

**THE BOARD OF DISCIPLINE  
THE INSTITUTE OF COMPANY SECRETARIES OF INDIA**

**IN THE MATTER OF COMPLAINT OF PROFESSIONAL OR OTHER MISCONDUCT  
UNDER THE COMPANY SECRETARIES ACT, 1980**

**ICSI/DC/307/2015**

Order reserved on: 19<sup>th</sup> November, 2018

Order issued on : 17 JAN 2019

**Mr. Nitin Mohanlal Lunkad**

....Complainant

**Vs**

**Mr. Mahesh Anant Athavale, FCS-2412 (CP No. 1488)**

....Respondent

**CORAM:**

CS C Ramasubramaniam, Presiding Officer  
CS Ashok Kumar Dixit, Member

**Present:**

Mrs. Meenakshi Gupta, Director (Discipline)  
Ms Anita Mehra, Assistant Director  
Shri Gaurav Tandon, Assistant Director

**FINAL ORDER**

1. A Complaint dated 19<sup>th</sup> May, 2015 in Form 'I' was filed under Section 21 of the Company Secretaries Act, 1980 read with sub-rule (1) of Rule 3 of the Company Secretaries (Procedure of Investigations of Professional and other Misconduct and Conduct of Cases) Rules, 2007 (the Rules) by Shri Nitin Mohanlal Lunkad (hereinafter referred to as the 'Complainant') against Shri Mahesh Anant Athavale, FCS-2412 (CP No 1488) (hereinafter referred to as 'the Respondent')
2. The Complainant has inter-alia alleged/ stated as under-
  - 2.1 That the Poona Club Ltd is a Ltd. Company (hereinafter referred to as "M/s. PCL") is a Guarantee Company with no Share Capital. The Complainant further stated that he is one of the ex-members of the Managing Committee as well as one of the Life Members of the Poona Club Ltd. (hereinafter referred to as "M/s. PCL" for the sake of brevity) his membership number is L-47.
  - 2.2 That as per the search of documents on official website of MCA relating to the Annual Filings made by M/s. PCL, it is observed that the Directors'



Report filed with MCA are not in conformity with the provisions of Section 217 of the Companies Act, 1956 and the Companies (Disclosure of Particulars in the Report of Board of Directors) Rules, 1988.

2.3 That M/s. PCL had failed to discharge its statutory obligations towards the members in preparation, signing and circulation of the directors reports from 2005 to till date. The company had filed directors report(s) year after year without inclusion of following mandatory details:-

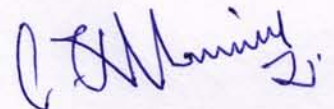
- i. Highlights of financial statements/performances, amount transferred to reserve and provision made for depreciation.
- ii. Details of Statutory Auditors who were/are eligible for re-appointment
- iii. Details of the name and other details of Directors who were/are liable to retire by rotation.
- iv. Material changes and commitments, if any, affecting financial position of the Company
- v. Details of Conservation of Energy, Technology Absorption, Foreign Exchange Earnings & Outgo in prescribed manner
- vi. Contingent liabilities & comment on Government Dues
- vii. Details of employees drawing remuneration above specified monetary limits.
- viii. Statement about particulars of name of every employee who is a relative(s) of director(s) and who draws remuneration above specified monetary limits, if any
- ix. Directors' Responsibility Statement
- x. Reply to adverse remark/qualification(s) in Auditor's Report by the Board of Directors
- xi. Particulars of loans, guarantees or investments made by the Company
- xii. The amounts, if any, which Company proposes to transfer to any Reserves

2.4 That it is placed on record that non attachment and non circulation of Directors' Report containing all the above mandatory details as envisaged by Section 217 of the Companies Act, 1956 and/or Section 134 of the Companies Act, 2013 signed by the Chairman or at least 2 directors amounted to improper issue, circulation or publication of Balance Sheet as envisaged by law. However, M/s. PCL had not bothered to include all mandatory details in each of the Directors' Reports so far and had also failed to comply with the provisions of law regarding signing of the same by requisite number of directors. These contraventions had been solely triggered due to gross negligence and lack of proper legal advice on the part of the Respondent.

2.5 That the Respondent who is a Practicing Company Secretary appointed as a company law consultant by M/s. PCL and was present in the almost all the Annual and Extra Ordinary General Meeting(s) from FY 2004-05 to till date. He was a party to all the proceedings of said meetings. In spite of this, he



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had neither uttered a single word about invalidity of Directors' Report on account of non inclusion of mandatory details as envisaged in Section 217 of the Companies Act, 1956 nor intimated/refrained the Chairman or any other members of the Managing Committee from placing it before the meeting(s) for seeking requisite approval of members of M/s. PCL. However, instead of giving proper professional advice for inclusion of mandatory details in the Directors' Report in question from time to time, the Respondent had kept deliberate silence in finalizing mandatory contents of the Directors' Report year after year which had resulted into signing of the same by members of the management committee and caused circulation thereof by M/s. PCL sent to all the members of M/s. PCL, despite fatal incurable legal deficiencies contained therein.

