singh and Shri Satish Singh. The account opening forms contain the photographs of the Respondent. Therefore, the Respondent in connivance with Shri J.P. Singh had opened various fictitious joint SB accounts.

k. The income of the Respondent as individual had not brought into the income of the Respondent (HUF). During investigation, it has been observed that HUF account number 547 was maintained with Dena Bank, Bilaspur in the name of M/s Excel Investigation Agency and operated by the Respondent.

l. Shri J.P.Singh in conspiracy with the Respondent got prepared the promissory note cum loan receipt dated 2nd December, 2001 mentioning the fact that loan of Rs. 20.5 lakhs had been given to Ms. Kiran Singh, Ms. Anvesha Singh and Ms. Garima Singh. Further, the respondent (HUF) had shown these loans and advances of Rs. 20.5 lakhs in his Income Tax Returns for the AY 2003-04. But these accounts were not the HUF account of the Respondent from the angle of law/Income Tax.

m. The Responded had advanced a loan of Rs. 4.25 lakhs to M/s. Holkar Enterprises in the AY 2003-04, but the Respondent had not filed the Income tax Returns in the year 2002-03 at Income Tax Office, he has violated the provisions of Income Tax as well as professional ethics by not filling the Income Tax Returns in the year 2002-03.

3.2 The aforesaid charges, if proved, would render the Respondent guilty of 'Professional and Other Misconduct' falling within the meaning of Clause (2) of Part-IV of First Schedule to the Chartered Accountants (Amendment) Act, 2006.

4. The Director (Discipline) considered the said information as well as written statement and formed the 'Prima Facie Opinion'. Prima Facie Opinion so formed by the Director (Discipline) was considered by the Board of Discipline at its meeting held in August, 2011 at New Delhi and the Board on consideration of the same agreed with the 'Prima Facie Opinion' of the Director (Discipline) and decided to proceed further under Chapter IV of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007. The Board also directed the Directorate that in terms of the provisions of sub-rule(2) of Rule 14 read with Rule 11, the Prima Facie Opinion' formed by the Director be sent to the Respondent and he be asked to submit his written Statement within 21 days in accordance with the provisions of these Rules. The Respondent, thereafter, submitted his Written Statement dated 30th November, 2011 on the above which are on records.

5. On perusal of the documents on record namely, the information, written statement, Prima Facie Opinion of the Director (Discipline), further written statement of the Respondent, additional submissions/documents and after hearing the submissions of the Respondent's Counsel, the Board noted that the charges against the Respondent are in respect of his Income Tax Returns filed for the assessment year 2003-04 with the Income Tax Department in the capacity of Individual and HUF. First charge against the Respondent is that there is opening balance of Rs. 35, 49,670/- in his capital account for the financial year 2002-2003. Although the Respondent brought on record copy of the capital a/c (without prejudice tentative) for the year ending 31.03.2001 to 31.03.2003, yet, he did not bring on record the copy of the documentary evidence to substantiate the said balance. The Respondent in his written and oral submissions before the Board accepted that he has no detail for this

opening balance. Accordingly, the Board is of the view that Respondent filed his ITR on the basis of transaction which were not supported by proper documentary evidences.

6. Further, based on CBI Investigation, it is alleged that in the balance sheet of the Respondent for financial year 2003-04, it has been shown that the Respondent has granted loans and advances worth Rs. 26 lakhs to various individuals/firms, however there is no documentary proof of the same. In this respect on Board's direction, the Respondent submitted letters from these individuals dated 12th June, 2013 confirming that the loan amount is still outstanding. The Board opined that these confirmation letters seems to be an afterthought as the Respondent did not bring on record copy of any bank account/statement payment made to these individuals as the loans were paid through cheques, as per the Respondent's own submission.

7. Further, on perusal of copy of the FIR/charge sheet of the CBI and bank account opening forms submitted by the CBI, the Board noted that the Respondent is operating various bank accounts individuals and jointly in his pets/alias names. The Respondent issued the address proof of his father-in-law to open such accounts who also acted as the introducer of the Respondent in such accounts. The Board further noted that the Respondent in connivance with Shri J.P. Singh was actively involved in the transfer of STDRs worth Rs. 20.5 lakhs through these fictitious bank accounts.

8. The Board took in view of various bank account opening forms, provided by the CBI. On perusal of these forms, the Board noted that the Respondent is operating three personal saving accounts with SBI in the name of Satish Singh S/o P. K. Singh, Santosh Singh S/o V.K. Singh and Sanjay Singh S/o V.K. Singh. Further he is also operating three joint saving bank accounts with SBI with Miss Anu Singh d/o J.P. Singh & Sudhir Singh S/o V.K. Singh, Tanu Singh & Sudhir Singh but no father name and Manu Singh & Sudhir Singh and also there is no father name. Further, address mentioned in these form was of Shri J.P. Singh and even account has also be introduced by said Shri J.P. Singh. Further, it is evident from the report of the CBI, that the Respondent has issued a Cheque from fictitious SB account no. 28713 for the issue of STDRs of Rs. 4.5 lakhs. Further, STDRs in the name of Smt. Kiran Singh, Shri J.P. Singh and Anvesha Singh totaling Rs. 4.5 lakhs which were issued on 19th November, 2001. In this way the respondent (son in law) of Shri J.P. Singh aided and abetted in the commission of offence committed by Shri J.P. Singh. Moreover, the respondent has also deposited Rs. 11.65 (#approx) Crore as cash in these accounts.

9. Moreover, on perusal of Report of the CBI, it is evident that the Respondent has opened three saving bank account with SBI in name of Mr. Sudhir Singh in joint name of Anu Singh, Tanu Singh and Manu Singh. These accounts has been used for depositing certain cash which was later on used for the issue of STDRs in the name of family members of Shri J.P. Singh.

10. Furthermore, these six accounts are disclosed by the Respondent fraudulently in his Income Tax Returns filed for the assessment year 2003-04 in the name of his HUF, however, it is revealed that these fictitious accounts are not of the HUF of the Respondent as none of these stand in the name of the Respondent as HUF.

11. In view of these series of events, the Board is of the opinion that the Respondent was instrument in the fraudulent activities of Shri J.P. Singh and such acts of the Respondent has clearly brought disrepute to the profession.

12. We have noted that in view of all the above, the Board of Discipline opined that the manner in which CA. Sameer Kumar Singh has conducted himself in the aforesaid activities is unbecoming of a Chartered Accountant and has brought disrepute to the profession, therefore, he is guilty of other misconduct falling within the meaning of aforesaid clause (2) of Part-IV of the First Schedule of the Chartered Accountants Act, 1949 and thus awarded him punishment as aforementioned in Para (1) of this order.

13. We have also observed that the appellants herein, have inter-alia raised a preliminarily objection regarding the veracity of the punishment awarded to him on the plea that the said punishment could not have been imposed by holding him guilty of **'other misconduct'** as the same was not dealt with in accordance with clause (2) of Part-IV of the First Schedule of the Chartered Accountants Act, 1949 under which he has been found guilty by the Board of Discipline of the Institute of Chartered Accountants of India as no such opinion has been sought from the Council of the Institute as mandated by the said clause.

14. In view of the above, 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 the instant Appeal No. 07/ICAI/2014, a copy of which has already been served upon the Appellant. The relevant paragraph No. 15 of the aforesaid order of the Authority is reproduced 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".*

15. Further, having considered the oral as well as written submissions including the complaint, written statements, Prima Facie Opinion formed by the Director (Discipline), the report and the Order of the Board of Discipline besides the arguments advanced before us by the parties of this Appeal, we have also noted that the basic reason and the premises on which this case has been taken cognizance by the Institute is on the basis of a complaint filed by the Central Bureau of Investigation against one Mr. J.P. Singh (father-in-law) of the Appellant, who was found to have been in possession of the disproportionate assets, though the case is still under trial. However, in the same investigation, according to the investigating officer, the present Appellant by providing some false credits and by opening certain bank accounts and issuing cheques there from appears to have abated and added in helping him in the crime.

16. We have also noted that the Learned Counsel Ms. Pooja M. Saigal, appearing on behalf of the Institute of Chartered Accountants of India fairly admitted that besides the charge-sheet filed by the Central Bureau of Investigation against Shri J. P. Singh wherein, the present Appellant is also one of the accused, the Board of Discipline has not collected any corroborative evidence so as to find out, as to how the Appellant before us is involved in this case. In fact, even the Investigating officer of this case was also not examined by the Board of Discipline of the Institute, what to talk further of summoning persons from the banks so as to verify in which manner and by what actions the Appellant assisted Shri J.P. Singh for the purpose of prosecuting him for having acquired disproportionate assets.

17. Be as it is, in the aforesaid circumstances, we do not feel it appropriate and in the Interest of Justice to accept the manner in which the decision has been taken by the Board of Discipline holding the present Appellant guilty of 'Other Misconduct' and awarding him punishment, which is the subject matter of this Appeal. Hence, while accepting and allowing the present Appeal of the Appellant, we are of the considered view that the ends of Justice will be met by remanding back the present matter to the Institute of Chartered Accountants of India for its reconsideration and for the purpose of collecting the relevant evidences and examining the relevant persons/witnesses for taking afresh decision thereon within a period of six months from the date of receipt of this Order.

18. 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.

19. Furthermore, while disposing of the present Appeal as above, we wish to place on record our observation that not only in this matter but in other such matters also, the manner in which these cases are being decided with regard to allegations of Professional or Other Misconduct by the Board of Discipline and or some times by the Disciplinary Committee, without collecting the relevant corroborative evidences and or examining the witnesses so as to find out the merit and strength of the Prima Facie Opinion formed by the Director Discipline, which is the basis of going for further investigation in the matter, is highly undesirable and requires reconsideration by all such Authorities who have been entrusted

the duty of deciding complaints relating to Professional or Other Misconduct by the members of the Institute in accordance with the provisions of the Chartered Accountants Act, 1949 read with the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 for the purpose of deciding future matters of such nature.

20. We hope that while deciding all cases, the concerned Authority/Officials of the Disciplinary Directorate of the Institute of Chartered Accountants of India will take note of our above observation more particularly while passing an Order of the punishment for removal of the name of any member from the Register of Members of the Institute, for whatever period it may be, in future in terms of this Order of the Authority.

21. Since the Impugned Order is set aside, therefore, Interim Orders are also vacated.

22. 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 25th November, 2017

BEFORE THE APPELLATE AUTHORITY

(Constituted Under Section 22A of The Chartered Accountants Act, 1949)

APPEAL NO. 04/ICAI/2016

IN THE MATTER OF:

Harish Kapoor ....Appellant

Versus

Institute of Chartered Accountants of India ....Respondent

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:

1. Mr. Ashish Makhija & Ms. Ishita Srivastava, Advocates appearing on behalf of Appellant

For the Respondents:

1. Ms. Pooja M. Saigal, Advocate appearing on behalf of ICAI Respondent
2. Ms. Mohita Khanna, Assistant Secretary, Disciplinary Directorate appearing on behalf of ICAI Respondent
3. Ms. Aruna Sarma, Senior Executive Officer, Disciplinary Directorate appearing on behalf of ICAI Respondent

ORDER

1. Being aggrieved of the Report of the Disciplinary Committee dated 10th February, 2014 and Order dated 19th October, 2015 passed by the Disciplinary Committee of the Institute of Chartered Accountants of India under Section 21B of the Chartered Accountants Act, 1949, as amended by the Chartered Accountants (Amendment) Act, 2006, CA. Harish Kapoor, (M. No. 082533), a practicing Chartered Accountant (Appellant herein), has filed this appeal against the Institute of Chartered Accountants of India, whereby, the Disciplinary Committee awarded punishment of holding him guilty under Clause (7) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949 (herein after referred as to Act), and awarded punishment for `removal of name of the Appellant from the Register of Members for a period of six months and also impose a fine of Rs.50,000/- (Rupees fifty thousand only) to be paid within 30 days of the receipt of the aforesaid Order. The said clause (7) 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."

2. We have noted the facts of the matter inter-alia that Mr. R. Shiv Kumar, Deputy General Manager, Federal Bank Ltd. Kerala, had sent a letter dated 13th June, 2009 bearing No. 1184/09 to the Institute of Chartered Accountants of India, against the Respondent (Appellant herein), alleging that the Respondent had issued a false certificate dated 9th July, 2007 to M/s. Pushpanjali Overseas Pvt. Ltd. (hereinafter referred to as the company). On the basis of the said certificate, the Bank had extended credit facilities to the Company. As per said certificate, on 9th July, 2007, the paid up capital of the Company was Rs.45 Lakhs and share premium amounted to Rs.105 lakhs, but subsequently, on the receipt of Audited Financial Statements of the Company for the Financial Year 2007-08, it was found that the paid up capital of the Company was Rs.45 lakhs only, and no share premium was available. Therefore, the information disclosed by the Respondent in said certificate was not correct.

3. The matter was examined by the Director (Discipline) and he found the Respondent (Appellant herein), **'Not Guilty'**. The 'Prima Facie Opinion' of 'Not Guilty' dated 14th November, 2011 as formed by the Director (Discipline) was placed before the Board of Discipline. The Board of Discipline considered the information, Written Statement and the 'Prima Facie Opinion' of the Director (Discipline) and did not agree with the 'Prima Facie Opinion' formed by the Director (Discipline) and further opined that the Respondent (Appellant herein) is guilty within the meaning of clause (7) of Part-I of Second Schedule to the Act and decided to refer the matter to the Disciplinary Committee to proceed further under Chapter-V of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2006. The basis of Board of Discipline decision was as under:-

"The Board noted that the certificate issued by Respondent dated 09th July, 2007 to M/s Pushpanjali Overseas Ltd was based on Resolution passed by the Board of Directors of the Companies and not based on the Books of Accounts as stated in the said certificate, therefore, the said matter needs to be looked into further."

4. The Appellant vehemently objected the allegation and made various submissions before the Disciplinary Committee. However, the Disciplinary Committee did not accept the same and vide Order dated 10th February, 2014 gave the findings as under:

   (i) The Committee noted that the Respondent has issued a certificate dated 9th July, 2007, certified therein that M/s. Pushpanjali Overseas Pvt. Ltd as per the Board's Resolution dated 7th May, 2007 increased its paid up capital and as such the paid up capital and share premium amount as on date stood as under:-

   a) Paid up Share Capital Rs.45,00,000/-
   b) Share Premium Amount Rs.1,05,00,000/-

Further, it was certified in the certificate that the above is correct as per books of accounts and other documents produced before the Respondent. The Committee further noted that in the audited Financial Statement of the Company for the Financial Year 2007-08, Share Premium A/C was not shown.

(ii) The Committee observed from the extract or Minutes of the Meeting of Board of Directors of the Company held on 07th May, 2007 that the Company had issued 2800 equity shares (sic 28000 equity shares) of Rs.100/- each at a premium of Rs.375/- per share to its two Directors.

(iii) The Committee further observed that the Minutes of the above said Meeting of Board of Directors held on 07th May, 2007 was approved by the Board of Directors in their meeting dated 26th July, 2007, wherein it was resolved as under:-

"RESOLVED that in partial modification of the resolution passed in the Board Meeting held on 07th May, 2007, the allotment of 28000 equity shares of Rs.100 each can be made at par to the following shareholders:

Mr. Ajay Sharma – 16000 equity shares of Rs.100 each.
Mr. Sanjeev Sharma – 12000 equity shares of Rs.100 each."

The Committee further noted that this effect was also shown in the Balance Sheet of the Company for the Financial Year 2007-08 signed by the Company.

(iv) The Committee noted that the Respondent was also the statutory auditor of the company and he was also the signing partner of the audited financial statements of the company for the F.Y.2007-08. The Respondent as the statutory auditor was required to disclose about this partial acceptance of the resolution of the Company which had an impact on the state of affairs of the Company whereby the value of the shares so allotted has been modified more so when he himself had issued the certificate certifying the share premium account. Thus, the committee is of the view that the Respondent had not exercised due diligence and was negligence while auditing and certifying the accounts of the Company.

(v) The Committee further noted that the Respondent has submitted a letter dated 7th August, 2007, written by "Spark" (a unit of Pushpanjali Overseas) to the Federal Bank Limited, requesting therein to arrange to return the CA certificate submitted in this regard. However, the letter was not properly acknowledged by the bank. There is no signature of any bank official and there is no date put by the bankers on the letter. Further, this exercise of taking back his certificate from the bank ought to have written a letter to the Company for withdrawing his certificate when he became aware of the partial acceptance of the Resolution dated 07.05.2007, more so when the certificate so issued by him has been based on the said Resolution only.

5. Before us, the Learned Counsels appearing on behalf of both the parties reiterated their submissions and arguments and also filed written submissions. We have considered all

the documents filed before us as well as before the Disciplinary Committee and have also considered all the submissions, oral and written of all the parties made before us.

6. The Learned Counsel Mr. Ashish Makhija, Advocate appearing on behalf of the Appellant vehemently objected to the Impugned Order of the Disciplinary Committee. He has filed various Written Submissions, documents and also made oral arguments. He also cited various case laws besides some documents which were not filed earlier.

   We have considered all such documents, oral and written arguments, case laws cited and additional documents submitted before us. It is noted that the main defence of the learned Counsel appearing for the Appellant is that at the time of issue of original certificate dated 9th July, 2007 in which the paid up share capital of the company Pushpanjali overseas Pvt. Ltd was shown as Rs. 45,00,000/- and the share premium account was shown as Rs. 1,05,00,000/- was correct and was issued after examination of the relevant all papers and books of accounts of the company. However, when the Annual Financial Statements of the same entity were audited by the Appellant for the year ended on 31st March, 2008 vide audited accounts dated 1st September,2008, the share capital was shown as Rs. 45,00,000/- and no share premium account was shown.

   As explained by the Appellant before the Disciplinary Committee as well as before us is that originally the company issued 28000 equity shares of Rs. 100 each to two persons i.e. Mr. Ajay Sharma – 16000 equity shares of Rs.100 each and Mr. Sanjeev Sharma – 12000 equity shares of Rs.100 each at a premium of Rs. 375/- per share . Thus, when the original certificate was issued the share capital was Rs. 45 lacs which included the old capital of Rs. 17 lacs and new issue shares of Rs. 28 lacs, and share premium account was shown as Rs. 105 lacs. However, before the audit of the financial year ended on 31st March, 2008, the said company vide resolution dated 26th July, 2007 modified the terms of allotment and decided to issue the said shares at par and therefore, no premium remains on the said allotment and thus no premium was shown in the final balance sheet. Therefore, in his submissions, there was no violation of clause (7) of Part-I of Second Schedule to the Chartered Accountants Act, 1949.

7. On the other hand, the Learned Counsel appearing on behalf of the Institute of Chartered Accountants of India submitted that the Impugned Order passed by the Disciplinary Committee is correct. Further, the Learned Counsel Ms. Pooja M. Saighal objected to the raising of additional evidence and new grounds at the Appeal level and accordingly, by filing a detailed reply on behalf of the respondent Institute of Chartered Accountants of India to this Appeal prayed that the Present Appeal be dismissed for the reasons as stated in the said reply.

8. We have heard the parties at length, examined all their oral and written submissions, additional evidences, case laws and perused all materials on record including the complaint, written statement, 'Prima Facie Opinion' formed by the Director (Discipline), observations made by the Board of Discipline, the Report including the findings of the Disciplinary Committee besides the Impugned Order passed by the Disciplinary Committee in the present matter.

9. Pursuant to the examination of all records as above, we enquired from the Appellant as to whether the act of company is not utilisation of the share premium account for which Section 78 of the Companies Act, 1956, as it was applicable that time, should be followed, for which no satisfactory reply was received from the Appellant.

10. We further enquired whether Form No. 2 for allotment for shares was submitted at the time of allotment, for which we have been informed that it was submitted later on 6th June, 2009. However, this Form as submitted, does not show the issue of shares at premium but at par. It was explained to us that as this was submitted after modification of the terms of allotment; hence the Form was filed as per revised terms. Further, a satisfactory reply was also not given by the Appellant as to why this important evidence of filing Form No. 2 for allotment was not examined by the Appellant before issue of the Impugned Certificate. Furthermore, no reply was given by the Appellant as to whether any disclosure, qualification was given in the auditor's report to the financial statements.

11. However, before us the Appellant has produced a fresh evidence in the form of alleged notes of accounts to the balance sheet for the year ending 31st March, 2008 as note number 2 of Schedule VII which reads as under:

    2. The Company took over the existing business of M/s Spark, a partnership firm run by the directors of the Company, as a going concern w.e.f.1st April, 2007. All assets and liabilities of the firm as on 31st March,2007 were taken over by the Company as its book value. Against the capital balance of partners as on 31st March,2007, initially Company resolved to issue 28000 equity shares of Rs. 100/- each at a premium of Rs.375/- per share, however, allotment terms were subsequently modified as resolved on 26th July, 2007 to issue the said shares at par relevant return of allotment is yet to be submitted.

    We record that this evidence was not furnished by the Appellant before the Disciplinary Committee and for which the Learned Counsel appearing on behalf of the Institute of Chartered Accountants of India, the Respondent herein, has vehemently opposed. Further, when the Authority enquired as to whether the same was filed before the Registrar of the Companies along with balance sheet, no evidence of the same was furnished by the Appellant except that it was suggested that the Institute of Chartered Accountants of India can obtain the same, thus raising doubts about its varsity even.

    In our view, it is not correct as it is for the Appellant to prove his defence, more so, when it was not taken at earlier stage. Be that as it may, the Authority further enquired as to how does it mitigate the violation of Section 78 of the Companies Act, 1956, no reply of the same was given on behalf of the Appellant.

12. Further, the Learned Counsel Shri Ashish Makhija appearing on behalf of the Appellant advanced certain new arguments before the Authority raising objections to the change in the constitution of the bench of the Disciplinary Committee hearing the matter, Denial of proper opportunity of being heard besides that there was no specific charge against the Appellant.

13. We have considered all the above arguments and observed that the same were never raised by the Appellant either before the Director (Discipline) or before the Disciplinary Committee of the Institute of Chartered Accountants of India nor even in the Grounds of Appeal. Even, then the Authority heard the Appellant on the new objections raised and accordingly, examined the same in their entirety. After examination, we find no justification in the same on merits as well, as the same are vague and general in nature. As regards, change in the constitution of the Bench of the Disciplinary Committee, we have observed that the Appellant had consented to continue the hearing of the matter. Even later on, no objection was raised by him to this effect. Therefore, we are of the view that these are only technical objections without any merit as we have also observed that adequate opportunity was given to the Appellant by the Disciplinary Committee before deciding the Present matter. Even though, we have considered all fresh evidence/arguments submitted by the Appellant before us. His allegation that he was examined before any evidence or charge was not specific is also not correct, as in the first notice itself, the details of the charge were given to the Appellant.

14. The Learned Counsel appearing on behalf of the Appellant also submitted before us that there is a confusion that as per last line of Para (17) of the Report of the Disciplinary Committee the negligence is about certifying the accounts of the company and not about the certificate for which show cause was given.

    We have accordingly examined the same and we find no ambiguity therein. The whole Report and even the said line makes it clear that certifying the accounts refers to the said certificate issued by the Appellant for which the Disciplinary Proceedings have been initiated.

15. Additionally, the Learned Counsel appearing on behalf of the Appellant has also cited various case laws including the following:-

    (i) H.V. Panchaksharappa vs. K.G. Eashwar, AIR 2000 SC3344
    (ii) Associated Cement Co. Ltd Vs. Workmen, (1963) II LLJ396SC and Central Bank of India Limited Vs. Karunaway Banerjee, AIR1968SC266
    (iii) P.Balachandra Reddy vs. Depot Manager, A.P.S.R.T.C, Anantpur, 1994 (1) ALT 208
    (iv) Laxmi Devi Sugar Mills vs. Nand Kishore Singh, AIR 1957 SC 7
    (v) Surath Chandra Chkrabarty vs State of West Bengal, AIR 1971 SC 752
    (vi) G.Chandrakanth vs. Guntur District, 1994 (2) ALT 253
    (vii) Lakhshminarayan vs. Karnataka State Seed Corporation, 1996 (5) KarLJ 653
    (viii) G.V. Aswathanarayana Vs. Central Bank of India by Chairman & Ors ILR 2003 KAR 3066
    (ix) Air India Limited Vs. Anil R. Joshi, 2002 III LLJ 665

16. We have gone through the above referred case laws and observed that the same are not relevant for the present matter. Further, as regard arguments of lack of opportunity to the Appellant by the Disciplinary Committee, we have observed that adequate opportunity was given to him, though; we have allowed the Appellant to raise all arguments and file all evidences which in his opinion were not considered by the Disciplinary Committee.

17. Having considered all the submissions and the relevant records, we find that the Appellant is raising only some technical issues about the rules of evidence, which are not in toto applicable on the facts and the law as well as the procedure for dealing with the matter under consideration.

18. In view of the above, since ample opportunity was given to the Appellant by the Disciplinary Committee of the Institute of Chartered Accountants of India in compliance of the applicable law and procedure to be followed in such matters, we are of the considered view that the rules of natural justice have been fully followed in deciding the present matter by the Institute of Chartered Accountants of India.

19. In the light of the above, we find no merit in the present Appeal and the same is rejected. The Appellant also made submissions about reducing the punishment. We do not find any circumstance to reduce the punishment also. Hence it is rejected.

20. All interim stay orders, if any, are vacated. No order as to cost and the Appeal is disposed of as above.

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Praveen Garg
Member

Dr. Navrang Saini
Member

Pronounced on dated 6th day of January, 2018 at New Delhi

BEFORE THE APPELLATE AUTHORITY

(Constituted under Section 22A of the Chartered Accountants Act, 1949)

APPEAL NO. 03/ICAI/2017

IN THE MATTER OF:

M. Sivaiah .....Appellant

Versus

Disciplinary Committee of the
Institute of Chartered Accountants of India ....Respondent

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:

1. Mr. C. V. Sajan, Advocate

For the Respondent:

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. Anurag Sharma, Assistant Secretary, Disciplinary Directorate appearing on behalf of ICAI
4. CA. Parvesh Bansal, Assistant Secretary, Disciplinary Directorate appearing on behalf of ICAI

ORDER

1. Being aggrieved of the Order dated 20th January, 2017 (Impugned Order), received on 25th February,2017 passed by the Disciplinary Committee of the Institute of Chartered Accountants of India under Section 21B (3) of the Chartered Accountants Act, 1949 as amended by the Chartered Accountants (Amendment) Act, 2006, CA. M. Sivaiah, (Membership No. 029421), a practicing Chartered Accountant, Appellant herein, has filed this appeal against the Disciplinary Committee of the Institute of Chartered Accountants of India challenging the Impugned Order, whereby, the Disciplinary Committee awarded punishment of holding him guilty under Clauses (5), (6) and (7) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949, as amended from time to time and awarded punishment for **'removal of name of the Appellant from the Register of Members for a period of three months and also imposed a fine of Rs.50,000/- (Rupees Fifty Thousand) upon him to be paid within 30 days of receipt of the aforesaid Impugned Order'.**

The said clauses (5), (6) and (7) 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 –

(5) fails to disclose a material fact known to him which is not disclosed in a financial statement, but disclosure of which is necessary in making such financial statement where he is concerned with that financial statement in a professional capacity;

(6) fails to report a material misstatement known to him to appear in a financial statement with which he is concerned in a professional capacity;

(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, as recorded by the Disciplinary Committee of the ICAI and noted by us are as hereunder:-

2.1 A letter dated 23rd December, 2011 along-with other related documents was received from the Chief Administrative Officer, South Central Railway, Secunderabad (hereinafter referred to as **"South Central Railway"**) containing allegations against **M/s Parikh & Associates, Chartered Accountants (hereinafter referred to as the Respondent firm)**. On an overall examination of allegations, the same was treated 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.

2.2 As per the 'information' letter dated 1st April, 2013 read with letter of the Chief Administrative Officer, South Central Railway, Secunderabad dated 23rd December, 2011, the allegations in brief are as under:-

i. The Respondent has issued the turnover Certificates in M/s. Mythri Constructions, Secunderabad (hereinafter referred to as the Company) for the years 2007-08 and 2008-09 which was in turn submitted to Railways by the Company being a party in one of the Joint Venture firms M/s ARI-SVCW-MCC while participating in Tender Notice which was opened on 9th March, 2011.

ii. The genuineness of the certificate was confirmed by the Respondent. When the Respondent firm was asked to submit the supporting documents like Audited balance sheet etc. in support of their certificates, they have failed to do so. However, Railways are in possession of audited balance sheets for the period in reference.

iii. The details of turnover recorded vide the certificate issued by the Respondent firm and turnover as arrived by using collected balance sheets for the same period in

the Company are as follows:

S. No	In the name of M/s. Mythri Constructions	2007-08 (Rs. in lakhs)	2008-09 (Rs. in lakhs)	2009-10 (Rs. in lakhs)
i)	As per T/O certificate	722.61	842.31	-
ii)	As per balance sheet	209.60	369.21	-

From the above, it is seen that the turnover prepared by the Respondent reflected vide certificate and the turnover as stated in audited balance sheets for years 2007-08 & 2008-09 are mismatching. Therefore, the turnover certificate given by the Respondent is fraudulent.

3. The 'Prima Facie Opinion (PFO)' was formed by the Director (Discipline) vide Order dated 28th January, 2012 in which the Appellant Prima Facie found guilty of Professional Misconduct falling within the meaning of Clauses (5), (6) and (7) of Part-I of the Second Schedule of the Chartered Accountants Act, 1949.

4. The matter was heard by the Disciplinary Committee of the Institute of Chartered Accountants of India on various dates and the findings as recorded in Para (12,13 & 14) of the Report of the Disciplinary Committee are as under:-

"12. The Committee noted that the Respondent for the purpose of figures in the certificate had taken the total value of work executed during a particular year and for purpose of figures in P/L account had recognized the amount by aggregating the amount bifurcated as per AS-7 and AS-9. The Committee noted that the Respondent had clarified that for the purpose of amount in Profit and Loss account, in case the total contract is borne by the Company, he had taken valuation as per AS-7, whereas in case where the material is provided by the contractee, he has taken net basis for service charges as per AS-9.

13. The Committee on perusal of the certificates noted that the Respondent had certified that the turnover of the Company for the year as per the books of accounts produced before him. The Committee noted that the Respondent had nowhere mentioned in the said certificate that the figures of turnover are taken as total contract value executed during the year. The Respondent was also required to mention that the certificate is issued on the basis of unaudited figures and he was required to give an appropriate disclaimer in the said certificate which he did not. In view of the same, the Committee is of the view that the Respondent had issued a misleading certificate.

14. The Committee noted that the Respondent in his first written statement dated 31st May, 2013 had submitted that the Certificate was issued to the Company on the basis of sample checking and on the basis of the unaudited books of accounts produced before him and he has done detailed audit, post certification, resulting in certain rectification entries in the Sales Ledger for both the years. Further, on consideration of the certificates

under question, it is seen that the same have a material impact in terms of figures of turnover which has variance of amount Rs. 513.00 lakhs and 473.09 lakhs for the year 2007-08 and 2008-09 respectively. The Committee doubted that the submissions relating to AS-7 and AS-9 are created by the Respondent as an afterthought. Accordingly, the Committee holds the Respondent guilty with respect to charge mentioned in the instant complaint".

5. The Committee on consideration of the same agreed with the 'Prima Facie Opinion' of the Director that the member was Prima-Facie guilty of Professional Misconduct falling within the meaning of Clauses (5), (6) and (7) of Part I of Second Schedule to the Chartered Accountants Act, 1949 and accordingly, found him guilty as mentioned above.

6. Before us also the Appellant has reiterated that the turnover certificate issued by him was not based on the turnover understood in common parlance. It is submitted that in case of civil construction contracts the value of works undertaken signifies the strength of the contractor and therefore turnover for them was the value of works performed. Therefore, irrespective of whether the contract was the one falling within AS-7 or AS-9, the corresponding gross value of work was reckoned for the turnover certificate. Further, Learned Counsel appearing on behalf of the Appellant reiterated his submission that for the purpose of audited accounts, revenue was recognized on the basis of AS-9 on the net basis for those contracts where they were within the ambit of rendering of service. In case of those contracts that were covered by AS-7, the accounting was done on gross basis. Hence, there was apparent difference in the revenue in profit and loss account as compared to the value of work done reflected as turnover in the certificate issued. Therefore, it was finally submitted that the audited accounts and numbers in the certificate were correct.

7. Additionally, the Learned Counsel appearing on behalf of the Appellant also argued that the turnover has not been defined anywhere. However, when his attention was drawn to various definition of turnover in many publications of the Institute of Chartered Accountants of India, including (i) Statement of ICAI on CARO, (ii) Guidance note on terms used in Financial Statements and (iii) Guidance note on Audit under Section 44 AB, wherein the turnover has been defined very clearly, no satisfactory response was given by him to this.

8. Furthermore, the Learned Counsel appearing on behalf of the Appellant vehemently reiterated the argument that the difference in turnover in the CA certificate and the audited accounts were due to the implication of Accounting Standards (AS-7) Titled 'Construction Contracts' and Accounting Standards (AS-9) Titled 'Revenue Recognition'. However, when he was asked to explain the same, he could not do that up to the level of satisfaction. It was also noted that in the said certificate, it is nowhere mentioned that it is either as per AS-7 or AS-9 and how the figures may differ from audited accounts. Even after audit of accounts no attempt was made to withdraw the earlier given certificates. Furthermore, when he was confronted that AS-7 and AS-9 merely prescribe the stage of accounting and nowhere prescribe a different definition of turnover, no convincing reply was received by the Authority from the Learned Counsel appearing on behalf of the Appellant.

9. During the process of hearing of this matter, we have also noted that the Appellant has changed his defence in this regard as in response to the first show cause notice vide his reply dated 31st May, 2013, he had stated that the certificate was issued to the company on the basis of sample checking and on the basis of unaudited Books of Accounts and he did detailed Audit Post Certification which resulted in certain rectification entries in sales ledger for both the years. However, no details of such difference and justification were produced before us. We have noted that the same point was tried to be raised before the Disciplinary Committee also where upon the Committee in Para 14 of its Report has doubted it considering the same as an afterthought. The said Para 14 of the Report of the Disciplinary Committee is reproduced as hereunder:-

> *"14. The Committee noted that the Respondent in his first written statement dated 31st May, 2013 had submitted that the Certificate was used to the Company on the basis of sample checking and on the basis of the unaudited books of accounts produced before him and he has done detailed audit, post certification, resulting in certain rectification entries in the Sales Ledger for both the years. Further, on consideration of the certificates under question, it is seen that the same have a material impact in term of figures of turnover which has variance of amount Rs. 513.00 Lakhs and 473.09 lakhs for the year 2007-08 and 2008-09 respectively. The Committee doubted that the submission relating to AS-7 and AS-9 are created by the Respondent as an afterthought. Accordingly, the Committee hold the respondent guilty with respect to charge mentioned in the instant complaint".*

10. On the other hand, Learned Counsel appearing on behalf of Disciplinary Committee of the Institute of Chartered Accountants of India, however, argued in support of the Order of the Disciplinary Committee on the basis of reasons recorded in the Report of the Disciplinary Committee.

11. We have heard the submissions made on behalf of the parties and perused all the records of the matter and based on the above, we therefore, find no merit in the present Appeal and the same is dismissed. Further, we have also not find any circumstance of mitigation on the submission of the Learned Counsel for reducing the punishment and uphold the order of Disciplinary Committee as well as the punishment awarded to the Appellant.

12. All interim stay orders, if any, are vacated. No order as to cost. The appeal stands disposed of accordingly.

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Praveen Garg
Member

Dr. Navrang Saini
Member

Pronounced on dated: 6th January, 2018 at New Delhi

BEFORE THE APPELLATE AUTHORITY

(Constituted Under The Chartered Accountants Act, 1949)

APPEAL NO. 09/ICAI/2017

IN THE MATTER OF:

Vinod Gupta ....Appellant

Versus

Institute of Chartered Accountants of India ....Respondent No. 1
Harpal Singh Dhingra ....Respondent 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:

1. Mr. Adarsh B. Dial, Senior Advocate and Mr. Anurag Bhatt, Advocate appearing on behalf of Appellant

For the Respondents:

1. Ms. Pooja M. Saigal, Advocate appearing on behalf of ICAI
2. Ms. Harleen Bhalla, Assistant Secretary, Disciplinary Directorate appearing on behalf of ICAI

ORDER

1. Present Appeal has been filed by the Appellant CA. Vinod Gupta, against the Report of the Board of Discipline dated 6th November, 2015 and Order dated 12th May, 2016 (Impugned Order) passed by the Board of Discipline in case No. PR-25/C/2013-DD/30/2013/BOD/167/2014 under Section 21A (3) of the Chartered Accountants Act, 1949, as amended by the Chartered Accountants (Amendment) Act, 2006, whereby the Appellant has been held 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 awarded punishment of 'reprimand and also imposed fine of Rs. 50,000/- (Rupees Fifty Thousand only) to be paid within 60 days from the date of receipt of the aforesaid order dated 12th May, 2016'. The said clause (2) 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 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, as recorded by the Board of Discipline and noted by us are as hereunder:-

2.1 That the complainant in his complaint in duly verified Form–I dated 30th January, 2013, Shri Harpal Singh Dhingra (hereinafter referred to as the "Complainant") made the following allegations against CA. Vinod Gupta (M.No.086239), (hereinafter referred to as the "Respondent").

(i) The Respondent has fixed a forged Police Stamp on fabricated Police complaint filed against the Complainant and submitted the same before, Hon'ble High Court of Delhi to cause irreparable reputation and financial loss to the Complainant.

(ii) These forged, fabricated & legal documents were submitted by the Respondent before the Hon'ble High Court, Delhi under pre-planned propaganda to shut center of the complainant, thereby causing insurmountable mental agony and irreparable financial & reputation losses. In view of the documents, forged and fabricated DTDC courier Consignment Receipts were created by the Respondent.

2.2 The Director (Discipline) formed the 'Prima Facie Opinion' and the said 'Prima Facie Opinion' formed by the Director (Discipline) on the Complaint, Written Statement of the Respondent, Rejoinder of the Complainant and additional documents were considered by the Board of Discipline. The Board on consideration of the same agreed with the 'Prima Facie Opinion' of the Director that the Respondent is guilty of 'Other Misconduct' falling within the meaning of clause (2) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949 (as amended from time to time). The Board, also directed the Directorate that in terms of the provisions of sub-rule (2) of Rule 14, the 'Prima Facie Opinion' formed by the Director be sent to the Respondent and the Complainant including particular or documents relied upon by the Director, if any, during the course of formation of 'Prima Facie Opinion' and the Respondent be asked to submit his Written Statement in accordance with the Provisions of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules,2006.

2.3 The Respondent thereafter submitted his duly verified Written Statement dated 13th May, 2014, which is on record.

2.4 That at the time of hearing held on 30th June, 2015, the Complainant and the Counsel, for the Respondent were present before the Board. The Complainant was put on oath and was asked to read out the charges alleged against the Respondent. The Complainant read out the charges in detail stating therein that there was some dispute between himself and the Respondent with regard to violation of terms of the business agreement. Thereafter, the matter went to the High Court wherein the Respondent submitted some forged documents before High Court of Delhi, wherein, Hon'ble Mr.

Justice Murlidhar in O.M.P. 897 of 2012 vide Order dated 06th November, 2012 observed as under:-

"It is clarified that it will be open to both the parties to urge their respective pleas in the arbitration proceedings apart from seeking any other remedy that may be available to both parties in accordance with law."

2.5 Further, the Complainant stated that the Respondent had pursued the courier person and asked him to prepare some false Courier receipts and besides, he and one CA. Jagdeep Gupta forged a Paharganj Police Station Stamp and put on the complaint stating that their auditors have visited the Complainant's premises at Hargobind Enclave, East Delhi for the settlement of the accounts and the Complainant had beaten them up.

2.6 The Complainant further stated that when he filed an RTI with the Delhi Police, they replied that this stamp was forged as they did not have this kind of a stamp and no complaint was received on the said date of 31st May as claimed by the Respondent. Moreover, on being enquired by the Complainant, the DTDC courier stated that all the Courier Receipts were a year prior to where the Respondent is claiming and these were sent at different addressees.

2.7 Thereafter, the Counsel for the Respondent submitted that when the franchisee agreement was terminated, the Complainant filed an arbitration application before the Hon'ble High Court and the Order was passed restraining the Respondent from opening any other Centre or giving admission to anybody. The Respondent filed the applications, seeking vacation of the interim Order passed by the Hon'ble High Court dated 6th November, 2012. The Hon'ble High Court vacated the earlier Interim Order since there were allegations leveled that these documents were not received by the Respondent, without giving any opinion as to the genuineness or veracity of the allegations.

2.8 The Counsel for the Respondent referred to the provisions of Clause (2) Part-IV for First Schedule to the Chartered Accountants Act, 1949 stating that there are no findings which prove that the respondent has brought disrepute to the profession, and that the Board should wait for the decision of the criminal Court. The Counsel for the respondent also submitted that letter of response to RTI cannot be read against the respondent because the person who has given this letter needs to be cross-examined.

2.9 The Board stated that in disciplinary proceedings, the criminality of pending proceedings cannot be a basis to postpone the disciplinary process, because it could be that in a case involving a person who may have most heinous offence against him, it might take years to get a conviction. Thus, one has to go by preponderance of probability, to apply the mind to the surrounding circumstances to understand what a situation is. Moreover, the person who had sent the letter was a third party not related either to the Complainant or the Respondent and which stated that no complaint by the Respondent against the complaint was ever received at the Police Station.

2.10 Thereafter, the Board enquired from the counsel for the respondent that if the police station denied that they never received any type of complaint of the Respondent being beaten up by the Complainant, then why any further steps were not taken by the Respondent to pursue his own complaint. To this, the Counsel for the Respondent submitted that he has been following with Police regarding the same.

2.11 On considering the submission of both the parties, the Board directed the Counsel for respondent to submit affidavit from the Respondent(s) as regards sequence of the action taken further to filing a police complaint against the complainant in Paharganj Police Station within 15 days from the date of hearing, to the Institute office at New Delhi.

2.12 On perusal of the documents on record, viz. the complaint, the Written Statement of the Respondent, the Rejoinder of the Complainant, additional documents, the prima facie opinion of the Director(Discipline), the further written statement of the Respondent and after hearing the submission of the complainant and the Counsel for the respondent, the Board gives its findings as under:

"The board noted that the charge levelled against the respondent is that he has forged the police stamp on certain documents which have been submitted before the Delhi High Court."