- 2.6 That these non compliances are suppression of the mandatory information which is very serious in nature as it had resulted into deprivation of fundamental rights of the members of M/s. PCL which in turn, had negated true and fair view of the state of affairs of the company. It appears that the Respondent had tried to cover up various unpardonable infractions of Company Law relating to his own domain so as to facilitate masking of the misdeeds of the management by non-disclosure of necessary information on year to year basis at every AGM(s).
- 2.7 That it is pointed out that all the filings of Form 23AC along with copy of so called Directors' Report made by auditors of M/s. PCL for FY 2004-05 to 2011-12 which are available on official website of the MCA had raised a question mark upon legality of the said Directors' Report.
- 2.8 That the Respondent had failed to report non inclusion of mandatory details in Directors' Reports which were very much known to him in a professional capacity which amounts to suppression of material facts.
- 2.9 That the Respondent had failed to invite attention to the material departure from the generally accepted procedure relating to the secretarial practice pertaining to the advice, preparation of directors reports from 2005.
3. The Respondent in his written statement denied the allegations levied against him and has *inter-alia* stated that:-
- 3.1 He is a consultant to the club engaged to provide opinions, views and guidance regarding the conduct of member's meetings and inspection of record, as and when the Managing Committee through the President, Secretary or the Deputy Secretary of the club asks him to provide his opinions, views and guidance. The Respondent further stated that the scope of providing advisory services to the Club by the Respondent is limited to the matters referred by the Managing Committee of the Club. The Respondent does not interfere / involve himself in the matters though relating to Company Law unless a reference is made to him by the Managing Committee.



3.2 That an offer was made by him to the club on 23rd February, 2009 for rendering services to the club for issuing compliance certificate and ensuring compliances under the Companies Act, 1956. However this offer was not accepted by the Club and only the assignment of giving opinion on case to case basis and uploading forms was given.

3.3 That the Complainant was a member of the Managing Committee of the Club himself during 2013-14 and is well aware about the scope of services of the Respondent with respect to the affairs of the Club. The Respondent was never consulted by M/s. PCL in drafting the Director's Report nor was it in the scope of services of the Respondent. However, he has made allegations against the Respondent in respect of the matters which are completely beyond the scope of the services provided by the Respondent. It may also be mentioned here that the Respondent had a limited role and the Respondent discharged his duties strictly in accordance with the law and to the entire satisfaction of the management of the Club. Had there been any deficiency on the part of the Respondent, the Club would have filed a complaint against the Respondent.

3.4 The Respondent further stated that the Complainant has been a Member of the Club since 30th June, 1994 and is raising various issues pertaining to non filing etc. by the Club since 2000 only after his defeat in the elections and post suspension of the membership.

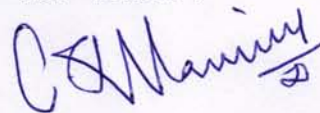
3.5 That the Complainant has made vague and sweeping allegation without specifying any act of professional misconduct. Therefore, the complaint deserves to be dismissed without any further action. It may also be placed on record that the Complainant has made as many as seven complaints against the Respondent and two against his partners which are frivolous in nature and not based on the sound principles of law.

3.6 That the allegations pertain to the contents of the Directors' Report and the Respondent had no role to draft, supervise, review and finalize the Directors' Report as contemplated under the Companies Act, 1956 and Companies Act, 2013. That assuming without admitting, it may be mentioned that even if the contentions of the Complainant are correct, even then the ICSI is not the proper forum to decide whether the contents of the Directors' Report are in compliance with the law or otherwise. The Respondent further stated that what needs to be confirmed is that whether the Directors' report which was circulated to the members of the Club was in fact uploaded by the Respondent on the MCA portal through Form no 23AC or not.

3.7 In fact this Form 23AC has been signed by Shri Gaurav Bapat as mentioned by the Complainant; therefore, there cannot be any complaint against the Respondent. However, be it as it may, the allegations are about contents of the Directors' report assuming that the Respondent has drafted or has advised about the contents of the Directors' report or has vetted /



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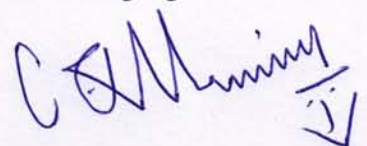


approved its contents; the ICSI is not the proper authority to adjudicate the matter.