2.13 The Board noted that the complainant and the respondent had entered into an agreement for providing satellite classes for CA examinations which subsequently got disputed. Thereafter, the complainant had filed an FIR against the respondent for the said matter alleging that he had forged the Paharganj Police stamp on the Police complaint dated 31st May, 2012 and DTDC Courier receipts for the letters sent to the complainant's office regarding their closure. Thereafter, when the franchisee agreement was terminated, the complainant had filed an arbitration before the Hon'ble High Court and the order was passed, restraining the respondent from opening any other Centre of giving admission to anybody.

2.14 During the proceedings of the instant case, the board noted that the respondent had filed the writ petition No. 2991/2014 against ICAI, Director (Disc) and Mr. Harpal Singh Dhingra (Complainant) before the Delhi High Court praying to quash the Prima Facie Opinion formed by the Director (Discipline), in before the Board of Discipline. The writ petition came up for hearing before the Hon'ble Justice Manmohan, Delhi High Court on 12th May, 2014, after hearing, the Hon'ble Court disposed of the said Writ Petition vide its order dated 12th May, 2014 directing that the said writ Petition be treated as representation to the Board of Discipline, who shall decide the same in accordance with law after giving an opportunity of hearing to the Petitioner and in the event the Board of Discipline takes a decision against the Petitioner, a fresh date shall be fixed for hearing the matter on the merits.

2.15 Thereafter, the Board at its Meeting held on 8th August, 2014 considered the Order of the Hon'ble Delhi High Court dated 12th May, 2014 passed in the aforesaid matter

wherein the complainant and the counsel for the respondent were present and concluded as under:

"…For all of the aforementioned reasons and further placing reliance on the aforesaid judgments, the Board finds no ground having been made out by the respondent for keeping the respective disciplinary proceedings against him in abeyance till the conclusion of the criminal cases against him.

Accordingly, the Board passes its order that the continuance of the present Disciplinary Proceedings against the respondent does not in any manner prejudice the conduct and / or conclusion of the Criminal Proceedings going on in the Criminal Court of Law.

2.16 The Board also noted that the Complainant has brought on record that the Delhi Police has filed charge sheet in the FIR. No. 1/2013 against the Respondent on 26th August, 2013 and that the Respondent is on anticipatory bail.

2.17 The Board has carefully gone through copy of the complaint dated 31st May, 2012 lodged by M/s Alok & Co. Chartered Accountants represented by its partner CA. Jugdeep Kumar Gupta alleged that his firm M/s Alok & Co., Chartered Accountants have been appointed by M/s Vinod Gupta Classes having their office at 30/11, Jhandewalan Ext., Near Videocon Tower, New Delhi-110055 to conduct audit of their franchisee at 11, Hargobind Enclave, Karkari Mod, New Delhi 110092. It was further alleged in the aforesaid complaint that when CA. Jugdeep Kumar Gupta went to the franchisee at 11.00 hrs the franchisee restrained him to enter into their premises and access the records despite disclosing his identity and his purpose of visit. He further stated that he was in fact informed by M/s Vinod Gupta Classes that their franchisee have already been informed about his visit and purpose. The said franchisee through Mr. Harpal Dhingra also confirmed the same in his presence. The Complainant (therein) further alleged that he was not only denied entry into the premises and Dhingra and his person thereby causing physical injury to him and his team. The Complainant further stated that Shri Harpal Singh Dhingra's men forcibly entered into his office M/s Alok & Co. at Jhandewalan and threatened them that they should not give any negative report for M/s Vinod Gupta Classes. The aforesaid complaint ended with the plea to the police authorities to take necessary action against M/s Stepping Stone Educational Welfare Society represented by Mr. Harpal Singh Dhingra.

2.18 It was informed to the Board that the copy of the aforesaid complaint dated 31st May, 2012 bears stamp of police station, Paharganj, Central Distt., New Delhi with some signature/ initial within the police stamp.

2.19 Thereafter, the said Shri Harpal Singh Dhingra of M/s Stepping Stone Educational Welfare society had applied to RTI Cell vide his application dated 12.11.2012 which was received in the office of the Additional Deputy Commissioner of Police cum Public Information Officer, Central District. Darya Ganj, Delhi for obtaining information under the Right to Information Act, 2005. In response to that Shri Harpal Singh Dhingra has received a point wise reply vide letter dated 10th December, 2012 with Reference no.

2012/3101(A)/18132/RTI Cell/ Central District, wherein it is clearly stated that as per the report of ACP, Paharganj Police Station, no complaint has ever been received at Police Station, Paharganj on 31st May, 2012. As per the report of ACP, the stamp put on the complaint dated 31.05.2012 is not used in Paharganj Police Station. After the receipt of this aforesaid information under RTI, the complainant has preferred an FIR dated 3rd January, 2013 at Police Station, Tilak Nagar, New Delhi under IPC under various Sections against CA Vinod Gupta Proprietor of M/s Vinod Gupta Coaching Classes. The FIR registered against Mr. Vinod Gupta on account of forgery and cheating. The FIR in addition is containing ongoing disputes between M/s Stepping Stone Educational Welfare Society and Mr. Vinod Gupta, Proprietor of M/s Vinod Gupta Coaching Classes. There is a specific allegation that Mr. Vinod Gupta submitted false, fabricated and forged documents before the Hon'ble High Court.

2.20 The police complaint dated 31st May, 2012 containing stamp of Paharganj Police Station submitted by Mr. Vinod Gupta in concurrence with Mr. Jugdeep Kumar Gupta of M/s Alok & Company. To verify the authenticity of police complaint and stamp dated 31.05.2012, Mr. Harpal Singh Dhingra filed an RTI and the ACP Paharganj Police Station denied receiving any alleged the proof of dispatch of letters through DTDC courier and DTDC courier receipts submitted by CA Vinod Gupta pertaining to closure of the center show cause letter, termination and account settlement letters are forged. Mr. Harpal Singh Dhingra upon verifying the authenticity of DTDC courier proof of delivery of the letters as submitted by Mr. Vinod Gupta. Shri Harpal Singh Dhingra sent an email and confirmation email sent by DTDC as received through official email ID confirms that the aforesaid DTDC receipts were forged thereby proving that such letters were never sent by CA Jugdeep Gupta to the office of M/s. Steeping Stone Educational Welfare Society.

2.21 The FIR further stated that CA Vinod Gupta's intention is to cheat Steeping Stone Educational Welfare Society by fabricating and forging police complaint, police stamp, letters, DTDC courier receipts with regard to consignee address, date of delivery and also forging receiver's signatures to establish proof of delivery at the address of Steeping Stone Educational Welfare Society. The FIR inter-alia requested to conduct a thorough investigation and cause CA Vinod Gupta to be arrested apart from investigating the role of others who all are involved with him in creating a false police complaint, forging police stamp and courier receipts thereby misrepresenting all the facts.

2.22 The Board carefully considered all the evidence, supporting material, affidavit executed by both the Respondent and CA Jugdeep Kumar Gupta and after carefully perusing of the material evidences, the Board was of the considered view that it is quiet strange on the part of the Respondent and CA Jugdeep Kumar Gupta that they have not taken any follow up steps in respect of their purported complaint dated 31.5.2012 filed with Police Station, Paharganj, New Delhi although the matter is of serious in nature wherein it had been alleged that CA Jugdeep Kumar Gupta has been physically beaten by Shri Harpal Singh Dhingra and his persons thereby causing him physical injury. Despite such a heinous crime having been perpetrated against the auditor of M/s Vinod Gupta Classes both the Respondent and CA Jugdeep Kumar Gupta remained silent after lodging the

police complaint dated 31.5.2012. Absolutely no evidences have been furnished by the Respondent to prove that they have taken any follow up measures whatsoever as a normal consequence of the complaint purported to have been lodged with the Police Station, Paharganj, New Delhi.

2.23 During the course of hearing, the Board had directed the Counsel for the Respondent to submit an affidavit as regards the consequences of action taken further to the filing of the alleged police complaint against the Complainant. In response thereto, the Respondent filed his Affidavit dated 7th July, 2015 wherein inter-alia it has been mentioned as under:-

i. That Thereafter I was informed by Mr. Gupta that the complaint had been filed by him with the Paharganj Police Station.

ii. That later on I came to know that Mr. Harpal Singh has obtained some RTI information to the effect that no such complaint was received by the police station on that day. Pursuant thereto an FIR came to be registered on the complaint of Mr. Harpal Singh, while the matter was referred by the Hon'be High Court order dated 3.12.2012 before the arbitral tribunal presided by Hon'ble Mr. Justice Anil Dev Singh (Retd.)

iii. That suddenly there were too many proceedings initiated by the Complainant herein where the deponent is defending himself till date. Nevertheless, the deponent advised Mr. Jagdeep Gupta, who was the Complainant in the complaint, dated 31.5.2012, to pursue all legal remedies that may be available in law, in respect of his complaint.

iv. That the deponent is being informed by Mr. Jugdeep Gupta that he had been corresponding with the investigating officer of the case and he is also acting under legal advice.

v. That as a matter of fact the investigating officer had carried out investigation in respect of Mr. Jagdeep Gupta's complaint and has already laid charge-sheet in respect thereof and the same is a subject matter before the Court of Learned Metropolitan Magistrate, Patiala House and it would be only after conclusion of the matter i.e. a finding with regard to the genuineness or otherwise of the complaint dated 31.5.2012, that any further action may be taken in that respect by the Complainant of that complaint.

2.24 From the above, the Board noted that it is evident that the Respondent instead of pursuing the complaint filed Mr. Jugdeep Gupta with the police station is trying to take legal remedies and corresponding with the concerned investigating officer. If at all the complaint had been filled on behalf of the Respondent by Mr. Jagdeep Gupta in Pahar Ganj Police Station. In the light of the denial received from the Police Authorities through RTI, the correct action for the Respondent would be only to immediately follow up the matter with the concerned police station so as to establish the genuineness of the complaint filed. Instead the Respondent has continued to choose a totally different defence by taking up the same defence as Mr. Jagdeep Gupta. The last nail in the camel's back is the clear cut denial by Mr. Rajesh Deo, Public Information

Officer, Central Distt., Delhi vide his letter dated 10th December, 2012 with Reference no.2012/3101(A)/18132/RTI Call/Central District to the effect that no such complaint was ever received at Pahar Ganj Police Station on 31.5.2012 and further stated clearly that the stamp put up on the complaint letter dated 31.5.2012 is not the one used in Police Station, Pahar Ganj. In view of the assertions made by RTI Cell it is evident that the police complaint dated 31.5.2012 has never been lodged and is concocted document.

2.25 Therefore, in the absence of any contradictory evidence to show that the complaint dated 31st May, 2012 was actually filed in the Paharganj Police Station, the Respondent was held guilty of abetting the crime of forging the police stamp and filing of a fabricated complaint by CA. Jagdeep Gupta. The role of the Respondent whose classes were the subject matter of dispute over franchisee ship should have been in a more ethical manner instead of trying to use coercive measures to discontinue the franchise. Thus based on the specific evidences of the denial by the Police Authorities of any complaint as alleged to have been filed and in the absence of any specific rebuttal by the Respondent on the said denial by the Police Authorities, it is evident that the allegations made by the Complainant against the Respondent were established and such an act unbecoming of a Chartered Accountant, the Board was of the view that the Respondent is guilty of Other Misconduct falling within the meaning of clause (2) of Part IV of the Chartered Accountants Act, 1949.

2.26 Further, the Board on perusal of the documentary evidences on record noted that there are several circumstantial evidences to suggest that the conduct of the Respondent is under question and moreover, the Respondent also has not produced any substantial evidences that could go in his favour against the charges being alleged. As stated earlier, the Respondent was specifically asked to file an affidavit to set out in detail the steps and efforts taken by him to pursue the complaint alleged to have been filed with the Paharganj Police Station in 2012 and particularly that he has been aware for a long time that the relevant Police Station has denied receiving any complaint on a RTI application filed by him. In this background the Board was of the view that any act of a Chartered Accountant compromising integrity and public trust, needs to be corrected so that the public at large continues to bestow its trust on them and render credibility to the profession.

3. During the proceedings before us, the Learned Senior Counsel Shri Adarsh Dail who appears on behalf of the Appellant along with Shri Anurag Bhatt, Advocate has submitted that the order passed by the Board of Discipline is not sustainable for the reasons that the alleged misconduct is not covered by the definition of other misconduct as given in clause (2) of Part-IV of the First Schedule of the Chartered Accountants Act, 1949 as no such opinion has been expressed by the Council wherein it has been opined that the act of the Appellant has brought disrepute to the Profession or the Institute. It is also further submitted by the Learned Senior Counsel that in this case the Complainant and the Appellant have entered into a settlement agreement dated 9th December, 2016, on the basis of which the FIR No. 1/2013 under sections 193/468/471/201/473/476/34 IPC, registered at Police Station, Tilak Marg, New Delhi stands compromised and even has been quashed by the Hon'ble

High Court of Delhi in case no CRM.M.C.488/2017 vide Order dated 2nd March, 2017. The relevant portion of the said Order of the Hon'ble High Court of Delhi is reproduced as under:-

> *"Respondent No. 2 further states that he does not wish to pursue the various proceedings launched by him before the Institute of Chartered Accountants of India and will abide by the terms of settlement. He states that he has now no claim whatsoever against the Appellants and does not wish to pursue the above noted FIR and the proceedings pursuant thereto. Respondent No.2 further states that he will abide by the terms of settlement arrived at between the parties."*

The court further passed the following order:

> *"Since the parties have entered into a comprehensive settlement and the above noted FIR was registered not on the complaint of this court but of the private complaint of Respondent No.2, no useful purpose will be served in continuing with the above noted FIR and the proceedings pursuant thereto. There being no legal impediment in quashing the FIR in question, this Court deems it fit to quash the above noted FIR and the proceedings pursuant thereto."*

4. Adversely, the Learned Counsel Ms. Pooja M. Saighal appearing on behalf of the Institute of Chartered Accountants of India, Respondent herein, submitted that the alleged misconduct is certainly covered under clause (2) of Part-IV of the Chartered Accountants Act, 1949, in as much as, the complaint lodged by Shri Harpal Singh Dhingra brings out information regarding misusing a police stamp as it is manifestly clear from the response given by the Commissioner of Police on an application filed under the Right to Information Act for which detailed findings were given by the Board of Discipline of the Institute of Chartered Accountants of India.

5. We have considered the submissions made on behalf of the parties besides perusing all related materials of this case, which is on record and are of the considered view that the fact remains that the settlement reached between the parties was subsequent to passing the Impugned Order of the Board of Discipline of the Institute of Chartered Accountants of India, which was never confronted or considered by the Institute.

6. However, as far as the first submission made by the Learned Senior Counsel, Shri Adarsh Dial for the Appellant that the Order passed by the Board of Discipline is not sustainable for the reasons that the alleged misconduct is not covered by the definition of other misconduct as given in clause (2) of Part-IV of the First Schedule of the Chartered Accountants Act, 1949 as no such opinion has been expressed by the Council wherein it has been opined that the act of the Appellant has brought disrepute to the Profession or the Institute, is concerned, we wish to record that the said argument is not tenable in view of an Order dated 13th May, 2017 passed by this Authority in Appeal No. 05/ICAI/2014 namely Rajeev Maheshwari Vs. ICAI and Appeal No. 08/ICAI/2014 namely Gyan Prakash Agarwal Vs. ICAI and the Appeal No. 07/ICAI/2014 namely Sameer Kumar Singh Vs. ICAI. The relevant paragraph No. 15 of the aforesaid Order of the Authority is reproduced 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".*

7. Be that as it may, it is evident that the compromise entered into between the parties and its consideration by the Hon'ble High Court of Delhi have not been considered by the Disciplinary Committee as these are the subsequent events in the matter. We are of the view that its impact on the subject matter of this complaint needs to be properly examined. Having considered the oral as well as written submissions including the complaint, written statements, 'Prima Facie Opinion' formed by the Director (Discipline), the Report and the Impugned Order of the Board of Discipline besides the arguments advanced before us by the parties of this Appeal, we are of the concerned view that it will be appropriate and in the Interest of Justice to set aside the Impugned order and further to **remit back the case to the Board of Discipline of the Institute of Chartered Accountants of India** with a direction to hear both the parties again and re-consider the matter particularly in the light of the settlement reached between the parties and the aforesaid Order dated 2nd March, 2017 passed by the Hon'ble High Court of Delhi quashing the aforementioned FIR, and to pass a fresh Order within six months from the date of receipt of this Order.

8. Since the Impugned Order is set aside, therefore, Interim Orders are also vacated.

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

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Dr. Navrang Saini
Member

Pronounced on dated: 6th January, 2018 at New Delhi

BEFORE THE APPELLATE AUTHORITY

(Constituted Under The Chartered Accountants Act, 1949)

APPEAL NO. 09/ICAI/2017

IN THE MATTER OF:

Jugdeep Kumar Gupta ....Appellant

Versus

Institute of Chartered Accountants of India ....Respondent No. 1

Harpal Singh Dhingra ....Respondent 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:

1. Mr. Adarsh B. Dial, Senior Advocate and Mr. Anurag Bhatt, Advocate appearing on behalf of Appellant

For the Respondents:

1. Ms. Pooja M. Saigal, Advocate appearing on behalf of ICAI
2. Ms. Harleen Bhalla, Assistant Secretary, Disciplinary Directorate appearing on behalf of ICAI

ORDER

1. Present Appeal has been filed by the Appellant CA. Jugdeep Kumar Gupta (M. No. 097314), against the Report of the Board of Discipline dated 6th November, 2015 and Order dated 12th May, 2016 (Impugned Order) passed by the Board of Discipline in case No. PR-26/2013-DD/31/2013/BOD/171/2014 under Section 21A (3) of the Chartered Accountants Act, 1949, as amended by the Chartered Accountants (Amendment) Act, 2006, whereby the Appellant has been held 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 awarded punishment of 'reprimand'. The said clause (2) 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 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, as recorded by the Board of Discipline and noted by us are as hereunder:-

2.1 In this complaint in duly verified From-I dated 4th February, 2013, Shri Harpal Singh Dhingra (hereinafter referred to as the "Complainant") made the following allegations against CA. Jugdeep Kumar Gupta (herein referred to as the "Respondent").

2.2 That the Respondent created a false, forged and fabricated police Complaint against the Complainant with the sole intention of defaming and causing irreparable losses to Complainant for which FIR under Section 471, 472, 468 & 34 IPC was also registered.

2.3 That the Respondent created, forged and fabricated Police Station Seal with the sole intention of creating bad name against the Complainant, wrongly alleging against the Complainant for causing physical injury, threatening, abusing, thrashing and misbehaving with the Respondent along-with his other auditors both at the Complainant's center as well as the office premises of the Respondent. Neither the audit nor the auditors ever visited the Complainant's premises.

2.4 Forged Police Station Seal, put on a false fabricated complaint in concurrence with CA. Vinod Gupta and filling of the same before the Hon'ble High Court, Delhi through CA. Vinod Gupta.

2.5 The Director (Discipline) formed the 'Prima Facie Opinion' and the said 'Prima Facie Opinion' formed by the Director (Discipline) on the Complaint, Written Statement of the Respondent, Rejoinder of the Complainant and additional documents were considered by the Board of Discipline. The Board on consideration of the same agreed with the 'Prima Facie Opinion' of the Director that the Respondent is guilty of 'Other Misconduct' falling within the meaning of clause (2) of Part-IV of the First Schedule to the Chartered Accountants Act, 1949 (as amended from time to time). The Board, also directed the Directorate that in terms of the provisions of sub-rule (2) of Rule 14, the 'Prima Facie Opinion' formed by the Director be sent to the Respondent and the Complainant including particular or documents relied upon by the Director, if any, during the course of formation of 'Prima Facie Opinion' and the Respondent be asked to submit his Written Statement in accordance with the Provisions of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules,2006.

2.6 The Respondent thereafter submitted his duly verified Written Statements dated 13th May, 2014, which is on record.

2.7 That at the time of hearing held on 30th June, 2015, the Complainant and the Counsel for the Respondent were present before the Board. The Complainant was put on oath and was asked to read out the charges alleged against the Respondent. The

Complainant read out the charges in detail stating therein that there was some dispute between himself and the Respondent with regard to violation of terms of the business agreement. Thereafter, the matter went to the High Court wherein the Respondent submitted some forged documents before High Court of Delhi, wherein, Hon'ble Mr. Justice Murlidhar in O.M.P. 897 of 2012 vide Order dated 06th November, 2012 observed as under:-

"It is clarified that it will be open to both the parties to urge their respective pleas in the arbitration proceedings apart from seeking any other remedy that may be available to both parties in accordance with law."

2.8 The Board on consideration of the same agreed with the prime facie opinion of the Director that the Respondent is guilty of 'Other Misconduct' falling within the meaning of Clause (2) of Part IV of the First Schedule to the Chartered Accountants Act, 1949 [as amended by the Chartered Accountant (Amendment) Act, 2006]. The Board, also directed the Directorate that in terms of the provisions of sub-rule (2) of Rule 14, the prima facie opinion formed by the Director be sent to the Respondent and the Complainant including particulars or documents relied upon by the Director, if any, during the course of formation of prime facie opinion and the Respondent be asked to submit his Written Statement in accordance with the provisions of these Rules.

2.9 Further, the Complainant stated that the Respondent had pursued the courier person and asked him to prepare some false courier Receipts and besides, he and one CA. Vinod Gupta forged a Paharganj Police Station Stamp and put on the complaint stating that their auditors have visited the Complainant's premises at Hargobind Enclave, East Delhi for the Settlement of the accounts and the Complainant had beaten them up.

2.10 The Complainant further stated that when he filed an RTI with the Delhi Police, they replied that stamp was forged as they did not have this kind of a stamp and no complaint was received on the said date of 31st May as claimed by the Respondent. Moreover, on being enquired by the Complainant, the DTDC courier stated that all Courier Receipts were a year prior to where the Respondent is claiming and these were sent at different addresses.

2.11 Thereafter, the Counsel for the Respondent submitted that when the franchisee agreement was terminated, the Complainant filed an arbitration application before the Honorable High Court and the Order was passed, restraining the Respondent from opening any other center or giving admission to anybody. The Respondent filed the applications, seeking vacation of the interim Order passed by the Honorable High Court dated 6th November 2012. The Honorable High Court vacated the earlier interim Order since there were allegations leveled that these documents were not received by the Respondent, without giving any opinion as to genuineness or veracity of the allegations.

2.12 The Counsel for the Respondent referred to the provision of Clause (2) Part IV of First Schedule to the Chartered Accountants Act 1949 stating that there are no findings

which proves that the Respondent has brought disrepute to the profession, and that the Board should wait for the decision of the Criminal Court. The counsel for the Respondent also submitted that letter of response to RTI cannot be read against the Respondent because the person who has given this letter needs to be cross-examined.

2.13 The Board stated that in Disciplinary proceedings, the criminality been proved cannot be relied upon because a person who may have a most heinous offence against him would take years to convict. Thus, one has to go by preponderance of probability, to apply the mind to the surrounding circumstances to understand what a situation is. Moreover, the person who had sent the letter was a third party not related either to the Complainant or the Respondent, and which stated that no complaint by the Respondent against the Complainant was ever received at the Police Station.

2.14 Thereafter, the Board enquired from the Counsel for the Respondent that if the Police Station denied having received the complaint filed by the Respondent, which included an allegation that he was beaten, then why no further steps were taken by the Respondent to pursue his own complaint. To this, the Counsel for the Respondent submitted that he has been following with the police regarding that.

2.15 On considering the submissions of both the parties, the Board directed the Counsel for Respondent to submit affidavit from the Respondent (s) as regards sequence of the action taken further to filling of a Police complaint against the Complainant in Paharganj Police Station within 15 days from the date of hearing, to the Institute's office at New Delhi.

2.16 On perusal of the documents on record, viz the Complaint, the Written Statement of the Respondent, the Rejoinder of the Complainant, additional documents, the Prime Facie Opinion of the Director (Discipline), the further Written Statement of the Respondent and after hearing the submissions of the Complainant and the Counsel for the Respondent, the Board of Discipline gives its findings as under:

i. The Board noted that the charge leveled against the Respondent is that he has forged the police stamp on certain documents which have been submitted before the Delhi High Court.

ii. The Board noted that the Complainant and the Respondent had entered into an agreement for providing satellite classes for CA examination which subsequently got disputed. Thereafter, the Complainant had filed an FIR against the Respondent for the said matter alleging that he had forged the Paharganj Police stamp on the Police complaint dated 31st May, 2012 and DTDC courier receipts for the letter sent to the Complainant's office regarding their closure. Thereafter, when the franchisee agreement was terminated, the Complainant had filed an arbitration application before the Honorable High Court and the order was passed, restraining the Respondent from opening other center or giving admission to anybody.

iii. During the proceedings of the instant case, the Board noted that the Respondent had filed the Writ Petition No. 2992/2014 against ICAI, Director (Discipline) and Mr. Harpal Singh Dhingra (Complainant) before the Delhi High Court praying to quash the Prime Facie Opinion formed by the Director (Discipline), in the matter and to quash the letter dated 29th April, 2014 sent to him for proceedings before the Board of Discipline. The Writ Petition came up for hearing before the Hon'ble Mr. Justice Manmohan, Delhi High Court on 12th May 2014, after hearing, the Hon'ble Court disposed of the said Writ Petition vide its order dated 12th May, 2014 directed that the said Writ Petition be treated as representation to the Board of Discipline, who shall decide the same in accordance with law after giving an opportunity of hearing to the Petitioner and in the event the Board of Discipline takes a decision against the Petitioner, a fresh date shall be fixed for hearing the matter on the merits.

iv. Thereafter, the Board at its meeting held on 8th August,2014 considered the Order of the Hon'ble Delhi High Court dated 12th May, 2014 passed in the aforesaid matter wherein the Complainant and the Counsel for the Respondent were present and concluded as under:-

"…….. For all of the aforementioned reasons and further placing reliance on the afore stated judgments, the Board finds no ground having been made out by the Respondent for keeping the respective disciplinary proceedings against him in abeyance till the conclusion of the criminal cases against him.

Accordingly, the Board passes its Order that the continuance of the present Disciplinary Proceeding against the Respondent does not in any manner prejudice the conduct and/ or conclusion of the Criminal Proceedings going on in the Criminal Court of Law."

v. The Board also noted the Complainant has brought on record that the Delhi Police has filed charge sheet in the FIR No.1/2013 against the Respondent on 26th August, 2013 and that the Respondent is on anticipatory bail.

vi. The Board has carefully gone through copy of the complaint dated 31st May, 2012 lodged by M/s Alok & Co. Chartered Accountants represented by its partner CA. Jugdeep Kumar Gupta to Paharganj Police Staion, New Delhi wherein the said CA. Jugdeep Kumar Gupta alleged that his firm M/s Alok & Co., Chartered Accountants have been appointed by M/s Vinod Gupta Classes having their office at 30/11, Jhandewalan Ext., Near Videocon Tower, New Delhi-110055 to conduct audit of their franchisee at 11, Hargobind Enclave, Karkari Mod, New Delhi 110092. It was further alleged in the aforesaid complaint that when CA. Jugdeep Kumar Gupta went to the franchisee at 11.00 hrs., the franchisee restraint him to enter into their premises and access the records despite disclosing his identity and his purpose of visit. He further stated that he was in fact informed by M/s Vinod Gupta Classes that their franchisee have already been informed about his visit and purpose.

The said franchisee through Mr. Harpal Dhingra also confirmed the same in his presence. The Respondent (herein) further alleged that he was not only denied entry into the premises and access to any relevant record but also beaten and abused by Shri Harpal Singh Dhingra and his persons thereby causing physical injury to him and his team. The Respondent further stated that Shri Harpal Singh Dhingra's men forcibly entered into his office M/s Alok & Co. at Jhandewalan and threatened them that they should not give any negative report for M/s Vinod Gupta Classes. The aforesaid complaint ended with the plea to the police authorities to take necessary action against M/s Stepping Stone Educational Welfare Society represented by Mr. Harpal Singh Dhingra.

vii. It was informed to the Board that the copy of the aforesaid complaint dated 31st May, 2012 bears stamp of police station, Paharganj, Central Distt., New Delhi with some signature/ initial within the police stamp.

viii. Thereafter, the said Shri Hapal Singh Dhingra of M/s Stepping Stone Educational Welfare society had applied to RTI Cell vide his application dated 12th November, 2012 which was received in the office of the Additional Dy. Commissioner of Police cum Public Information Officer, Central District, Darya Garj, Delhi for obtaining information under the Right to information Act, 2005. In response to that, Shri Harpal Singh Dhingra has received a point wise reply vide letter dated 10th December, 2012 with Reference no. 2012/3101(A)/18132/RTI Cell/Central District wherein it is clearly stated that as per the report of ACP, Paharganj Police Station no complaint has ever been received at Police Station, Paharganj on 31st May, 2012. As per the report of ACP, the stamp put on the complaint dated 31st May, 2012 is not used in Paharganj Police Station. After the receipt of aforesaid information under RTI, the Complainant has preferred an FIR dated 3rd January, 2013 at Police Station, Tilak Marg, New Delhi under various Sections of Indian Penal Code against CA Vinod Gupta Proprietor of M/s Vinod Gupta Classes on account of forgery and cheating. The FIR in addition is containing ongoing disputes between M/s Stepping Stone Educational Welfare Society and Mr. Vinod Gupta, Proprietor of M/s Vinod Gupta Classes. There is a specific allegation that Mr. Vinod Gupta submitted false, fabricated and forged documents before the Hon'ble High Court.

ix. The police complaint dated 31st May, 2012 containing stamp of Paharganj Police Station submitted by Mr. Vinod Gupta in concurrence with Mr. Jugdeep Kumar Gupta of M/s Alok & Company. To verify the authenticity of police complaint and stamp dated 31.5.2012, Mr. Harpal Singh Dhingra filed an RTI and the ACP Paharganj Police station denied receiving any such complaint thereby meaning that it was forged stamp. The FIR further alleged the proof of dispatch of letters through DTDC Courier and DTDC courier receipts submitted by CA. Vinod Gupta pertaining to closure of the center show cause letter, termination and account settlement letters are forged. Mr. Harpal Singh Dhingra upon verifying the authenticity of DTDC courier proof of delivery of the letters as submitted by Mr. Vinod Gupta, Shri Harpal Singh Dhingra sent an e mail and confirmation e mail sent by DTDC

received through official e mail ID stating that the aforesaid DTDC receipts were forged by CA. Vinod Gupta thereby proving that such letters were never sent by CA. Vinod Gupta to the office of M/s Stepping Stone Educational Welfare society.

x. The FIR further stated that CA. Vinod Gupta's intention is to cheat M/s Stepping Stone Educational Welfare Society by fabricating and forging police complaint, police stamp, letters, DTDC courier receipts with regard to consignee address, date of delivery and also forging receiver's signature to establish proof of delivery at the address of M/s Stepping Stone Educational Welfare Society. The FIR inter alia requested to conduct a thorough investigation and cause CA Vinod Gupta to be arrested apart from investigating the role of others who all are involved with him in creating a false police complaint, forging police stamp and courier receipts, thereby misrepresenting all the facts.

xi. The Board carefully considered all the evidence supporting material, affidavit executed by both CA Vinod Gupta and the Respondent and after carefully perusing of the material evidences, the Board is of the considered view that it is quiet strange on the part of the Respondent and CA Vinod Gupta that they have not taken any follow up steps in respect of their purported complaint dated 31.05.2012 filed with Police Station, Paharganj, New Delhi although the matter is of serious in nature wherein it had been alleged that the Respondent has been physically beaten by Shri Harpal Singh Dhingra and his persons thereby causing him physical injury. Despite such a heinous crime having been perpetrated against the auditor of M/s Vinod Gupta Classes both CA Vinod Gupta and the Respondent remained silent after lodging the police complaint dated 31.05.2012. Absolutely no evidences have been furnished by the Respondent to prove that they have taken any follow up measures whatsoever as a normal consequence of the complaint purported to have been lodged with the Police station, Paharganj, New Delhi.

xii. During the course of hearing, the Board had directed the Counsel for the Respondent to submit an affidavit as regards the consequences of action taken further to the filing of the alleged police complaint against the Complainant. In response thereto, the Respondent filed his affidavit dated 14th July, 2015 wherein inter alia it has been mentioned as under:-

1. That the deponent had lodged the police complaint against the Complainant detailing vicious conduct of the Complainant without loss of time immediately after recovering from the shock of that frightening incident after reporting the matter to Shri Vinod Gupta (who had assigned him the audit work).

2. That it was too exasperating for me when I came to know that complaint filed by me at Paharganj Police Station on 31st May, 2012 has been denied to have received by them in the RTI reply obtained by the Complainant which became one of the grounds of registration of case FIR No. 01/13, P.S. Tilak Marg, New Delhi.

3. That thereafter, the matter was being investigated by the I.O. in respect of all the matters concerning the FIR got registered by the Complainant herein which included the complaint dated 31st May, 2012, filed by me also. The Ld. I.O. had time and again, been making inquiries about the same although no separate FIR had been registered thereupon.

4. The correspondence exchanged/ letters written by me in this context are annexed herewith as Annexure-A to the present affidavit. The letters written by me makes my stand i.e. the factual position about the Complaint dated 31st May, 2012, explicitly clear and the matter is still under investigation.

5. That the deponent legitimately believed and expected that the factual matrix covering the entire sequence of events is being investigated which is now before the competent Court of jurisdiction as also before the Ld. Arbitrator, and it would be only after culmination of these proceedings that the truth will come out and only thereafter further steps would be taken. The deponent reckons the above belief to be well founded based on sound legal advise and there was no reason for him to take a different view of the matter.

6. That the deponent, with immense grief, recounting the tragic incident when pursuant to the said false/ frivolous and invented FIR, he was arrested on 28th April, 2013 and was eventually released on bail by the Sessions Court vide order dated 2nd May, 2013. It was the most miserable experience of deponent's life and he is yet trying hard to somehow efface it from his memories.

7. That as if the FIR and arrest was not sufficient enough, the Complainant filed the present complaint before the Institute just to exert pressure upon me and Shri Vinod Gupta, despite fully knowing that we have committed no wrong.

xii From the above, it is evident that the Respondent instead of pursuing his purported complaint filed with Paharganj Police Station, is trying to take legal remedies. If at all, the complaint had been filed by him on behalf of CA Vinod Gupta in the said Police Station, in the light of the denial received from the Police Authorities through RTI, the correct action for the Respondent would have been only to immediately follow up the matter with the concerned police station so as to establish the genuineness of the complaint filed. Instead, the Respondent has continued to choose a totally different defence in the matter.

xiii The last nail in the camel's back is the clear cut denial by Mr. Rajesh Deo, Public Information Officer, Central Distt., Delhi vide his letter dated 10th December, 2012 with Reference no. 2012/3101(A)/18132/RTI Cell/Central District to the effect that no such complaint was ever received at Paharganj Police Station on 31st May, 2012 and further stated clearly that the stamp put up on the complaint letter dated 31st May, 2012 is not the one used in Police Station, Paharganj. In view of the assertions made by RTI cell it is evident that the police complaint dated 31st May,

2012 has never been lodged and is a concocted document. Such an act on the part of the Respondent in attempting to file a false complaint with a forged stamp of a Police Station is an act which was meant to cause disrepute to M/s Stepping Stone Educational Welfare Society to damage its reputation and to add strength to the ongoing legal dispute between M/s Vinod Gupta classes and them.

xiv Further, the Board, on perusal of the documentary evidences on record, noted that there are several circumstantial evidences to suggest that the conduct of the Respondent is under question and moreover, the Respondent also has not produced any substantial evidences in his defence. As stated earlier, the Respondent was specifically asked to file an affidavit to set out in detail the steps and efforts taken by him to pursue the complaint alleged to have been filed with the Paharganj Police Station in 2012 and particularly that he has been aware for a long time that the relevant Police Station has denied receiving any complaint on a RTI application filed by him. It is noted that the affidavit does not provide any of the information that had been requested by the Board. The Board also noted that although the Respondent has referred to the correspondence exchanged/ letters written by him in this context as being annexed as Annexure 'A' to the present affidavit, yet the same had not been provided to the Institute by way of Annexure to the said affidavit. The only inference that can be drawn is that the Respondent does not have any evidence to establish that there was a filing of the alleged complaint. In this background, the Board was of the view that any act of a Chartered Accountant comprising integrity and public trust, needs to be corrected so that the public at large continues to bestow its trust on them and render credibility to the profession.

3. During the proceedings before us, the Learned Senior Counsel Shri Adarsh Dail who appeared on behalf of the Appellant along with Shri Anurag Bhatt, Advocate has submitted that the order passed by the Board of Discipline is not sustainable for the reasons that the alleged misconduct is not covered by the definition of other misconduct as given in clause (2) of Part-IV of the First Schedule of the Chartered Accountants Act, 1949 as no such opinion has been expressed by the Council wherein it has been opined that the act of the Appellant has brought disrepute to the Profession or the Institute. It is also further submitted by the Learned Senior Counsel that to bring an end to all allegations, disputes and differences in pursuance of the fruitful and constrictive deliberations and negotiations held between the parties, it has been mutually decided by the Appellant and the Complainant in the present matter to settle all their disputes in an amicable fashion and the parties, accordingly, have entered into a settlement agreement dated 09th December, 2016, on the basis of which the FIR No. 1/2013 under sections 193/468/471/201/473/476/34 IPC, registered at Police Station, Tilak Marg, New Delhi stands compromised and even has been quashed by the Hon'ble High Court of Delhi in case no CRM.M.C.488/2017 vide Order dated 2nd March, 2017. The relevant portion of the said Order of the Hon'ble High Court of Delhi is reproduced as under:-

"Respondent No. 2 further states that he does not wish to pursue the various proceedings launched by him before the Institute of Chartered Accountants of

India and will abide by the terms of settlement. He states that he has now no claim whatsoever against the Appellants and does not wish to pursue the above noted FIR and the proceedings pursuant thereto. Respondent No.2 further states that he will abide by the terms of settlement arrived at between the parties."

The court further passed the following order:

"Since the parties have entered into a comprehensive settlement and the above noted FIR was registered not on the complaint of this court but of the private complaint of Respondent No.2, no useful purpose will be served in continuing with the above noted FIR and the proceedings pursuant thereto. There being no legal impediment in quashing the FIR in question, this Court deems it fit to quash the above noted FIR and the proceedings pursuant thereto."

4. Adversely, the Learned Counsel Ms. Pooja M. Saighal appearing on behalf of the Institute of Chartered Accountants of India, Respondent herein, submitted that the alleged misconduct is certainly covered under clause (2) of Part-IV of the Chartered Accountants Act, 1949, in as much as, the complaint lodged by Shri Harpal Singh Dhingra brings out information regarding misusing a police stamp as it is manifestly clear from the response given by the Commissioner of Police on an application filed under the Right to Information Act for which detailed findings were given by the Board of Discipline of the Institute of Chartered Accountants of India.

5. We have considered the submissions made on behalf of the parties besides perusing all related materials of this case, which is on record and are of the considered view that the fact remains that the settlement reached between the parties was subsequent to passing the Impugned Order of the Board of Discipline of the Institute of Chartered Accountants of India, which was never confronted or considered by the Institute.

6. However, as far as the first submission made by the Learned Senior Counsel, Shri Adarsh Dial for the Appellant that the Order passed by the Board of Discipline is not sustainable for the reasons that the alleged misconduct is not covered by the definition of other misconduct as given in clause (2) of Part-IV of the First Schedule of the Chartered Accountants Act, 1949 as no such opinion has been expressed by the Council wherein it has been opined that the act of the Appellant has brought disrepute to the Profession or the Institute, is concerned, we wish to record that the said argument is not tenable in view of an Order dated 13th May, 2017 passed by this Authority in Appeal No. 05/ICAI/2014 namely Rajeev Maheshwari Vs. ICAI and Appeal No. 08/ICAI/2014 namely Gyan Prakash Agarwal Vs. ICAI and the Appeal No. 07/ICAI/2014 namely Sameer Kumar Singh Vs. ICAI. The relevant paragraph No. 15 of the aforesaid Order of the Authority is reproduced 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".

7. Be that as it may, it is evident that the compromise entered into between the parties and its consideration by the Hon'ble High Court of Delhi have not been considered by the Disciplinary Committee as these are the subsequent events in the matter. We are of the view that its impact on the subject matter of this complaint needs to be properly examined. Having considered the oral as well as written submissions including the complaint, written statements, 'Prima Facie Opinion' formed by the Director (Discipline), the Report and the Impugned Order of the Board of Discipline besides the arguments advanced before us by the parties of this Appeal, we are of the concerned view that it will be appropriate and in the Interest of Justice to set aside the Impugned order and further to remit back the case to the Board of Discipline of the Institute of Chartered Accountants of India with a direction to hear both the parties again and re-consider the matter particularly in the light of the settlement reached between the parties and the aforesaid Order dated 2nd March, 2017 passed by the Hon'ble High Court of Delhi quashing the aforementioned FIR, and to pass a fresh Order within six months from the date of receipt of this Order.

8. Since the Impugned Order is set aside, therefore, Interim Orders are also vacated.

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

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Dr. Navrang Saini
Member

Pronounced on dated: 6th January, 2018 at New Delhi

APPELLATE AUTHORITY

(Constituted Under The Chartered Accountants Act, 1949)

Appeal No. 1/ICSI/ 2011

In the matter of:

M/s Sanghi Polyesters Ltd.

Vs

Mr. MN Murthy CS

Dated: 10th August, 2011

ORDER

The Appellant preferred this Appeal. The Appeal was in accordance with the Rules. He was sent notice asking to comply with Rules and to deposit the draft amount of Rs. 5500/- as prescribed under the rules. The Appeal is not liable to the admitted, hence the same is dismissed.

(Justice S.N. Dhingra)
Chairperson

APPELLATE AUTHORITY

(Constituted Under The Chartered Accountants Act, 1949)

Appeal No. 5 /ICSI/ 2011

In the matter of:

Mr. Pravin Mirajakar and Mr. Maruti Kulkarni

Vs

M/s Bengal Speech & Hearing Pvt. Ltd.

Dated: 10th August, 2011

ORDER

The Appellant was sent notice drawing his attention to the fact that he has not deposited the necessary fee, Process Charges and has not filed six copies of the paper books in accordance with the rules of the Appellate Authority. The Appellant did not respond to the notice in writing. -However, telephonically he sought time to deposit fee and comply with the rules by 20th July, 2011. He has not complied with the rules necessary for filing appeal nor deposited the appeal fee. The appeal is not liable to be admitted and stands dismissed.

(Justice S. N. Dhingra)
Chairperson

APPELLATE AUTHORITY

(Constituted Under The Chartered Accountants Act, 1949)

Appeal No. 2/ICSI/ 2011

In the matter of:

Mr. Naresh Mohan Mittal

Vs

Institute of Company Secretary & Ors.

Dated: 10th August, 2011

ORDER

The Appellant was sent notice drawing his attention to the fact that he has not deposited the necessary fee, Process Charges and has not filed six copies of the paper books in accordance with the rules of the Appellate Authority. The Appellant did not respond to the notice in writing. However, telephonically he sought time to deposit fee and comply with the rules by 20th July, 2011. He has not complied with the rules necessary for filing appeal nor deposited the appeal fee. The appeal is not liable to be admitted and stands dismissed.

(Justice S. N. Dhingra)
Chairperson

APPELLATE AUTHORITY

(Constituted Under The Chartered Accountants Act, 1949)

Appeal No. 12 /ICSI/ 2011

In the matter of:

Dr. P.G. Kale

Dated: 10th August, 2011-08-10

ORDER

The Appellant has preferred Appeal in the form of a letter which is not accompanied by any document. The Appellant was sent notice asking him to comply with the rules. The Appellant has not responded to the notice nor filed appeal fee or process fee. The Appeal is not liable to be admitted and therefore, is dismissed.

(Justice S. N. Dhingra)
Chairperson

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Chartered Accountants Act 1949,
The Cost & Work Accountants Act 1958 & The Company Secretaries Act 1980)

APPEAL NO. 6/ICSI/2011

IN THE MATTER OF:

V. Subhash .....Appellant
Through : Appellant in person Versus
Director (Discipline)

The Institute of Company Secretaries of India .....Respondent
Through: Shri R.D. Makheeja, Advocate for ICSI

AND

APPEAL NO. 7/ICSI/2011

IN THE MATTER OF:

K. Ramasamy .....Appellant
Through : Appellant in person versus
Director (Discipline)

The Institute of Company Secretaries of India .....Respondent
Through: Shri R.D.Makheeja, Advocate for ICSI

CORAM:

HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE MR. ASHOK HALDIA, MEMBER
HON'BLE MR. G.GEHANI, MEMBER
HON'BLE MR. PAVAN KUMAR VIJAY, MEMBER

Date of hearing:
3rd September, 2011

Date of judgment:
12th November, 2011

Appeal No. 6 & 7/ICSI/2011

JUDGEMENT

1. By the above two appeals, the Appellants assailed an order of the Board of Discipline of the Institute of company Secretaries (here in after called 'the Institute') dated 14th December, 2010 whereby the Board of Discipline held both the Appellants guilty of misconduct and punished them with reprimand.

2. The Appellants have submitted that the impugned order of the Board of Discipline was perverse and beyond jurisdiction; the Board had no authority to re-adjudicate the issue

already considered by the Disciplinary Committee and the Board of Discipline also failed to consider that the only option available with the Council of the Institute or with the Director (Discipline) was to prefer an appeal against the order of the Disciplinary Committee. Apart from taking this ground about perversity of the order of the Board of Discipline, it has also been contended by the Appellant that the alleged professional misconduct had not taken place at all.

3. The Brief facts relevant for the purposes of deciding these two appeals are as under;

i) On 14th December, 2008, 122nd meeting of the Regional Council of Southern India of the Institute (hereinafter called SIRC) had taken place at Tirupathi. After the meeting, the Council of the Institute received an information that the Appellants viz. Mr. K.R. Ramasamy and Mr. V.S. Subhash had used unparliamentary language and exhibited violent gestures at the meeting and they had denigrated the dignity of the Council;

ii) On receipt of this information, the Council of the Institute of the Company Secretaries of India in its meeting held on 20th December, 2008 at New Delhi directed Chairperson of SIRC and Executive Officer (SIRO) to send a report of the proceedings of the meeting of SIRC. The report was received via e-mail on 20th December, 2008. The Council considered these two reports on 185th meeting held on 19th January, 2009 and was of the opinion that the conduct of the Appellants at Regional Council meeting was unbecoming of a member of the Institute and referred the matter to Director (Discipline) to make investigation to initiate disciplinary action against them under provisions of The Company Secretaries Act, 1980 (hereinafter the Act).

iii) The Director (Discipline) investigated the matter and submitted his report to the Disciplinary Committee of the Institute constituted under Section 21B of the Act. Disciplinary Committee, after considering the report of the Director (Discipline) passed an order dated 23rd July, 2009 observing that though the alleged misconduct of the appellants was obstructive and unbecoming of a member of the Institute, however the alleged conduct did not constitute misconduct as defined under Section 22 read with First and Second Schedule of the Act. The Disciplinary Committee however observed that the incident was unfortunate and should be viewed seriously. It was recommended that appropriate regulations should be framed by the Council in exercise of powers vested under Section 39 read with Clause 1 of sub-section 2 of Section 15 of the Act, so that such conduct of the members of the Institute at the meetings of the Councils/ Regional Councils can be dealt with. A copy of this order was sent to Council of the Institute. The Council of the Institute being unhappy with the order, instead of directing the Director (Discipline) to prefer an appeal against it as provided under Section 22E (proviso one) of the Act, before the Appellate Authority, directed the Director (Discipline) to further investigate the matter.

iv) The Director (Discipline) in obedience to the directions given to him by the Council, prepared a fresh report of the same incident and this time, instead of sending his report to the Disciplinary Committee, he sent his report for disciplinary action to the Board of

Discipline constituted under Section 21A of the Act;

v) The Board of Discipline passed the impugned order reprimanding the Appellants;

vi) The Appellants are aggrieved and have approached this Appellate Authority.

4. There are two disciplinary authorities constituted under the Act – one Board of Discipline and other Disciplinary Committee. The Board of Discipline is constituted under Section 21A of the Act and Disciplinary Committee is constituted under Section 21B of the Act. While the Board of Discipline has powers to decide disciplinary matters of the members of Institute and has power to take disciplinary action if it finds that the member was guilty of a professional misconduct as defined under First Schedule of the Act, whereas the Disciplinary Committee has wider power than the Board of Discipline and Disciplinary Committee can punish a member if he is found guilty of a professional misconduct or other misconduct as mentioned in Second Schedule or both the First and Second Schedule of the Act. Sections 21A and 21B of the Act read as under:

21A. Board of Discipline.

(1) The Council shall constitute a Board of Discipline consisting of—

(a) a person with experience in law and having knowledge of the disciplinary matters and the profession, to be its presiding officer;

(b) two members one of whom shall be a member of the Council elected by the Council and the other member shall be the person designated under clause (c) of sub-section (1) of section (16);

(c) the Director (Discipline) shall function as the Secretary of the Board.

(2) The Board of Discipline shall follow summary disposal procedure in dealing with all the cases before it.

(3) Where the Board of Discipline is of the opinion that a member is guilty of a professional or other misconduct mentioned in the First Schedule, it shall afford to the member an opportunity of being heard before making any order against him and may thereafter take any one or more of the following actions, namely:

(a) reprimand the member;

(b) remove the name of the member from the Register up to a period of three months;

(c) impose such fine as it may think fit which may extend to rupees one lakh.

(4) The Director (Discipline) shall submit before the Board of Discipline all information and complaints where he is of the opinion that there is no prima facie case and the Board of

Discipline may, if it agrees with the opinion of the Director (Discipline), close the matter or in case of disagreement, may advise the Director (Discipline) to further investigate the matter

21B. Disciplinary Committee.

(1) The Council shall constitute a Disciplinary Committee consisting of the President or the Vice-President of the Council as the Presiding Officer and two members to be elected from amongst the members of the Council and two members to be nominated by the Central Government from amongst the persons of eminence having experience in the field of law, economics, business, finance or accountancy:

Provided that the Council may constitute more Disciplinary Committees as and when it considers necessary.

(2) The Disciplinary Committee, while considering the cases placed before it, shall follow such procedure as may be specified.

(3) Where the Disciplinary Committee is of the opinion that a member is guilty of a professional or other misconduct mentioned in the Second Schedule or both the First Schedule and the Second Schedule, it shall afford to the member an opportunity of being heard before making any order against him and may thereafter take any one or more of the following actions, namely:—

(a) reprimand the member;

(b) remove the name of the member from the Register permanently or for such period, as it thinks fit;

(c) impose such fine as it may think fit, which may extend to rupees five lakhs.

(4) The allowances payable to the members nominated by the Central Government shall be such as may be specified

Section 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 authorised by the Council, within ninety days:

5. A perusal of Sections 21A and 21B of the Act would show that the Disciplinary Committee is a larger body consisting of President/Vice President of the Council as Presiding Officer,

two elected members out of Council members and two nominated members by the Central Government, whereas Board of Discipline consists of three members – one person with experience in law, and out of other two members, one member has to be elected by the Council and other member has to be person designated by the Council of the Institute. The powers of the Board of Discipline are to consider disciplinary matters only falling under First Schedule. If an alleged misconduct falls under Second Schedule, the Board of Discipline has no power to proceed with the matter. Similarly, if the misconduct falls under both First and Second Schedule, only the Disciplinary Committee shall have power to deal with the matter. If the matter falls under only Second Schedule, then also only the Disciplinary Committee shall have the power to deal with the matter. Thus, the powers and authority of the Disciplinary Committee is larger in scope than the powers and authority of Board of Discipline.

6. It is strange that after the matter was considered by Disciplinary Committee and Disciplinary Committee had passed an order giving opinion that the conduct of the Appellants did not fall either under First or Second Schedule, the Council directed Director (Discipline) to reinvestigate the matter. The Council had no such power to give directions to Director (Discipline) to reinvestigate the matter. Only the Board of Discipline or the Disciplinary Committee had the power to give directions to Director (Discipline) to reinvestigate or further reinvestigate the matter. This is clear from Section 21A (4) and is clear from Rule 9 of Chapter I prescribing Procedure for Investigation of Professional and Other Misconduct (Rules, 2007). This rule specifies that the Board of Discipline or the Disciplinary Committee, as the case may be, if disagrees with the prima facie opinion of the Director (Discipline), it shall either close the matter or advise the Director(Discipline) to further investigate the matter.

7. From the provisions of The Company Secretaries Act, 1980 and the Rules framed there under, it is clear that the Council of the Institute transgressed its jurisdiction and powers by directing the Director (Discipline) to further investigate /reinvestigate the matter and resubmit its report. Director (Discipline) also misconducted himself by re-investigating the matter without any authority either from the Board of Discipline or from the Disciplinary Committee. He went a step ahead and after alleged reinvestigation, he filed his complaint before the Board of Discipline instead of filing it before the Disciplinary Committee.

8. We, therefore, consider that Board of Discipline had no power to reconsider the matter already considered by the Disciplinary Committee in respect of the same incident and in respect of the same members.

9. There is another aspect which is quite important. The procedure of filing complaints and investigation of complaints in respect of disciplinary matters is given in detail under the Act and rules. Disciplinary proceedings can be initiated either on complaint or on information. Whenever information is received by the Director (Discipline), he has to write a letter to the informant asking him that he should instead file a complaint because that is more appropriate mode of initiating disciplinary action. It is provided under the rules that if the complaint is from any statutory institute, or from the Government, then the Government

or the statutory institute has to nominate and authorize a person to file such complaint (see Chapter II of Rules 2007 describing procedure of investigation of professional and other misconduct). Sub rule 2 provides that on receipt of information, when the source of information is Central Government, State Government or statutory authority, at first instance the Director of Discipline shall enquire whether the Institute would like to file a complaint and it is further provided that source of the information shall only be sent a copy of the final order. The Institute of Company Secretaries, no doubt, is a statutory body and The Institute of Company Secretaries cannot be above law and is governed by Company Secretaries Act and Rules framed there under. If the Institute had received information, it should have been sent to the Director (Discipline) in the form of a compliant. Moreover the Council of the Institute could not have taken upon itself the responsibility of punishing the members by itself violating the disciplinary proceeding procedure. In this case, this is what has been done. When the Disciplinary Committee gave a finding that the misconduct was not covered under existing rules and rules should be suitably modified , the Council, it seems felt offended and instead of filing an appeal, directed the Director (Discipline) to file a fresh report before the Board of Discipline, instead of the Disciplinary Committee and the Board of Discipline obliged the Council by passing an order reprimanding the Appellants, perhaps as desired by the Council. The order of the Board of Discipline is contrary to law, beyond jurisdiction, perverse and liable to be set aside and these appeals are to be allowed along with costs quantified at Rs.20,000 per appeal. The Institute shall pay Rs.10,000 to each of the Appellant and Rs.10,000 shall be deposited with the fund of Appellate Authority within 30 days from the pronouncement of the Order.

10. We however make it clear that acceptance of above appeals should not be construed as an approval of alleged misconduct of the appellants.

S.N. Dhingra
(Chairperson)

Rakesh Chandra
(Member)

Ashok Haldia
(Member)

G. Gehani
(Member)

Pavan Kumar Vijay
(Member)

APPELLATE AUTHORITY

(Constituted under The Company Secretaries Act, 1980)

Appeal No. 03/ICSI/2012

T.P. Sivadas .....Appellant
(through Shri Govind H Bharathan, Sr. Adv.
with Shri S. Chandrasekaran, FCS
& Shri Sanand Ramakrishnan,
Shri Rajeev Mishra, Advocates)

Vs.

The Institute of Company Secretaries .....Respondent
of India and Another
(through Dr. K.S. Bhati, Shri Sarat Chandra, Advocates)

CORAM:

HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE MR. ASHOK HALDIA, MEMBER
HON'BLE MR. G.GEHANI, MEMBER
HON'BLE MR. PAVAN KUMAR VIJAY, MEMBER

Date of hearing:
March 24, 2012.

Date of judgment:
October 15, 2012.

ORDER

(per S.N. Dhingra, Chairperson, Rakesh Chandra, Ashok Haldia, G. Gehnai, Members)

1. This appeal has been preferred by the appellant against the order dated 5th January, 2012 of the Disciplinary Committee of the Institute of Companies Secretaries of India whereby the Disciplinary Committee held the appellant guilty of professional misconduct under clause (7) of Part I of Second Schedule of the Companies Secretaries Act, 1980 on the ground that the appellant did not perform his duties of Company Secretary with due diligence. As a punishment, the name of the appellant was directed to be removed from the register of members for a period of 270 days.

2. The complaint was filed on 4.11.2010 against the appellant by the complainant Mr. V.P. Abdul Kareem who was a Director and shareholder of M/s. Glosoft Technologies (P) Ltd. In his complaint, the complainant had stated that he was holding 50% equity shares of Glosoft while other 50% was held by Mr. Mehroof Manalody. Mr. Mehroof was Managing Director and he was Chairman. He was a resident of Dubai. He had invested money in this company at the instance of Mr. Mehroof as Mr. Mehroof had problems with other shareholders sometimes in the year 2004. All other shareholders left the company and he and Mr. Mehroof were the only two shareholders and only two Directors of the Company.

In the year 2009, he came to India for actively involving himself with the affairs of the company. He found lot of irregularities and found that the Company Secretary was mixed up with Mr. Mehroof. Mr. Mehroof also felt uncomfortable on his coming to India and getting involved into the business of the company and exercising his rights. He alleged that Mr. Mehroof and the Appellant, who was the practicing Company Secretary of the Company, both colluded against him and fabricated various documents. The appellant did not perform his professional duty and committed professional misconduct. He gave following instances of the collusion between Mr. Mehroof and the appellant:-

"a) Form No. 23AC for the year ended on 31.3.2008 was shown as approved at a Board Meeting held on 25.3.2010. He had never attended the Board Meeting of the Company on 25.3.2010. Mr. T.P. Sivadas had certified this Form No. 23AC without making any enquiry as to its genuineness especially when the date of the AGM was shown as 30.9.2008 and the accounts were approved on 25.3.2010. Though the Notice of AGM was attached along with Form No. 23AC, no notice of the adjourned Annual General Meeting in which the accounts could have been approved by the shareholders, was attached along with Form No. 23AC. An ordinary prudent person would have enquired into the genuineness of any document before signing the same. A professional should have taken more care and caution before attesting any document. This was a clear case of negligence and dereliction of duty on the part of Mr. T.P. Sivadas.

b) Mr. Mehroof Manalody, with the connivance of Mr. T.P. Sivadas filed a Form No. 32 on 31.7.2010, purporting to show that Mrs. Vaheeda Kizhakke Peerathil (wife of Mr. Mehroof Manalody) had been appointed as an additional Director of the Company on 30.9.2009. On 30.9.2009 there were only two directors namely Mr. Mehroof Manalody (Managing Director) and the complainant (Chairman). The extract of the resolution shows that the meeting was held at 10.30 A.M. at Calicut on 30.9.2009. I was not aware of any such meeting, nor was such meeting held on such date. There were no Minutes of the meeting signed by me, as the Chairman of the Company. Surprisingly, this Form was also certified by Mr. T.P. Sivadas. This Form was filed on 31.7.2010, after a lapse of more than eight months from the date of the purported appointment. This is a clear case which shows that Mr. T.P. Sivadas had colluded with Mr. Mehroof Manalody, in an illegal act, knowing it to be illegal, false and fabricated.

c) On 30.9.2009, Mrs. Vaheeda K.P. was not holding a Director Identification Number (DIN). Rule 3 of the Companies (Director Identification Number) Rules, 2006 clearly specifies that every person indenting to be appointed as a Director of the Company shall hold a valid DIN at the time of appointment. Mrs. Vaheeda K.P. obtained a DIN only on 30.7.2010 and immediately thereafter a Form No. 32 was filed on 31.7.2010. This clearly shows that the document, pertaining to the appointment of Mrs. Vaheeda K.P. as a Director of the Company was fabricated and a professional like Mr. T.P. Sivadas did not feel any shame to be a party to such a most irregular, illegal, falsified and unauthorized activity, presumably for monetary gain.

d) *Again a Form No. 2 was filed showing Allotment of 50 equity shares to Mrs. Vaheeda K.P. w/o Mr. Mehroof Manalody on 30.9.2009. As stated earlier, there was no such meeting on 30.9.2009 and the document pertaining to the allotment of shares was fabricated with the connivance of Mr. T.P. Sivadas.*

e) *The Company has filed Form No. 20B in respect of the AGM held on 30.9.2009. The registered Office of the company is situated at Chennai. Therefore, the AGM should be and would have been held at Chennai on 30.9.2009. The Board Meeting for the appointment of Mrs. Vaheeda K.P., and for allotment of 50 shares to her was shown as held on 30.9.2009 at 10.30 A.M. at Calicut. While the Company has only two Directors and two Shareholders (who are the same persons), it is humanly impossible to have two meetings on the same day at two different locations being a distance of about 600 kilometers apart. Strangely, all the forms pertaining to these meetings were certified by Mr. T.P. Sivadas. It may be possible that in the lure of money, he might have lost his commonsense, prudence, ideology and professional commitment of being a member of a prestigious institute."*

3. On receipt of information, the Director (Discipline) of the Institute sent a letter to the appellant seeking his response by way of written statement. The appellant instead of giving clear cut response to the allegations made by the complainant made counter allegations that the complainant had a grudge against him and had filed the complaint because Mr. Mehroof had engaged him to represent him before Company Law Board. He also denied that he had indulged in any collusion with Mr. Mehroof. He asserted that he had performed his duties with due diligence. He took another plea that the proceedings against him should be stayed as the matter was sub judice since the complainant had filed a petition before Company Law Board and had also filed a criminal complaint against him.

4. The Director (Discipline) formed a prima facie opinion that appellant was guilty of professional misconduct and sent it to the Disciplinary Committee for taking appropriate action. The prima facie opinion formed by the Director (Discipline) was placed before the Disciplinary Committee and the Disciplinary Committee considered it a fit case for initiation of disciplinary proceedings. The appellant was sent a copy of the prima facie opinion and was asked to respond. The appellant sought extension of time for his response to the Disciplinary Committee which was allowed.

5. The Committee fixed the matter for hearing at Chennai on 20th August, 2011. The appellant did not appear on 20.8.2011 and sent his authorized representative Shri S. Eshwar. Shri Eshwar informed the committee that the appellant was not able to come as he had met with some accident and sought adjournment. Since the Disciplinary Committee had specially moved to Chennai to conduct the proceedings and complainant was also summoned to Chennai, the adjournment was granted subject to cost and this was agreed by the representative of the appellant.

6. The next hearing was fixed on 19th September, 2011 when both the appellant and complainant appeared and made their submissions. The matter was again heard on 3rd

October, 2011 and the hearing was concluded on that day. Thereafter, the appellant was heard on question of punishment on and a composite order was passed by the Committee on 5th January, 2012.

7. The complainant had made five specific allegations against the respondent. The respondent had not categorically denied some of the facts and had given vague answers.

8. It is not disputed that form no. 23AC for the financial year ending on 31st March, 2008 was shown approved at a board meeting held on 25th March, 2010 and this was certified by the appellant. The allegation of the complainant is that he never attended board meeting of 25th March, 2010 nor the accounts were approved at alleged board meeting. The appellant did not make inquiry about the genuineness of the proceedings of board meeting held on 25th March, 2010 or of the AGM proceedings shown to be held on 30th September, 2008. The documents in respect of the alleged board meeting and AGM were forged.

9. A perusal of the hand written minutes of AGM and Board meeting available on record would show that these meetings are shown to have taken place at Registered/Admin. Office. The Company was having its Registered Office at Chennai and Admn. Office 600 kms. away at Kozhikode in Kerala. The meetings could not have taken place at two places i.e. at Registered Office as well as Admn. Office. A meeting of the board or AGM could have taken place either at Chennai or at Kozhikode, Kerala. The date of one meeting is shown as 3.4.2000 instead of 2009. The resolution passed at the meeting makes no sense and reads as under :-

> *"Resolved that the audited balance sheet as on 31.3.2008 and P/L account approved be Board of Directors at their meeting held on 25.3.2010. The resolution was carried unanimously."*
>
> *The above resolution itself is incomplete and does not show what was carried, whether the accounts were approved or disapproved.*

10. The accounts for the financial year ending 31st March, 2008 were filed by the Appellant who was the practicing Company Secretary of the Company, with the authorities in form 23AC after March, 2010. As per Companies Act, section 220, a company is supposed to file balance sheet and profit & loss account as approved at AGM with the Registrar within 30 days from the date on which the balance sheet and Profit & Loss accounts were laid before the AGM and in case the AGM is not held for any reason, they are to be filed with the Registrar within 30 days from the latest date on or before which AGM should have been held. It is obvious that the accounts for the financial year 2007-08 were to be laid before the AGM within the year 2008 and if for any reason AGM was not held, the accounts were to be filed within 30 days of the latest date by which AGM could have been held. An Annual General Meeting is to be held within one year of the last AGM or at the most within 15 months of the last AGM as per provisions of the Companies Act. A Company Secretary is a professional, specially trained in Company Law and is engaged by company to advise it on compliance of the provisions of the Companies Act. It is not the case of the appellant that

he had advised filing of the balance sheet and Profit & Loss Account dated 31st March, 2008 within the period prescribed by law.

11. The second allegation is about filing of form no. 32 by the appellant on 31.7.2010 purporting to show Mrs. Vaheeda K.P., wife of Mr. Mehroof having been appointed as Additional Director of Company on 30.9.2009. It is an undisputed fact that Vaheeda K.P. had no DIN (Director Identification Number) on 30th September, 2009. She had obtained DIN on 30th July, 2010. The provisions of Companies Act (section 266A to 266G) make it abundantly clear that after the amendment of Companies Act in 2006, nobody could be appointed as a Director in a company without first obtaining DIN. The law requires that when a person is intended to be appointed as a Director, he should first apply for allotment of DIN and only after allotment of DIN, he can be appointed as a Director. It is hoped that the appellant, a practicing Company Secretary, was aware of Companies Act. However, he had shown appointment of Mrs. Vaheeda K.P. as Director from 30th September, 2009 when she was not holding DIN and she could not have been appointed as a Director. Any resolution passed by the Board contrary to the provisions of the law is non est. This would have been known to the appellant. The Appellant's act of filing form no. 32 in respect of Mrs. Vaheeda K.P.'s appointment as additional director w.e.f. 30th September, 2009 despite her not having obtained DIN on 30.9.2009 only shows connivance of the appellant with Mr. Mehroof in showing appointment of his wife as Additional Director from a back date. The minutes of the meeting of 30th September, 2009 of the Board of Directors (photo copies of which are placed on record) again are hand written. The meeting is stated to have been held at Registered/Admn. Office i.e. at two places. In this meeting, it is also allegedly resolved that Mrs. Vaheeda K.P. be allotted 50 number of equity shares and be appointed as Additional Director. AGM of 30th September, 2007, minutes of which are on record was also held at Regd./Admn. Office i.e. at two places.

12. The appellant had filed form no. 20B in respect of the AGM held at Chennai on 30th September, 2009. The Board Meeting for appointment of Mrs. Vaheeda K.P. is alleged to have been held at Calicut around 600 kms. away from Chennai. This fact that the board meeting was allegedly held at Calicut is not denied. If the board meeting was held at Calicut and AGM was held at Chennai on same day one after another, it was humanly impossible to hold two meetings at two different places 600 kms. away. If both meetings were held at Calicut, there was no reason to record that the AGM and Board meeting were held at the Regd. Office. In the minutes itself, it would have been recorded that the meetings were held at Calicut office. The minutes also do not disclose identity of Mrs. Vaheeda K.P. as wife of Mr. Mehroof Manalody but record her parents name and Kerala address.

13. In order to justify that the AGM could be held at Calicut also, the appellant has relied upon a Board Resolution of the Company passed on 1st June, 2004 in an Extra Ordinary General Meeting of Glosoft. This Board Resolution states that the EGM had taken place at the Admin. Office at Calicut and the -EGM authorized the M.D. to convene an AGM at any place within Kerala as the members were of the opinion that holding of meeting outside Kerala would be inconvenient. The difference between the minutes dated 1.6.2004 and the other minutes of AGM and Board Meeting produced on record is clear. In the minutes dated 1.6.2004,

the place of meeting is categorically stated whereas in all other minutes placed on record of 30th September, 2009, 3rd April, 2000 etc., the place of meeting has been deliberately recorded as Regd./Admn. Office. Whether the meeting was held in Chennai or in Calicut is not mentioned and this seems to have been done deliberately in order to use the minutes as per convenience. It is thus apparent that the allegations made by the complaint of the connivance of the appellant with Mr. Mehroof regarding back dated allotment of shares to Mrs. Vaheeda. K.P. as well as appointing her Additional Director without DIN and filing of form no. 32 with the Registrar of Companies to that effect by the appellant were fortified by documentary evidence.

14. The appellant's contention is that the Balance Sheet and Profit & Loss Accounts dated 31.3.2009 were signed by the Managing Director and the Complainant and Finance Manager and the minutes of the board meeting held on 25.3.2010 were duly signed by the Chairman of the Company. Filing of balance sheet with the ROC was a requirement under Section 220 of the Companies Act and he was not supposed to make inquiries whether the documents placed before him were correct or not and, therefore, he only performed his duty of filing the returns as required under law with Registrar of Companies. Since he was not supposed to attend either the board meeting or the AGM, he was not supposed to see whether the resolutions per se were correct or not and whether the accounts were properly adopted or not. He was only to see if the balance sheet was signed and it was laid down before the AGM.

15. On the other hand, it is submitted by the counsel for the Institute that the Appellant, a practicing Company Secretary was engaged as a Company Secretary to the company right from 2004 onwards. It was his duty to advise the Company on all aspects of Company Law and it was also obligatory on him to ensure that what he was filing was in accordance with the law and the records of the company. He could not have kept his eyes closed about the genuineness of the documents being relied upon by him and verification of the same from the record. The Institutions of Chartered Accountants, Company Secretaries and Cost Accountants are being run to train and produce professionals equipped with knowledge. If the professional has only to act as a post office or as a clerk of filing the documents and appending signatures, then there is no necessity of these institutes. A Company Secretary is specially trained to ensure that the company complies with all the requirements of the Companies Act. The appellant herein was supposed to ensure that the Company was acting as per the provisions of the Companies Act. He, however, seems to have connived in violating the provisions of the Companies Act. This was reflected from the forged minutes of the AGM and Board Meeting and violations in respect of filing the annual accounts and form no. 32 for Mrs. Vaheeda K.P.

16. The contention of the appellant is that the minutes of the AGM and Board of Directors' meeting were to be considered as authentic evidence of proceedings recorded therein as per section 194 of the Companies Act unless the contrary was proved. He as a practicing Company Secretary of the Company was not supposed to question the minutes and could only act according to minutes of the meeting as provided to him.

17. There is no doubt that the minutes of the meeting are authentic record of the conduct of proceedings, however, no meeting can take place simultaneously at two places, i.e. at Chennai, the Registered Office of the Company and at Calicut, the Admn. Office of the Company. In all hand written minutes placed on record, every AGM and Board meeting has taken place at two places i.e. at Chennai and at Calicut. Obviously, there was sufficient intrinsic evidence to show that the minutes were doubtful. However, a benefit of doubt can be given to the appellant regarding the place of holding the meeting as it is quite possible that he might not have minutely gone into this aspect. But his submission regarding appointment of Mrs. Vaheeda K.P. and filing of form 32 that a person can be appointed as a Director by the Board of Directors and the Company Secretary has nothing to do with appointment of the Additional Director is baseless. Filing of form 32 with ROC is now not a mere requirement of reporting a fact. The responsibility of a Company Secretary while filing form 32 is also to verify that the person appointed as a Director of the Company on the date mentioned in that form had DIN. Even if the Chairman had signed the minutes of the meeting, he could not have ignored the fact that no DIN was applied on behalf of Mrs. Vaheeda nor DIN was obtained before her appointment.

18. Since the appellant was a practicing Company Secretary of the Company, the Company had to ask the appellant to obtain DIN of Mrs. Vaheeda K.P. so that the company could appoint Mrs. Vaheeda K.P. as Additional Director. Even if the company had not asked the appellant about DIN, it was the responsibility of the appellant to inform, the company that Mrs. Vaheeda K.P. could not be appointed as a Director unless her DIN was obtained and that appointment of a Director without obtaining DIN attracted penalty of Rs.5,000/- and it being a continuing offence, a fine of Rs.500/- was leviable for every day of default. In fact, section 264 of the Companies Act mandates that every person who was proposed to be a candidate for office of Director has to give his consent in writing and this consent is to be filed with ROC. It is apparent that there was no consent filed in this case, no DIN was obtained before appointing Mrs. Vaheeda K.P. as Director. Thus the allegation of complainant that she was appointed with back date in connivance with the appellant stands fortified and substantiated.

19. Another plea taken by the appellant is that charge of professional misconduct is in the nature of quasi criminal charge and must be proved beyond reasonable doubt and that the Disciplinary Committee ignored this crucial aspect and the charge against the appeal was not proved beyond reasonable doubt, The concept of beyond reasonable doubt has been debated for quite long by the judges in their academic discussions as well as in judgments. 'Beyond reasonable doubt' is not something which can be measured on a scale and someone can say that the proof of a particular fact was not as per the scale. The adjudicating authority, after considering the evidence before it, has to see whether the evidence was convincing enough to consider the existence of a fact. If the evidence was convincing enough of the existence of a fact, the fact is considered proved beyond reasonable doubt. In this case, the Disciplinary Committee rightly came to a conclusion about the existence of facts on the basis of evidence before it.

20. In view of the above discussion, we find that the charge of connivance of the appellant in filing form 32 showing the appointment of Mrs. Vaheeda K.P. as Additional Director from back date of 30.9.2009 while she had obtained DIN on 30.7.2010 stands proved. The conduct of the appellant was unprofessional, contrary to law and gave an impression of his being in league with one of the directors. This certainly amounted to professional misconduct on the part of the appellant, though on other counts a benefit of doubt can be given to the appellant.

21. The appellant has also argued that the quantum of punishment imposed on him was harsh. However, we consider that looking at the manner in which the appellant connived with one of the Directors out of the two directors and in spite of being the practicing Company Secretary of the Company, he became party to the interest of one of the Directors. It is not a case where punishment awarded was harsh. It is the duty of the Institute of Company Secretaries to maintain high professional and ethical standards. Looking at the the professional standards and the way in which some some professionals are selling their conscience, we consider that removal of the name of the appellant for 270 days was not a harsh punishment. Per Pavan Kumar Vijay, Member By the above appeal, the Appellant challenges the order of the Disciplinary Committee of the Institute of Company Secretaries (hereinafter called 'the Institute'), dated 05.01.2012, whereby the Disciplinary Committee held the Appellant guilty of misconduct and directed for the removal of name of the Appellant from the Register of Members of the Institute, for a period of 270 (two hundred & seventy) days.

22. The Appellant has contended that while passing the impugned order, the Disciplinary Committee has not considered the averments of the Applicant and has not taken into account the preliminary objections raised or the oral evidence and documents produced and without considering the submissions, imposed very harsh punishment on the Appellant. The Appellant has further contended that no professional misconduct has occurred and that the passing of the impugned order is erroneous.

23. The brief facts relevant for the purposes of deciding the Appeal are as under:

    i) The Appellant is a practicing Company Secretary with FCS 4791 (CP No. 6449) engaged by M/s. Glosoft Technologies Pvt. Ltd. (hereinafter the Company), a Company having its registered office at Erulappan Street, Chennai.

    ii) The Complaint dated 04.11.2010 was filed against the Appellant by Mr. V.P. Abdul Kareem (hereinafter Complainant), one of the Directors of the Company for alleged negligence in professional duties, false certification of forms/returns, fraudulent and unethical practices. That the allegations so made were on basis of following:

        a. Filing of Form No. 23AC for the year ended 31.03.2008

        b. Filing of Form No. 32 on 31.07.2010, showing appointment of Mrs. Vaheeda Kizhakke Peerathil as Additional Director w.e.f. 30.09.2009.

c. Illegal appointment of Mrs. Vaheeda Kizhakke Peerathil as Additional Director without holding Director Identification Number.

d. Filing of fabricated Form No. 2 showing allotment of 50 Equity Shares to Mr. Mrs. Vaheeda Kizhakke Peerathil on 30.09.2009.

e. Filing of Form No. 20B in respect of the AGM held on 30.09.2009.

iii) As against the allegation of the Complainant, the Appellant had filed a detailed written statement dated 28.08.2011 denying the charges and submitting annexure in support of its contentions. In his written statement, the Appellant had challenged the competency of the Complainant to file the Complaint and has also raised issues with respect to ongoing disputes between the Complainant and the other director of the Company namely Mr. Mehroof Manalody and also averred of various suits pending between the parties at different forums and contending that the Complainant in his attempt to take charge of the Company has been filing false complaints against other directors as well as the Appellant.

iv) Subsequent to the filing of the written statement by the Appellant, the Complainant filed a rejoinder dated 07.01.2011.

v) That on perusal of the complaint, written statement and other documents on records, the Director of Discipline, formed a prima facie opinion that the Appellant was guilty of professional misconduct.

vi) The proceedings were initiated by the Disciplinary Committee and which after listening to both the parties and considering the documents on record passed the impugned order dated 05.01.2012 holding the Appellant guilty of professional misconduct.

vii) The Appellant aggrieved by the order has approached this Appellate Authority.

24. Without going in details as to the maintainability of the Complaint and the legality of the order of the Disciplinary Committee, I restrict my observation only to the issues pertaining to Professional Misconduct and the role of Appellant in this regard.

25. Firstly, with respect to the allegation of wrong filing of Form 23AC for the year ended 31.03.2008, a copy of the Company's Balance Sheet and Profit and Loss Account for the year ended 31.03.2008 is perused and it is observed that the documents are duly signed by the Managing Director and the Complainant and the Finance Manager of the Company. The minutes of the board meeting held on 25.03.2010, duly signed by the Chairman of the Company, are also on record. Filing of approved balance sheet and profit and loss account with the Registrar is a statutory requirement under Section 220 of the Companies Act, 1956. As per the relevant provisions of Section 220, read with the provisions of Section 215 of the. Act, the balance sheet and profit & loss account must be signed by two directors including Managing Director (if any), From the documents on record, it is evident, that the Appellant herein has relied upon the duly signed balance sheet by two Directors and the

Finance Manager and the extract of the signed minutes of the Company and has verified and uploaded the Form 23AC. More importantly, from the documents placed on record, it is observed that the Complainant himself has signed the balance sheet in the capacity of Director as on 25.03.2010 and collectively the signed balance sheet and the signed minutes corroborate the conduct of the Board Meeting on 25.03.2010 and approval of balance sheet by the board on the said date. As a professional, the Appellant had relied on duly signed documents including the signed document by the Complainant himself and there has been nothing on record to prove the contrary and thereby the Appellant has performed his duty in the normal course.

26. Further, before taking cognizance of any other issues, it is pertinent to take into relevance the observation of the Hon'ble Supreme Court in the matter of M.S. Madhusoodhanan and another Vs. Kerala Kaumudi (P) Ltd. and others (2003) 4 Comp Q 185 (SC), wherein the Hon'ble Court was pleased to observe that "Furthermore, under section 194 of the Companies Act, 1956, minutes of meeting kept in accordance with the provisions of section 193 shall be evidence of proceedings recorded therein and, unless the contrary is proved, it shall be presumed under section 195 that the meeting of Board of Directors was duly called and held that all proceedings thereat to have duly taken place."

27. Thus, from the governing provisions of the Companies Act, 1956, as well as the rulings of the Hon'ble Supreme Court of India, it is well settled that minutes of a board meeting duly kept and signed are conclusive evidence of the meeting so held and business duly transacted. In light of this, where the other allegations against the Appellant as to filing of Form 32 for appointment of Mrs. Vaheeda Kizhakke Peerathil as additional director in a board meeting held on 30.09.2009 as well as filing of Form 2 for allotment of 50 Equity Shares of the Company to Mrs. Vaheeda Kizhakke Peerathil in the same board meeting are concerned, the minutes of the Board Meeting so held on 30.09.2009 signed by the Chairman are on record. The minutes show Mr. Mehroof Manalody, Mrs. Vaheeda Kizhakke Peerathil as well as the Complainant in attendance of the meeting. The minutes also record the appointment of Mrs. Peerathil as additional director and allotment of 50 equity shares of the Company to her. The Appellant, herein, has relied upon the duly signed Minutes of the Board Meeting which are conclusive evidence of the transactions undertaken.

28. With respect to the AGM held on 30.09.2009 as well filing of Form No. 20B of Annual Return of the Company, the Minutes of the AGM held on 30.09.2009 are also on record. It is further submitted by the Appellant that the Annual Return of the Company is duly signed by its directors including the Complainant himself and the Annual Return confirms the appointment of Mrs. Vaheeda Kizhakke Peerathil as additional director, allotment of shares to her, as well as showing the Complainant as director and not chairman. Considering the duly signed minutes on record, it is apparent that the Appellant had relied upon the minutes, duly signed by the Chairman and has filed form No. 20B relying on the available documents and had been prudent in performing his duties.

29. Also, with respect to the Board Meeting as well as the AGM, both being held on the same day, i.e., 30.09.2009 at Calicut and the AGM being held at a place other than the Registered

Office of the Company, the Appellant has produced the minutes of the Extraordinary General Meeting held on 01.06.2004 resolving that the AGM of the Company could be held anywhere in Kerala. Further, it is observed that there is no evidence on record to show that the Complainant was the Chairman of the Company and should have signed the minutes to validate them. The form DIN 2, dated 26.10.2009, duly signed by the Complainant himself is placed on record by the Appellant which shows the appointment of Complainant as Non-Executive Director and not as Chairman. Also the Balance Sheet for the period ended 31.03.2008 is signed by the Complainant as on 25.03.2010 in the capacity of the Director only and not as Chairman. Thus, in absence of any proof evidencing the appointment of the Complainant as Chairman and given the availability of duly signed minutes of the Board Meeting as well as AGM as on 30.09.2009, the conduct of the meetings and business executed therein cannot be invalidated.

30. Lastly, so as to the appointment of Mrs. Vaheeda Kizhakke Peerathil as director without having DIN, it is observed that section 253 of the Companies Act 1956, prohibits a Company to appoint or re-appoint any individual as Director of the Company unless he has been allotted a DIN. The provision of the section is reproduced as below:

253. Only individuals to be directors.—

No body corporate, association or firm shall be appointed director of a [***1 company, and only an individual shall be so appointed:

Provided that no company shall appoint or re-appoint any individual as director of the company unless he has been allotted a Director Identification Number under section 266B.

31. To determine whether a person is eligible to be appointed as Director or not is the responsibility of the Company and the Board of Directors of the Company. Filing of Form 32 with the Registrar of Companies is the post facto reporting requirement and the responsibility of a professional while signing or filing Form 32 is to verify that the person is actually appointed as a Director of the Company on the date as being mentioned in the Form. The evidence of appointment of a person as an Additional Director under section 260 of the Companies Act, 1956 could be the proceedings of the Board Meeting in which the matter is considered. The minutes of the meeting duly signed by the Chairman are the conclusive evidence of the proceedings in the meeting. Here, in the present case, the Appellant had relied upon the duly signed Minutes of the Board Meeting for the appointment of Mrs. Peerathil as well as the Annual Return which was signed by both the parties including the Complainant. We have also noted that there is nothing in the impugned order to suggest any mala fide intent or connivance or any ulterior motive of the Appellant.. In the absence of any such observation in the impugned order, it is observed that a person can be expected to observe only as much care as a person of reasonable prudence would take under the same or similar circumstances. Herein, the Appellant could not be expected to be investigative before signing and filing the form 32, though he could have been more careful by checking whether Mrs. Peerathil held a DIN at the time of appointment or not as the form was being filed after undue delay.

32. Furthermore, I am of the view that the impugned order, dated 05.01.2012, awarding punishment of removal of name of the Appellant from the Register of Institute of Company Secretaries for 270 days is a non speaking order and has not placed any argument or material on record to establish the misconduct and to justify the penalty imposed. The order has merely dealt with the factual details of submissions made and proceedings held and no clinching evidence or arguments have been placed on record to sustain the impugned order so passed. The Disciplinary Committee has further not considered that a professional cannot be expected to act as an investigator while rendering his professional services.