- 3.8 That the Complainant has also failed to produce any document to support his allegation that the Respondent was an advisor to the Club for all matters and was responsible for ensuring the compliances of each and every section of the Companies Act. The scope of the services of the Respondent was limited to the extent of providing company law consultancy on the matters which were referred by the Committee of the Club. The opinion and views of the Respondent were required on more than one occasion and hence the arrangement for payment of fees on monthly basis rather than on case to case basis was agreed and the same kind of arrangement still continues.
- 3.9 That he was never given an assignment of ensuring compliance of all the applicable provisions of the Companies Act. The Complainant has failed to produce any documentary evidence to support his allegation that the Respondent was given the assignment for preparation of various forms, returns and other documents required to be filed with the Registrar of Companies / MCA and other related company law matters. The Respondent was never a party to finalise the contents of the Directors' report for all these years.
- 3.10 That in reply to paragraph 2.3 pertain to the irregularities on the part of the discharge of duties by the Club and its Managing Committee and not of the Respondent. If the Complainant has any grievance in regard to circulation of the Directors' Report or the contents thereof, he should file complaint before the competent authority as the Institute of Company Secretaries of India has no jurisdiction to take the actions required in the events of non-circulation of the Directors' Report and non-disclosure of mandatory details in the Directors' Reports of the Club.
- 3.11 That he has been attending the members' meetings of the Club only to supervise the conduct of the meetings and to advise/ help the President of the Club during such meetings, about the queries raised by the members on the floor, pertaining to proper convening the meetings. Sitting on the dais, it is not the duty of the Respondent to scrutinize and find fault with the Directors' Report which is already circulated to the members. It is for the members to raise objections, if any, on the documents circulated along with the notice. The Respondent had no role to play on the contents of the Directors' Report.
- 3.12 That the Complainant has been a member of the Club from the year 1994 and has been attending several meetings of the members of the Club over the years and never objected to the contents of the Directors' report for all these years. It is only after losing the election that the allegations have been made as an afterthought. The Directors' Report once approved cannot be challenged. The Respondent further stated that it would be further interesting to note that the Complainant was a member of the Managing



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Committee which approved the draft of the Directors' Report for circulation of the members in the year 2013 -2014.

- 3.13 That in all these years, the Complainant has not even once raised any query with respect to the contents of the Directors' Reports. In fact, as a member of the then Managing Committee, the Complainant has signed the Balance Sheet and Income and Expenditure account in the Financial Year ended on 31st March, 2014 approving the set of the financials of the Club.
- 3.14 That as per the practice and precedence of the Club, a separate President's Report is attached to the financials of the Club which provides the overview of the affairs of the Club and contains other details. Such President's Report is read out every year during the members' meetings. This President's Report makes the material disclosures to the members of Club and often leads to discussion and the debate pertaining to the performance of the Club every year. Hence, the question of suppressing mandatory information does not arise.
- 3.15 That the Complainant has stated in his complaint that the Directors' report is made by the Auditors of the Club and not by the Respondent. Though it is doubtful whether Auditors have made the Directors' report as alleged by the Complainant, but in any case on this ground also, the Respondent cannot be held responsible for any irregularities arising therein as the Complainant himself has made it obvious that Directors' report has not been made by the Respondent.
- 3.16 That the Respondent has no reason to comment about the allegation as he has not signed Form 23AC for the year 2013-14, but since it has been certified by Shri Gaurav Madan Bapat, as the Associate of the Respondent, it is submitted that the extent of involvement of Shri Gaurav Madan Bapat, is only to the extent of digitally certifying the contents of the Form 23AC which are to be reproduced from the financial statements in the e-Form based on the information provided in the signed financial statement, which have been signed by the Complainant himself, as a member of the Managing Committee. A separate certificate has also been affixed to the Form 23AC by CS Gaurav Madan Bapat, in which it has been clearly clarified that form 23AC has been certified on the basis of the audited and signed annual accounts made available to the Respondent. For reasons best known to the Complainant, he has preferred not to produce this letter as an annexure to the complaint. This is material suppression of the fact by the Complainant. The Directors' report is an attachment to form 23AC. This report is the same report which was circulated to the members. Hence, whether the contents of the Directors' report were in compliance with the provisions of the Companies Act, 1956 or not was never the responsibility of Shri Bapat or the Respondent.
- 3.17 That in the Disciplinary Case of Dr. Kalpana Agrawal Vs. CA Vijay Kumar Agrawal, held at the Disciplinary Committee of the Institute of Chartered Accountants of India, it has been held that any Report issued by a

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C. S. Munnay

Professional which was made on the basis of the information and explanation given to him by his Client, if contains any discrepancies will not make the Professional guilty of the Professional Misconduct.