33. It is also observed by that the impugned order was directed to be effective within a period of 7 days from passing of the order, which again is unreasonable as the same does not accord the party to adopt any legal remedy by way of appeal, especially where there is no immediate requirement of any preventive steps. The Disciplinary Committee is hereby directed to accord reasonable time in effectuating any order in future so as to give adequate time to the parties to prefer an appeal if required.

34. In regard to the impugned order, considering the documents and arguments on record, the order is too harsh and liable to be set aside. Although with respect to filing of form 32, undue delay without checking the date of obtaining DIN no. is an oversight and the Appellant could have been more vigilant in his act. Thus, I am of the view that a warning may be issued to the Appellant to be more cautious in future.

    Accordingly the impugned order dated 05.01.2012 is set aside.

Conclusion

In view of the majority order, the appeal stands dismissed.

Justice S.N. Dhingra (Retd.)
Chairperson

Rakesh Chandra
Member

Ashok Haldia
Member

APPELLATE AUTHORITY

(Constituted under The Company Secretaries Act, 1980)

Appeal No. 04/ICSI/2012

IN THE MATTER OF

Sunil Kumar Garg, (M No.82378) ....Appellant
E-133, Greater Kailash part-I,
New Delhi-110048
(through Ms. Smita Dikshit, Advocate)

Vs.

The Institute of Company Secretaries of India and Another ....Respondent
(through: Dr. K.S. Bhati, Shri Sarat Chandra, Advocates for R-1
Shri Anil Kumar Bhatnagar, R-2 in person)

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE MR. PAVAN KUMAR VIJAY, MEMBER

Date of hearing:
2nd June, 2012

Date of judgment:
15th October, 2012

ORDER

1. The appellant by way of this appeal, has assailed order of Disciplinary Committee dated 5.1.2012 (passed by majority) whereby the appellant was held guilty of professional misconduct under clause (6) & (7) of Part – I of Second Schedule to the Companies Secretaries Act, 1980 holding that the appellant failed to report a material fact known to him that he was concerned in professional capacity and also did not exercise due diligence in discharge of his professional duties. He was awarded punishment of removal of his name from the Register of Members for a period of 30 days. Shri P.K. Mittal, Member gave dissenting opinion.

2. The complaint against the appellant was made by one Shri A.K. Bhatnagar who alleged that the appellant had prepared his fake digital signature and filed various fake forms with Registrar of companies, Kanpur in respect of M/s. UP Industrial Consultants Ltd. (UPICL), Kanpur in collusion with Mr. Vikram Hans, Chairman & Managing Director. The Complainant submitted that he resigned from the Board on 7th February, 2009 in the Board Meeting held on 25th February, 2009. There was no reason for him to sign Form No. 32 on 3rd March, 2009 in respect of appointment of Shri Abhay Kumar Bajpayee who was allegedly appointed as Director on 6th November, 2007. He submitted that he had resigned from Directorship was in the knowledge of the appellant who was the practicing Company secretary of UPICL and still his digital signatures were forged by the appellant and were illegally used by the appellant.

3. It was submitted by complainant that appellant signed Form No. 32 on 3rd March 2009 showing him as Managing Director while he was not even a Director on 3rd March, 2009 to the Knowledge of appellant. It is also submitted that Mr. S. Bobde was appointed vide resolution No.11 of 6th November, 2007 and his form 32 was filed immediately thereafter but in case of Mr. Abhay Kumar Bajpayee, no Board resolution number appointing him as Director has been mentioned. This showed fraudulent behavior of the appellant.

4. It is a case of the appellant that he was also managing a certified center for procuring digital signatures. An employee of UPICL came to his office and presenting an application for obtaining digital signature of the complainant and in a routine manner this application was sent through e-mail to digital signature issuing authority and the digital signature issuing authority after verifying the details, issued digital signature. He did not know any of the applicants personally and never verified or recommended any application for issuance of digital signature. He had no role to play in issuance of digital signature. He also took the stand that complaint was filed against him malafidely by the complainant since he, during his tenure with UPICL had committed several financial irregularities and embezzlement and there were number of complaints pending against him. He was forced to resign as Managing Director in February, 2009. Later one Mr. Vikram Hans was appointed as Managing Director. There were 5-6 Directors on the Board of UPICL and the complainant being the Managing Director at the relevant time did not file Form No. 32 in respect of any of those Directors nor any form was filed in respect of appointment of Mr. Vikram Hans. IDBI Bank had advised the company to complete all legal formalities, including filling of Form -32. Therefore using digital signatures of complainant, a Form- 32 in respect of appointment of Shri A.K. Bajpayee appointed in the Board meeting held on 6th November, 2007 (when the complainant was MD) was filed with the ROC. He stated that there was no dispute about the appointment of Mr. Abhay Kumar Bajpayee as a Director of UPICL but the Dispute was only in respect of filing of Form – 32 filed under TAC the by complainant. The appellant had done wrong by filing the form No. 32 using TAC of the complainant.

5. The Disciplinary committee after considering the entire facts came to conclusion that the complainant had already obtained digital signature valid for a period of two years. His name was 'Anil Kumar Bhatnagar'. The appellant obtained his duplicate digital signature by misrepresenting his name as 'Anil Kr. Bhatnagar'.

6. A perusal of the record would show that complainant had obtained his digital signature from Tata Consultancy Services through Innovative Law Solutions Pvt. Ltd. on 6th September, 2007 valid for a period of two years ending on 5th September, 2009. These signatures could be verified by anyone by downloading from MCA site. This would have been in the knowledge of appellant as well since he was practicing Company Secretary of UPICL since 2009. The appellant's contention that someone from the company came to his consultancy firm and applied for digital signature of the complainant and same was forwarded appears to be patently false. A person already having digital signature would not apply for new digital signature and there was no reason for complainant to apply for new digital signature through appellant, as considered him inconvenient.

7. It is quite possible that the complainant had not done his duty while working as Managing Director and had not forwarded Form 32 of different Directors to ROC office. However, two wrongs do not make one right. The wrong of complainant could not have been set right by the appellant by doing another wrong of getting his forged digital signature procured at the instance of new Chairman & Managing Director. The complainant had already resigned from the company and as per the contention of appellant, he was forced to resign from the post because of various irregularities allegedly committed by him. The appellant was practicing Company Secretary of the UPICL. He being Company Secretary was very well aware of the fact of resignation of complainant and his status in the Company. There was no reason for the applicant to forward Form No. 32 allegedly digitally signed by the complainant and himself, after resignation of complainant. If the appellant was having a centre for forwarding applications for digital signatures that does not mean that he was at liberty to forward application for digital signature of any person without knowledge of that person and obtain the same on his own e-mail address. In this case, the appellant forwarded a forged application requesting digital signature of complainant with slight change in name of the complainant. The complainant used to write word 'Kumar' in his name and the appellant change 'Kumar' to 'Kr' and forwarded the application. It is apparent from the conduct of the appellant that he got mixed up with Mr. Vikram Hans and obtained forged digital signature of complainant and thereafter used the same to forward Form-32. This conduct of the appellant was a disgrace to the profession of Company Secretaries. The appellant was earlier also held guilty of professional misconduct by the Board of Discipline vide order dated 19.4.2010 and was awarded punishment of 'Reprimand'.

8. We find no force in the appeal. The appeal is hereby dismissed.

Justice S.N. Dhingra(Retd.)
Chairperson

Rakesh Chandra
Member

Pawan Kumar Vijay
Member

New Delhi
Dated this 15th day of October, 2012

APPELLATE AUTHORITY

(Constituted under the Company Secretaries Act, 1980)

APPEAL NO. 13/ICSI/2012

IN THE MATTER OF

R. R. Mallar, (M No. 008836)
3, Silver Cascade, 1st Floor,
110AA, Senapati Bapat Marg, Dadar (W),
Mumbai – 40002. ……Appellant
(through: None)

Versus

1. Bipin S. Acharya,
B3 Ripple Apartment,
Near Hindu Mahila Milan Mandir,
Narayan Nagar, Paldi,
Ahmedabad 380007.

2. Director (Discipline),
The Institute of Company Secretaries of India,
ICSI House, 22 Institutional Area,
Lodhi Road, New Delhi – 110003. …….Respondents
(through: Sh. R. D. Makheeja, Advocate)

JUDGEMENT

1 By this appeal, the appellant has assailed Order dated 25th August, 2012 of the Disciplinary Committee of the Institute of Company Secretaries whereby the name of the appellant was removed from the Register of Members of the Institute for a period of 180 days.

2. An information was sent by Respondent No. 1 (Shri Bipin S. Acharya) against the appellant that the appellant while holding a Certificate of Practice No. 3439 was also practicing as an Advocate at Bombay High Court. He was one of the country's leading and most experienced consulting lawyers. It was stated by the informant that as per provisions of Companies Secretaries Act and Rules framed thereunder, a Company Secretary holding the Certificate of Practice cannot engage himself in any other business or occupation/profession. He has also submitted that a member of Institute holding a Certificate of Practice is required to get his certificate renewed every year and he has to file an application in Form D. In the application, he is required to categorically state that he is not enrolled as a member of any Bar Council. It was submitted that since appellant was occupied in the profession as an Advocate in contravention of provisions under Rule 168 of the Company Secretaries Regulation 1982, this amounted to professional misconduct on the part of the appellant and it should be enquired into. Along with the complaint, the complaint forwarded photocopies of the website of the appellant created under the name 'Mallar Law Consulting (Advocates,

Consulting Lawyers, Trade Marks, Attorneys and Company Secretaries)'. In this web page, the appellant described himself a Member of International Bar Association, Trademark, Patents, Design & Copyright Attorney and an Advocate at Bombay High Court, apart from being a Fellow Member of Institute of Company Secretaries.

3. A copy of the complaint/information was sent to the appellant for response. The appellant in his written statement dated 20.06.2011 did not deny the fact that he was enrolled as an Advocate. He stated that he had been teaching regularly for many years in many institutes and was also regular Guest Faculty. He did not have significant practice as a Company Secretary and due to his vast experience in corporate world, the corporate world knew him more as a corporate lawyer than as a Company Secretary. Practicing only as a Company Secretary may hamper his name & fame, so he was seriously considering to surrender his Certificate of Practice (COP) instead of wasting his time and time of the Institute in defending against motivated charges of the complainant. After receiving this reply, a prima facie opinion was formed by the Director (Discipline) holding him guilty of professional misconduct and matter was sent to Disciplinary Committee. The Disciplinary Committee sent a notice to the appellant for filing written submissions as well as for personal appearance vide its letter dated 17.01.2012 and in the letter he reiterated the stand taken by him before the Director (Discipline) and told Disciplinary Committee that he has decided to surrender his COP w.e.f June, 2012. Bipin S. Acharya, who had made complaint against the appellant, in the meantime, had died on 28th January, 2012. The Disciplinary Committee after considering Regulation 168 (1) of the Companies Secretaries Act which barred a Company Secretary from the profession or the profession of an Advocate gave a report dated 9th July, 2012 arriving at a conclusion that the appellant was guilty of professional misconduct within the meaning of clause (1) of part II of the Second Schedule of the Institute and was also in occupation as a lawyer/advocate. The Disciplinary Committee decided to offer an opportunity to the appellant before passing an order under section 21(B) against the appellant. The appellant did not appear before the Committee even at the time of this hearing. The Committee on consideration of the matter in its meeting held on 16th August, 2012 decided to remove the name of the appellant from Register of Members for a period of 180 days.

4. In the present appeal, the appellant has assailed the order of the Committee on the ground that the Disciplinary Committee failed to consider the written submissions filed by him and mechanically followed the prima facie opinion of the Director (Discipline). The Disciplinary Committee did not decide the preliminary objections raised by the appellant in respect of maintainability of the application filed by the complainant, as the complaint/information was not accompanied with prescribed fee of Rs.2500/- and when the Institute had written to the complainant to file complaint with prescribed fee, the complainant had refused to pay the prescribed fee. It is also submitted that Disciplinary Committee failed to appreciate that the prima facie opinion formed by the Director (Discipline) was invalid and the case of the appellant did not fall within the ambit of Regulation 168(1) of the Companies Secretaries Act, since there was no evidence led by complainant to show that the appellant was really engaged as a lawyer or had appeared as a lawyer in the courts. He submitted that any

Company Secretary/practicing Company Secretary is also a consulting lawyer or a corporate lawyer and so long as he does not appear as an Advocate in the courts, no action can be taken against him under Regulation 168(1).

5. The appellant did not appear to substantiate the contentions raised by him before this Authority. He had not appeared either before Director (Discipline) or Disciplinary Committee. We have considered the grounds raised by the appellant. The Appellate Authority also got it verified independently whether the appellant was registered as an Advocate with Bar Council of Bombay High Court or not and it transpired that the appellant was registered as an Advocate. The appellant has his registration with Bar Council of Maharashtra. This fact, is not even denied by the appellant. In a nutshell, the contention of appellant is that though he was registered as an Advocate, he was not appearing in the courts and he was only a consulting lawyer and is therefore not covered under regulation 168(1).

6. Any person who intends to practice in courts has to get himself registered as an Advocate. A person can work as a legal consultant even without being registered as an Advocate. Registration as a member of Bar Council is required only when somebody wants to practice as an Advocate and appear in courts. Without being registered as a member of the Bar Council, one cannot appear before the courts in India but without being registered as a member of the Bar Council, one can give legal advice to his clients, business world, commercial world or to whomsoever he intends to give. There is no bar on giving legal advice on a professor imparting legal knowledge or teaching. The plea taken by the appellant that he was registered only for the namesake so that he may give legal advice is, therefore, a baseless plea. Whether a person who is registered as an Advocate is appearing in the courts or not is within his special knowledge, neither the Bar Council nor the Institute of Companies Secretaries would be knowing what would be the number of appearances made by such person, the onus to prove lies on him. It was for the appellant to come and depose before the Disciplinary Committee to the fact that he was registered as an Advocate only for the namesake so that he was able to write himself as a consulting lawyer and give consultation and be invited as an expert lawyer for lecture. However, he did not bother to appear before the Disciplinary Authority to give this evidence. Even otherwise a person who is registered as a Company Secretary is not authorized to get himself registered as an Advocate without general or specific permission of the Council of the Institute by a resolution to that effect. Regulation 168 reads as under:-

"A Company Secretary in Practice shall not engage in any business or occupation other than practicing as Company Secretary without the general or specific permission of the Council by a resolution to that effect. However, a Company Secretary in Practice is not barred to act as a Secretary, trustee, executor, administrator, arbitrator, receiver, valuer, internal auditor, management auditor, management consultant or as a representative on financial matters including taxation and may take up an appointment that may be made by the Central or any Statement Government, Court of Law, Labour Tribunals, or any other statutory authority without prejudice to the discretion of the Council to prohibit such appointment. The Council has

decided w.e.f. 1st June, 1991 not to permit a member in practice in provide these services as an employee of an organization."

7. There is no general resolution passed by the Council to permit a person to get himself registered as an Advocate for non-practicing purpose. In the application for issuance of renewal of Certificate of Practice, a Company Secretary has to state as under:-

"I state that I am/shall be engaged in the profession of Company Secretary only on whole-time basis and not in any other profession, business, occupation or employment. I am not enrolled as an Advocate on the rolls of any Bar Council do not hold certificate of practice from any professional body including ICAI and the ICWAI."

8. The ground taken by the appellant about maintainability of complaint without fee of Rs.2500/- is equally untenable. The Institute has not only an authority to take suo-moto action as and when a professional misconduct of a member comes to its knowledge but has an obligation to do so since it has an obligation to keep the professional stream pure and blemish free. The Institute was within its rights to proceed against appellant and treat the same as information.

9. Thus the appeal filed by the appellant has no merits and the same is accordingly dismissed.

JUSTICE (RETD.) S.N. DHINGRA
CHAIRPERSON

RAKESH CHANDRA
MEMBER

G. GEHANI
MEMBER

PAVAN KUMAR
MEMBER

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Company Secretaries Act, 1980)

APPEAL NO. 14/ICSI/2012

IN THE MATTER OF

Sudhir M. Dave
Through: Natwar Rai, Advocate ……Appellant

Versus

1. The Institute of Company Secretaries of India ……Respondents
   Through: R.D. Makheeja, Advocate

2. Vipulkumar Dahyalal Bheda
   Through: S. Suriyanarayanan, Advocate

CORAM:

HON'BLE JUSTICE S.N. DHINGRA	CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA,	MEMBER
HON'BLE MR. G. GEHANI,	MEMBER
HON'BLE MR. PAVAN KUMAR VIJAY,	MEMBER

Date of Hearing: 02-02-2013

Date of Order : 27-07-2013

ORDER

1. The present appeal has been preferred by the appellant Sudhir M. Dave against orders of the Disciplinary Committee of Institute of Company Secretaries dated 1st June, 2012 and 9th July, 2012. Vide the first order, the appellant was held guilty of professional misconduct under Clause (7) of Part I of the Second Schedule of the Company Secretaries Act, 1980 and by the second order the appellant was awarded a punishment of "Reprimand" and a fine of Rs.10,000/-.

2. The brief facts relevant for the purpose of deciding this appeal are that the complainant Vipul Kumar Bheda had filed a complaint against Chirag B. Shah (a fellow member of the Institute of Company Secretaries) and the appellant, alleging professional misconduct against both of them. Along with the complaint, he had filed an affidavit and documents relied upon by him. The Director (Discipline) of the Institute of Company Secretaries who had to scrutinize the complaint and give a prima facie opinion, sought replies from both the members of the institute against whom the complaint was made and after considering the written response and the evidence, gave a prima facie opinion about a case of professional misconduct made out on the part of present appellant.The Director (Discipline) did not find professional misconduct on the part of Chirag B. Shah. The opinion was considered by Disciplinary Committee and the Disciplinary Committee held an enquiry into the alleged professional misconduct of the appellant and after holding the enquiry passed the aforesaid orders.

3. The crux of complaint dated 9.7.2010 made by the complainant was that Mr. Sudhir M. Dave, a practicing Company Secretary, in connivance with R.N. Algotar, a director of V.S. Cosmopharma Pvt. Ltd. had on the basis of forged notices for calling Board Meetings, filed (a) Forms No.32 with ROC removing the complainant from directorship of the company and fraudulently, appointing Chirag B. Shah as a director of the Company (b) filed Form No.23 with ROC passing a resolution for shifting of registered office (c) filed Form No.18 showing registered office of the company having been shifted (d) filed Forms No.32 regarding appointment of other directors in a fraudulent and mala fide manner (e) filed Form No. 20B on 6th July, 2010 showing that the complainant did not hold any share of the company, although the complainant had invested more than Rs.16,00,000/- into the company on the date of filing his complaint. The complainant alleged that Form No.20B was filed on 6th July, 2010 by the appellant despite his sending e-mails to him on 26th June, 2010, 1st July, 2010 and 2nd July, 2010 informing of the fraudulent acts.

4. In response to this complaint, the respondent had taken a stand that the complainant had not specified the clause/schedule/part of the act covering the professional misconduct of the respondent and the allegations of the complainant of false certification of forms and taking undue advantage were false and baseless. There was no evidence supporting the allegations made by the complainant and he had no malafide intentions against the complaint and at the time of filing the forms, he had not conducted himself contrary to professional ethics. The appellant alleged that complainant had not come to the Institute with clean hands as he had filed a criminal complaint against his colleagues as well as against the director of the company. He submitted that he had verified the relevant documents before filing and certifying various forms filed with ROC. He was not supposed to investigate or adjudicate the matter/dispute between the directors. He was only supposed to do necessary verifications before certifying forms. He was also not to make a fishing expedition. All allegations made by the complainant were false and the complainant had maliciously dragged the appellant into controversy between him and the other directors by filing this false complaint.

5. The Disciplinary committee in its order dated 1.6.2012 noted the contents of the complaint, the response of the respondent and the material placed before it and noted the arguments advanced by both the sides before it and came to a conclusion that the appellant did not exercise due diligence at the time of certifying and filing inter-alia Form No.32 in regard to cessation of the directorship of the complainant. The respondent was expected to exercise his professional acumen and due diligence before filing the forms.

6. The appellant contended before the Appellate Authority that the Disciplinary Committee held him guilty of professional misconduct for filing Form No.32 in respect of complainant's ceasing to exist as a Director. The appellant had specifically stated in his written statement that the notices of Board Meetings were issued to the complainant under UPC, which he denied to have received. The sending of notices by UPC was a proper mode of serving of notices of Board Meetings. The Director (Discipline) in his prima facie view sent to Disciplinary Committee had stated that there were conflicting judgments on validity of sending notices by UPC. The Disciplinary Committee in its order was silent as to how it reached a conclusion that the appellant was guilty of professional misconduct; whether it considered sending of

notices by UPC improper or otherwise. The order of the Disciplinary Committee was thus perverse since it was passed without giving justifications. The order deserved to be set aside.

7. We find that the order of Disciplinary Committee was silent on reasons. It had given no reasons of its own for holding the appellant guilty of professional misconduct. The order of the Disciplinary Committee is in the form of recording the submissions of both the parties and ultimately saying that it holds the appellant guilty of professional misconduct as the appellant did not exercise due diligence in certifying and filing inter-alia Form No.32 in regard to cessation of directorship of the complainant.

8. The order of the Disciplinary Committee consists of 26 paras. From para 1 to 25, the Disciplinary Committee has reproduced the contents of complaint, the contents of defence taken by the two respondents (Sudhir M. Dave & Chirag B. Shah), then the rejoinder of the complainant to the written statements of the two respondents, then the prima facie opinion of the Director (Discipline) and then the arguments of the respective advocates. There is no discussion on merits from para 1 to 25, either of the disputed facts or of the disputed questions of law. The only contribution of the Disciplinary committee in this order is para 26, which reads as under:-

> *"The Disciplinary Committee at its 32nd meeting held on 1st June, 2012 considered the submissions made by the parties and other material available on record, came to the conclusion that the Respondent is 'Guilty; of Professional Misconduct under Clause (7) of the Second Schedule of the Company Secretaries Act, 1980 as the Respondent did not exercise due diligence for certifying and filing inter-alia Form 32 in regard to cessation of the directorship of the Complainant which is expected from a professional. The Committee, in terms of sub-rule (1) of Rule 19 of the Company Secretaries (Procedure of Investigations of Professional and other misconduct and conduct of cases) Rules, 2007, hereby affords an opportunity of being heard to the Respondent on Monday, the 9th July, 2012 before passing order under section 21B of the Company Secretaries Act, 1980".*

9. It is apparent from the order dated 1.6.2013 that the Disciplinary Committee may have applied mind in its 32nd meeting on the submissions made by the parties but it failed to disclose its mind in the order. It only disclosed the conclusion to which it came, without giving reasons for coming to such conclusion. It did not even discuss the professional misconduct or the argument advanced before it by Sudhir M. Dave. It did not state what reasons weighed upon its mind to hold Sudhir M. Dave as guilty of professional misconduct.

10. It is a settled law that the disciplinary proceedings are in the nature of quasi judicial proceedings and the Disciplinary Committee acts as a quasi judicial authority. Every quasi judicial authority is supposed to consider the disputed questions of fact as well as of law raised before it and give its own reasons for arriving at a conclusion. When both the sides present their arguments before a quasi judicial authority, it is not enough that the quasi judicial authority reproduces the arguments and then without a discussion and without

giving its mind as to what appealed to it and why, it passes the order.

11. This would have been a fit case for this Appellate Authority to send back to the Disciplinary Committee for deciding it on merits. However, we thought it proper to dispose of the matter after considering the issues raised on merits and after hearing the arguments of both the sides.The Disciplinary Committee of the Institute keeps changing every year. The same Disciplinary Committee is never active in the next year. The members of Disciplinary Committee change with every election. Under these circumstances, sending this matter back to the Disciplinary Committee would have entailed an unnecessarily long delay.

12. The core issue involved in this matter is whether reliance placed by the appellant on UPC about sending of the notice of a Board Meeting to directors was good enough to file form No.32 before ROC about loss of directorship based on such notices. In this case, three Board Meetings were allegedly held on 9.1.2010, 20.2.2010 and 15.4.2010 respectively. The notices of these three Board Meetings were allegedly sent to the complainant, one of the Directors and to another Director, Rajiv Rakam Singh only by UPC. A perusal of notices available on record would show that the date of notice for the meeting dated 9.1.2010 was 2.1.2010. Similarly of 20.2.2010 was 12.2.2010 and of 15.4.2010 was 8.4.2010. Another alleged Board meeting was held on 26.5.2010 and the notice of this meeting was also allegedly sent on 19.5.2010 via UPC. It is clear from the copy of notices that these notices were allegedly sent a week before the date of Board Meeting and were allegedly sent under UPC. The claim of the appellant is that he had seen UPC and was satisfied about the services of the notices and was also satisfied that the three Board Meetings had taken place on 9.1.2010, 20.2.2010 and 15.4.2010 and the complainant did not attend these Board Meetings. By virtue of section 283(1)(g) and 283(1)(i) of the Companies Act the complainant ceased to be a Member of the Board for the reason of not attending three consecutive Board Meetings. Form No.32 was therefore rightly filed by appellant showing that he ceased to be a member of the board. Similar arguments have been given by the appellant in respect of other forms filed by him namely, Form No.23, Form No.18, Form No.32 in respect of appointment of Chirag B. Shah and Form No.20B on 6th July, 2010 showing that the complainant does not hold any shares in the Company.

13. We are living in an era of communication revolution where communication can be transmitted to a person instantly and a confirmation of transmitted communication having been received is also received immediately. The record shows that the complainant's e-mail address was with the Company Secretary and the Company Secretary's e-mail address was with the complainant. It is obvious that if the complainant was having an e-mail address, his e-mail address must have been known to the company and other directors of the Company. It would also not be out of place to mention that mobile phones have become so affordable that even rickshaw pullers these days maintain a mobile phone. It cannot be presumed that the directors of the Company who had invested lakhs of rupees into the company were not having mobile phones. In this case, V.S. Cosmopharma Pvt. Ltd. was having only three Directors and it cannot be imagined that directors did not have each other's phone numbers or e-mail addresses. A communication through phone, e-mail, SMS is an instant communication and the fact of the communication having been received, is also known by

the communicator immediately, electronically. It is noteworthy that due to this revolution in communication, the ROC office had introduced e-filing of all statutory forms and all forms in this case were also filed not physically, but through e-filing. A professional Company Secretary living in the modern era, who resorts to e-filing of statutory forms and who had e-mail address of the complainant director, who corresponded with him at least before filing of form No.20B, cannot be heard to say that he was satisfied that the directors were properly served with the notice of Board Meeting because a UPC certificate was produced before him. It is well known that a UPC certificate can be easily procured. It can be predated and having a UPC certificate is no guarantee of even actually posting of the letters. Though, there is a presumption under law that once an article/document is put in post, it reaches the person whose address is written on the envelope, but when a person denies that he has received the article through post and gives evidence or files an affidavit and uses his e-mail to communicate with the Company Secretary, then Company Secretary cannot be heard to say that the service of notices could be presumed on the basis of UPC. Since UPC certificates were being grossly misused, the postal department also stopped issuing UPC certificates since 2011. It is also to be noted that the Postal Department had started Speed Post service long back and one can keep track of the position of the article sent by speed post service through the internet and can come to know whether the article sent by speed post was delivered or not. When an article is sent through speed post, the dispatch of the article is ensured by issuance of a receipt and its reaching to the destination is ensured by obtaining a receipt from the receiver. With the facility of Speed Post, SMS, etc. being available for communicating date and place of meeting and the agenda of meeting and when the directors were having some kind of dispute with each other within the knowledge of appellant, it was expected of the appellant (Company Secretary) to ensure that proper service of notices of the meetings was there before he filed statutory forms of cessation of a director on the Board of the Company so that allegations of fraud could be not made later on. In this case all notices were sent only through UPC and the appellant was told by complainant that a fraud was being played with him and he (appellant) himself was in connivance, despite this correspondence through e-mail, he filed another Form 20B on 6th July, 2010 after receiving letters from the complainant through e-mail. These e-mail letters are there on record and had not been denied. This only shows that the appellant was not conducting himself diligently in performance of his professional duty and he filed all the statutory forms in regard to affairs of the company including Form No.32 about appointment of Chirag B. Shah, Form No.23 for passing special resolution for registered office, form No.18 for shifting registered office, Form No.32 for appointment of other Directors and Form No.20B, deliberately knowing well that the process of service of notice was doubtful and no notice was served upon the complainant for ulterior purpose.

14. As regards the argument of complainant not mentioning the provisions of the Schedule under which misconduct was covered, this must be rejected. A perusal of Section 22 of the Act would show that the section gives an inclusive definition of professional misconduct and the misconducts enumerated in First and Second Schedule are not exhaustive in nature. The legislature could not have foreseen the different kinds of misconducts of Company Secretaries and it is not humanly possible to foresee all of them. It is for this purpose that

an inclusive definition of misconduct was given by the legislature. In Institute of Chartered Accounts vs. B. Mukerjea (1958) SCR 371 Supreme Court had occasion to consider the import of section 22 of the Chartered Accountants Act and observed as under:-

> *"The misconduct alleged on the part of a Chartered Accountant may not attract any of the provisions in the schedule and may not therefore, be regarded as falling within the first part of Section 22; but as the definition given by Section 22 itself purports to be an inclusive definition and as the section itself in its latter portion specifically preserves the larger powers and jurisdiction conferred upon the Council to hold inquiries under section 21, sub-section (1), it would not be right to hold that such disciplinary jurisdiction can be invoked only in respect of conduct falling specifically and expressly within the inclusive definition given by Section 22. Section 8, sub-sections (v) and (vi) also support the argument that disciplinary jurisdiction can be exercised against chartered accountants even in respect of conduct which may not fall expressly within the inclusive definition contained in Section 22. Hence, if a member of the Institute is found, prima facie, guilty of conduct which, in the opinion of the Council, renders him unfit to be a member of the institute, even though such conduct may not attract any of the provisions of the schedule, it would still be open to the Council to hold an inquiry against the member in respect of such conduct and a finding against him in such an inquiry would justify appropriate action being taken by the High Court…"*

15. In Council of Institute of Chartered Accounts of India vs. Mukesh Arsha AIR 2004 Guj. 164, Gujarat High Court had observed that even if a member of the Institute is found guilty of a conduct which in the opinion of the Council renders him unfit to be a member of the Institute, it would be a professional misconduct though such conduct may not attract any of the provisions of the schedule. It would be open to the Council to hold an inquiry against the member in respect of such a conduct and give a finding against him after such an inquiry and to take appropriate action.

16. We therefore find that there is no force in the appeal and the appeal is therefore dismissed. We also find that no reasons were there to terminate the membership of appellant for life as pleaded before us by the respondent. However, we hope that the appellant shall, in future uphold the dignity of his profession and conduct himself diligently. We also expect that Disciplinary Committee in its future orders shall disclose the reasons and justifications for arriving at a conclusion.

Justice S.N. DHINGRA(Retd.)
CHAIRPERSON

G. GEHANI
MEMBER

RAKESH CHANDRA
MEMBER

PAVAN KUMAR VIJAY
MEMBER

New Delhi
Dated: _____ July, 2013.

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Company Secretaries Act, 1980)

APPEAL NO. 10/ICSI/2012

IN THE MATTER OF

Sh. Dhiren R. Dave ....Appellant
Appellant in person

Versus

Late Sh. Bhogilal H. Bachkaniwla and ors. ....Respondents
Shri R.D. Makheeja, Advocate for Respondent No. 1

CORAM:

HON'BLE JUSTICE S. N. DHINGRA	CHAIRPERSON
HON'BLE MR. G. GEHANI,	MEMBER
HON'BLE MR. RAKESH CHANDRA,	MEMBER
HON'BLE MR. PAVAN KUMAR VIJAY,	MEMBER

Date of Hearing: 20-12-2013

Date of Pronouncement: 14-02-2014

ORDER

1 This appeal has been preferred by the appellant against the order dated 20th April, 2012 of the Disciplinary Committee of the Institute of Company Secretaries of India, in case No. DC/61/2009-10 whereby the Disciplinary Committee held the appellant guilty of professional misconduct under clause 7 of part-1 of second Schedule of Company Secretaries Act, 1980 on the ground that he did not exercise due diligence and was grossly negligent in conduct of his professional duties. The Disciplinary Committee after holding him guilty penalized him with 'reprimand' and a fine of Rs.10,000/-. After the appeal was received by the Appellate Authority, the Appellate went through the appeal and was of the opinion that the punishment awarded by the Disciplinary Committee was not commensurate with the professional misconduct of the appellant. The Appellate Authority vide its order dated 4th August, 2012 observed as under:-

> *"After considering the Disciplinary Committee Report and other aspects of the case, the Authority feels that the notice be issued to the Appellant as to why the punishment awarded to the Appellant by the Disciplinary Committee, vide the orders dated 20th April, 2012, be not enhanced. The appellant shall be heard on the merits of the appeal as well as on the issue of enhancement of the punishment in the next hearing.*
>
> *It was noted that the complainant in this case has also filed a writ petition before the Gujarat High Court praying for enhancement of punishment awarded to the Appellant on the ground that same was not adequate and he be removed permanently from the Membership of the Institute.*

The case is listed for arguments on 15th September, 2012 at 11.00 A.M.

It is also noted that the Institute of Company Secretaries has not been made a party. The Institute is a necessary party in all the appeals filed before the Authority. An amended memo of parties may be filed by the Appellant. The complainant be informed of the next date of hearing and a copy of this order be sent to the Complainant."

2. The complainant who initially filed a complaint with the Institute against the appellant for taking disciplinary action had passed away and his son and wife have been pursuing the matter before all forums including the Disciplinary Committee. They had filed a special civil application no. 8080 of 2012 before the High Court of Gujarat at Ahmedabad assailing the order of the Disciplinary Committee awarding such a meager punishment to the appellant. The above order of this Authority was brought to the notice of the Gujarat High Court and the Gujarat High Court observed that since the Appellate Authority was considering the issue of meager penalty and notice in this respect has already been issued to the appellant, the issue should be raised before the Appellate Authority and the petitioners would get opportunity to make submissions about quantum of penalty and justify their request to enhance the penalty so as to be commensurate with the misconduct before the Appellate Authority. The Gujarat High Court disposed of the petition with this observation.

3. The appellant preferred LPA No. 1300/2012 against the above order of single bench before the division bench and the division bench observed that the Appellate Authority shall consider the merits of the matter and any observation made by the single bench would not come in the way of the Appellate Authority and it shall decide the appeal by applying its own mind.

4. The Appellate Authority heard both the parties on merits as well as on issue of quantum of penalty.

5. The brief facts relevant for the purpose of deciding this appeal are that one Shri Bhogilal H. Bachkaniwala (deceased) was a Director and shareholder in a company Himson International Private Ltd. He was original subscriber to the memorandum of association and was one of the first directors of the Company. Shri Kamlesh Bachkaniwala and Shri Darshan Bachkaniwala were other directors on the board of this company. Mrs. Vasumati Bachkaniwala wife of Bhogilal H. Bachkaniwala was the majority shareholder. Some differences cropped up among the directors of the company due to which Mr. Bhogilal H. Bachkaniwala did not sign form DIN 2 for the aforesaid company. However, he found that despite his not signing Form DIN 2, DIN 3 a form which is to be accompanied with duly signed Form DIN 2 was filed by the appellant with the Registrar of Companies on the basis of a forged resolution of Board of Directors allegedly signed by Shri Kamlesh Bachkaniwala as Director. The appellant had also signed form DIN 2 of Bhogilal H. Bachkaniwala annexed with it without any date or signature of Bhogilal Bachkaniwala. The appellant made a note on form DIN 2 that Director had refused to sign DIN 2 as he was to resign from the company. This was factually incorrect. No evidence of refusal to sign was placed on record and no evidence of complainant's intention to resign was placed on record. Mr. Bhogilal H. Bachkaniwala submitted that he had never expressed such an intention to the appellant.

6. The other allegation made was that the appellant also filed Form No. 32 with ROC under document No. D-2007-07-31-2656038-EFROM removing him from the directorship of the company under the alleged resolution passed in alleged extra ordinary meeting held on 20th July, 2007. The Form No. 32 was digitally signed by ShriKamlesh Bachkaniwala as Director of the company and the appellant had also signed the same digitally certifying that he had verified the particulars from the books and records of the company and found them to be true and correct. It was stated in Form No. 32 that Bhogilal H. Bachkaniwala was not associated with the company with effect from 20th July, 2007 due to his removal under section 284 of the Companies Act. The appellant also made a note that Shri Kamlesh Bachkaniwala informed him that the company had the practice of only giving oral intimation was given to all the directors of board meeting dated 10.07.2007, where the draft notice of extra ordinary post under UPC. Mr. Bhogilal H. Bachkaniwala claimed that no notice either of the alleged board meeting or of the alleged extra ordinary general body meeting was served on him and he was removed from the Board under a conspiracy between the appellant and another director, Mr. Kamlesh Bachkaniwala. The appellant certified Form No. 32 stating that a meeting of the Board of Directors took place on 10th July, 2007 which authorized the issue of notice of extra ordinary general meeting. On 10th July, 2007 there were four directors as per the Register of Registrar of Companies. No notice either written or oral was given to the complainant namely, Bhogilal H. Bachkaniwala and the claim made by appellant about holding a board meeting on 10th July, 2007 was false.

7. It is argued that the appellant in connivance with two directors of the company, Kamlesh Bachkaniwala and Mrs. Leena Bachkaniwala committed illegality and filed Form No. 32 purpotedly removing Bhogilal H. Bachkaniwala from directorship under section 284 of the Companies Act. This was a fraud and the appellant was the main perpetrator and advisor of this fraud. Along with the complaint, the complainant filed certified copies of documents as obtained from the Registrar of Companies which show that Form DIN 3 was filed by the appellant and in Form DIN 3, the appellant signed as full time professional company secretary. Form DIN 3 was accompanied by unsigned Form DIN 2 of the original complainant Bhogilal H. Bachkaniwala. The Company Secretary along with this Form DIN 3 filed a certificate that he was orally informed that two Directors, Shri Bhogilal H. Bachkaniwala and Darshan Bachkaniwala were not available and they were to resign from the company but they refused to do so. Thus these two directors were removed in the extra ordinary general meeting on 20.07.2007 under section 284 of the Companies Act. The appellant along with Form No. 32 filed a verification certificate that he had verified the particulars from the books and records of Himson International Private Ltd. and found them to be true and correct. Along with Form No. 32 he also filed extracts of the minutes of extra ordinary general meeting.

8. The plea taken by the appellant is that he had not committed any professional misconduct and along with DIN 3 and Form No. 32 he had filed his qualification certificate. Moreover, he was informed about non-signing of DIN 2 by the other director and removal from directorship also by other director.

9. It is an undisputed fact that no written notice of the Board meeting was served upon the original complaint (deceased) and the notice of extra ordinary meeting was allegedly sent

under UPC. Section 286 of the Companies Act deals with notice of meeting and reads as under:-

> *"(1) Notice of every meeting of the Board of Directors of a company shall be given in writing to every director for the time being in India, and at his usual address in India to every other director.*
>
> *(2) Every officer of the company whose duty it is to give notice as aforesaid and who fails to do so shall be punishment with fine which may extend to [on thousand rupees]*

10. A perusal of the above provision of the Companies Act makes it clear that the law requires that a notice of every meeting of Board of Directors should be served on the directors in writing and non-compliance of this provision is made punishable. This implies that no oral notice of board meeting can be served and if oral notice is served, the same is not a valid notice in the eyes of law. The appellant has taken a plea that he was told by Kamlesh Bachkaniwala, the Director of the company that there was a practice of serving oral notice and he believed Kamlesh Bachkaniwala. We wonder what kind of a Company Secretary the appellant is. He had been trained in compliance of company law and instead of advising his client that such a practice of oral notice cannot be followed nor is recognized under law, he himself acted illegally by accepting oral notice as a legal notice. We consider that the plea taken by the appellant of considering oral notice as a valid notice in itself was a grave professional misconduct and the appellant was not only negligent in professional duty but was instrumental in commission of illegality by a company. We also believe that the complainant's plea that he was not served with a notice either of board meeting or of extra ordinary board meeting was truthful. It is well known that UPC is not a proper mode of service. Today, we are living in an era of communication revolution. The notice can be sent through e-mail, courier, speed post for which a proper proof of receipt of notice by the recipient and to say the least, the UPC can be obtained from post offices by dubious means and that is why it is found that in all such cases where no notice are sought to be served on directors, in the present era of communication revolution, the notices are shown to be sent through UPC. The UPC has become totally obsolete mode of sending notices and nowadays nobody sends notices through UPC, sending of e-mail, SMS, speed post is a proof oriented service and proof of service is retained by the server, but in case of UPC, there is no proof of service.

11. It is also seen that the appellant verified Form No. 32 and recorded that he had verified the records of the company about due compliance with the provisions of the Companies Act. There could have been no record of the company sending oral notice of the board meeting in which the original complainant allegedly refused to resign. Since he had no notice, he could not have been present on that day. This only shows that the extra ordinary meeting was a forgery committed by the other Directors of the company and encouraged by the appellant. Today in the era of communication revolution, when cell phones, e-mail, SMS, etc., can instantly be approached and service can be instantly verified, the appellant was supposed to verify from the complaint, Mr. Bhogilal H. Bachkaniwala about the board

meeting as well as about extra ordinary meeting. It is not the case of the appellant that he made an effort to ascertain the truth of what was being stated by one of the directors to him. It must be kept in mind that the appellant was the company secretary of M/s. Himson International Private Ltd. and he was not the company secretary of a particular director and as the company secretary of the company, his obligation was to all the directors and was as the company secretary of the company, his obligation was to all the directors and was not to one director who had asked him to file DIN 3 or Form No. 32. If a Company Secretary starts conducting himself as the appellant conducted himself, then any director can go to a practicing Company Secretary and state that the company served oral notice of extra ordinary board meeting and a resolution was passed removing a particular Director and he should file DIN 3 and Form 32. Such a conduct on the part of a Company Secretary shall destroy the whole profession and result in loss of faith in the profession. We consider that the conduct of the appellant was gross professional misconduct of severe nature. It was not mere negligence but it was an apparent effort of the appellant to take sides with some of the directors and to suggest ways and means how to remove another director without following the letter and spirit of law.

12. The appellant took the plea that he had qualified Form No. 32 as well as DIN 3 and argued that there was no provision in the Companies Act which prohibited him from qualifying these forms and therefore he had all the rights to qualify and he was not negligent. This plea of the appellant must be rejected. It must be noted that DIN 3 and Form No. 32 are not application forms sent to Registrar of Companies with certain prayers nor are they required to be processed by the Registrar of Companies to see whether the necessary requirements for granting relief have been fulfilled or not. DIN 3 and Form No. 32 are information required to be sent to the Registrar of Companies for public consumption. The information filed by the company is stored in a data bank and can be retrieved when required. None of these forms provide that a Company Secretary can qualify these forms like qualification of a balance sheet by a Chartered Accountant. In fact, qualifying a financial statement of a company by a CA is a mandatory requirement of law and is specifically provided for in the Companies Act. Whenever, a Chartered Accountant finds that there were certain discrepancies which must be brought to the notice of the shareholders and members of the board so that the shareholders and members of the board can take appropriate decisions, he is to qualify the financial statements. This qualification is not meant for Registrar of Companies. There is no meaning or purpose of putting qualifications by a Company Secretary on Form No. 32 or DIN 3. If this is allowed, then a Company Secretary can commit all illegality himself and put a note that he was instructed by such a director to do so. DIN 3 and Form 32 are electronically filed information of the company to be shared with the Registrar of Companies for benefit of the public. There is no scope for putting qualifications on Form No. 32 or DIN 3.

12. We have heard the parties on quantum of penalty. While the appellant has assailed the order and stated that there was no negligence on his part, the respondents have stated that professional misconduct of the appellant was of a grave nature. We agree with the LR's plea and consider that the penalty awarded to appellant was not commensurate with the

grave nature of the misconduct of the appellant. In our opinion, the name of the appellant should be removed from the Register of the Institute for a period of six months at least and a fine of Rs. 1 lakh be imposed on him. We, therefore, modify the punishment and direct that the name of the appellant be removed from the Register of Members of the Institute of Company Secretaries for a period of six months and a penalty of Rs. 1 lakh is imposed on him. He is directed to deposit the penalty within 10 days from the date of the receipt of this order.

Justice S. N. Dhingra(Retd.)
CHAIRPERSON

RAKESH CHANDRA
MEMBER

PAVAN KUMAR VIJAY
MEMBER

G. GEHANI
MEMBER

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Company Secretaries Act, 1980)

APPEAL NO. 01/ICSI/2013

IN THE MATTER OF

Rakesh Kumar Srivastava ……Appellant
Through: Sh. Ashish Middha, Advocate

Versus

The Institute of Company Secretaries of India ……Respondent
Through: Sh. R.D. Makheeja, Advocate

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE MR. G. GEHANI, MEMBER
HON'BLE MR. PAVAN KUMAR VIJAY, MEMBER

Date of Hearing:
12-10-2013

Date of Order:
26-12-2013

ORDER

1. The appellant, aggrieved by the order dated 17.6.2013 of the Board of Discipline of Institute of Company Secretaries, holding him guilty of professional misconduct and penalizing with a fine of Rs.25,000/- and removal of his name from the Register of Members for a period of 30 days, has filed this appeal.

2. The brief facts relevant for the purpose of deciding this appeal are that an e-mail message was forwarded to various members of the Institute of Company Secretaries during elections of the Institute in the year 2010. The e-mail sent from e-mail ID of one John Smith reads as under:-

    1. A Writ Petition has been filed before Hon'ble Delhi High Court by a member of the Institute challenging the validity of elections of those central council members who are contesting third time without giving a cooling period. It has always been the intent of the Company Secretaries Act to give a cooling period of one term after completing two consecutive terms.

    2. The affected Council members by the writ are Mr. Nesar Ahmad and Mr. P.K. Mittal.

    3. The Hon'ble Delhi High Court has said that the election process is subject to decision of this court and the next date is fixed for 11th January, 2011.

    4. The matter being sub-judice, why the Institute has allowed the affected Council members to contest the elections for the third consecutive term?

5. Why so much of Institute's money is being spent on defending the affected council members?

6. What happens if the court rejects the candidature of affected council members? Will the institute appeal against the decision? Or,

7. Will the Institute conduct elections again? If yes, at whose cost?

Your vote is your voice. Don't waste your vote; cast it judiciously."

3. The Institute suo moto took cognizance of this e-mail and engaged a law firm, namely, 'e-Minds Legal consultants Pvt. Ltd.' to carry out cyber investigation to identify the person responsible for sending/forwarding the e-mail. A criminal complaint was also filed at a Gurgaon Police Station by Mr. Sumit Pahwa, Advocate of e-Minds Legal on behalf of the Institute of company Secretaries on 11.6.2011 under section 66A of the Information Technology Act. With the help of Gurgaon Police, the address of the sender of above e-mail was traced and it was found that the e-mail was sent from the office of Shri Lakshmi Cotsyn Limited, 19/X-1, Krishnapuram, G.T. Road, Kanpur. The criminal complaint was thereafter junked and no action followed.

4. There were three members of the Institute working at the address so found, namely, Ms. Vidhi Jain, Ms. Archana Gupta and Mr. R.K. Srivastava. Since, Mr. Rakesh Kumar Srivastava, the appellant was also one of the candidates for Central Council Elections to be held in December, 2010, 'e-Minds Legal', the company engaged by the Institute, drew conclusion that it was Mr. R.K. Srivastava who was responsible for circulating the e-mail since the e-mail was written at the time of election with a possible motive to influence the decision of the members with regard to their vote.

5. After receiving the report of e-Minds Legal, a formal complaint was filed before Director (Discipline) and the Director (Discipline) of the Institute formed a prima facie opinion that Mr. R.K. Srivastava was guilty of professional misconduct under Item (2) of Part-IV of the First Schedule of the Company Secretaries Act, 1980, which reads as under:

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

6. The Board of Discipline on receiving prima facie opinion proceeded against the appellant and passed the impugned order holding the appellant guilty of professional misconduct and imposed a penalty of a fine of Rs.25,000/- and removal of his name from the Register of Members for a period of 30 days.

7. A perusal of the order of the Board of Discipline shows that the Board of Discipline acted in a totally mechanical manner without application of mind. Prerequisite for acting against a member of the Institute under Part-IV of First Schedule of Company Secretaries Act is that the member should have brought disrepute to the profession or the Institute as result of his action. There is no evidence on record either of a member of the Council or of the

Institute stating that the appellant brought disrepute to the profession or to the Institute. Neither Director (Discipline) nor Board of Discipline thought it proper to examine either any of the contestants of the Council election or voters to know their views about the e-mail and both the Director (Discipline) and Board of Discipline passed the order without evidence. The only material relied upon by the Director (Discipline) & the Board of Discipline was a self serving report obtained by the Institute from a law firm by paying a fee to it. Such a report has no evidentiary value in the eyes of law even in a disciplinary enquiry.

8. The Institute had not formed a formal opinion that the action of forwarding the e-mail allegedly by the appellant had brought disrepute to the profession and the Institute. No member had a grievance against the e-mail, still disciplinary proceedings were initiated against the appellant, perhaps for exterior reasons. Nowhere in the complaint, is it mentioned that the Institute was of the opinion as stated above. The Director (Discipline) in her prima facie opinion has merely reproduced the facts and provisions of Rule 42(4) (ii), (iii), (viii) & (xii) of the Company Secretaries (Election to the Council) Rules, 2006 and Item (2) of Part-IV of First Schedule of the Company Secretaries Act, 1980 and after quoting the facts and rules has stated that the respondent was prime facie guilty of contravening of Election Rules and Item (2) of Part-IV of the First Schedule of The Company Secretaries Act, 1980 and held respondent prima facie guilty. The Director (Discipline) has given no reasons as to how he even prima facie came to a conclusion about the guilt of the appellant. In the impugned order of the Board of Discipline too, the fact of forwarding of an e-mail to different members has been stated, the fact of obtaining the report of e-Minds Legal has been stated and the fact of giving response to the complaint by the respondent has been stated, the various provisions of Election Rules and Part-IV of the First Schedule of The Company Secretaries Act, 1980 have been reproduced and it is stated that the Board considered all the facts and response of the appellant as well as the report of e-Minds Legal Consultants Pvt. Ltd. and made enquiries from the respondent and came to conclusion that appellant was guilty of professional misconduct. The Board emphasized that the appellant could not escape responsibility as the E-mail was sent out to several members of ICSI in order to exercise undue influence in the minds of potential voters at the time of the elections. The e-mail was sent with an attempt to hinder the smooth conduct of election process and for the purpose of causing inconvenience or annoyance to the Institute, the Council Members as well as for misleading the recipients of the e-mail. The Board considered that usage of a fictitious name and e-mail ID of John Smith leads to the conclusion that the appellant had sent the e-mail and this act of the appellant, who happened to be a contesting candidate for ICSI Central Council Election, 2010, was in violation of the Company Secretaries (Election to the Council) Rules, 2006. However, except the report of e-Minds Legal, there was no other material on record and no evidence was there, how the election process got hindered and how members got influenced by an e-mail that asked the members to vote judiciously.

9. It is apparent from the order of the Board of Discipline that the Board did not conclude that the action of the respondent brought disrepute to the profession or to the Institute. The only observation made by the Board in para-18 is that the e-mail was sent with an attempt to hinder the smooth conduct of election process and for the purpose of causing

inconvenience or annoyance to the institute and the Council members and for misleading the recipients of e-mail.

10. We shall discuss the content and their effect a little later but inconvenience or annoyance of Institute or the Council Members or the Board of Discipline itself is not a ground for taking disciplinary action against any member of the institute. The Truth 'most of the time' is bitter and many people get annoyed when confronted with the truth. The inconvenience or annoyance of persons who cannot face the truth is not equivalent to bringing disrepute to the profession or the Institute. Inconvenience and annoyance of the Institute cannot be a ground to penalize the member who is source of annoyance.

11. The e-mail circulated among the Members is reproduced in para-2 above. A perusal of the e-mail shows that this e-mail brought to the notice of the members a true fact about the pendency of a writ petition before the Delhi High Court. The writ petition was filed by another Member of the Institute. By this writ petition, the validity of candidature of some of the contesting members was challenged. It appears that the High Court had not stayed the conduct of elections and observed that the results of the election shall be subject to decision of the High Court. In the e-mail, a question was raised that since the matter was sub judice, why hold elections and why was the Institute allowing the affected Council Members to contest the elections for the third consecutive term and why so much money was being spent on defending affected Council Members and what would happen if the court rejects the candidature of the affected council members. The names of two affected Council Members, Mr. Nesar Ahmad and Mr. P.K. Mittal were mentioned in the e-mail. At the end the voters were advised to cast their vote judiciously.

12. Although, the appellant has disowned this e-mail and there is no clear cut evidence that this mail was sent/forwarded by the appellant, however, presuming that this mail was forwarded by the appellant, we find that the mail was merely information to the Members and could not have been a cause of inconvenience or annoyance to the Institute. The language used in the e-mail, by no stretch of imagination can be said to be abusive or un-parliamentary or below the dignity of a member. In our opinion, there is nothing in the substance or the language of this e-mail which called for taking cognizance of the e-mail for the purpose of disciplinary proceedings. The e-mail may have annoyed or caused inconvenience to the Council Members for the reasons best known to them but the e-mail did not undermine the reputation of the Institute or the Members. Rather the e-mail showed that the Members of the Institute were alive to their rights of questioning the Council Members and were also informing other members to cast their vote judiciously. Raising questions about holding elections or protesting against certain members of the Council who were contesting elections for the third time, allegedly contrary to the rules, cannot be said to be abusive nor can it be said that the e-mail in any manner interfered with the elections or process of election being conducted by the Institute.

13. We consider that the entire approach of the Director (Discipline) and the Board of Discipline has been the approach of a subservient authority. The Director (Discipline) and the Board of Discipline are supposed to act independent of the Council Members. We find that the prima

facie order was passed by the Director (Discipline) without evidence. Similarly the Board of Discipline also passed the order without application of judicious mind. The order dated 17.6.2013 is liable to be set aside. The order is hereby set aside and the appeal is allowed with costs of Rs. 25,000/- in favour of the appellant. Institute to pay costs within 30 days.

14. This Appellate Authority has had occasion to deal with a number of appeals arising from the orders of the Board of Discipline of the Institute of Company Secretaries and found the enquiries being conducted casually, although the orders of the Board affect the careers of the members of the Institute. The Orders of the Board do not even reflect the thought process and give no reasoning for the conclusions arrived at. Often there is no analysis of the evidence and material.

    The Institute should give adequate training to those who are involved in conducting disciplinary proceedings and taking decisions.

Justice S.N. DHINGRA (Retd.)
CHAIRPERSON

G. GEHANI
MEMBER

RAKESH CHANDRA
MEMBER

PAVAN KUMAR VIJAY
MEMBER

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Company Secretaries Act, 1980)

APPEAL NO. 02/ICSI/2013

IN THE MATTER OF

Sh. Pradeep K. Mittal .....Appellant
Through Mr. Nidesh Gupta, Sr. Advocate with
Shri Saurabh Kalia and Manoj Kr. Sinha, Advocates

Versus

The Board of Discipline and ors.
Through Shri R.D. Makheeja, Advocate for Respondent No.1 .....Respondents

CORAM:
HON 'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE M.R. PAVAN KUMAR VIJAY, MEMBER

Date of Hearing:
07-02-2014

Date of Order:
14-02-2014

Order

1. The appellant has preferred this appeal against the order dated 13th September, 2013 of the Board of Discipline of the Instiotute of Company Secretaries of India whereby the appellant was rewartded a punishment of 'reprimand' by the Board.

2. The brief facts relevant for the purpose of deciding this appeal are that the appellant had contested the election to Central Council of the Institute from Northern India in December, 2010. Teo of the mebers of the Institute namely Shri S.K. Jain and Shri Sunil Kumar Khemka (respondents no. 2 and 3) made allegations against the appellant to the Institute through e-mail that the appellant had contravened clause (d) of the sub rule 3 of rule 42 of the Company Secretaries (Election to the Council) Rules, 2006 (hereinafter called election rules) as the appellant circulated and distributed manifesto/ circular to the members of the constituencies outside Northern India. The Director Discipline sent a copy of the complaint to the appellant and the appellant sent his explanation to the Director (Discipline). The explanation given was that the appellant had advised his staff to send election profile to members/ voters located within Northern India region. However, the staff might have mis-understood the instructions and through oversight sent election profile to some members outside the Northern India regional constituents. The appellant also took objection to the fact that the respondents No. 2 and 3 instead of making a formal complaint in the prescribed form had only sent emails to the Institute and the Institute should not have acted on emails despite the office of Director (Discipline) telling the respondent to file the complaint along with a fee of Rs. 2500/-. The respondents in fact refused to file the complaint in the

prescribed form and did not deposit the requisite fee. The complaint was, therefore, liable to be rejected.

3. The Director (Discipline) considered the two emails as material sufficient to act despite the respondents refusal to file a formal complaint. The Director (Discipline) gave a prima facie opinion that the explanation given by the appellant was sufficient and the appellant was prima facie not guilty of alleged professional misconduct. He sent this opinion to the Board of Discipline.

4. The Board of discipline instead of agreeing or disagreeing with the opinion of the Director (Discipline) sent the matter back to the Director (Discipline) asking him to seek rejoinder from respondent no. 2 and 3 and to review his opinion based on such response from the two respondents. Accordingly, a copy of the reply received from the appellant was sent to the two respondents and they submitted a rejoinder and a supplementary rejoinder to the reply. Thereafter the Director (Discipline) reviewed his prima facie opinion and gave a supplementary opinion wherein he held that prima facie a case was made out against the appellant for violation of rule 42(4)(vii).

5. The Board of Discipline decided to act against the appellant on the basis of the reviewed prima facie opinion. The appellant was asked to send his response to the reviewed prima facie opinion. The appellant again denied the allegations and pleaded that he was not guilty of any professional misconduct.

6. Though the two respondents in their initial e-mails to the Institute had alleged that the appellant had circulated his profile and manifesto outside the jurisdiction, in the rejoinder Mr. S.K. Jain alleged that the appellant had violated Rule 42(3)(d) of the Election Rules. The violation of rule 42(3)(d) of the election rules was alleged on the ground that the appellant had circulated his election manifesto containing his photograph and the ICSI logo in violation of directions issued by Retuning Officer. The Director (Discipline) had reviewed his prima facie opinion based on this allegation made in the additional rejoinder.

7. The Board of Discipline vide its order dated 17th June, 2013 held the appellant guilty of violation of rule 42(4)(vii) of the election rules on account of circulation of his profile which contained his photograph along with image of the ICSI logo. The circulation of photograph and ICSI logo was found to have been done by appellant contrary to the instructions issued by returning officer.

8. The Board of Discipline thereafter 'reprimanded' the appellant for violation of these instructions vide its order dated 13th September, 2013.

9. A perusal of the record of the appeal brings out some strange and inconvenient trend of the Board of Discipline. The initial complaint was made in respect of circulating manifesto and profile outside the constituency. The Director (Discipline) in his prima facie opinion had found that no case of professional misconduct was made out The Board of Discipline is a body constituted under law for making inquiry into the acts of professional misconduct of the members. The Board of Discipline is not a body to invite complaints. In this matter once

the Director (Discipline] after conducting an enquiry had formed a prima facie opinion and forwarded it to the Board of Discipline, the Board of Discipline could have either agreed with the prima facie opinion or disagreed and directed the Director (Discipline) to make further inquiry. It had no authority to tell the Director (Discipline) to review' his opinion or to ask the complainants, who in fact were 'not even ready to send a formal complaint spent Rs. 2500/- as fee, to send rejoinders. From the entire episode it looks as if the entire proceedings against the appellant were in the nature of a witch hunt initiated at t the instance of Board of Discipline and not at the instance of the complainants.

10. It is again strange that neither the Director (Discipline) nor the Board of Discipline thought it necessary to have a close look at the directions issued by the Election Officer in terms of Rule 42. The directions issued by the Election .Officer have been perused by this Appellate Authority and the counsel of the Institute .was confronted with these during arguments. It would be seen that -these directions were issued by the Election Officer on 29m November, 2010, after 10 days of the appellant sending his manifesto along with his photograph taken at,a function of the Institute which obviously contained a photograph of the logo of the Institute. These directions were not in force when the appellant mailed his manifedo to respondent nos. 2 and 3 on 18th November, 2010 and 19th November, 2010. The directions/ instructions were issued by the Election Officer undisputedly on 29th November, 2010. It is obvious that on the day when the appellant sent hi manifesto and photograph containing image of the logo of the Institute through email, the directions were not in force. It only appears that the Board of Discipline somehow wanted to frame the appellant and accordingly issued directions to the Director (Discipline) to review his prima facie opinion. The Director Discipline) closed his eyes to the date of issuing instructions and the date of email of the appellant The Board of Discipline also closed its eyes to the date of issuing instructions and the date of emails.

11. We find that the appellant had not violated my election rule on the date when he sent emails to the respondents as no such instructions were in force at that time. The disciplinary proceedings against the appellant seem to be actuated for exterior reasons and are liable to tie set aside. We therefore allow this appeal. The appeal is allowed. The sentence awarded to the appellant is set aside. The Director (Discipline) and the Board of Discipline are directed to be careful in future while proceeding against the honourable members of the Institute. They should treat the members as honourable as they wish the world at large to so treat the members. In fact it is the Board of Discipline and fie Director (Discipline) who committed gross misconduct in this case.

12. Before parting with the order we also feel that there is a need to have a relook at election rules prohibiting circulation of his election manifesto by a candidate to persons outside his constituency, for two reasons -one, that in reality, the circulation of his manifesto by a candidate to persons outside his constituency does not really matter, since many voters nonetheless remain outside the constituency and this will not prejudice the position of the candidate in any manner.

Secondly, in this age of technology, where the election manifestos are being circulated by the means of email, it becomes difficult to find out which recipient is placed in which constituency. There always remains a chance of circulation of the manifesto to voters outside the candidate's constituency as well which technically results in the contravention of the rule. It is not feasible to determine the location of the recipient on the basis of his email id. When the manifestos were sent only through the physical, mode, this could be determined from postal address, but in an era of communication revolution, when a mail can be forwarded by a recipient to all of his known persons such a rule becomes meaningless. Rules must keep pace with time and technology.

JUSTICE S.N. DHINGRA (RETD.)
CHAIRPERSON

RAKESH CHANDRA
MEMBER

PAVAN KUMAR VIJAY
MEMBER

New Delhi
This 14th day of February, 2014

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Company Secretaries Act, 1980)

APPEAL NO. 03/ICSI/2013

IN THE MATTER OF

Dr. Baiju Ramachandran .....Appellant
Through G.Somanathan Nair Thiruvananthapuran, Advocate

Versus

The Board of Discipline and anr
Shri R.D.Makheeja, Advocate for Respondent No. 1 .....Respondents

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE MR. RAKESH CHANDRA, MEMBER
HON'BLE MR. PAVAN KUMAR VIJAY, MEMBER

Date of Hearing:
07-02-2014

Date of Order :
14-02-2014

ORDER

1. The brief facts relevant for the purpose of deciding this appeal are that the appellant had filed nomination papers to contest elections of the Institute of the Company Secretaries of India for Southern India Regional council (SIRC) in the year 2010. The Respondent No. 2 filed a complaint against the appellant with the Institute under section 21 of the Companies Secretaries Act 1980 read with rule 3(1) of the Company Secretaries • (Procedure of Investigation of Professional and other misconduct) Rules 2007 (hereinafter called the Rules) alleging that the appellant defrauded the Institute and the members by giving a false affidavit along with nomination forms filed by him. In the nomination form, he had stated his having obtained first rank in LLB examination, MMM examination and M.Com examination. However, as per his verification, the appellant had not obtained first rank either in LLB or in MMM examinations. Thus, he furnished wrong information in the nomination form and filed a wrong supporting affidavit verifying the correctness of information about his academic achievements. As per respondent no. 2, the false statement made by the appellant about his academic achievement influenced the members of the Institute and he got elected in ICSI election 2010.

2. On the complaint of Respondent no. 2, the Director (Discipline) sought the response of the appellant. The appellant denied the allegations. He submitted that he had obtained first position in M.Com examination and he mentioned about the first rank in M.Com examination only. He stated that although he had filed four nomination forms, but he attached a demand draft for election fee and security deposit for election along with his form dated 22.9.2010.

This form was hand-filled by him. This form of 22.9.2010 was scrutinised and accepted as valid nomination form. The other forms were neither scrutinised nor accepted as valid nomination forms.

3. The Director (Discipline) after examining the complaint, response and rejoinder as well as documents gave a prima facia opinion that the appellant was guilty of professional misconduct under clause (2) of Part IV of First Schedule of Company Secretaries Act, 1980 for contravening Rule 42(4)(xii) of the Election Rules observing that the appellant despite having opportunity to correct the error in his particulars submitted to ICSI, did not do so.

4. The Board of Discipline after holding enquiry concurred with the opinion of the Director (Discipline) and came to conclusion that the statement made by the appellant in the nomination form, supported by affidavit, was in violation of the Election Rules, since the appellant had mis-stated about his merits and did not correct the error subsequently when the information was published by the Institute. The Board of Discipline held the appellant guilty for professional misconduct and awarded him a penalty of fine of Rs.10,000/-.

5. The notice of hearing of appeal was sent to the appellant and to the respondents. The parties that appeared before the Appellate Authority were heard and the documents were perused. A perusal of the record of the nomination papers would show that the appellant had sent the security deposit and nomination fee for election to the Council only with one form dated 22nd September, 2010. The check list for scrutiny of nomination attached by the Institute with the nomination forms also shows that nomination form filed on 22nd September, 2010 contained details of DD no. and date for nomination fee. Security deposit was also made only with the form dated 22.9.2010. This form is hand filled by the appellant and this form was scrutinised by the Institute for the purpose of election. With other nomination forms, no security deposit or nomination fee was filed. Another form on record dated 23.9.2010 is also hand filled and in this hand filled form, the same particulars which have been given in the form dated 22.9.2010 have been repeated.

6. In the two type written forms with which the required security deposit and nomination fee were not filed, the appellant had stated that he obtained first rank in M.Com, LLB and MMM.. However, in the two hand written forms, the appellant had written three qualifications and written first rank against the first qualification i.e. M.Com.

   The column in the form seeking information read as under:-

   a) .....

   b) Merit awards (limited upto first three positions) in the examinations-of recognized universities and the examinations conducted by the Institute;

7. The appellant contended that he was supposed to write qualifications in which he had obtained merit awards for the examination of recognised universities. In all the three qualifications mentioned by him, he had obtained merit awards for his performance, only in

M.Com examination, he had obtained first rank. He, therefore, mentioned first rank in his hand written form against M.Com. About typewritten forms he stated that same were typed in his office by his clerk who did not copy it correctly from the hand written form. But since he had already filed a hand written form with correct information, he did not scrutinise the forms properly and signed it.

8. He stated that he had no intention to make a false statement. He had stated about his qualifications and ranking as per the requirements of the nomination form. He also stated that he holds around 15 qualifications, details of which he had given in the nomination forms. Out of these, in three qualifications he was placed among first three positions in the universities, so he mentioned those three qualifications against the column stated above in para-6 and against M.Com he mentioned first rank as he had obtained first position in M.Com. There was thus no false statement made by him, nor did he have any intention to do so.

9. The Council for the Institute on the other hand submitted that the appellant had written first rank in such a manner in the nomination form appearing as if he had obtained first rank in all the three qualifications, namely, LLB, MMM and M.Com. Therefore, he had made a false statement.

10. We consider that only that nomination form of the appellant could be taken into consideration which was scrutinised and accepted by the Institute. It was obligatory on the Returning officer to accept one nomination form as valid and to reject other nomination forms as invalid as they were not submitted with requisite nomination fee and security deposit. The scrutiny form of the Institute available on the original file shows that three scrutinisers finally scrutinised the nomination fom on 16.10.2010. Prior to that the nomination forms were checked and a check list prepared by five officials of the Institute and it was recommended for acceptance. Thus the nomination form of the appellant was seen and checked by eight persons of the Institute. Three scrutinisers and five other officials have signed the check list for scrutiny of the nomination. However, what is strange is that this scrutiny paper is attached with all the four nomination papers and no particular nomination was accepted or rejected.. We consider that it was obligatory on the Returning Officer to mention on record as to which nomination form was accepted. The Returning officer was obliged to discard nomination forms which were not accepted or not considered.

11. Since the nomination fee and security deposit had accompanied only one nomination form dated 22.9.2010, only this nomination form could have been looked into by the Institute as well as by the Disciplinary Committee and the Director (Discipline). Other nomination forms could not have been looked into.

12. As per the nomination form dated 22.9.2010, the appellant had mentioned his ranking against Column B as under:-

B)	Merit awards (limited upto first three positions)	M. Com	1st Rank
	in the examinations of recognized universities	LLB	
	and the examinations conducted by the Institute;	MMM	

It is apparent that the appellant had mentioned first rank against only M.Com and not against LLB and MMM. The allegation made by respondent in respect of false statement made by appellant thus does not seem to be true.

Rule 42(4)(xii) of the election rules reads as under:-

"42. Disciplinary action against member in connection with conduct of election.

(4) A member shall not adopt one or more of the following practices with regard to the election to the Council, namely:

(xii) Contravention or, misuse of any of the provisions of these Rules or making of any false statement knowing it to be false or without knowing it to be true, while complying with any of the provisions of these Rules."

13. It is apparent from the reading of the Rule that a false statement must be made by a person knowing it to be false or without knowing it to be true. This shows that the element of mens rea is to be inferred from the above rule, meaning thereby that the person making false statement must have an intention to do so. However, in the present case, there seems to be no intention of the appellant to make a false statement about rank held by him. The appellant was holding 15 qualifications, most of the them post graduate qualifications. If a voter could not be influenced by 15 qualifications, he would not have been influenced by the rankings of three qualifications: We consider that there could not have been a mala fide intention on the part of the appellant to influence the voters by mentioning rank

14. The other ground raised against the appellant is that he, despite having an opportunity to correct the informant did not do so. After the nomination forms are filed, the Institute publishes a list of candidates and their particulars. The Institute in this case, while publishing the list of candidates and particulars mentioned first rank of the appellant against all the three qualifications and these particulars and information were circulated to the Members. It is apparent that the person who typed the list of candidates and their particulars, misread information given in Column (b) above and instead of reading first rank against M.Com only, he read first rank against all the three degrees. The putting of bracket on the left side of the qualifications makes it clear that the appellant had no intention to state first rank against the three qualifications. Otherwise he would have put the bracket on the right hand side of the qualifications and then written first rank. He had to put bracket on left hand side because the academic qualifications to be mentioned in column (a) overran the space provided therein. He put bracket on the left side to show that those 15 qualifications fell in column A. Similarly, against these three qualifications, he put bracket on left side to show that these fell in Column B. The clerk typing the particulars to be circulated by the Institute did not read the column properly.

15. Election Rule 15 does not cast a -duty on the candidate to intimate to the Institute an error in the list of candidates or the particulars of the candidate published by it before or after the particulars have been published and circulated to the members. If no duty was cast on the appellant to intimate to the Institute or to the Returning Officer an error in the list published

by it, .the appellant cannot be held guilty for violation of any rules. While it was obligatory on the appellant to state correct particulars in the nomination form, it was also an obligation on the Institute to publish the particulars of the candidates correctly for information of the members. The appellant cannot be punished for an error of the Institute or on the ground that he did not approach the Institute for correct of the mistake. It cannot be said that the appellant made a false statement to the Institute knowing it to be false. We come to conclusion that the appellant had not given a false statement in the nomination form nor the affidavit filed by the appellant was false.

16. We therefore allow this appeal. The appellant had not contravened any of the provisions of the election rules nor was he guilty of professional misconduct on that account. The respondent no. 1 is directed to refund the penalty deposited by the appellant.

Justice S.N. DHINGRA (Retd.)
CHAIRPERSON

RAKESH CHANDRA
MEMBER

PAVAN KUMAR VIJAY
MEMBER

New Delhi,
This 14th day of February, 2014.

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Company Secretaries Act, 1980)

APPEAL NO. 10/ICSI/2015

IN THE MATTER OF

Benny Mathew .....Appellant

Versus

M/s Kerala Tourism Development Corporation Ltd.
Institute of Company Secretaries of India .....Respondents

Appearances:
Dr. K B S Rajan, Advocate for appellant
Mr. R.S Hegde & Ms.Babita Sant, Advocates for Kerala Tourism Development Corpn. Ltd.
Mr. R.D. Makheeja, advocate for Institute of Company Secretaries of India

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE DR. NAVRANG SAINI MEMBER
HON'BLE MS. PREETI MALHOTRA MEMBER

Date of pronouncement of order:
1st August, 2016

ORDER

1. The appellant was at one time a Company Secretary in practice and was holding Certificate of Practice(CoP) granted to him by the Institute of Company Secretaries of India (hereinafter to be referred as 'the Institute'). After surrendering his Certificate of Practice he got employed with Kerala Tourism Development Corporation Ltd.('KTDC' in short) sometime in the year 1 2012 at a senior level position of Secretary & Financial Controller. While in the employment of KTDC he allegedly committed some acts of misconduct and was proceeded against for disciplinary action after serving him with a charge memo by KTDC. Before that enquiry could be completed KTDC lodged a complaint with the Institute also against the appellant on 22/06/2013 under Section 21(2) of the Company Secretaries Act,1980 (Áct of 1980' in short) for those acts of misconduct which were claimed to be acts of falling under Clause(1) of Part II of the Second Schedule of the Act of 1980. The appellant has been held guilty during the departmental enquiry conducted by KTDC and the Disciplinary committee constituted under the provisions of the Act,1980 which had also conducted enquiry against the appellant also found him guilty of the alleged misconducts vide order dated 20th Novemner, 2014(which order appears to have been actually signed by the members on 12th January, 2015) and awarded penalty of removal of his name from the rolls of the Institute for a period of 30 days and fine of Rs. 20,000/- vide order dated 9th June, 2015 (appearing to have been signed

by the members on 30th July,2015). The appellant felt aggrieved by these orders of the Disciplinary Committee of the Institute and approached this Appellate Authority constituted under Section 22 of the Act of 1980 by filing the present appeal.

This appeal has been contested by the Institute as well as the complainant KTDC through their respective counsel. All the counsel appearing in the matter have submitted written arguments also besides making oral submissions before the Bench of three members without insisting for hearing of the appeal by all the five members of the Appellate Authority, out of whom one member (Shri Sanjay Grover) had already recused himself for the reason that he was a member of the Disciplinary Committee which had passed the impugned orders, in view of the two judgments of Hon'ble High Court of Delhi rendered in W.P.(C) No. 5621/2012 "M/s Kwality Restaurant & Ice Cream Co. Vs The Commissioner of VAT, Trade & Tax Department" and W.P.(C) No. 3664/2015 "Bharat Bijlee Ltd. Vs Commissioner of Trade & Taxes".

The relevant portions from the complaint KTDC against the appellant are being extracted below:

"Undertaking private work without prior permission from KTDC Ltd.

The official computer used by Shri Benny Methew, Secretary & Finance Controller on probation (under suspension) was seized upon a complaint and was sent to Resources Centre for Cyber Forensics, CDAC Thiruvananthapuram for retrieving the data of private works carried out by him while he was officiating in the capacity of Secretary & Finance Controller of KTDC Ltd. The Resources Centre for Cyber Forensics, CDAC has reported that they have analysed the hard disk of the computer used by Shri Benny Methew and they have retrieved eight Microsoft Excel files and fifty five Microsoft Word Document Files related to the Companies/Firms mentioned by KTDC and has submitted the files along with the details including last accessed time and logical size of the files. The observations of CDAC are as follows:

a) One document showing the bank details of Company 'Emerizz' has been found. Ref: File name-"Emerizz Bank Details.docx." Last accessed time: 25-10-12 10:35:02AM. Logical size of the file -11,680 KB

b) Documents such as Memorandum of Association, list of shre holders, appointment details of directors, list of share transfer of shareholders of M/s Dolphin Wires Pvt. Ltd. has been found. Ref: File name-"Articles.docx", "Objects.docx", "Copy of Dolphin Register of Members -1.xlsx, dolphin.xlsx , notice "dolphin.docx". Last accessed time: 27-12-12 14:04, 17:53

c) Minutes prepared for the Company 'Emeritus Legal Technology Pvt. Ltd. was found. Ref:- file Name "Emeritus.docx", "Kenny.docx".Last accessed time: 08-08-12 04:54:02PM, 09:11:12, 12:20:37PM. Logical size of the file -15,045KB and 26,683KB

d) A document showing details of share transfers of persons "Elizabeth and Jose Thomas" was found. Ref: File name-"Details of share transfers.xlsx" Last accessed

time: 28-12-12 17:53. Logical size of the file -9,133 KB

e) One letter related to the Company M/s AV Technologies was found. Ref: File name-"Avtechnology.docx." Last accessed time: 20-01-03:02:33PM. Logical size of the file -11314 KB

f) The Articles of Association of the company "Mariya Groups International Private Ltd. was found. Ref: File name-"AOA.docx", "Declaration.docx" Last accessed time: 04-10-12 02:18:57PM. Logical size of the file -79,360

g) Documents like Legal notice, explanatory statements, resolutions of the company "Choice Trading Corporation Private Ltd" has been found. Ref: File name-"1301290049_b0021.doc" Last accessed time: 29-01-13 02:28:55PM.Logical size of the file -9,641 KB

2. Utilizing materials and human resources of KTDC Ltd for private works

Shri Benny Mathew, Secretary & Finance Controller on probation (under suspension) had misused the office and official computer for private business and for this purpose he had utilized the service of employees and the computer resoureces of KTDC.

He had held the position of Managing Director of M/s. Benny & Co., Director of M/s Emerizz and member at M/s Kocheris Legal Consultants LLP of without any permission from the KTDC.

He had association with M/s, M/s. Dolphin Wires, M/s A V Technologies, Emeritus Legal Technology Pvt Ltd, Maria Groups International P Ltd. and Choice Trading Corporation Pvt Ltd. Etc without prior sanction from KTDC.

3. Affixed fraudulently the signature of Managing Director in a communication to the Government."

These were the allegations against the appellant in the enquiry conducted by KTDC also. The appellant had refuted all the allegations made in the complaint of KTDC against him with the Disciplinary Directorate of the Institute by filing a defence statement. The relevant portions of his written statement dated 8th August,2013 submitted before the Director(Discipline), which was to look into the matter to form a prima facie opinion as to whether the appellant could be said to have committed professional or other misconduct requiring detailed investigation by the concerned Authorities under the Act of 1980, are as under:-

"Undertaking private work without prior permission from KTDC Ltd.

I have not carried out any private work during the period of my employment as Secretary and Finance Controller in KTDC Ltd. The allegation is therefore baseless and hence denied.

After joining the service with the KTDC Ltd., I have not signed any single documents

or done any private work in any manner, other than documents pertaining to KTDC Ltd., in the Capacity as Company Secretary using my seal and signature and the Complainant has not produced any Document in proof of private work done by me. With regard to the alleged observations raised by the Complainant, I have the following submissions, paragraph wise:-

Regarding the allegations in paragraph (a) the Bank details of Company Emerizz allegedly found in the computer is of no consequences since it only relates to Name, Bank Account details (Name, Bank Account Number and address of the Branch) of two of my friends namely Sivaji Pradhan and Smt. Geetha Kailas I do not know what private work does this indicate. The alleged logical size of the file seems to have been exaggerated.

Regarding the allegations in paragraph (b) with respect to the documents of memorandum of association, details of Directors list of transfer of share holders of M/s Dolphin Wires Pvt. Ltd. it is submitted that, it is a Company registered in the year 1992 and Memorandum and other details were downloaded from the Ministry of Corporate Affair's Website as a study tool. This document cannot interpreted as a record of private work done by me.

Regarding the allegation in paragraph (c) that the minutes of the Company Emeirtus Legal Technology Pvt. Ltd. was found in the computer, it is submitted that the same was sent to my e-mail on the basis of my specific request in order to follow the same procedure for changing the name of "KTDC Hotels and Resorts" to "KTDC Ltd.". The said minutes of Emeritus Legal Technology Pvt. Ltd. also pertains to change of name of the said company. This is clearly a work related to KTDC Ltd. and not a private work.

Regarding the allegations in paragraph (d) regarding the alleged recovery of details of share transfers of persons "Elizabeth and Jose and Jose Thomas, it is nothing but an advice given by me while I was practicing and before joining the service of the KTDC Ltd. It seems the transfer was effected by the parties only later and the same was sent for my information. This also cannot be interpreted as private work.

Regarding the allegation in paragraph (e), it is submitted that I have absolutely no connection with M/s. AV Technologies. On verification of the registry kept by the ROC, I could not find any Company registered in the aforesaid name. This also does not show any private work done by me.

Regarding the allegations in paragraph (f), regarding the Articles of Association of Mariya Groups International Pvt. Ltd., it is nothing but a study tool downloaded from the MCA web site and is therefore not a private work.

Allegation in paragraph (g) refers to a notice by one Choice Trading Corporation Ltd. regarding their extra ordinary general meeting. Of Course, I had given certain guidelines to the party long before I joined the service of the KTDC. Perhaps on the

basis of such advice, they have prepared the notice and sent for my information, I have not given any advice as I had already taken up employment in KTDC Ltd. Therefore this also does not indicate any private work done by me during my employment in KTDC Ltd.

Utilizing the materials and Human Resources of KTDC Ltd. for Private Works

The allegation that I have utilized the materials and Human Resources of KTDC Ltd. for Private works are vague, unspecific and made without any proof and hence denied. With regard to the alleged observation raised by the Complainant, I have the following submissions, paragraph wise:-

There is no documentary proof to show that I was the Managing Director of Benny & Co. Further CDAC, in their concluding forensic analysis report (Para 6.4) themselves have stated that they could not find any document related to Benny &Co. This matter can also be confirmed from the virtual records kept by the MCA 21 website.

Regarding the allegation that I was a Director of M/s. Emerizz , I wish to state that CDAC, in their concluding forensic analysis report (Para 6.2) themselves have stated that they could not find any document that prove Benny Methew is the Director of the Company Emerizz. This matter can also be confirmed from the virtual records kept by the MCA 21 website.

Regarding the allegation that I was a member of Kocheris Legal Consultants LLP, I wish to state CDAC, in their concluding forensic analysis report(Para 6.1) themselves have stated that they could not find any document that prove Benny Methew is a member of Kocheris Legal Consultants LLP. This matter can also be confirmed from the virtual records kept by the MCA 21 website.

Affixed fraudulently the signatures of Managing Director in a communication to the Government

The above allegation is factually incorrect and hence I hereby deny the same and submit as follows:-

I was holding charge of the Managing Director, from 10.12.2012 onwards during the period, while the Managing Director was away on paternity leave. I was put in charge under the orders of the Managing Director himself. A copy the said order is attached herewith for your perusal and necessary action.

It is true that while I was holding the charge of Managing Director, I have written a letter among others, addressed to the Secretary, Tourism Development, Government of Kerala (who is also a member of the Board of KTDC Ltd.) for communicating

a Board decision to the Government. I have put my signature on the letter in the capacity as Managing Director. The fact that I have signed the letter as Managing Director is for and on behalf of Managing Director which has the authority of the Managing Director. It is an accidental omission that the letter "f" before the designation of the Managing Director was not affixed particularly because a professional of my standing will never sign as Managing Director and this may be properly understood.I never affixed fraudulently the signature of the Managing Director as alleged. The genuineness of my signature in the said letter can be verified from the records kept by the Institute of Company Secretaries. A copy of the alleged letter sent to Government is attached herewith for your perusal. I have not put the signature of the MD, I have put only my signature. Therefore it cannot be said that I have fraudulently put the signature of MD.

In the above circumstances, it is most respectfully submitted that I have not committed any professional misconduct as alleged by the complainant and the complaint may be rejected in toto."

KTDC submitted its rejoinder dated 09th Sep 2013 in which it reiterated its allegations against the appellant. The relevant portion therefrom in respect of the allegation about which detailed facts were not mentioned in the complaint is also re-produced below:-

"Affixed fraudulently the signatures of Managing Director in a communication to the Government.

a) Regarding the statement given in paragraphs C(1) and (2) of the written statement, Shri Benny Mathew was given the charge of Managing Director KTDC while the Managing Director availed the paternity leave. Shri. Benny Mathew was instructed to look after the routine matters and that has been in practice also when charge is hand over to another person for a short period when the MD in on leave.

The charge handing over letter to Shri. Benny Mathew is marked as **Exhibit- 6** and a previous instance of handing over charge is marked as **Exhibit- 7**. This means in ordinary sense the MD in charge just have to attend the matters for pushing the normal operations ahead. Therefore signing in a document which involves a number of consequences with regard to promotion /Appointment by Transfer of the employees especially in a PSU which is regarded as a State under law and amenable to writ petitions cannot be regarded as an accidental commission especially from a qualified company secretary. It may be also noted that Shri Benny Mathew had fraudulently affixed his signature as Managing Director of KTDC on the very same draft which has been rejected by the Managing Director in order to pursue with his mala fide intention. The copy of the rejected draft by the managing Director is produced herewith and marked as **Exhibit-8**. The fraud committed by Shri Benny Mathew was detected by the Secretary to the Government of Kerala, Tourism Department. It was upon the direction from the Government that action was initiated against Shri Benny Mathew. The letter from the Tourism Department is

produced herewith and marked as **Exhibit-9**. Upon perusal of the note sheet, it was detected that the file was handled on a date after the Managing Director had returned from leave, but that Shri Benny Mathew had fraudulently affixed his signature on a prior date to pursue his mala fide objective. This particular file is live in the Government Secretariat and the consequences could naturally follow."

The Director(Discipline) after examining the allegations in the complaint, written statement of the appellant, complainant's rejoinder and other material submitted by the complainant came to the following prima facie conclusion :-

"On examination of the complaint, written statement, rejoinder and other material on record, it is observed that the Resources Centre for Cyber Forensics, CDAC has reported that they have analyzed the hard disk of the computer used by the Respondent and they have retrieved eight Microsoft Excel files and fifty five Microsoft Word Document Files related to the companies/ firms mentioned by M/s. KTDC and has submitted the files along with the details including last accessed time and logical size of the files. In some of those records, the name of the Respondent is appearing.

In exercise of the powers contained in Section 22 of the Company Secretaries Act, 1980, the matter has been inquired, Reliance has been made to the forensic report dated 17th April, 2013 of CDAC submitted by the Complainant, Based on the complaint, written statement, rejoinder and other material on record specifically the forensic report of CDAC, it is observed that the Respondent per-se deemed to be in Practice; and (ii) while being in employment with M/s. KTDC has rendered professional services or assistance with respect to matters of principle or detail relating to the practice of the profession of the Company Secretaries as given in Section (2) (e) of the Company Secretaries Act, 1980.

The Council of the Institute had passéd a Resolution dated 12th May, 1991 prohibiting the members holding the Certificate of Practice to accept employment. In this case, it is abundantly clear that the Respondent has undertaken the assignments of other companies being in employment with M/s. KTDC, which has violated the said Resolution dated 12th May, 1991 passed by the Council. Therefore, prima-facie the Respondent is 'guilty' of professional misconduct under clause (1) of Part – II of the Second Schedule of the Company Secretaries Act, 1980."

Accordingly, the Director(Discipline) forwarded the case to the Disciplinary Committee of the Institute for further appropriate action in the matter. The Disciplinary Committee concurred with the prima facie opinion of the Director (Discipline) and decided to hold regular investigation/ enquiry against the appellant.

The appellant was once again given an opportunity to the appellant to come forward with his stand and also to respond to the prima facie opinion of the Director(Discipline), copy of which was supplied to him. He submitted his response and reiterated his defence pleas which he

had already taken before the Director(Discipline). The Disciplinary Committee gave opportunity to the appellant and the complainant to appear in person also before it which they availed of. It appears that the Disciplinary Committee had asked the appellant to obtain necessary confirmations from those Companies mentioned in the complaint to whom he had allegedly been advising as a Company Secretary while in the employment of KTDC. The appellant had submitted before the Committee letters from those Companies supporting his defence that he had given any advice to them after joining KTDC.

After examining the complaint, reply thereto and other material the Disciplinary Committee passed its order on 20/11/2014(which appears to have been actually signed on 12th January,2015) holding the appellant guilty of misconduct. In the said order the Disciplinary Committee virtually re-produced the contents of the complaint, appellant's reply and complainant's rejoinder and prima facie opinion. Thereafter gave its findings in the following last two paragraphs of its impugned order:

> *"9. We have noted that the Respondent vide letter dated 22nd September, 2014 has submitted attested copies of the letters obtained from (i) M/s. Emerizz Solutions Pvt. Ltd. (ii) M/s. Dolphin Wires Pvt. Ltd, (iii) M/s. Choice Trading Corporation (P) Ltd., (iv) m/s. Benny & Co. (v) M/s. Kocheries Legal Consultants LLP, (vi) M/s. Benny & Co. (v) M/s. Kocheries Legal Consultants LLP, (vi) M/s. LSG (India) Pvt. Ltd., (Emeritus Legal Technology Pvt. Ltd.) and (vii) M/s. Maria Group International (P) Ltd.*
>
> *10. The Disciplinary Committee after considering the complaint, written statement, and rejoinder, other material on record and upon hearing both the parties found that the Respondent has affixed the signature of MD in a communication sent to the Government. It is also observed that the Respondent had misused official computer for his private work while he was officiating in the capacity of Secretary & Finance Controller of M/s. KTDC Ltd. We conclude that the Respondent has been dealing with the said companies while he was in whole time employment with M/s. KTDC ltd, and therefore, we conclude that the Respondent is 'Guilty' of professional misconduct under Clause (1) of Part-II of the Second Schedule of the Company Secretaries Act, 1980."*

Thereafter the appellant was awarded punishment noticed already and then this appeal came to be filed.

We have heard the counsel for the parties and also perused the record which was made available to us by the Institute and have also gone through the written submissions filed by them.

Now, as far as the allegations made against the appellant that he was rendering professional advice to various entities while in full time employment of KTDC, which the appellant had totally denied, are concerned we find that there is no evidence whatsoever adduced before the Disciplinary Committee on behalf of the Institute as well as the complainant KTDC. Instead, contrary to the well settled principles to the effect that in such like cases

where the delinquent professional denies the charges the Director(Discipline) acts like a prosecutor in a criminal trial according the relevant Rules of 2007 for investigation of charges of professional and other misconduct of Company Secretaries, as contained in the prima facie opinion which serves the purpose of a charge sheet, framed under the Act of 1980, is called upon to adduce evidence in support of the charges, the appellant was asked to produce evidence that he was not rendering professional advice to private clients for remuneration even after surrendering certificate of practice and joining KTDC on full time basis. The Director(Discipline) does not appear from the record submitted before us to have even appeared before the Disciplinary Committee. In any case, the appellant had produced necessary certificates from the Companies to whom he had allegedly rendered advice. In the order of the Disciplinary Committee there is a reference to those certificates but without assigning any reason as to why those certificates were not acceptable the members of the Disciplinary Committee jumped to the conclusion, as re-produced already, that the appellant was continuing to render professional advice to private clients while in full time employment of KTDC meaning thereby that he was representing to private parties that he was in practice and could give professional advice. Even no witness from the side of the complainant had appeared in enquiry to substantiate these allegations. The Managing Director of KTDC did appear on two dates and made some oral submissions but did not enter the witness box to substantiate the allegations made in the complaint. The expert witness whose report regarding the material retrieved from the official computer of the appellant was also not examined in the enquiry. Even otherwise, the material retrieved from the computer of the appellant made available to him by KTDC did not indicate that he was sending any mails to third parties giving some advice or that he had raised any bills for any professional fee. Learned counsel for the Institute was really unable to justify the conclusion of the Disciplinary Committee on these charges against the appellant nor could he refer to any evidence worth our consideration. He really had nothing to say in defence of the impugned order is also evident from his written submissions wherein he also simply referred to the allegations and not to any evidence which could substantiate those allegations. Of course he did not concede that the impugned findings were not supported by any evidence. The findings in the impugned order are based only on surmises and conjectures and inferential only. It is well settled legal position which was not disputed also by the counsel for the Institute that the nature of proceedings against professionals for acts of misconduct are in the nature of quasi criminal and burden of proof of guilt is as high as in a normal criminal trial upon the prosecution and guilt has to be established beyond reasonable doubt. Here, as noticed already, even the Director(Discipline) who had formed the prima facie opinion about the guilt of the appellant had not appeared in the enquiry to pursue and substantiate by adducing evidence the allegation of misconduct of rendering professional advice by the appellant to private parties while in employment of KTDC in violation of the resolution dated 12th May,1991 of the Council of the Institute prohibiting such practice by employed Company Secretaries. The said resolution in any case has been mechanically pressed into service by the Disciplinary Committee simply to hold the Appellant guilty of misconduct in as much as this resolution prohibits Company Secretaries in practice and holding CoP to accept employment whereas in the present case admittedly the appellant had surrendered has CoP before accepting employment with KTDC. Thus, the entire procedure for investigation of

charges of misconduct was totally ignored. Therefore, the findings on the charge that the appellant was continuing to render professional advice to private parties while in employment of KTDC and thereby was deemed to be in practice is liable to be set aside.

Now, we come to the finding of the Disciplinary Committee that the appellant had affixed the signature of Managing Director of KTDC on a letter dated 10th December,2012, on which date the Managing Director had proceeded on paternity leave, and sent to the Government. As noticed already, the charge against the appellant was that on 10/12/2012 the then Managing Director of KTDC had proceeded on paternity leave and the appellant was authorised to do routine duties of Managing Director in his absence. A reading of the complaint, reply of the appellant and rejoinder thereto submitted by the KTDC firstly before the Director(Discipline) and then before the Disciplinary Committee would show and which factual position was never disputed by the appellant, one of the employees of KTDC had represented for his promotion and in regard to that representation the Board of KTDC had passed some resolution which was to be forwarded to the Government for its consideration. Before the Managing Director had proceeded on leave a draft letter dated 8th November,2012 to be sent to the Government was put up before him for approval but that draft was rejected by the Managing Director. The allegation against the appellant, as stated in the rejoinder submitted before the Director(Discipline)and not in the original complaint, was that despite the fact that the Managing Director had not approved of the draft letter dated 8th November,2012 regarding the promotion case of the concerned employee the appellant signed same very letter as Managing Director of KTDC when the Managing Director had proceeded on leave and got it despatched to the Government. Regarding this charge the appellant's defence was that he had not affixed the signature of the Managing Director on that letter but he had put his own signature but inadvertently he had not mentioned in the letter dated 10th December,2012 'for' before the words 'Managing Director'.

The Director(Discipline) in his prima facie opinion did not accept the allegation that the appellant had fraudulently affixed the signature of Managing Director on the letter dated 10th December,2012 and had restricted his conclusion that the appellant had in violation of the Council's resolution of 12th May,1991 been giving advice to private parties while in the employment of KTDC. There is no doubt that the Disciplinary Committee could still enquire into the complainant's charge that the appellant had fraudulently affixed the signature of the Managing Director of KTDC. However, for establishing this allegation necessary evidence had to be adduced by the Director(Discipline) which was not done and as noticed already he does not appear to have appeared even once before the Disciplinary Committee.

Despite that the complainant could still adduce evidence of the person whose signature the appellant had allegedly affixed on the letter dated 10th December,2012. That was also not done. The new Managing Director of KTDC though appeared twice before the Disciplinary Committee did not even submit that the appellant had committed this act of affixing the signature of the earlier Managing Director and that too fraudulently or that the appellant had signed that letter and sent to the Government knowing that draft of that letter had earlier been rejected by the Managing Director, as was the case set up in the rejoinder of KTDC(and not in the complaint). Then how could the Disciplinary Committee conclude in

its impugned order dated 20th November,2014 that "the respondent(appellant herein) has affixed the signature of MD in a communication sent to the Government." The plea of the appellant that he had forgotten to prefix 'for' before 'Managing Director' in the letter was not even discussed by the Disciplinary Committee. This conclusion is also thus not sustainable as it is based on no evidence at all and consequently perverse and liable to be set aside.

This clearly is a case where a professional has been awarded harsh punishments of removal of his name from the Register of Members of the Institute and a fine of Rs.20,000/- without there being no sufficient evidence against him. At one place in the impugned order the Disciplinary Committee had observed that the appellant herein had not disputed the allegations and impression appears to have weighed in the minds of the members while holding him guilty. The counsel for the appellant had submitted that that was not correct observation. The counsel for the Institute also could not point out any admission of guilt by the appellant. We have ourselves also taken a deep plunge into the records of the case but could not find any admission by the appellant. That makes the impugned order more vulnerable.

We may simply note before concluding that the appellant during the hearing of the appeal had brought on record the views about this case against the appellant expressed by the present Chairman of KTDC in a meeting of the Board held on 19th January,2016 after the High Court had directed the Disciplinary Authority, the Managing Director of KTDC, to pass final orders in the disciplinary proceedings against the appellant within one month, to the effect that there was a conspiracy against the appellant to terminate his services with the intentions of spoiling his career and this is only a personal revenge. The counsel for the appellant sought to justify the appellant's plea that he had been victimised by the earlier Managing Director. Neither the counsel for the KTDC nor of the Institute made any comments about that document produced by the appellant. We have, however, not based our conclusions on the basis of that document produced at the appellate stage.

This appeal is accordingly allowed with costs of Rs. 20,000/- to be paid to appellant by the Institute in addition to refund of fine, if it already stands paid by appellant. The impugned orders of the Disciplinary Committee are set aside.

Justice P.K.Bhasin (Retd.)
Chairperson

Dr. Navrang Saini
Member

Preeti Malhotra
Member

1st August, 2016

BEFORE THE APPELLATE AUTHORITY

(Constituted under The Company Secretaries Act, 1980)

APPEAL NO. 11/ICSI/2015

Sital Prasad Swain .....Appellant

Versus

Institute of Company Secretaries of India & Ors. .....Respondents

Appearance:
Dr. S. Kumar, Advocate for appellant
Mr. R.D. Makheeja, advocate for respondent no.1(ICSI)
Mr. A. K. Srivastava, advocate for respondent no.2(complainant)

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE DR. NAVRANG SAINI (MEMBER)

Date of pronouncement of order : 8th August,2016

ORDER

The appellant is a practicing Company Secretary and he stands held guilty of committing professional misconduct by the Disciplinary Committee of the Institute of Company Secretaries('Institute" in short) established under Section 21B of the Company Secretaries Act,1980('Act of 1980' in short) and has been awarded punishment of 'Reprimand' and fine of Rs.5,000/-. Feeling aggrieved by the order dated 12th January, 2015 of the Disciplinary Committee holding him guilty of professional misconduct and the order dated 22nd July, 2015 awarding him the said punishments the appellant has preferred this appeal under Section 22 E of the Act of 1980.

The relevant facts leading to the filing of a complaint dated 10th September, 2012 against the appellant by respondent no. 2 herein(hereinafter to be referred as the 'complainant'), conduct of enquiry into the allegations contained in that complaint and his being held guilty and punished can be gathered from the relevant portions of the complaint, appellant's reply thereto, complainant's rejoinder and the impugned order. The complainant had alleged as under:

> *"I, Pramod Khosla, am a director and promoter shareholder and virtual owner of the company M/s Khosla Steel Industries Private Limited. I along with other directors of the company appointed Mr. Bishender Singh, as additional director in our company, so that he could arrange finance for our company.*
>
> *However, Mr. Bishender Singh along with the Practicing Company Secretary, Mr. Sital Prasad Swain(the appellant herein), showed us as ceased to be directors of the company under section 283(g), reduced our shareholding by showing fraudulent allotments to others and debarred us from managing the affairs of the company. The said Bishender Singh has taken our factory under illegal control by sheer criminal force and with the active support of District Police. We have already filed*

a petition with Hon'ble CLB, Kolkata Bench vide CP No. 216/2012 pending disposal with the said Hon'ble Bench.

However, my complaint against the said professional Mr. Sital Prasad Swain is limited to the following grievances:

Mr. Bishender Singh was appointed as Additional Director on 10.08.2011 pursuant to section 260 and ceased to be director of the company with effect from 30.08.2011 i.e. the date of AGM. However, as Mr. Bishender Singh in connivance with Mr. Sital Prasad Swain showed himself as a promoter director in the Form 32 filed for his appointment as an additional director. His name was not removed from the MCA website as director even after AGM held on 30.08.2012.

The professional filed Form 32 for appointment of Mr. Bishender Singh as an Additional Director by using our digital signature and didn't attach the Board Resolution that was passed by the Board of Directors of our company.

After getting appointed as Additional Director (though shown as promoter director in the Form 32 filed by the said professional) the said Mr. Bishender Singh refused to finance the company and seized the factory owned by the company by criminal force with the active support of District Police.

A director Mr. Kishore Khosla resigned from directorship of the company on 20.12.2011 and a Board Meeting was held on the same day accepting his resignation. I was also present in that Board Meeting and I was duly authorized to file the From 32 and which is also mentioned in the Form 32 which was filed on 21.12.2011

First of all, Mr. Bishender Singh didn't arrange finances for our company rather took our factory in his illegal control by sheer criminal force and to further the misappropriations and mischiefs Mr. Bishender Singh in connivance with the professional filed a Form 32 for the removal of my wife Mrs. Sarita Khosla and myself and showed us as ceased to be a director from the company under section 283(1)(g) on 27.02.2012.

However, a Board Meeting was duly held on 20.12.2011 for accepting the resignation of Mr. Kishore Khosla and we were present at that Board Meeting . So three months has not elapsed from the date of last Board Meeting on 27.12.2012 and therefore section 283(1)(g) was not applicable in our case.

The professional should have been diligent before filing the Form 32. The Form 32 was also available in the MCA website and the professional should have taken appropriate steps before filing the form 32 for our removal.

The professional also did not follow the circular issued by Ministry of Corporate Affairs bearing Circular No. 1/2012 dated 10.02.2012 where reason for removal is mandatorily required to be attached when there is a cessation of any directors is affected. He could have figured out the Form 32 filed earlier for resignation of Mr. Kishore Khosla showing the Board Meeting. Obviously then as three months has

not elapsed from that date, question of cessation under section 283(1)(g) did not arise which could have been apparent even to a bystander.

However, Mr. Sital Prasad Swain didn't do his duty in so inquiring by reason connivance with the said Mr. Bishender Singh rather than lack of knowledge. He attached some receipts of Speed Post showing some letters sent to us on 22.07.2012 and on that basis and that irrelevant and false ground the professional showed our removal from Directorship of the Company.

We received a mail from ROC seeking our cessation. We immediately mailed to ROC, Patna informing him about fraudulent filing by a person who was not a director of the company and took advantage of his name appearing at the MCA wrongly.

We approached the Professional, we asked for the following explanations;

Mr. Bishender Singh was not a director of the Company, then how could he call a meeting and file Form 32 for our removal. You were well aware that he was appointed only as an additional director of the company.

We did not receive any notice of Board Meeting. As per law notice of meeting is mandatory and any person(a director obviously) who calls and convenes a Board Meeting must ensure that the notices are reached to all the directors. As a company secretary you are expected to know the requirement and therefore verify the same.

We have conducted a meeting on 20.12.2011 and therefore section 283(1)(g) of the Companies Act,1956 was not invokable at all then how could you file such a form by putting your digital signature.

Mr. Bishender Singh also in connivance with the professional allotted shares to two companies and reduced our shareholding by such illegal allotments……"

The appellant refuted all allegations leveled against him by the complainant. The relevant portions from his written statement dated 10th November,2012 submitted to the Director(Discipline) of the Institute when he was required to respond to the complaint are as under:-

"The complainant has made all sorts of baseless allegations and commented on the conduct of the undersigned just to make me and escape goat and pass on the buck to my shoulders and thereby to smartly cover up all his series of violations and illegal conduct.

As mentioned earlier, it will be evident from the Annual Return of the Company, as available from the MCA portal that the AGM for the year 2011 was held on 18.08.2012 and not on 30.08.2011 as alleged or at all. The Auditor has issued the Audit Report of the Company w.r.t. the financial year ended on 31.03.2011 only on 14.05.2012 and thereafter the AGM was finally held on 18.08.2012.

The Complainant himself digitally signed the form and now he cannot challenge what he had signed. It is submitted that if the Complainant wanted to attach any resolution then he could have attached the same and then signed the form instead of showing concern now after nearly more than 400 days of signing the same.

With respect to the sub paragraph no. 2 of the third un-numbered paragraph of the letter to the President, it is submitted that the veracity of the Board Resolution attached at Annexure B is already sub judice before Hon'ble Company Law Board, Kolkata Bench and I fail to understand how the contentions raised therein are in any way connected w.r.t. my signing a form 32 w.r.t. Mr. Bishender Singh as mentioned hereinabove. I demand strict proof and explanation from complainant in this regard. It is further submitted that the Complainant has failed to provide any evidence that he gave me a copy of the aforesaid resolution and that he instructed me to attach the same to any form.

With respect to the sub-paragraph no. 5 of the third un-numbered paragraph of the letter to the President, it is submitted that the contentions raised therein is already sub judice before Hon'ble Company Law Board, Kolkata Bench. It is pertinent to note here that due notices were served upon the Complainant, copy whereof has been attached by the Complainant himself and I fail to understand the issue which he desires to raise. I demand strict proof and explanation and to the point reference as to under which legal provision he has alleged that the undersigned should been diligent? It is submitted that utmost care and diligence was exercised by me before certifying the aforesaid form. I have duly verified the details of the meetings and notice to the Complainant and I cannot be compelled to certify, something just on the basis of what the Complaint has filed earlier.

I have all right and it is my responsibility and duty to verify the facts afresh and not simply rely on the wrong and not to carry on the wrong which has been done by the Complainant.

With respect to the sub-paragraph no. 6 of the third un-numbered paragraph of the letter to the President, it is submitted that the contentions raised therein is already sub judice before Hon'ble Company Law Board, Kolkata Bench. It is denied and disputed that the reason for removal has not been mentioned in the form, as alleged or at all. It is submitted that the reason for removal has been very clearly mentioned in the form and to ensure proper diligence the relevant extracts as well as the postal receipts are attached to the form itself"

The relevant portions from the rejoinder submitted by the complainant to the said reply of the appellant are also extracted below:-

"With reference to averment made in paragraph 1(e) I would like to say that I have made a substantial complaint. Mr. Bishnder Singh was appointed as an Additional Director by a Board Resolution dated 10.08.2011 whereas he was shown as Promoter Director in Form 32 without enclosing a copy of Board Resolution, deliberately by the said Professional who signed digitally that form in connivance

with the said Bishender Singh. He again filed Form 32 for the removal of my wife, Mrs. Sarita Khosla and me and showing us a ceased to be a director from the company under section 283(1)(g) on 27.02.2012 without fulfilling even the basic conditions under section 283(1)(g). A Board Meeting was held on 20.12.2011 in which the resignation of Mr. Kishore Khosla one of the Directors of the Company was accepted and a Form 32 was filed on the same day. In order to invoke provisions of section 283(1)(g) at least 3 months must have elapsed from the date of previous meeting i.e. 20.12.2011. That form 32 dated 20.12.2011 was already available on the website of MCA on the date of filing of Form 32 showing cessation of me and my wife therefore, the same could not have done without connivance with the said Bishender Singh by the said Professional.

With reference to averment made in paragraph 11, I would like to state that the said professional has intentionally filed Form 32 for appointment of Mr. Bishender Singh as Promoter Director of the company instead of Additional Director of the company. It is the duty of a Professional to give fair and correct information to ROC by filing Forms and attaching required documents.

With reference to averment made in paragraph 13, I wish to state that the said form 32 has not been signed by the complainant.

With reference to averment made in paragraph 14, I would like to say that the said professional has not verified the details before filing Form 32 for the cessation of me and my wile along with Mr. Kishore Khosla and Mrs. Veena Khosla as directors of the company. He gave cause of removal "as ceased to be a director from the company under section 283(1)(g) on 27.02.2012". However, a Board Meeting was duly held on 20.12.2011 for accepting the resignation of Mr. Kishore Khosla and we were present at that Board Meeting. Therefore, three months had not elapsed from the date of last Board Meeting on 20.12.2011 and therefore section 283(1)(g) was invokable in our case at all. I think this is a serious professional misconduct"

These allegations were looked into by the Director(Discipline) of the Institute, as provided under Section 21(2) of the Act of 1980, to find out whether a prima facie case of professional conduct was made out or not against the appellant justifying regular enquiry by the Disciplinary Committee or the Board of Discipline, depending upon the category of misconduct as defined in the Schedule I and Schedule II to the Act of 1980, allegedly committed by the professional concerned. When the matter was looked into at that stage the appellant was called upon by the Director(Discipline) to submit the documents which he had relied upon while certifying the two Forms 32 in question. The appellant submitted his reply dated 24th August,2013 and claimed that for certifying the Form regarding the appointment of Bishender Singh as a Director he had relied upon the certified true copy of resolution dated 10th August,2011 of the Extra Ordinary Meeting of the Company. Regarding the other Form 32 certified by him regarding the cessation of complainant and his wife as Directors w.e.f. 27/02/12 his response was that they had ceased to be Directors under Section 283(1)(g) of the Companies Act as they were absent on three consecutive meetings of the Board and were also not available for a continuous period of three months without obtaining leave of

absence and also that copies of postal receipts, minutes and acknowledgement of registered posts had been annexed with the Form 32. He also submitted alongwith that reply copies of postal receipts, minutes etc. The Director(Discipline) vide order dated 27th February,2014 came to the conclusion that prima facie the appellant had committed professional misconduct falling under Clause (7) of part I of the Second Schedule to the Act of 1980 because of his not having exercised due diligence and acting grossly negligently while certifying Form 32 on both the occasions. The matter was then placed before the Disciplinary Committee of the Institute which concurred with the prima facie view of the Director(Discipline) and decided to hold regular enquiry into the allegations against the appellant as provided under Rule 9(2)(b) of the Company Secretaries(Procedure of Investigations of Professional and Other misconduct and Conduct of Cases) Rules, 2007. Accordingly the appellant and the complainant were both given opportunity to put forth their respective cases before the Disciplinary Committee.

From the foregoing narration the picture which emerges is that the professional services of the appellant were availed of by one of the Directors of a Company by the name of M/s Khosla Steel Industries Pvt. Ltd. for certifying 'Form 32' on two separate occasions.

It is common case of all the parties that Form 32 prescribed under the Rules framed under the Companies Act,1956 is required to be submitted by the incorporated Companies with the Registrar of Companies, Ministry of Corporate Affairs(MCA) in different contingencies. Form 32 can be certified by a Chartered Accountant or by a Company Secretary and even by a Cost Accountant and once that certification is done before submission of the Form 32, which these days is done online, great sanctity is attached to the correctness of the contents of the Form and the same is acted upon without any further enquiry by the office of Registrar of Companies. One of the contingencies when Form 32 is to be submitted by a Company is when a new Director is brought on the Board of Directors or if some existing Director ceases to be a Director by removal or otherwise. It was also the common view of the counsel for all the parties that the standard of due diligence goes high in case when an existing Director is claimed by other Directors to have been removed or to have ceased to be a Director for any reason since immediately on submission of Form 32 duly certified by a Chartered Accountant or a Company Secretary or a Cost Accountant the information transmitted through Form 32 to that effect in the office of Registrar of Companies comes within the public domain and can be relied upon by anyone as the correct state of affairs of the concerned Company even though some wrong information had been furnished fraudulently. In the present case the appellant had certified the contents of Form 32 once when one Mr. Bishender Singh was made a Director of the aforesaid Company and on another occasion he certified another Form 32 when two of the existing Directors, the complainant and his wife, were to be shown to have ceased as Directors under Section 283(1)(g) of the Companies Act,1956. The complaint of the complainant, who alongwith his wife were the Directors of the said Company when Bishender Singh was also made a Director, lodged with the Institute was that while certifying Form 32 on both the occasions the appellant had not exercised due diligence expected from a professional and that had resulted in great harm to him inasmuch as he had been thrown out from the Company of which he was virtually the owner. The complainant's case is that had the appellant

exercised due diligence before signing the Form 32 on two occasions he would have come to know that Bishender Singh was made only an Additional Director under Section 260 of the Companies Act and whose appointment came to an end on the day when next AGM of the Company was held which in the present case was held on 30/08/11(though as per the appellant it was held on 18/08/12) and, consequently he could not have held any Board meeting on 27/02/12 with one more Director Neelam Khosla and passed a resolution that the complainant and his wife had both ceased to be the Directors under Section 283(1)(g) of the Companies Act because of their having not attended any of the Board meetings held on 11/11/2011, 13/12/2011, 19/01/2012 and 27/02/12 . However, the appellant, as per the grievance of the complainant in his complaint to the Institute, helped Bishender Singh in achieving his illegal designs of illegal getting control of the Company illegally by ousting the complainant and his wife by using 'their' digital signatures while certifying Form 32 showing Bishender Singh's appointment as a promoter Director and not as an Additional Director till the next AGM only and by not attaching the resolution dated 10th August,2011 passed by the Board of Directors of the Company appointing Bishender Singh as an Additional Director only. Similarly, as per the case of the complainant if the appellant had exercised due diligence while certifying the second Form 32 showing that he(complainant) and his wife had ceased to be the Directors by going to the portal of Ministry of Corporate Affairs he would have come to know that there was a Board meeting held on 20/12/11 which was attended by the complainant and in which meeting resignation of another Director Kishore Khosla, complainant's brother, was accepted and, therefore, Section 283(1)(g) could not have been invoked by Bishender Singh and Neelam Khosla for the removal of the complainant and his wife from the Board of Directors of the Company.

The case of the appellant has been that he had exercised due diligence while performing his professional duty. It is the grievance of the appellant that neither in the complaint lodged by the complainant he had said anything as to what actually he should have done while certifying the two impugned Forms and what he had not done nor the Director(Discipline) as well as Disciplinary Committee had said in their impugned orders as to how the appellant had not done his professional duty of certifying the impugned Forms 32 with due diligence and if that had been specified he would have duly responded. He had claimed in his reply to the complaint before the Director(Discipline), which averment is to be found at page no. 96 of the appeal paper book, that the on the first occasion when he had certified Form 32 when approached by the complainant and his brother Kishore Khosla that Form was digitally signed by the complainant himself and his brother Director Kishore Khosla had also given a copy of resolution dated 10th August,2011 allegedly passed in the Members' extraordinary meeting held that day for the appointment of Bishender Singh as Executive Director(promoter category)(copy of which is available in the appeal paper book at page no.171) (this plea was noticed by the Director(Discipline) in his prima facie opinion and further that no resolution relied upon by the complainant in the enquiry proceedings was given to him at the time of filing of Form 32 and as far as non filing of any resolution as an attachment to Form 32 is concerned there is no such requirement of law and so resolution provided to him by Kishore Khosla was not submitted with Form 32.

We have considered the submissions of the counsel for the parties and have also gone through the records of the case produced before us by the Institute.

From the record of the case that hearing in the enquiry before the Disciplinary Committee had taken place on 12th January,2015 and same date matter was disposed of also with the passing of the impugned order, which is a two page order having five paras. The first three paras of the impugned order, which only are relevant are re-produced below:-

"*1. The Disciplinary Committee considered the submissions made by the parties and the material on record. The Disciplinary Committee held the Respondent Guilty of professional misconduct under Clause (7) of Part I of the Second Schedule of the Company Secretaries Act, 1980 as the Respondent without exercising due diligence certified and filed two Forms 32. The first Form 32 relates to the appointment of Shri Bishender Singh as a 'Promoter Director' of M/s Khosla Steel Industries Pvt. Ltd. whereas as per the documents the Board of Directors of the company had appointed him as 'Additional Director' and not as a 'Promoter Director' which is clearly stated in the Board resolution dated 19th August,2011. The other Form 32 related to 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.*

2. The Disciplinary Committee felt that section 283(1)(g) of the Companies Act,1956 is not attracted in this case as three months were not elapsed from 20th December,2011 i.e. the date of the Board meeting in which the resignation of Mr. Kishore Khosla was accepted. Apparently, the Complainant and his wife were present in the said meeting.

3. The Disciplinary Committee also observed that no conclusive evidence has been brought on record to establish that Board meeting of the company was not held on 20th December,2011 or was not attended by the Complainant and his wife. Hence, therefore thtree months were not elapsed as on 27th February,2012 i.e. the date of the Board meeting in whioch the Complainant and his wife were removed from the Directorship of the company purportedly under Section 283(1)(g) of the Companies Act,1956."

A reading of this order has disappointed us. We are disappointed to find that there is no discussion whatsoever about the pleas raised by the appellant as well as the complainant. In fact, this order starts with the findings straightaway which is not the correct way of passing final orders by a Disciplinary Body constituted under a statute, which in the present case is the Company Secretaries Act,1980, while dealing with the complaints of professional misconduct against professionals enrolled with the Institute of Company Secretaries. No decision has been given on any of the pleas of the parties and particularly of the appellant against whom enquiry had been conducted for professional misconduct. In this order there is nothing said as to what care should have been taken by the appellant while certifying the two Forms 32 and what he had not done which as a professional he was expected to do.

The appellant was right in his contention that when he had categorically claimed that at all stages that he had exercised due diligence while certifying the impugned Forms and had also informed the Disciplinary Authorities of the Institute about the documents relied upon by him for satisfying himself about the correctness and genuineness of the contents of those Forms the Disciplinary Committee should have informed him during the one day enquiry as to what steps he was expected to have taken and what he had failed to take and then he would have responded accordingly. Even in the impugned orders no specific act of negligence was attributed to him. It was simply mentioned that on record there was a resolution of the Company which showed that Bishender Singh was appointed as an Additional Director while the appellant had certified Form 32 which showed that he was appointed as a promoter Director. It is undisputed that the disputes as to which of the two resolutions relied upon by the parties were subject matter of controversy before the Company Law Board, Kolkata and the Disciplinary Committee was not concerned about that controversy. All that was required to be seen, firstly by the Director(Discipline) and then by the Disciplinary Committee was whether the appellant had taken all the care before certifying the Forms 32 and none of them disclosed to the appellant at any stage as to what diligence was expected of him. So, even we are handicapped in considering the appeal in proper perspective. We cannot enter into the minds of the learned members of the Disciplinary Committee to find out as to what they considered to be acts of negligence on the part of the appellant. If any reasons had been given in the impugned orders as to what constituted due diligence on the part of the appellant in the facts and circumstances of this case we would have examined those reasons and given appropriate decision. In the absence of any reasons/discussion in that regard we feel that we cannot hold whether the appellant was guilty of professional misconduct of not exercising due diligence while certifying the two Form 32 on first occasion. Similarly nothing had been said either by the Disciplinary Committee or by the Director(Discipline) as to what was expected of the appellant while certifying the second Form 32 and what he had failed to do at that stage. Even the learned counsel for the Institute could not state before us with any certainty as to what steps the appellant should have taken before certifying the Forms in question and what would have happened if he had taken those steps.

In the aforesaid circumstances, we feel that the only appropriate order which we should pass in this appeal is to set aside the impugned orders of the Disciplinary Committee and remand the matter back to the Disciplinary Committee for passing fresh orders in the light of our aforesaid observations after giving opportunity of hearing to all the parties. The appeal stands disposed of accordingly.

The Discipilnary Committee shall complete this exercise after remand within four months from the date of receipt of this order after duly informing the parties of the date to be fixed for fresh hearing.

Justice P.K. Bhasin (Retd.)
Chairperson

Dr. Navrang Saini
Member

8th August, 2016

BEFORE THE APPELLATE AUTHORITY

(Constituted Under The Company Secretaries Act, 1980)

APPEAL NO. 02/ICSI/2015

IN THE MATTER OF:

Subramanyam S. .....Appellant

Versus

Institute of Company Secretaries of India
and others .....Respondents

CORAM

Hon'ble Mr. Justice M.C. Garg (Retd.)	Chairperson
Hon'ble Dr. Navrang Saini	Member
Hon'ble Mr. Sanjay Grover	Member

PRESENT:

For the Appellant:

Mr. S.M. Sundaram, Advocate

For the Respondents:

Mr. R.D. Makheeja for ICSI : Mr. Ramesh Kumar Srinivasa for Respondent 2 & 3

ORDER

Date: 14.01.2017

This appeal arose out of the order dated 18.01.2015 in case no DC: 162/2012 passed by the Board of Discipline in a complaint filed by Shri Ramesh Srinivasa and Shri Naresh Kumar Bharadwaj dated 22.10.2012 in the Institute of Company Secretaries of India (Hereinafter referred to as the 'Institute'). It appears that the said complaint was examined and proceeded for further investigation by the Board of Discipline without having any prima Face opinion formed by the Council of the Institute on record as required under clause (2) of Part-IV of the First Schedule of the Company Secretaries Act, 1980, which 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) xxxxx***
>
> ***(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".***

The Learned Counsel appearing for the Appellant has raised certain vital issues before the bench stating that the Board of Discipline while forming its Prima Facie opinion of guilt did not provide the reasons as to how it came to conclusion in term of clause (2) of Part IV of the First Schedule of the Company Secretaries Act 1980. The Learned Counsel further submitted that the Board of Discipline while coming to the conclusion of holding guilty has totally exceeded its powers and further ignored that within the said clause, the Board of Discipline cannot exercise its powers as the same has to be exercised by the Council of the Institute as the language used in the said clause by the legislature is different from the **'other acts'** of misconduct in the First Schedule.

The Learned Counsel appearing for the Institute has submitted that it is true that in this case there is no Prima Facie opinion formed by the Council of the Institute but the very fact that the matter has been referred to the Board of Discipline and the Board of Discipline has come to the conclusion about the misconduct of the respondent, this should be taken as the proper compliance of the provisions of the law in this regard.

Another point raised by the Learned Counsel appearing for the Institute is as regards the technical objection in this case wherein he has submitted that the respondent in the complaint has admitted his guilt before the Board of Discipline and prayed for taking a lenient view while awarding the punishment in the matter. However, on this point according to the appellant counsel, there is nothing on record, whereby, anything was given in writing by the respondent admitting his guilt.

The complainant who appeared before the Appellate Authority in person also submitted that in this case, the documents were created, forged, and back dated, certification was made by the Company Secretary. He further submitted that certain documents were signed by him even after three years and the form 32 was not signed as per the requirements of the Company Law.

We are of the opinion that in view of the specific language of statute i.e., clause (2) of Part IV of the First Schedule of the Company Secretaries Act 1980, the correct procedure to be followed in future can be, referring the complaint where there is allegation of other misconduct, to the Council at the time of filing of the complaint to itself. The complaint be examined by the Council and it is only when the Council form Prima Facie opinion that the case is covered in clause (2) of Part IV of the First Schedule of the Company Secretaries Act 1980, then the council may refer the matter for further action regarding the collection of evidence etc., by the Board of Discipline.

It is true that after the amendment of the statute the Discipline Directorate has been constituted under section 21 of the Act and the said Discipline Directorate has also visualized of creation a Director Discipline for examination of the complaint with respect to all the allegations of misconduct, but when it comes to the other misconduct the requirements of the "**formation of Prima Facie Opinion (PFO)**" by the council as mentioned in clause (2) of Part IV of the First Schedule of the Company Secretaries Act 1980 is still kept intact.

In view of the aforementioned facts and considering the submissions of the relevant parties to this appeal the language of the statute and without going into the merit of the appeal at this stage, we are of the considered view that in view of technical violation of law i.e. no information of forming Prima Facie opinion by the Council about the alleged misconduct is on record, therefore,

we direct the Institute of Company Secretaries of India to reconsider the matter in the light of clause (2) of Part IV of the First Schedule of the Company Secretaries Act 1980, wherein the council has to form the Prima Facie opinion as to whether particular act/omission of its Member has brought disrepute to the Institute or the Profession. In case the Council forms Prima Facie opinion that the member appears to be guilty of other misconduct, then, the matter be referred to the Board of Discipline for further investigation and passing an appropriate order in the said matter. In the meanwhile, order dated 18.01.2015 passed by Board of Discipline is set aside.

We furthermore direct the Registrar of the Appellate Authority to communicate the copy of this order to the Secretary/Director (Discipline) of all the respective Institutes for their information and ensuring the compliance of clause (2) of Part IV of the First Schedule of the respective enactments in future in such cases.

Justice M.C.Garg (Retd.)
Chairperson

Dr. Navrang Saini
Member

Sanjay Grover
Member

BEFORE THE APPELLATE AUTHORITY

(Constituted Under The Company Secretaries Act, 1980)

APPEAL NO. 14/ICSI/2014

IN THE MATTER OF:

Manish Kumar Maheshwari .....Appellant

Versus

Institute of Company Secretaries of India
and others .....Respondents

CORAM

Hon'ble Mr. Justice M.C. Garg (Retd.)	Chairperson
Hon'ble Dr. Navrang Saini	Member
Hon'ble Ms. Preeti Malhotra	Member

PRESENT

For the Appellant:

1. S. Kumar, Advocate
2. Mr. Manish Kumar Maheshwari, Appellant in person

For the Respondents:

1. R.D. Makheeja, Advocate for respondent 1 & 3 (ICSI)

ORDER

Date: 28.02.2017

1. Being aggrieved of the Orders dated 31st May, 2014 (signed by the Disciplinary Committee on 8th August, 2014) and dated 7th October, 2014 passed by the Disciplinary Committee 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. Manish Kumar Maheshwari, a Company Secretary, the Appellant herein, against whom a complaint was filed by Mr. Rajendra Jain, one of the Promoter Directors of M/s R. R. Home Developers Private Limited (hereinafter referred to as the "Company"), in form (I) on 21st December, 2012 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 against the Institute of Company Secretaries of India and others challenging the Impugned Orders dated 31st May, 2014 and dated 7th October, 2014 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 30 days and also imposed fine of Rs.5000/- (Five Thousand only).

2. Mr. Rajendra Jain, the complainant before the Institute of Company Secretaries of India in his complaint inter-alia stated that he and Mr. Rajesh Gupta are the two Promoters Directors and equal shareholders of the Company. The complainant has alleged that Mr. Manish Kumar Maheshwari has certified and filed Form 32 (For removal from directorship) and Form 23 (For filing of resolution of members) for his removal from the directorship of the said company ignoring the fact that he is holding 50% of shares in the company without exercising due diligence.

3. The complainant further stated that since there are two shareholders and directors in the Company, therefore, no board meeting or any general meeting could have convened or held for his removal. Moreover Mr. Manish Kumar Maheshwari failed to obtain sufficient information which was necessary for expression of an opinion in respect of Form 32 and Form 23 dated 15th March, 2012 for his removal and thereby failed to exercise due diligence. The complainant further stated that the respondent had certified Form 32 and Form 23 both dated 15th March, 2012 on the basis of an Extra Ordinary General Meeting (EOGM) held on dated 15th March, 2012 which was never held. The complainant furthermore stated that no notice either for the Board Meeting or for Members Meeting was given.

4. The Disciplinary Directorate of the Institute of Company Secretaries of India in pursuance of sub-rule (3) of rule (8) of the Rules had sent a copy of the complaint to the Respondent Mr. Manish Kumar Maheshwari vide letter dated 26th December, 2012 calling upon him to submit the written statement.

   4.1 The Respondent submitted the written statement on dated 16th January, 2013 wherein he denied the allegations levied against him and inter-alia stated that the work was carried out by him in a Professional manner and the certification / verification has been done on the basis of documents made available to him (but no such documents have been produced on record).

   4.2 The respondent/appellant further stated that the complainant is a Promoter Director in the Company since 20th July 2009 along with Mr. Rajesh Gupta and both were holding 5000 Equity Shares of the company till 28th November, 2011. Thereafter Mr. Rajesh Gupta gifted 2500 equity shares of the company to Mr. Gopikishan Agrawal (Gupta) as per declaration of Gift Deed dated 28th November 2011. Mr. Gopikishan Agrawal lodged the duly executed Transfer Deed along with share certificate No. (3) to the company for transfer of said shares. The said transfer was approved by the Board vide meeting dated 7th December 2011 and the same was recorded in the Register of Members. Accordingly there are three shareholders namely the complainant Mr. Rajendra Jain, Mr. Rajesh Gupta and Mr. Gopikishan Agarwal (Gupta) holding 5000, 2500 and 2500 shares each respectively.

   4.3 The respondent further stated that the shareholders Mr. Rajesh Gupta and Mr. Gopikishan Agarwal jointly hold 50% Equity shares in the company had sent a notice in terms of and in full compliance of Section 169 of the Companies Act, 1956 to the company at its registered office for calling and holding an EOGM on requisition. The

Respondent further stated that the Board of the company failed to call the requisitioned meeting on 15th January, 2013 and therefore in terms of the provisions of sub-section (6) of Section 169 of the Companies Act, 1956, the requisitionists themselves called the EOGM. The requisitionists sent the notice dated 10th February, 2012 for calling an EOGM vide consignment note no. 116407 and 116408 dated 10th February, 2012 of the same by the Reliance Courier. The shareholders thereafter convened an EOGM on 15th March, 2012 at 11:00 AM at Hotel Lords Inn South Tukoganj, Indore and legitimately passed the resolution for removal of the complainant from the Board of the company in terms of Section 284 of the Companies Act, 1956 and for appointment of Shri Gopikishan Agarwal as the Managing Director of the company whose office would not be determined by retirement by rotation. This resolution was completely forming part of the requisitions notice.

4.4 The respondent further stated that there were only two directors in the company but this being a requisitioned EOGM, no Board Meeting was ever called or held and therefore the statement of the complainant that no board meeting is held is not applicable to this matter. Therefore, on the basis of the information made available to him and documents on record, he verified that the calling and holding of the requisitioned EOGM was in compliance with the applicable provisions of the Companies Act, 1956. Further, the complainant is also incorrect in stating that he had expressed an opinion in respect of Form 32 and Form 23.

4.5 The Respondent further stated that the said two certificates required his due diligence to the limited extent of verifying the particulars appearing in the respective forms from the records of the company and to confirm that these particulars are correct and are in line with the records of the company.

5. In pursuance of rule 9 of the Rules, the Director (Discipline) after examination of the complaint, written statement, rejoinder and other materials on record formed his 'Prima Facie Opinion' dated 16th September, 2013 whereby he has observed that the Respondent did not notice that the Complainant was removed from the directorship of the company under Section 284 (3) of the Companies Act, 1956, without giving him proper opportunity of being heard before his removal which is in violation of section 284(3) of the Companies Act, 1956. The Respondent is therefore Prima-Facie 'Guilty' of professional misconduct under Clause (7) of Part-I of the Second Schedule of the Company Secretaries Act, 1980 as he did not exercise due diligence in the conduct of his professional duties. The Director (Discipline) placed his report before the Disciplinary Committee on 3rd October, 2013 for its consideration. The Disciplinary Committee considered the 'Prima Facie Opinion' and other materials on record and agreed with the 'Prima Facie Opinion' and decided to proceed further in the matter in accordance with the Rules.

6. The Disciplinary Committee after hearing the submissions of the parties asked the Respondent/Appellant as to whether he can produce the attendance sheet of the Board meeting of the company held on 7th December, 2011 wherein the transfer of shares were considered by the Board of Directors. The Respondent stated that these are not available but

he would try to submit the same. The Disciplinary Committee also asked the Respondent as to whether he had seen that the notice for removal of the complainant from the directorship of the company was served to the complainant. The Respondent in response stated that he had seen the booking courier receipt of the said notice sent to the complainant but had not seen the proof of delivery of the same to the complainant.

7. The Disciplinary Committee relying on the judgment of the Hon'ble Rajasthan High Court in the matter of J. S. Bhati vs. Council of ICAI (S.B. Civil Misc. Appeal No. 136 of 1973) wherein the Hon'ble Court had inter-alia observed that mere obtaining a certificate of posting does not fulfill the requirements as the presumption under section 114 of the Indian Evidence Act, 1872 is that the letter in due course reached the addressee cannot be replaced that positive degree of proof of delivery of letter to the addressee which letters of the law in this case require. The High Court further held that the communication which has been properly acknowledged by the addressee would be effective communication.

8. The Disciplinary Committee further came to the conclusion that the respondent is 'Guilty' of professional misconduct under clause (7) of Part-I of the Second Schedule of the Act as he did not exercise due diligence while certifying and filing form 32 and Form 23 for removal of the complainant from the directorship of the Company, as, he has failed to see as to whether the notice was served to the complainant or not and this being most important as the complainant was removed from the directorship of the company under section 284 of the Companies Act, 1956 without giving proper opportunity of being heard to him before his removal which is in violation of section 284 (3) of the Companies Act, 1956. The aforesaid provisions for the sake of reference is reproduce here under:-

"Section 284 of the Companies Act, 1956

1. A company may, by ordinary resolution, remove a director (not being a director appointed by the central Government in pursuance of section 408) before the expiry of his period of office:

Provided that this sub-section shall not, in the case of a private company, authorise the removal of a director holding office for life on the 1st day of April, 1952, whether or not he is subject to retirement under an age limit by virtue of the articles or otherwise:

Provided further that nothing contained in this sub-section shall apply where the company has availed itself of the option given to it under section 265 to appoint not less than two-thirds of the total number of directors according to the principle of proportional representation.

2. Special notice shall be required of any resolution to remove a director under this section, or to appoint somebody instead of a director so removed at the meeting at which he is removed.

3. On receipt of notice of a resolution to remove a director under this section, the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting".

9. The Disciplinary Committee in terms of sub-rule (1) of Rule 19 of the Rules after affording an opportunity of being heard to the respondent passed the order dated 7th October, 2014 under sub-section (3) of Section 21B of the Act, whereby, the Disciplinary Committee awarded punishment of removal of appellant's name from the Register of members for a period of 30 days and also imposed fine of Rs.5000/-(Five Thousand Only).

10. Having examined the matter in its entirety and noting the manner in which the appellant certified Form 32 and Form 23 without there being any material on record to show that shares were transferred as claimed and that a proper Board Meeting was held or that such meeting was held after due notice to all concerned and without taking note of the fact that when there are two equal shareholders the question of removing the other shareholder from the post of Director without having any material to justify such removal being not on record, the manner in which the appellant acted shows that the appellant has completely given up his statutory responsibility as a Company Secretary which, as on date, it is the responsibility upon the professional in accordance with the law thereby dispensing with the requirement to verify each and every document filed before the Registrar of the Companies/ Competent Authority, which is taken on record on Straight Through Process(STP) based on the certification of professional, the same has been accepted to be in order and acceptable without any further requirements. Moreover, in this case Shri Gopi Kishan Agarwal has been appointed as a Managing Director with no obligation to retire in turn itself clear establishes the mischief.

11. Even otherwise, we are of the considered view that the Orders dated 31st May, 2014 (signed by the Disciplinary Committee on 8th August, 2014) and dated 7th October, 2014 passed by the Disciplinary Committee are detailed orders and have taken note of the submissions of both the parties as well as the records available. Further, it is also important to note the observation made by the Director (Discipline) while forming the 'Prima Facie Opinion' dated 16th September, 2013 that the Respondent did not notice that the complainant was removed from the directorship of the company without giving him proper opportunity of being heard before his removal which is in violation of sub-section (3) of Section 284 of the Companies Act, 1956, this clearly shows not exercising due diligence by the Appellant.

12. The other observations made in the order are not required to be repeated by us but the same shows that the Director Discipline as well as the Disciplinary Committee has taken into consideration of all relevant aspects before passing the said orders.

13. Accordingly, taking into account all circumstances as narrated above, we don't find any reason for modifying the said orders of the Disciplinary Committee regarding removal the name of the appellant from the Register of Members of the Institute of Company Secretaries of India or for considering any relaxation / reduction in the punishment awarded or in any

way modification of the orders dated 31st May, 2014 and dated 7th October, 2014. However, before us again request was made to bring on record the attendance register about the meeting of the Board of Directors wherein the transfer of the shares took place but no such record was produced by the appellant rather an affidavit was filed of Shri Rajesh Gupta who is the king pin of the entire episode stating that the company does not keep the record even though the issue of the transfer of shares was directly relevant in this case.

14. With the aforesaid, the appeal stands dismissed. A Copy of this order be sent to the appellant and to all concerned including the Institute of Company Secretaries of India.

Justice M. C. Garg
Chairperson

Dr. Navrang Saini
Member

Preeti Malhotra
Member

BEFORE THE APPELLATE AUTHORITY

(Constituted Under The Company Secretaries Act, 1980)

APPEAL NO. 13/ICSI/2014

IN THE MATTER OF:

Ashok Surana .....Appellant

Versus

Institute of Company Secretaries of India
and others .....Respondents

CORAM

Hon'ble Mr. Justice M.C. Garg (Retd.)	Chairperson
Hon'ble Dr. Navrang Saini	Member
Hon'ble Ms. Preeti Malhotra	Member

PRESENT

For the Appellant:

1. Mr. S. Kumar, Advocate
2. Mr. Ashok Surana, Appellant in person
3. Mr. Tribhuvanlal Kanhaiyalal Kalya, Chairman, TK Infrastructure Pvt. Ltd.

For the Respondents:

1. Mr. R.D. Makheeja, Advocate for ICSI
2. Mr. Satish Kumar, Executive Law for ICSI

ORDER

Date: 15.03.2017

1. Being aggrieved of the Orders dated 31st May, 2014 and 28th August, 2014 passed by the Disciplinary Committee 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. Ashok Surana, a Practicing Company Secretary, the appellant herein, against whom a complaint was filed by Mr. Ramprakash Omprakash Kalya, one of the Directors of M/s TK Infrastructure Private Limited (hereinafter referred to as the "Company"), in form (I) on 3rd November, 2011 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 against the Institute of Company Secretaries of India and others challenging the Impugned Orders dated 31st May, 2014 and dated 28th August, 2014 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 120 days and also imposed fine of Rs.25,000/- on him.

2. The present appeal arose between the appellant and the Institute of Company Secretaries of India when the Respondent Number 2 herein, namely Ramprakash Omprakash Kalya, one of the Directors of the company made a complaint vide his letter dated 3rd November, 2011 to the Institute of Company Secretaries of India alleging inter-alia that the appellant had certified and filed e-forms namely Form 32 with regard to the appointment of Shri Surya Prakash Kalya as Director of the Company on 01.10.2009 in the Extra Ordinary General Meeting (EOGM) shown to have been held on 01.10.2009.

3. The complainant further alleged that the respondent has wrongly certified and filed Form 5 and Form 23 for increasing the authorized share capital of the company from Rs.25 lacs to Rs. 100 lacs in the shareholders meeting held on 9th October, 2009.

4. Furthermore, the respondent has also certified and filed form 2 showing the allotment of 1, 70,000 equity shares of Rs.10/- each to Shri Surya Prakash Kalya and Mrs. Pushpa Surya Prakash Kalya in the Board Meeting allegedly held on 30.03.2010. However, the complainant has denied to have attended the Board Meeting/Meeting of the share holders in which the resolution of appointment of Shri Surya Prakash Kalya as Director of the Company passed. The complainant has also stated that the Company had never passed any such resolution to increase the authorized share capital. Hence, neither such meeting with regards to increase the authorized share capital was held nor had the company passed any resolution to increase the authorized shares capital. Therefore, the certificates given by the appellant are materially false, fabricated and are without any proof of any document. In this way the Appellant had committed professional misconduct as well as criminal offences.

5. Pursuant to receipt of the complaint, the Director (Discipline) in terms of sub-rule (3) of rule 8 of the Rules, sent a copy of the complaint to the Respondent vide letter dated 9th November, 2011 calling upon him to submit the written statement. The Respondent vide his letter dated 14th December, 2011 submitted the written statement wherein he inter-alia stated that no EOGM was held on 01.10.2009 as alleged by the complainant and only Board Meeting was held on 01.10.2009. The respondent further stated that he has relied upon the Board resolution dated 1st October, 2009 regarding the appointment of Shri Surya Prakash Kalya as Director of the Company. The respondent has stated that he had ascertained from the company records that share application money from the allottees was received and credited in bank accounts as well as shown in company's books of accounts. The respondent further stated that the complainant has dispute with the other director of the company and hence, the complainant had filed the present complaint with mala-fide intention. The respondent further stated that he has taken utmost care and exercised due diligence while certifying the Forms under question and can furnish any further document/(s) required or personal appearance of director of the company who have signed the resolution and e-Forms electronically.

6. Pursuant to sub-rule (4) of rule 8 of the Rules, a copy of the written statement was sent to the complainant vide letter dated 14th December, 2011 calling upon him to submit the rejoinder. The complainant submitted the rejoinder dated 3rd January, 2012. The complainant inter-alia stated that the respondent, in-spite of being aware of the dispute among the two

directors of the company, gave undue advantage to Shri Tribhuvanlal Kanhaiyalal Kalya and used their tricky minds to deceive the complainant. The respondent also certified the truthfulness and correctness of the documents knowing well that no Board meeting or General meetings were held. The Respondent is fully aware of the facts that there are only two directors of the company who are also shareholders having 50% of shares each and there is some dispute among both of them and that one director residing in Rajasthan is not attending the Board meeting as well as General Meeting as no notice of such meeting has been served to him by the other director who has control over all statutory books and record of the company. Since the company has only two directors, absence of any one director will lead to improper conduct of meeting. The respondent could not produce proof of dispatch of notice of Board Meeting, attendance sheet, copy of minutes because no such meetings were held which can also be confirmed from the Compliance Certificate issued by Shri Shailesh Karande, Practicing Company Secretary (PCS). The documents submitted by the Respondent are signed by the other Director, Shri Tribhuvanlal Kanhaiyalal Kalya who has control over all the statutory books and registers and who has manipulated all the records of the company with the help of the Respondent. The Bank statement submitted by the respondent does not clearly show whether the money was received as application money for allotment of shares or for any other purpose. The respondent has not produced copies of the share application form, Bank statement of allottees from whom share application money has been received and ledger of share capital.

7. In terms of rule 9 of the Rules, the Director (Discipline) after examination of the complaint, written statement, rejoinder and other materials on record, formed the 'Prima Facie Opinion' (PFO) dated 16th May,2012 which stated that the complainant had alleged that the respondent has wrongly certified Form 32 for the appointment of Shri Surya Prakash Kalya as Director of M/s TK Infrastructure Pvt. Ltd, on the basis of alleged Extraordinary General Meeting shown to be held on 01.10.2009 and has also wrongly certified Form 5 and Form 23 for increasing the authorized share capital from Rs. 25 lacs to Rs. 100 lacs in the shareholders meeting held on 09.10.2009. Also Form 2 has been found certified and filed by him showing allotment of 170000 equity shares of Rs.10/- each to Shri Surya Prakash Kalya and Mrs. Pushpa Surya Prakash Kalya allegedly in the Board Meeting allegedly held on 30.03.2010 which was not held. The complainant has questioned the validity of the aforesaid meetings as he had not attended the said meetings. As on the date of the appointment of Shri Surya Prakash Kalya as Director and increasing the authorized share capital of the company, there were only two Directors and shareholders i.e. the complainant himself and Shri Tribhuvanlal Kanhaiyalal Kalya. Further, as per the compliance certificate issued by Shri Shailesh Karande, PCS, for the Financial Year ended 31st March, 2010 only five Board meetings (i.e. on 06.06.2009, 30.08.2009, 30.09.2009, 28.12.2009 & 27.03.2010) and one General Meeting on 30.09.2009 were held during the FY 2009-2010. Further, as per the compliance certificate, no appointment of Director, additional Directors or alternate Directors to fill the vacancy was done during the financial year as found mentioned in Form 32 certified and filed by the Respondent which shows that an EOGM was held on 01.10.2009 and Board Meeting was held on 01.10.2010. The Respondent in his defense contended that he has relied on the Board Resolution dated 1st October, 2009 regarding

the appointment of Shri Surya Prakash Kalya as director of the Company. The Respondent has also stated that he had ascertained from the Company records that share application money from the allottees was received and credited in bank accounts as well as shown in the company's books of accounts. Further, the complainant has submitted a copy of the letter dated 3rd November, 2011 addressed by him to Regional Director (Western Region), Ministry of Corporate Affairs, which also indicated that there have been wrong doings in the company as the complainant has stated that in compliance to the order passed by Company Law Board (CLB) dated 13.09.2011 wherein both the parties were to exchange their documents, he has provided all the documents to Shri Tribhuvanlal Kanhaiyalal Kalya but he did not provide any document to the complainant. The CLB had again vide its order dated 01.11.2011 directed to provide the documents to the complainant. The complainant has requested the RD to order investigation of affairs of the company under section 235 of the Companies Act, 1956.

8. In view of the above, it is observed that there has been laxity on the part of the respondent while certifying and filing the Form 32 (for appointment of Shri Tribhuvanlal Kanhaiyalal Kalya as director of the company). Form 23 (for special resolution), Form 5 (for increase in share capital) and Form 2 (for return of allotment) of M/s TK Infrastructure Pvt. Ltd. Therefore, 'Prima-Facie' the respondent is 'Guilty' of Professional misconduct under clause (7) of Part-I of the Second Schedule of the Company Secretaries Act, 1980 as he did not exercise due diligence in conduct of his professional duties. Clause (7) of Part- I of the Second Schedule of the Act reads as under:

> *"A Company Secretary in practice shall be deemed to be guilty of professional misconduct, if he does not exercise due diligence, or is grossly negligent in the conduct of his professional duties."*

9. The Disciplinary Committee, too, after considering the complaint, 'Prima-Facie Opinion' dated 16th May, 2012 of the Director (Discipline), written statement, rejoinder and other materials on record held the respondent 'Guilty' of Professional misconduct under the above reproduced clause (7) of Part-I of the Second Schedule of the Act and passed the order under section 21B (3) of the Act read with proviso to Rule 19 (1) of the Rules and awarded punishment of removal of the appellant's name from the register of members for a period of 120 days in addition to imposing a fine of Rs.25,000/- on him.

10. We have heard the submissions and arguments advanced by both the parties and perused the records available in the instant matter. Though, the minutes signed by the Chairman of the Company (the other Director) of the meeting of the Board of Directors in question were submitted by the learned Advocate Shri S. Kumar, appearing for the appellant but under the circumstances when one of the only two Directors is disputing about any such meeting, we are of the considered view that the same requires to be corroborated by any other documents to be considered the same as the sufficient and a valid proof of the existence of the fact of such meeting. Moreover, the Second EOGM is shown to be convened on 9th October, 2009 for increase in the Authorized Capital from Rs. 25 Lakhs to Rs. 100 Lakhs just after only 7 days from the first EOGM which is shown to be held on 1st October,

2009. We have also taken note of the fact that for calling EOGM on a shorter notice, 100% shareholders' consent is required. Whereas, in the instant matter, when there are only two shareholders and one shareholder is disputing about convening any such meeting, then, without his consent how the EOGM can be validly convened and any lawful business can be performed therein.

11. We have also given an opportunity to the appellant for producing the Attendance Register or any other corroborated documents/evidence of the proof of convening such meeting to produce before us but it was submitted by the appellant, who was present before us in person, that the company does not maintain the Attendance Register or pay any sitting fees to the directors or any kind of reimbursement and accordingly, he could not produce any such record.

12. Taking note of all the facts and circumstances of the matter, we are not inclined to agree with the submissions and arguments advanced by the appellant that he has taken the utmost care and exercised the due diligence required in the instant matter while performing his professional duties for certifying various 'Forms' of the Company. In fact, at the time of certifying Form-5 and Form-23, the appellant should have been more vigilant and careful as to why the items relating to increase in the authorized capital was not included in the Extra Ordinary General Meeting dated 1st October, 2009. Even, otherwise, if there was a need or subsequent thought to increase the authorized capital, the appellant should have corroborated all the documentary evidences, which, in our view, he did not. Therefore, we don't find any reason for modifying the said orders dated 31st May, 2014 and dated 28th August, 2014 passed by the Disciplinary Committee of the Institute of Company Secretaries of India regarding removal of the name of the appellant from the Register of Members of the Institute of Company Secretaries of India or for considering any relaxation / reduction in the punishment awarded.

13. With the aforesaid, accordingly the appeal is dismissed and the punishment awarded by the Committee is sustained. All interim stay Orders, if any, are vacated with immediate effect. No order as to cost. A copy of this order is sent to the appellant and to all concerned.

Justice M. C. Garg
Chairperson

Dr. Navrang Saini
Member

Preeti Malhotra
Member

BEFORE THE APPELLATE AUTHORITY

(Constituted under the ICWAI Act, 1959)

APPEAL NO. 04/ICWAI/2015

IN THE MATTER OF

Vijender Sharma .....Appellant
Sh. Kaustubh Bhardwaj & Sh. Ajay Sejwal, Advocates

Versus

Sanjay Gupta &DC(ICAI) .....Respondents

Appearances:
Sh. Kaustubh Bhardwaj & Sh. Ajay Sejwal, Advocates
Mr. Krishnendu Datta & Ms. Sanjana Saody, Advocates for respondent no. 1
Dr. S. Kumar, advocate for ICAI with Mr. Rajendra Bose from ICAI

CORAM:
HON'BLE THE CHAIRPERSON
HON'BLE DR. NAVRANG SAINI MEMBER

Order Pronounced On 20th June, 2016

ORDER

The Institute of Cost Accountants of India(earlier known as Institute of Cost & Works Accountants of India) is a creation of an Act of Parliament, namely, Cost and Works Accountants Act,1959(hereinafter referred to as 'the Act of 1959'). This Institute was constituted to regulate the profession of Cost and Works Accountants in India. No person is entitled to practice the profession of Cost and Works Accountant unless he/she is a member of the Institute of Cost Accountants of India ('the Institute' in short) and holds a Certificate of Practice issued by the Institute. .For the management of the affairs of the Institute a Council is constituted as provided under Section 9 of the Act of 1959 and the same comprises of elected members of the Institute and some members nominated by the Central Government. The Council can constitute Regional Councils also for advising and assisting it on matters concerning its functions. Duration of the Regional Council is four years. The Council has to maintain a Fund the source of which primarily is from the moneys contributed by the members of the Institute. The Funds of the Regional Councils come from the grant-in-aid given to it by the Council and also from its own resources.

This case centres around the controversy regarding passing of a resolution by the office bearers of the Regional Council of North India known as Northern India Regional Council (NIRC) in its meeting held on 18th November, 2007 whereby the Regional Council members were authorised to draw a fixed amount every month from the funds of the NIRC towards travelling/telephone expenses etc. spent while discharging duties of the NIRC without submission of any proof

regarding those expenses. The Chairman was authorised to receive fixed amount of Rs. 5,000/- p.m. while other members were to receive Rs. 4,000/- p.m.The appellant, a cost and works accountant by profession, was Joint Secretary of the NIRC during its four year duration from 2007 to 20011 and during the same period respondent no.2 Shri Sanjay Gupta, also a practicing cost and works accountant, was Joint Vice Chairman of NIRC. Shri B. L. Jain was the Chairman, Shri Rajeev Mehrotra was the Vice Chairman, Shri Rakesh Bhalla was the Secretary and treasurer. Shri Chandra Wadhwa, the then President of the Institute and S/Sh Hari Kishan Goel and Balvinder Singh, Central Council members, were the nominee members from the Central Council. The meeting of 18th November, 2007, when the above referred resolution was passed was attended by all the above-named office bearers/members except Mr. Chandra Wadhwa.

The controversial resolution passed on that date was as under:

To fix the reimbursement for Miscellaneous Expenses

As per prevailing practice NIRC members are getting the reimbursement for miscellaneous expenses such as use of personal cars & telephone, for professional purposes and other misc expenses like entertaining the official guests etc.

After some discussion it has been approved that Rs. 5,000/- per month to the Chairman, NIRC and Rs. 4,000/- per month to each member of NIRC including Office bearers on account of above expenses i.e. use of personal car, telephone and other misc. expenses for entertaining official guest on behalf of NIRC, without submission of bills etc. will be reimbursed w.e.f. 8th August, 2007.

However reimbursement of expenses against production of bills will be continued as per prevailing practice.

This resolution was confirmed by the NIRC in its next meeting held on 1st February,2008 which was also attended by the appellant as well as respondent Shri Sanjay Gupta.

On 9th June, 2009 the appellant herein lodged a complaint dated 6th June,2009 with the Disciplinary Directorate of the Institute against respondent no.1 herein Shri Sanjay Gupta(which was registered as Complaint No.Com/21-CWA (1)/2009) for some acts of misconduct falling under different Clauses of IInd Schedule to the Act of 1959.The allegation, which only is relevant for the present, was that Shri Sanjay Gupta had drawn Rs. 32,000/- vide voucher dated 20/06/08 in cash against conveyance @ Rs.4000/- p.m. for eight months without production of supporting documents merely on the strength of resolution of 18th November,2007 which was passed in violation of Regulation No.132 of the Cost and Works Accountants Regulations, 1959. That act of Shri Sanjay Gupta receiving Rs.32,000/- allegedly amounted to misconduct as contemplated under Clause(1) of Part II of the Second Schedule to the Act of 1959 read with Sections 21(3) and 21B(3) of the said Act of 1959.

Regulation 132 of the Regulations of 1959 which is alleged to have been violated by the members of NIRC which had passed the impugned resolution reads as under:-

"132. The funds of a Regional Council shall be employed for such purposes as may from time to time be sanctioned by the Regional Council:

Provided that no funds thereof shall be applied, either directly or indirectly, for payment to the members of the Regional Council except for reimbursing them for any expenses incurred by them in connection with the business of the Regional Council in the region concerned."

The misconduct allegedly committed by respondent no.2 and falling in Clause(1) Part–II of the Second Schedule to the Act of 1959 is as under:-

"A member of the Institute, whether in practice or not, shall be deemed to be guilty of professional misconduct, if he:

(1) contravenes any of the provisions of this Act or the regulations made thereunder."

The complaint of the appellant, reply of respondent no.2 and other material brought on record by them was examined by the Director (Discipline) of the Institute for the formation of a prima facie opinion as to whether the professional against whom allegations of misconduct had been levelled appeared to have committed the same or not, as provided under Section 21(2) of the Act of 1959. The then Director(Discipline) on 23rd December,2009 after referring to the complaint, reply submitted by respondent no.2 herein, rejoinder of the complainant(the appellant herein) wherein the complainant had alleged that the matter of passing of resolution dated 18th November,2007 be investigated against all who were signatory to the same as they were equally guilty, passed one line order: "Accordingly, the complaint may be pursued in accordance with law." and then the matter came to be referred to the Disciplinary Committee for appropriate orders as provided under Section 21(3) of the Act of 1959which reads as under:

"21(3). Where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the First Schedule, he shall place the matter before the Board of Discipline and where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the Second Schedule or in both the Schedules, he shall place the matter before the Disciplinary Committee.:"

Since the complaint and other record of Director(Discipline)was placed before the Disciplinary Committee as provided under Rule 9(1) of the Cost and Works Accountants(Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 it can be safely inferred that the Director(Discipline) was actually of the view that prima facie there appeared to be a violation of Regulation 132 by NIRC it was a case of commission of misconduct falling under Clause I of Part II of the Second Schedule to the Act,1959.

It also appears to us that the Disciplinary Committee also found a prima facie case of misconduct justifying further enquiry as provided under Rule 9(2)(a) of the Cost and Works Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007. Rule 9 reads as under:-

"9. Examination of the Complaint.(1) The Director shall examine the complaint, written statement, if any, rejoinder, if any, and other additional particulars or documents, if any, and form his prima facie opinion as to whether the member or the firm is guilty

or not of any professional or other misconduct or both under the First Schedule or the Second Schedule or both.

(2) (a) Where the Director is of the prima facie opinion that (i) the member or the firm is guilty of any misconduct under the First Schedule, he shall place his opinion along with the complaint and all other relevant papers before the Board of Discipline; (ii) the member or the firm is guilty of misconduct under the Second Schedule or both the First and Second Schedules, he shall place his opinion along with the complaint and all other relevant papers before the Committee. (b) If the Board of Discipline or the Committee, as the case may be, agrees with the prima facie opinion of the Director under clause (a) above, then the Board of Discipline or the Committee may proceed further under Chapter IV or V respectively."

Rule 18 in Chapter V which prescribes the procedure to be followed by the Disciplinary Committee if it decides to hold an enquiry into the allegations of misconduct against any Cost & Works Accountant. Relevant parts of Rule 18 read as under:-

"18. Procedure to be followed by the Committee.(1) The Committee shall be guided by the principles of natural justice and shall follow the procedure in dealing with all cases before it, as laid down in this Chapter.

(2) If the Committee decides to proceed further under clause (b) of sub-rule (2) of rule 9 or if it receives a reference from Board of Discipline under clause (b) of sub-rule (3) of rule 9, it shall expeditiously cause to deliver to the respondent and the complainant, a copy each of the following,—

(a) prima facie opinion formed by the Director; and

(b) particulars or documents relied upon by the Director, if any, during the course of formulation of prima facie opinion.

(3) The Committee shall inform the respondent, as the case may be to file a written statement, within such time as may be specified: Provided that the Committee may give him additional time for submitting his written statement, on application by the respondent on his adducing sufficient reasons to the satisfaction of the Committee for seeking additional time :

(7) During the first hearing, the Committee shall read out the charge or charges to the respondent along with the summary of prima facie opinion arrived at by the Director, and ask the respondent whether he pleads guilty to the charge or charges made against him : Provided that if the respondent does not appear for the first hearing even after one adjournment, the reading out of charge or charges along with the summary of prima facie opinion shall be made in his absence and the case proceeded with in accordance with the provisions of this Chapter.

(8) If the respondent pleads guilty, the Committee shall record the plea and take action as per provisions under rule 19.

(9) If the respondent does not plead guilty, then the Committee shall fix a date for examination of witnesses and production of documents.

(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.

19. Orders of the Committee.(1) On arriving at a finding under sub-rule (8) or sub-rule (17) of rule 18 that the respondent is guilty of professional or other misconduct, the Committee shall give the respondent an opportunity to be heard before passing any order under subsection (3) of section 21B of the Act ....."

In the present case the matter was examined by the Disciplinary Committee. The respondent no.2 had submitted his defence before the Disciplinary Committee denying all the allegations of misconduct levelled against him by the complainant-appellant. One of the objections, inter alia, raised by him before the Committee was the inclusion of one Mr. Kunal Banerjee as one of the members of the Committee constituted to enquire into the allegations against him on the ground that he was likely to be biased against him since he was a business partner of one Mr. Rakesh Singh, who had also lodged similar complaint in respect of resolution of 18th November, 2007 against two other members of NIRC who were also privy to the passing of that resolution. He had requested for recusal of Mr. Kunal Banerjee. Another plea in defence taken was that the complainant himself was also involved in the passing of the said resolution being an office bearer of NIRC and therefore he could not complain against that decision of NIRC. On merits it was claimed that the passing of the said resolution in any event did not constitute any professional misconduct at all and that the complaint against him was due to professional rivalry and aimed at blocking the way for him to contest the Central Council election of the Institute and he had been singled out of seven members of NIRC who had unanimously passed the impugned resolution. He also sought to justify passing of the resolution in question which according to him had been passed to curb the prevalent practice of limitless reimbursements of expenses to the members of NIRC without production of any supporting documents/proof of expenditure of which reimbursements were claimed.

The Disciplinary Committee after concluding the enquiry came to the following conclusion vide its decision taken in its meeting on 6th February, 2015 minutes of which were confirmed on 27th April,2015:

"Shri Vijender Sharma (M/18513) filed a complaint dated 6th June, 2009 against

Shri Sanjay Gupta (M/18672) in Form I along with requisite fee of R. 2500/- which was registered vide Complaint No. Com/21-CWA (1)/2009. The complaint was made inter alia regarding drawal of conveyance expenses and payment of membership fee from NIRC based on a resolution dated 18th November 2007 passed by the Council of NIRC.

Prior to the amendment of Cost and Works Accountants Regulations, 1959 in 2012, regulation 132 which deals with Expenditure from Fund is reproduced below:

"The funds of a Regional Council shall be employed for such purposes as may from time to time be sanctioned by the Regional Council:

Provided that no funds thereof shall be applied, either directly or indirectly, for payment to the members of the Regional Council except for reimbursing them for any expenses incurred by them in connection with the business of the Regional Council in the region concerned."

In the instant case, NIRC in one of its Council Meetings fixed the reimbursement amount of Miscellaneous Expenses. As per the Minutes of the said meeting held on November 18, 2007, NIRC approved fixed amounts of Rs 5000/- per month to the Chairman and Rs 4000/- per month to each member of NIRC including Office Bearers for various miscellaneous expenses, which shall be paid on a monthly basis and without submission of bills.

There is no doubt that under Regulation 132 of the Cost and Works Accountants Regulation, 1959, the Regional Council has the power to sanction expenditure from funds. However, such power is to be exercised keeping the proviso to the said Regulation In mind. As per the said Proviso, no fund shall be applied, directly or indirectly, for payment to any member of the Regional Council except for reimbursing them for any expenses incurred by them in connection with the business of the Regional Council in the region concerned. The proviso prohibits use of the fund except for in the manner prescribed therein, meaning only for reimbursing them for any expensesincurred by them. Neither the Regulation nor its proviso permits the sanctioning of fixed monthly amounts, irrespective of the actual expenses incurred, and the sanctioning of such fixed monthly amount operates like a monthly allowance which is to be paid irrespective of the fact that the said expenditure has been made or not. The proviso is a clear bar to such practice which permits reimbursement only of 'expenses incurred' .Thus, the resolution dated 18th November 2007 of NIRC is void ab initio and has no legal basis.

In view of the above, the following order is passed:-

(i) The Resolution dated 18th November 2007 passed by Northern India Regional Council (NIRC) is void ab initio since the resolution is in violation of Regulation 132 of Costand Works Accountants Regulations, 1959 which approved payment of fixed amounts of Rs 5000/- to the Chairman and Rs 4000/- per month to each member ofNIRC on a monthly basis without submission of bills.

(ii) Letter of caution should be issued to Shri Sanjay Gupta for drawal of money from NIRC on the strength of the resolution dated 18th November 2007.

(iii) Shri Sanjay Gupta and any other elected member of NIRC who had drawn money on the basis of the resolution dated 18th November 2007 are required to deposit the exact amount that they had drawn on the strength of the resolution dated 18.11.07, with NIRC within a period of 30 days from the date of receipt of the order.

(iv) The Order stated in (iii) above shall apply mutatis mutandis in respect of all members of Council of NIRC who had drawn money on the basis of the resolution in question.

(v) All elected representatives of Council of NIRC be informed to desist themselves from passing any such resolution which is in violation of the Cost and Works Accountants Act, 1959 and the rules regulations framed thereunder.

(vi) The aforesaid decision is to be communicated to all who were members of Council of NIRC during the period 2007-2011.

Sd/-

(Dr. A.S. Durga Prasad)

"Presiding Officer"

The respondent no.2 herein against whom the complaint was lodged by the appellant herein(complainant) and who had allegedly been paid a sum of Rs. 81623/-(which amount included Rs.32,000/- mentioned in the complaint and the balance which also he had received before the conclusion of the proceedings against him on the strength of the impugned resolution of NIRC) did not feel aggrieved by the said order of the Disciplinary Committee and so chose not to file any appeal before the Appellate Authority. However, the complainant of the case, Shri Vijender Sharma, who claimed himself to be a whistle-blowerhighlighting many types of irregularities in the functioning of NIRC including in finance matters,decided to file the present appeal. In the memorandum of appeal he has pleaded that **"The Disciplinary Committee to which the matter was referred has made an order for punishment against the appellant awarding punishment of "caution and to deposit the exact amount that he has drawn on the strength of resolution dated 18-11-2007 with NIRC within a period of 30 days from the date of receipt of the order."**He also pleaded that since the Disciplinary Committee had struck down the impugned resolution dated 18th November,2007 as void ab initiobeing in contravention of Regulation 132 and had also ordered return of money by everyone who had been paid on the strength of impugned resolution his stand stood vindicated and he was satisfied to that extent. However, the Disciplinary Committee did not examine his other three charges of misconduct which had also been levelled against respondent no.2 in his complaint dated 6th June,2009 which were of serious nature and were covered under Clause 3, Part II of the Second Schedule of the Act of 1959 for which also the respondent no.2 deserved

to be severely punished. It was also submitted that the Institute had in any case not even issued caution letters as directed by the Disciplinary Committee in its impugned order to anyone.

This appeal has been contested by the respondents. The Institute has supported the decision of the Disciplinary Committee. On behalf of respondent no.2 his learned counsel raised a preliminary objection that this appeal by the complainant is not maintainable as he has not been awarded any punishment provided under Section 21(3) of the Act of 1959 and in fact he has himself claimed in the memorandum of appeal that his stand has been vindicated as far as the complaint regarding passing of resolution dated 18th November,2007 in violation of Regulation 132 and payment of money to respondent no.2 on the strength of that resolution is concerned and, therefore, no appeal was maintainable in respect of that charge.Learned counsel further submitted that even though the appellant-complainant had levelled some other charges also against the respondent no.2 but he has not been found guilty of those charges and if the complainant-appellant is aggrieved by that he may have his remedy somewhere else but certainly not before this Appellate Authority. In support of this objection learned counsel drew our attention to Section 22E(1) of the Act of 1959 which is as follows:-

"22E.

(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 authorised 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.

Learned counsel read out Section 21(3) also which is as under:

"21B(3) Where the Disciplinary Committee is of the opinion that a member is guilty of aprofessional or other misconduct mentioned in the Second Schedule or both the First Schedule and the Second Schedule, it shall afford to the member an opportunity of being heard before making any order against him and may thereafter take any one or more of the following actions, namely:—

(a) reprimand the member;

(b) remove the name of the member from the Register permanently or for such period, as itthinks fit;

(c) impose such fine as it may think fit, which may extend to rupees five lakhs."

Learned counsel for respondent no.2 submitted that in this case none of the aforesaid punishments provided under Section 21(3) of the Act of 1959 had been awarded to the appellant by the Disciplinary Committee, therefore, no appeal lies at his instance before this Appellate Authority.

Learned counsel for the appellant on the other hand submitted that since in the impugned order all members of NIRC including the appellant had been indicted for having acted in contravention of Regulation 132 and resolution having been struck down as illegal and all those who had received money from the Fund of NICR on the strength of the impugned resolution had been directed to return that money and everybody was required to desist from passing any such resolution which is in violation of the provisions of the Act of 1959.It wassubmitted that the appellant despite being the complainant had also been indicted though he had done nothing wrong and so he could file this appeal.

When it was put to the appellant's counsel by us during the course of hearingthat by filing this appeal he was accepting that he had been held guilty of misconduct and reprimanded the answer was that it was correct and that is why he had filed this appealfor getting an order of absolute exoneration from the Appellate Authority and he would not endorse the illegality committed in the passing of the impugned resolution by ignoring the mandatory provision of Rule 132 and he has been fighting for a cause. Learned counsel also submitted that the appellant was not aggrieved by the conclusion of the Disciplinary Committee that by passing the impugned resolution the members of NIRC had committed violation of Regulation 132 which conclusion, according to the counsel, tantamounts to a finding that the members who were privy to the passing of that resolution were deemed to be guilty of misconduct falling under Clause I of Part IIof Second Schedule to the Act of 1959. However, counsel argued, the Disciplinary Committee went wrong in indicting the appellant as well by ignoring his case that he had in fact right from day one protesting against the passing of the impugned resolution but his protest was not recorded by other members of NIRC either on the day of meeting of 18th November,2007 or on the next meeting of NIRC held on 1st February,2008 for the ratification/confirmation of the minutes of the meeting of 18th November,2007 and also the fact that he had not withdrawn any money on the strength of the impugned resolution, as was done by respondent no.2.

We have bestowed our thoughtful consideration to the submissions of the counsel for the parties and particularly the objection regarding thevery maintainability of this appeal raised by counsel for respondent no.2 and which objection was adopted by the learned counsel for the Institute also. In fact, counsel for both the respondents had also requested for deciding the maintainability of the appeal first but we had called upon all the counsel to make their submissions on all the aspects which then they did.

Before proceeding further we may mention that during the course of hearing neither the counsel for the appellant nor of respondent no.2 had argued that the impugned resolution of 18th November,2007 was not in violation of Regulation 132 and that was the conclusion of the Disciplinary Committee also. We were also informed by the counsel for the respondentsthat the impugned resolution was in fact withdrawn also in August, 2009 in a meeting of NIRC members, including the appellant and respondent no.2, which was much before it was declared to be void ab initio by the Disciplinary Committee in its order dated 6th February,2015. However, the appellant's counsel submitted that the illegality which stood committed by other members of NIRC could not be ignored due to the withdrawl of the impugned resolution after he had raised hue and cry.

As noticed already the appellant has claimed in his appeal that he has been punished vide impugned order. The submission of respondent no.2, however, is that the appellant has not been awarded any punishment and so this appeal is not maintainable. We are however of the view that in the impugned order it having been held that the resolution of 18th November,2007 had no legal backing and was in utter violation of statutory Regulation 132 and consequently void ab initio clearly amounts to severe criticism of the decision taken by the members of NIRC and that criticism and rejection of the collective decision of the seven members of NIRC does amount to punishment of reprimand/censure. Just because the Disciplinary Committee has not expressly used the expressions 'reprimand or censure' in its impugned order it cannot be said that for the violation of statutory Regulation 132 by the members of NIRC in passing the impugned resolution and which finding about the violation of Regulation has not been challenged by the appellant, there was no reprimand/censure order for the members of NIRC concerned.Hon'ble Delhi High Court had in one of its decisions reported as 1968 Lab. Industrial Cases 1364, "Nadhan Mal vs Union of India" held that substance of punishment order is to be seen and not merely its form. This judgment has been subsequently also followed by Hon'ble Delhi High Court in its judgement dated 12th May,2010 in the case of "B.S. Ahluwalia(Deceased) vs Indian Institute Of Technology" (W.P.(C) NO. 231/1988).We may also refer to a Division Bench judgment dated 22nd January,2013 of Hon'ble Madhya Pradesh High Court in Writ Appeal No.1407 of 2010, "M.P.Housing Board vs Satish Kumar Sane" wherein it also was held that substance or order passed in disciplinary proceedings and not its form should be seen to find out if the delinquent person was being exonerated or punished. So, going by the substance of the impugned order of the Disciplinary Committee and a meaningful reading of the same there can be no other conclusion drawn except that the Disciplinary Committee in holding the impugned decision of the members of NIRC to be in contravention of Regulation 132 had, in fact, reprimanded/censured all the members of NIRC concerned who had attended that meeting including the appellant and had also told them to desist from taking such like illegal decisions. Therefore, the appellant could approach the Appellate Authority by filing this appeal. We, therefore, reject the objection against the maintainability of this appeal.

However, we are in agreement with the submission of the learned counsel for the respondent no.2 that since the appellant himself had pleaded in his appeal that his stand regarding the resolution of 18th November, 2007 stood vindicated and he was satisfied with the conclusion of the Disciplinary Committee that that resolution was in contravention of Regulation 132 no relief can be granted to him in this appeal. During the course of arguments leaned counsel for the appellant had submitted that the appellant was not a privy to the impugned resolution nor he had obtained any money from NIRC on the strength of that Resolution and, therefore, he should have been excluded by the Disciplinary Committee from the criticism of the impugned resolution and he should not have been censured just because he was present at the time of passing of the resolution. However, we are not inclined to accept this argument since in the memorandum of appeal neither there is any averment that the appellant was not a privy to the impugned resolution nor is there any prayer made by him for modifying the impugned order by giving him clean chit and excluding him from the general criticism of the decision taken by the members of NIRC. He has also not taken a plea in this appeal that he had protested against the passing of the impugned resolution but the same was not recorded in the minutes, as was urged before us

during the course of arguments by his counsel. In fact even in his complaint filed after about a year of the passing of the impugned resolution he had not claimed that he had protested against the passing of that resolution. Merely on the basis of oral submissions made in that regard before us at the time of hearing of the appeal in which he has himself stated that he was satisfied with the impugned order we will not enter into any enquiry and make modification in the impugned order.

We also do not find any substance in the grievance of the appellant that despite everybody having been indicted by the Disciplinary Committee and it having directed issuance of caution letter to respondent no.2 the same had not been issued. The Institute had forwarded the copy of the final order of the Disciplinary Committee to all the members of NIRC on 30th March,2015 including the Central Council nominee members and, therefore, in our view there was compliance of that direction. There is no specific format of 'caution letter' provided anywhere. Other members including the appellant were also asked to desist from committing any such illegal act and they also stood informed of that decision.

As far as the grievance of the learned counsel for the appellant that the Disciplinary Committee had not even examined his other charges of misconduct levelled against respondent no.2 is concerned we find from the appeal and record of the Institute which we had sent for that the appellant had raised a point that the respondent no.2 had used NIRC's money towards payment of his own membership subscription as well as certificate of practice fee payable annually for getting the certificate of practice, validity period of which is one year only, renewed on year to year basis. The said fees was to be paid by 30th of June every year. Use of NIRC's fund by respondent no.2 for payment of the fees payable to Institute to keep the membership and certificate of practice alive from the funds of NIRC, according to the appellant's case, was in contravention of Regulation 132 and so that act of respondent no.2 also constituted misconduct.Learned counsel for appellant submitted that membership subscription/certificate of practice fee could not have made by way of any adjustment in any account of NIRC whether imprest or otherwise, which as per respondent no.2's defence he was having with NIRC and consequently the Institute was bound to treat his name having been removed from its Rolls automatically w.e.f. 01/7/08 and the respondent no.2 was required to seek fresh enrolment and his continuation in practice should have been treated as without a certificate of practice and that that having not been ordered by the Disciplinary Committee this Authority should do that by giving a declaration to that effect.

The learned counsel for respondent no.2 had submittedthat for the redressal of

this grievance the appellant could file a writ petition and he cannot get any relief from this Authority as far as exoneration of respondent no.2 from this charge is concerned. It was submitted that the Disciplinary Committee having not examined this aspect implies that respondent no.2 stood exonerated.

Since we have held this appeal to be maintainable as the appellant also stood reprimanded alongwith his colleagues in NIRC and we had sent for the records of the case Section 22E(2) of the Act of 1959 can be invoked by us for considering this grievance of the appellant. This sub-section reads as under:-

(1) 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 subsection (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 the case; or

(d) pass such other order as the Authority thinks fit:

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

This provision of law confers upon the Appellate Authority wide powers to do complete justice between the concerned parties while deciding an appeal against the orders of the Disciplinary Committee or the Board of Discipline, as the case may be, whose records have been sent for.

From the record of the authorities below we find that the defence taken in respect of this allegation respondent no.2 before the authorities below was that his membership fee and annual certificate of practice fee became payable by 30th June,2008 and since by that time his monthly entitlement @ Rs.4000/- p.m. in terms of resolution dated 18th November,2007(referred to already and around which the whole controversy has been revolving) amounting to Rs.32,000/- from 01/08/07 till 31/03/08 had become due but had not been claimed by that time by him and so the NIRC had shown that amount in its audited balance sheet for the period ending 31/03/08 as outstanding and payable to him, the membership fee/certificate of practice fee of Rs.1330/- and Rs.1500/- was adjusted by NIRC on 13/05/08 and 29/06/08 respectively from his imprest account as per the old practice in that regard prevalent in NIRC. It had also been claimed by him that by that time another amount of Rs.12000/- @ Rs. 4000/- p.m. had also become due to him for the period from 01/4/08 to 30/06/08 and so he was released the payment of Rs.32,000/- on 20/06/08 from his imprest account. Thereafter he had in any event adjusted his imprest account by making cash payment of Rs.2830/- on 04/09/08 and so according to him the membership fees was paid by him from his own money and not by utilising NIRC money.

Reading of the impugned order of the Disciplinary Committee, which because of the soft language used was sought to be given a self serving interpretation of being an innocuous order by respondent no.2 though we have gone by its substance and not the form and opined it to be an order of reprimand coupled with a direction for return of money by the delinquent members of NIRC who might have received money on the strength of the impugned resolution and which direction is really in the nature of imposition of fine also, we find that this part of the complaint of the appellant was not even referred to by the Disciplinary Committee for reasons best known to its learned members, what to say of dealing with the same and giving its decision in accordance with law. The appellant-complainant had lodged three pronged attack upon respondent no.2

one of which was passing of impugned resolution for which he himself has also been indicted being a privy to the passing of that resolution and which has made this appeal by him to be maintainable. The second one was based upon non-payment of membership/COP fee by respondent no.2 which had become payable till 30/06/08. There was another allegation also against respondent no.2 and which also had not been touched by the Disciplinary Committee but we are not referring to that allegation because there is no reference to that made by the appellant himself in the grounds of appeal and his prayer was only for a declaration that the respondent no.2 had ceased to be a member of the Institute w.e.f. 01/07/08 and consequently had become disqualified to hold a certificate of practice which lapsed on 30/06/008 because of non-payment of fee by him from his own pocket. The Disciplinary Committee was duty bound to consider this second charge also in the impugned order but it failed to discharge its legal duty.

The Disciplinary Committee was bound to examine as to how the annual membership subscription of respondent no.2 and fee for renewal of his certificate of practice stood paid by 30th June,2008 when undisputedly he himself had not deposited that money, who showed in the account of respondent no.2, if at it was shown, that the payment by way of adjustment, as was being claimed by respondent no.2, was made and whether that adjustment was after proper sanction by competent authority and further if adjustment entry had already been made by way of two vouchers then why payment in cash was received from respondent no.2 in September, 2008 as was also being claimed by him in reply to the complaint. It was also to be probed as to whether the so called prevalent practice of accepting payments of members' fees by way of adjustments, as was claimed by respondent no.2 amounted to contravention of Regulation 132 or not. All these questions have remained unanswered by the Disciplinary Committee and the same are required to be answered even now by our direction which we are inclined to issue just now.

We, therefore, while rejecting the prayer made by appellant-complainant for giving him a clean chit by excluding his name from the list of those who stood indicted for having acted in concert in the contravention of Regulation 132 by passing the impugned self serving resolution direct the Disciplinary Committee to decide the above highlighted points arising out of the second charge of the appellant Committee after giving fresh opportunity of hearing and to adduce evidence, if so desired, to the parties concerned. This exercise should be completed preferably within a period of three months keeping in mind the Division Bench judgment dated 22nd April,2013 of High Court of Delhi in LPA No. 240/2013, "Vipin Malik vs. The Institute Of Chartered Accountants of India" and the matter should not be kept pending endlessly as had been done earlier when almost five years were consumed in disposing of the matter.

Justice P.K. Bhasin (Retd.)
Chairman

Dr. Navrang Saini
Member

20th June, 2016

BEFORE THE APPELLATE AUTHORITY

(Constituted under the ICWAI Act, 1959)

APPEAL NO. 07/ICWAI/2015

IN THE MATTER OF

Rakesh Bhalla .....Appellant

Versus

1. ICWAI
2. Rakesh Singh .....Respondents

Appearances:
Appellant in person
Dr. S. Kumar, advocate for Respondent no.1 with
Mr. Rajendra Bose, Director (Discipline) ICAI
None for respondent no. 2

CORAM:

HON'BLE THE CHAIRPERSON	
HON'BLE DR. NAVRANG SAINI	MEMBER
HON'BLE MR. B.M. SHARMA	MEMBER

Date of pronouncement of order:
5th August, 2016

ORDER

The Institute of Cost and Works Accountants of India(now known as Institute of Cost Accountants of India) (hereinafter to be referred as „the Institute") was a creation of an Act of Parliament, namely, Cost and Works Accountants Act,1959(hereinafter referred to as „the Act of 1959"). This Institute was constituted to regulate the profession of Cost and Works Accountants. No person is entitled to practice the profession of Cost and Works Accountant in India unless he/she is a member of the Institute of Cost Accountants of India and holds a Certificate of Practice issued by the Institute. For the management of the affairs of the Institute a Central Council is constituted as provided under Section 9 of the Act of 1959. The Council can constitute Regional Councils also for advising and assisting it on matters concerning its functions as provided under Section 23 of the said Act. Duration of the Regional Council is four years. The Council has to maintain a Fund the source of which primarily is from the money contributed by the members of the Institute in the form of membership fee etc. As well as as on account of tuition fee from students. The Funds of the Regional Councils come primarily from the grant-in-aid given by the Council and also from its own resources.

This case centres around the controversy regarding passing of a resolution by the office bearers of the Regional Council of North India known as Northern India Regional Council(NIRC) for the

period 2007-2011 in its meeting held on 18th November, 2007 at its Delhi office whereby the Regional Council members were authorised to draw a fixed amount every month from the funds of the NIRC towards travelling/telephone expenses etc. spent while discharging duties of the NIRC without submission of any proof regarding those expenses. The Chairman was authorised to receive fixed amount of Rs. 5,000/- p.m. while other members were to receive Rs. 4,000/- p.m. The appellant, a cost and works accountant by profession, was Secretary-cum-treasurer of the NIRC during its four year term from 2007 to 20011 and during the same period Shri Sanjay Gupta, was Joint Vice Chairman. Shri B.L. Jain was the Chairman, Shri Rajeev Mehrotra was the Vice Chairman, Shri Vijender Sharma was the Jt. Secretary, S/Shri Chandra Wadhwa, Hari Kishan Goel and Balvinder Singh, Central Council members, were the nominee members from the Central Council. The meeting of 18th November, 2007, when the above referred impugned resolution was passed was attended by all the above-named office bearers/members of NIRC, except Mr. Chandra Wadhwa and was chaired by Shri B.L.Jain.

The controversial resolution passed on that date was as under:

(i) To fix the reimbursement for Miscellaneous Expenses

As per prevailing practice NIRC members are getting the reimbursement for miscellaneous expenses such as use of personal cars & telephone, for professional purposes and other misc expenses like entertaining the official guests etc.

After some discussion it has been approved that Rs. 5,000/- per month to the Chairman, NIRC and Rs. 4,000/- per month to each member of NIRC including Office bearers on account of above expenses i.e. use of personal car, telephone and other misc. expenses for entertaining official guest on behalf of NIRC, without submission of bills etc. will be reimbursed w.e.f. 8th August, 2007.

However reimbursement of expenses against production of bills will be continued as per prevailing practice.

This resolution was approved by the NIRC in its next meeting on 2nd February, 2008.

On 27th August, 2009 the respondent no.2, who is also a cost and works accountant by profession and at one time he was member of Central Council of ICAI and also Chairman of NIRC, lodged a complaint dated 25th August,2009 with the Disciplinary Directorate of the Institute against the appellant (which was registered as Complaint No.Com/21-CWA (6)/2009) for an act of misconduct falling under Clause(1), Part II of IInd Schedule to the Act of 1959 for having passed the impugned resolution and drawing money from the funds of NIRC on the strength of that resolution dated 18th November, 2007. It was claimed that that resolution was passed in violation of Regulation 132 of the Cost and Works Accountants Regulations, 1959.

Regulation 132 of the Regulations of 1959 which is alleged to have been violated by all the members of NIRC which had passed the impugned resolution reads as under:-

"The funds of a Regional Council shall be employed for such purposes as may from time to time be sanctioned by the Regional Council:

Provided that no funds thereof shall be applied, either directly or indirectly, for payment to the members of the Regional Council except for reimbursing them for any expenses incurred by them in connection with the business of the Regional Council in the region concerned."

The misconduct allegedly committed by the appellant as provided in Clause(1) Part–II of the Second Schedule to the Act of 1959 is defined as under:-

"A member of the Institute, whether in practice or not, shall be deemed to be guilty of professional misconduct, if he:

(1) contravenes any of the provisions of this Act or the regulations made thereunder."

The complaint of the respondent no.2, reply of the appellant and other material brought on record by them was examined by the Director(Discipline) of the Institute for the formation of a prima facie opinion as to whether the professional against whom allegations of misconduct had been made appeared to have committed the same or not, as provided under Section 21(2) of the Act of 1959. The appellant had denied that he had committed any misconduct. The complaint against him was alleged to be politically motivated. It was claimed by the appellant that the complainant had filed complaint only against two members out of seven members of NIRC who had unanimously passed the impugned resolution of 18th November,2007 which showed that the complainant was targeting him to malign his(appellant"s) stature. The mala fides in the lodging of the complaint was also clear from the fact that the complaint was lodged more than a year after the passing of the impugned resolution. The complainant reiterated in his rejoinder the allegations against the appellant and regarding the charge of selectively targeting two members of NIRC only his response was that even if the impugned resolution was passed unanimously by seven members of NIRC it was his prerogative and choice to complain against either or one or all. The complaint was alleged to have been filed within the required time.

Director (Discipline) on 23rd December,2009 after referring in detail in his eleven pages order to the complaint, reply submitted by appellant herein, rejoinder of the complainant passed only a one line order: "Accordingly, the complaint may be pursued in accordance with law." and then the matter came to be referred to the Disciplinary Committee for appropriate orders as provided under Section 21(3) of the Act of 1959 which reads as under:

"21(3). Where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the First Schedule, he shall place the matter before the Board of Discipline and where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the Second Schedule or in both the Schedules, he shall place the matter before the Disciplinary Committee.:"

Since the complaint and other record of Director(Discipline) was placed before the Disciplinary Committee as provided under Rule 9(1) of the Cost and Works Accountants(Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 it can be safely inferred that the Director(Discipline) was actually of the view that prima facie there appeared to be a violation of Regulation 132 by members of NIRC which had passed the impugned resolution and it was a case of commission of misconduct falling under Clause I of Part II of the Second Schedule to the Act,1959. The appellant"s grievance, however, is that the one line order passed by the Director(Discipline) did not amount to any opinion much less a prima facie one as contemplated under Section 21(3).

It also appears to us that the Disciplinary Committee also found a prima facie case of misconduct justifying further enquiry as provided under Rule 9(2)(a) of the Cost and Works Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007. Rule 9 reads as under:-

> *"9. Examination of the Complaint.(1) The Director shall examine the complaint, written statement, if any, rejoinder, if any, and other additional particulars or documents, if any, and form his prima facie opinion as to whether the member or the firm is guilty or not of any professional or other misconduct or both under the First Schedule or the Second Schedule or both.*
>
> *(2) (a) Where the Director is of the prima facie opinion that (i) the member or the firm is guilty of any misconduct under the First Schedule, he shall place his opinion along with the complaint and all other relevant papers before the Board of Discipline; (ii) the member or the firm is guilty of misconduct under the Second Schedule or both the First and Second Schedules, he shall place his opinion along with the complaint and all other relevant papers before the Committee. (b) If the Board of Discipline or the Committee, as the case may be, agrees with the prima facie opinion of the Director under clause (a) above, then the Board of Discipline or the Committee may proceed further under Chapter IV or V respectively."*

In the present case the matter was examined by the Disciplinary Committee upon getting referred to it by the Director(Discipline). The appellant was once again in October, 2010 called upon to submit his response to the above-referred allegation of misconduct levelled against him by the complainant Rakesh Singh. The appellant had submitted his defence before the Disciplinary Committee also denying all the allegations of misconduct levelled against him by the complainant-respondent no.2 as was done in his reply before the Director(Discipline). Some additional pleas were also raised by him. It was claimed that the passing of the impugned resolution did not constitute any professional misconduct and in fact was passed with the pious object of ensuring that no member of NIRC got reimbursements of expenses incurred by them without any limit and without production of any supporting documents as was the prevalent practice in NIRC since long. It was further alleged that the impugned resolution having been passed by NIRC and not be any individual no proceedings could have been initiated against the appellant for committing misconduct of having acted in contravention of Regulation 132.

The Disciplinary Committee passed final order on 6th February, 2015, which was after a lapse of almost five years in a matter of this kind where neither any evidence was recorded nor was required in view of the fact that facts were not in dispute and came to the following conclusion:

"Shri Rakesh Singh (M/10111) filed a complaint dated 25th August, 2009 against Shri Rakesh Bhalla (M/9442) in Form I along with requisite fee of R. 2500/- which was registered vide Complaint No. Com/21-CWA (6)/2009. The complaint was made on the ground of passing a resolution and/or withdrawal of Institute money in contravention of Regulation 132 of CWA Regulations,1959.

Prior to the amendment of Cost and Works Accountants Regulations, 1959 in 2012, regulation 132 which deals with Expenditure from Fund is reproduced below:

"The funds of a Regional Council shall be employed for such purposes as may from time to time be sanctioned by the Regional Council:

Provided that no funds thereof shall be applied, either directly or indirectly, for payment to the members of the Regional Council except for reimbursing them for any expenses incurred by them in connection with the business of the Regional Council in the region concerned."

In the instant case, NIRC in one of its Council Meetings fixed the reimbursement amount of Miscellaneous Expenses. As per the Minutes of the said meeting held on November 18, 2007, NIRC approved fixed amounts of Rs 5000/- per month to the Chairman and Rs 4000/- per month to each member of NIRC including Office Bearers for various miscellaneous expenses, which shall be paid on a monthly basis and without submission of bills.

There is no doubt that under Regulation 132 of the Cost and Works Accountants Regulation, 1959, the Regional Council has the power to sanction expenditure from funds. However, such power is to be exercised keeping the proviso to the said Regulation In mind. As per the said Proviso, no fund shall be applied, directly or indirectly, for payment to any member of the Regional Council except for reimbursing them for any expenses incurred by them in connection with the business of the Regional Council in the region concerned. The proviso prohibits use of the fund except for in the manner prescribed therein, meaning only for reimbursing them for any expenses incurred by them. Neither the Regulation nor its proviso permits the sanctioning of fixed monthly amounts, irrespective of the actual expenses incurred, and the sanctioning of such fixed monthly amount operates like a monthly allowance which is to be paid irrespective of the fact that the said expenditure has been made or not. The proviso is a clear bar to such practice which permits reimbursement only of „expenses incurred" .Thus, the resolution dated 18th November 2007 of NIRC is void ab initio and has no legal basis.

In view of the above, the following order is passed:-

(i) The Resolution dated 18th November 2007 passed by Northern India Regional Council (NIRC) is void ab initio since the resolution is in violation of Regulation 132 of Cost and Works Accountants Regulations, 1959 which approved payment of fixed amounts of Rs. 5000/- to the Chairman and Rs 4000/- per month to each member of NIRC on a monthly basis without submission of bills.

(ii) Letter of caution should be issued to Shri Rakesh Bhalla for drawal of money from NIRC on the strength of the resolution dated 18th November 2007.

(iii) Shri Rakesh Bhalla and any other elected member of NIRC who had drawn money on the basis of the resolution dated 18th November 2007 are required to deposit the exact amount that they had drawn on the strength of the resolution dated 18.11.07, with NIRC within a period of 30 days from the date of receipt of the order.

(iv) The Order stated in (iii) above shall apply mutatis mutandis in respect of all members of Council of NIRC who had drawn money on the basis of the resolution in question.

(v) All elected representatives of Council of NIRC be informed to desist themselves from passing any such resolution which is in violation of the Cost and Works Accountants Act, 1959 and the rules regulations framed thereunder.

(vi) The aforesaid decision is to be communicated to all who were members of Council of NIRC during the period 2007-2011.

Sd/-

Dr. A.S. Durga Prasad
Presiding Officer

The appellant has returned to NIRC the money which he had received on the strength of the impugned resolution dated 18th November, 2007 and has filed the present appeal challenging the aforesaid order of the Disciplinary Committee. In the appeal filed by the appellant, challenging the Orders of Disciplinary Committee holding him guilty of misconduct and directing him to refund the money which undisputedly he had drawn from the funds of NIRC on the strength of the Impugned resolution, he also prayed for refund of that amount which he claimed to have deposited under protest.

This appeal has been contested by the respondent-Institute. Though after receiving the notice of this appeal the complainant, respondent no.2 herein, appeared before this Authority in person once and filed brief written submissions also but thereafter he chose not to be present at the time of final hearing of this appeal.

The appellant presented his case in person and submitted detailed written submissions also. The Institute has supported the decision of the Disciplinary Committee and on its behalf also written submissions were submitted.

The appellant reiterated before this Authority during the course of oral submissions as well as in his written arguments the pleas which he had raised before the authorities below. Additionally a plea of bias against one of the members of the Disciplinary Committee was also raised before this Authority.

We have given our due consideration to the rival submissions and have also perused the records of the case produced before us by the Institute in compliance of our direction to that effect.

The undisputed position which emerges out is that on 18th November,2007 the then members/ office bearers of NIRC assembled in Delhi office for holding a meeting of NIRC to discuss various items included in the Agenda. During the course of that meeting the members of NIRC decided to examine the question, which was not in that meeting"s Agenda, of reimbursement of money to members spent by them in connection with the business of NIRC and then took a decision that day which has already been extracted in the earlier part of this order and it is that decision which has given rise to this legal fight between two members of the Institute one of whom is the appellant, an elected member of NIRC during that period and the other one during those days was a member of Central Council of the Institute. By way of the impugned resolution the members of NIRC had made themselves entitled to get fixed amount of money every month towards expenses on account of conveyance, telephone bills etc. in connection with the affairs of NIRC and which decision, according to the Disciplinary Committee, amounted to fixing a monthly allowance for the members irrespective of the fact whether any expense was incurred or not and that decision was thus taken in contravention of statutory Regulation no.132 (which has been reproduced already). The appellant"s argument is that that decision was taken with the bona fide intention of curbing the ongoing practice in NIRC of reimbursing to its members limitless expenses and that too without production of any proof of expenses. In our view the object behind passing of the impugned resolution might have been this but the fact remains that such like decision was not permitted to be taken in connection with the Funds of NIRC. It has been rightly observed by the Disciplinary Committee that such a self beneficial decision amounts to fixation of fixed monthly allowance for the members of NIRC and that exactly is not permitted in law and contravenes Regulation 132 which admittedly governs the utilisation of NIRC"s money which belongs to every member and not to the office bearers of NIRC alone who can spend it in any way they like. It was rightly pointed by the learned counsel for the Institute that the resolution did not restrict the spending of NIRC money by its members to Rs.5000/- by Chairman and Rs.4000/-p.m. by others in NIRC which decision in fact entitled them to have fixed amounts every month and additionally they could also claim actual money spent them meaning thereby that the members were to have cake and eat it too. In our view, if there was a wrong practice prevalent in NIRC for the reimbursements of money to members without any limit and without production of proof of expenses steps could have been taken to curb and regulate that practice by and also by proceeding against those officials who were instrumental in sanctioning the reimbursements without supporting documents. Here what was done by the members of NIRC who had taken over the management only in August,2007 showed undue haste in fixing a

sort of monthly allowance for themselves in November, 2007. Unfortunately, those who passed the unanimous resolution included nominees from the Central Council also who are included in NIRC as watchdogs to ensure that no irregularities take place in financial matters in the Regional Councils which are set up away from the Headquarter of the main Institute. We are also of the view that there can be no justification for contravention of statutory provisions. If there is a bar for spending NIRC money by reimbursing money claimed by members on account of expenses unless money is actually shown to have been incurred any decision taken ignoring that bar becomes questionable and no explanation for the contravention and howsoever good intentions may be behind that decision, the decision cannot be approved of by anyone. Good intentions behind any decision which is prohibited under law cannot wipe off the consequences of contravention of the statutory provision like Regulation 132 in this case. In fact, when law is broken while taking some decision absence of bona fides has to be presumed. In reply to the grounds of appeal filed by the Institute the Institute has taken a plea that the members of the NIRC who had passed the impugned resolution had acted dishonestly. Thus, in these circumstances the appellant cannot even invoke Section 36 of the Act of 1959 which was also pressed into service by the appellant. This provision of law protects the officials of Institute, Committees constituted under the Act etc. against any action taken in good faith. No action taken in the teeth of legal provision like Regulation 132 can be said to have been taken in good faith.

Under Clause 1 of Part II of the second schedule to the Act of 1959 it is clearly provided that a member of the Institute, whether in practice or not, is deemed to have committed professional misconduct if contravenes any provision of the Act of 1959 or regulations framed thereunder. In the present case the members of NIRC, who are Cost Accountants and members of the Institute, contravened statutory Regulation 132 and so were deemed to have been guilty of misconduct and the Disciplinary Committee"s decision cannot be faulted with.

The appellant came out with an argument that since the decision in question was not taken by him alone and was in fact taken by NIRC, which is not a member of the Institute, no misconduct can be said to have been committed by him personally and, therefore, the entire proceedings held against him need to be quashed. This submission, in our view, is also not acceptable at all. In the present case members of the Institute who were part of NIRC which had taken the impugned decision were simply working under the umbrella of collective body called NIRC and, therefore, it cannot be said that no member had committed misconduct. NIRC has to function through individual members and so each and every member participating in any decision making process in contravention of law can be said to have committed misconduct falling under Clause (1) of Part II of the Second Schedule which we have already quoted. And this is what the Disciplinary Committee has also concluded while declaring that the decision taken by the members of NIRC(without referring to any particular member) had no legal basis. What the Disciplinary Committee wanted to convey was that the newly elected members of NIRC had sought to create a private fiefdom by making a self beneficial Rule for payment of fixed amounts of money to each member every month irrespective of whether some money was actually spent by them or not from their own pockets. Lot has been said by the appellant about the past practice of members of NIRC claiming and getting limitless reimbursements and that too without

submission of any proof of expenditure incurred and the intention behind passing the impugned resolution to curb that practice. The appellant had sought to highlight that even the complainant Rakesh Singh was also indulging in that practice as also another member of the NIRC namely Shri Hari Krishan Goel. However, nothing turns around this stand taken by the appellant since it is not the case of the appellant that reimbursements were being made in the past by the sanctioning authority without being satisfied that money being claimed any member was actually spent or not. Counsel for the Institute submitted that wherever money was being reimbursed without documentary proof the concerned member used to give a self declaration of money having actually being incurred and unless any suspicion was there about the genuineness of the claim the payments were being cleared. It was sought to be illustrated that if any member claims taxi fare it is not expected of him to give documentary proof of that expense as normally taxi drivers do not issue receipts and this fact can be taken notice of by anyone. We do not find this submission on behalf of the Institute to be unjustified. So, that practice in the past did not justify taking a decision in contravention of Regulation 132 by fixing monthly amounts for members of NIRC without justifying actual expense in addition to reimbursements on the basis of proof of expenditure.

The other argument raised by the appellant was that the complainant had been selective in proceeding against him alone when the impugned resolution was passed unanimously by seven members of NIRC and therefore the Disciplinary Committee should have held the complaint of Rakesh Singh to be mala fide and motivated one. This grievance of the appellant is also not justified in the facts and circumstances of the case. The complainant was right in his stand that it was his choice whether to lodge formal complaint against one or all guilty of misconduct. However, a bare reading of the impugned order of the Disciplinary Committee shows that it had struck down the decision of NIRC as void ab initio holding that by passing this kind of a resolution NIRC members had fixed monthly allowance for themselves which decision had no legal basis. Thus, everyone had been indicted and painted with same brush and criticised with same force and the appellant alone was not held to be instrumental in contravention of Regulation 132. Every member was directed to return the money if drawn on the strength of the impugned resolution. That direction was in the nature of a fine which could also be imposed under Section 21(3) of the Act of 1959. So, this grievance of the appellant stood taken care of by the Disciplinary Committee itself which was not bound by the choice of the complainant in choosing the delinquent Cost Accountants. The Disciplinary Committee was free to indict everyone involved in the passing of the impugned resolution and not to restrict its criticism against the appellant alone despite the fact that the complainant had chosen not to name any other member of NIRC in his complaint. The appellant can thus have no grievance on this count.

Finally the appellant pressed into service the plea of bias and questioned the constitution of the Disciplinary Committee which included the complainant Rakesh Singh himself also as one of the members. It is undisputed that the complainant of this case, respondent no.2 herein, was a member of the Disciplinary Committee at the relevant time when the complaint against the present appellant was being looked into after the Director(Discipline) had referred the matter to it. This fact was brought to our notice during the course of hearing of the appeal by the appellant and was admitted by the counsel for the Institute and the learned counsel had submitted that in

the meetings of the Committee whenever this matter was taken up Mr. Rakesh Singh had been recusing himself and walking out of the room where enquiry proceedings were being conducted. On our directions he produced the copies of the minutes of the meetings of the Committee whenever the present matter was taken up and those minutes did show that the complainant Rakesh Singh had gone outside the room when this matter was being taken up. Counsel for the Institute submitted that as per the practice Disciplinary Committee is constituted by the Central Council not for any individual complaint but for looking into complaints in general against many Cost Accountants and it is not that for this case only the Committee comprising of Rakesh Singh was constituted. He also submitted that in any case the appellant never raised this objection of bias when the enquiry was going on and had he done so the other remaining members might have taken some decision on that objection and, therefore, this Appellate Authority need not entertain this objection. These documents were produced on 25/05/16 but on that date the appellant did not turn up and instead sent a request for adjournment. We had then adjourned the hearing to 26/05/16. However, on that day also the appellant sent a request for adjournment by email but had also written in his email that if further adjournment was not acceptable then the appeal could be disposed of by considering his grounds of appeal and written arguments submitted already. He had made some points in his email also. Since we were not inclined to adjourn the hearing any more we closed the proceeding after hearing the counsel for the Institute. So, from the side of the appellant there was no response to the aforesaid submissions of counsel for the Institute regarding his objection against the complainant Rakesh Singh being one of the members of the Disciplinary Committee.

We are of the view that considering the fact that the complainant Rakesh Singh had been recusing himself from the proceedings against the appellant and the fact that no objection in any case was raised in this regard before the other members of the Committee this plea of bias also needs to be rejected.

This appeal, thus, being devoid of any merit is hereby dismissed with cost of Rs. 20,000/- which shall be deposited in the Member"s Benevolent Fund which is maintained by the Institute of Cost Accountants of India.

Justice P.K. Bhasin (Retd.)
Chairperson

Dr. Navrang Saini
Member

B. M. Sharma
Member

5th August, 2016

BEFORE THE APPELLATE AUTHORITY

(Constituted under The Cost Accountants Act, 1959)

APPEAL NO. 04/ICWAI/2017

IN THE MATTER OF:

Ashok B. Nawal .....Appellant

Versus

Institute of Cost Accountants of India
and others .....Respondents

CORAM

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

PRESENT

For the Appellant:

1. Mr. Ashok B Nawal, Appellant in person
2. Mr. Pradeep Dahiya, Advocate

For the Respondents:

1. Mr. Peeyoosh Kalra, Advocate appearing for Respondent no. 1
2. Mr. Rajendra Bose, Director (Discipline), ICWAI
3. Mr. Kush Chaturvedi and Mr. Rahul Malhotra Advocate appearing for Respondent no. 2
4. Mr. D. Kavin Prabhu, Advocate appearing for Respondent no. 2
5. Mr. Ashish P. Thatte, Respondent no. 2 in person

ORDER

Date: 19.07.2017

1. This appeal along with stay application arises against the Order dated 27th June, 2017 passed by the Disciplinary Committee of the Institute of Cost Accountants of India in complaint No. Com-21/CA (20)/2014 titled Ashish P. Thatte (Complainant) Vs. Ashok B. Nawal (Respondent), whereby, the Appellant has been held guilty of Professional Misconduct under clause (10) of Part-I of the First Schedule of the Cost Accountants Act, 1959 for having worked as Managing Director of M/s Bizsolindia Services Private. Limited. The said clause reads as under:-

> ***"PART-I: PROFESSIONAL MISCONDUCT IN RELATION TO COST ACCOUNTANTS IN PRACTICE***
>
> *A cost accountant in practice shall be deemed to be guilty of professional misconduct, if he-*

(10) engages in any business or occupation other than the profession of cost accountant unless permitted by the Council so to engage:

Provided that nothing contained herein shall disentitle a cost accountant from being a director of a company (not being a managing director or a whole-time director) unless he or any of his partners is interested in such company as accountants".

2. The Appellant has submitted that the impugned order has not been passed in accordance with the law as contained in the Cost Accountants Act, 1959 and the Cost and Works Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 made by the Central Government in as much as, as facts as well as the Disciplinary Committee has not acted correctly as per the procedure to be followed by the Disciplinary Committee more particularly Rule 18 (14) of the Cost and Works Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007. The said Rule reads as under:-

"(18) Procedure to be followed by the Committee:-

(1) x x\ x x

(14) If the respondent applies to the Committee to issue any notice for compelling attendance of any witness for the purpose of examination or cross-examination, or the production of any document or any material object, the Committee shall issue such notice unless it considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by it in writing".

3. It is also submitted before us that the Disciplinary Committee has not recorded any evidence in support of the allegations made in the complaint and despite the request having been made in this regard, no opportunity of cross examination of the complainant has been provided to the Appellant herein.

Furthermore, it is also submitted that the manner in which the order of removal of the name of the Appellant from the Register of Members has been passed, shows some bias on the part of the authority who have done so as the Impugned Order had not even reached to the Council of the Institute of Cost Accountants of India for its perusal in terms of sub-section (2) of Section 20 of the Cost Accountants Act, 1959. The said section reads as under:-

"(20) Removal from the Register:-

(1) x x\ x x

(2) The Council shall remove from the Register the name of any member in respect of whom an order has been passed under this Act removing him from membership of the Institute".

4. Additionally, we have also been taken through the various provisions of the Cost Accountants Act, 1959 and the Cost and Works Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 with special reference to sub-rule (14) of Rule (18) of the said Rules, as the said Rule goes to show that once a request is made by the Respondent for cross examination of any witness, to the committee, it is obligatory on the part of the committee to issue notice for compelling attendance of the witness for the purpose of examination or cross examination. Of course, there is discretion available with the committee to refuse from doing so, but in the present case, it is apparent that on the very first date of receipt of this request, it was refused, but not for the reasons as specified and aforesaid mentioned.

5. However, it is true that according to the Disciplinary Committee of the Institute of Cost Accountants of India, there were other reasons also and non-cooperation virtually on the part of the Appellant on various dates, besides admission of certain facts regarding the Appellant working as a Managing Director despite being holder Certificate of Practice (CoP).

6. The records goes to show that neither the Institute has recorded any evidence in support of the complaint nor afforded any opportunity of the cross examination to the Appellant despite his request. It clearly goes to show that the Cost and Works Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 have not been complied with in the present case. It is the settled law of the land that the justice should not only be done but it should also seem to be done. This is also contrary to the principles of Natural Justice.

7. Though on behalf of the Appellant, it is argued before us that the refusal to accept the request of cross examination of the complainant has caused a serious prejudice to his case, while according to the Respondent, it is not so considering his conduct on the past hearings, but we are in agreement with the submissions made on behalf of the Appellant that the refusal to accept the request for cross-examination, causes a prejudice to the case of the Appellant and would come within the preview of denying justice to the concerned party besides being voilative Rule 18(14) as aforesaid.

8. Taking all these facts into consideration and without going further, we are of the considered view that the manner in which the name of Appellant has been removed from the Register of Members, avoiding the compliance of the provisions of the Act and the Rules framed thereunder, casts serious issues regarding the fairness of the procedure followed and the interest of justice will be met out by directing the Council of the Respondent Institute of Cost Accountants of India to reinstate the name of Appellant with immediate effect. Accordingly, we stay the operation of the Impugned Order dated 27th June, 2017 passed by the Disciplinary Committee and the Notification No. 16-CWR (23583)/2017 issued in pursuance of the Impugned Order for removing the name of Mr. Ashok B. Nawal from the Register of Members of the Institute for a period of two years, till the compliance of the directions which are being issued to the Institute of Cost Accountants of India through this Order and reconsideration of the compliance report by the Appellate Authority as well as to the Appellant.

9. Further, the Disciplinary Committee is hereby 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 be completed within a period of three months from the date of the receipt of this order and thereafter the matter be referred back to the Appellate Authority for its further consideration.

10. The Appellant herein, in case he wants to hold the Certificate of Practice (CoP), is also hereby directed to resign from all the posts, if he is holding the same presently like Managing Director, Whole time Director or Executive Director from various corporate bodies within a period of three days from the date of receipt of this order and supply a copy of his resignation to the Institute of Cost Accountants of India as well as to this Authority through the Registrar for records. The aforesaid directions are being given in view of the admission of the Appellant working as a Managing Director that also for annual remuneration as stated in his letter dated 1st April, 2014.

11. With this, the present stay application is disposed of and the Registrar of the Appellate Authority is directed to list this appeal before the Appellate Authority after receipt of the report of the proceedings held in compliance of the directions issued to the Disciplinary Committee / Council of the Institute of Cost Accountants of India and the Appellant.

Justice M. C. Garg
Chairperson

B.M. Sharma
Member

Dr. Navrang Saini
Member

BEFORE THE APPELLATE AUTHORITY

(Constituted Under The Cost & Works Accountants Act, 1959)

APPEAL NO. 13/ICWAI/2017

IN THE MATTER OF:

Balwinder Singh .....Appellant

Versus

Anil Sharma .....Respondent No. 1
Director (Discipline) .....Respondent No. 2
Institute of Cost Accountants of India .....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:

For the Appellant:

1. Mr. Balwinder Singh, Appellant in person

For the Respondents:

1. Mr. Peeyoosh Kalra, Advocate appearing on behalf of ICWAI
2. Mr. L. Gurumurthy, Director (Discipline) appearing on behalf of ICWAI

ORDER

1. This Appeal has been filed before the Authority by CMA. Balwinder Singh against the Order dated 5th May, 2017 passed by the Disciplinary Committee of the Institute of Cost Accountants of India in Complaint No. Com/21-CA (18)/2014 namely Shri Balwinder Singh (M/19898) Vs. Shri Anil Sharma (M/15091), wherein, Shri Balwinder Singh was the original complainant, by submitting that he is an aggrieved member on account of certain observations made by the Presiding Officer of the Disciplinary Committee of the Institute of Cost Accountants of India in its Order dated 5th May, 2017 in respect of all the members of the Managing Committee during the period of 2009-10, 2010-11 and 2011-12 as he was also one of the member of the Managing Committee for the period of 2009-10 and have been cautioned by the aforesaid Order as under:-

   "All members of the Managing Committee during the period 2009-10, 2010-11 and 2011-12 be cautioned".

2. Shri Balwinder Singh further submitted that he has also not been given any opportunity of being heard by the Disciplinary Committee before passing the impugned Order.

3. Learned Counsel Shri Peeyoosh Kalra along with L. Gurumurthy, Director (Discipline) both appearing on behalf of the Institute of Cost Accountants of India have also agreed that no such opportunity of being heard has been given to Shri Balwinder Singh before passing the said Order against which the Appellant has filed the present Appeal.

4. We have also noted Section 22E of the Cost Accountants Act, 1959, and observed that though the same does not entitle the complainant to file an Appeal before this Authority.

5. After hearing the arguments advanced on behalf of both the parties and considering that the observations made by the Presiding Officer of the Disciplinary Committee in its Order dated 5th May, 2017 without issuing him a proper notice and without providing him an opportunity of being heard is clearly in violation of the Principles of Natural Justice. Therefore, we set aside this portion of the impugned Order, i.e., "All members of the Managing Committee during the period 2009-10, 2010-11 and 2011-12 be cautioned" for the purpose of deciding the limited question of the grievance of the Appellant and hold that the same shall not be considered as the part of the impugned Order.

6. However, we wish to observe that if the Disciplinary Committee feels that such observations /directions are required in the interest of justice, it may take up the matter afresh after issuing proper notice to all the members of the Managing Committees for the relevant years and may pass fresh order after taking into consideration the submissions made on behalf of the relevant parties, within a period of three months from the date they decide to take such an action.

7. With above, the present appeal is disposed of.

Justice M.C. Garg
Chairperson

B M Sharma
Member

Praveen Garg
Member

Dr. Navrang Saini
Member

Pronounced on dated 3rd November, 2017 at New Delhi