4. The Complainant in his Rejoinder *inter-alia* stated as under-

4.1 M/s. Poona Club Limited (M/s. PCL) is public limited company limited by guarantee having no share capital and the Respondent is the company law consultant to the company. That the Respondent used to attend various meetings, providing opinions, providing all kinds of services under Companies Act, 2013 including certification of various applications of M/s. PCL, is himself raising objections that his appointment was not properly made? The Respondent and his partners have been providing all kinds of company law services to the company.

4.2 That the email submitted is a fabricated mail. It does not have any legal sanctity. Unless specific resolution is passed in the Management Committee meeting, the Chairman is not supposed to issue such type of mail to any consultant. It is a fabricated mail created by the Respondents as self serving document. The mail is also not sent from the official email account from the Chairman's office of M/s. PCL. That admittedly the Respondent used to appear on the dais in every general meeting. Every member is entitled to ask any query to the Chairman in the meeting and not to any consultant(s). However, he cannot wash his hands off the matter from responsibility of drafting various documents from time to time on behalf of M/s. PCL. The Chairman had categorically made statements in the minutes of the meeting evidencing role of the Respondent in relation to company law matters, for giving various opinions, for preparation of various company law documents. All these mails are prepared as an afterthought and do not have any legal substance.

4.3 That the Professional Misconduct case is relating to wrong advice and drafting of Directors' Report by the Respondent which were in contravention of Section 217 of the Companies Act, 1956. The Complainant has found out various irregularities and hence objected to the Respondent from time to time.

4.4 That the Respondent and his partners are advising on various matters under the Companies Act, 1956/2013, since long back. Naturally every member was having impression that M/s. PCL is a Section 25 company. Later on the company has issued one clarificatory letter mentioning that the Company is not a Section 25 under Companies Act 1956 & Section 8 of the Companies Act, 2013. M/s. PCL has been availing the exemptions under the Companies Act, 1956. From time to time, M/s. PCL has been taking various benefits, enjoyed exemptions as if it is a Section 25 Company under the Companies Act, 1956. The Complainant has sent various letters to M/s. PCL and the Respondent to confirm the exact nature of the company under the Companies Act, 1956/2013.



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- 4.5 That the filing of Directors Report and Balance Sheet (Form 23AC) was made by the Auditor. However, the Respondent has twisted the said sentence and making out a false case that Directors' Report were made by the Auditor to run away from his professional misconduct. The original sentence contained in the above para of the Complaint made by the Complainant is as given "the fillings of 23AC for the previous years along with the Directors were made by auditor". Thus, it can be observed that no where it was mentioned that the director's reports made by auditors.
- 4.6 It is reiterated that the company had filed Directors' Report(s) year after years without inclusion of mandatory details as stated in the Complaint. That it is placed on record that non attachment and non circulation of Directors' Report containing all the above mandatory details as envisaged by Section 217 of the Companies Act 1956 and/or Section 134 of the Companies Act, 2013 signed by the Chairman or at least 2 directors amounted to improper issue, circulation or publication of Balance Sheet as envisaged by law. However, the Respondent and M/s.PCL had not bothered to include all mandatory details in each of the Directors' Reports so far and had also failed to comply with the provisions of law regarding signing of the same by requisite number of directors. These contraventions had been solely triggered due to gross negligence and lack of proper legal advice on the part of the Respondent.
- 4.7 That the Respondent who is a PCS appointed as a Company law Consultant by M/s. PCL and was present on the dais of almost all the Annual and Extra Ordinary General Meeting(s) for several years along with members of the Managing Committee during the period FY 2004-05 till date. He was a party to all the proceedings of said meetings. In spite of this, he had neither uttered a single word about invalidity of Directors' Report on account of non inclusion of mandatory details as envisaged in Section 217 of the Companies Act, 1956 nor intimated/refrained the Chairman or any other members of the Managing Committee from placing it before the meeting(s) for seeking requisite approval of members of M/s. PCL. This shows his unbecoming and apathetic professional conduct which has a great adverse demonstration effect on all the members of M/s. PCL and all other stakeholders.
- 4.8 That these non compliances are suppression of the mandatory information which is very serious in nature as it had resulted into deprivation of fundamental rights of the members of M/s. PCL which in turn, had negated true and fair view of the state of affairs of the company. The Complainant further stated that all filings of Form 23AC along with copy of so called Directors' Report made by auditors of M/s. PCL for FY 2004-05 to 2011-12 which are very much available on official website of the MCA had raised a big question mark upon legality of the said Directors' Report. The Complainant further stated that as regards filing of so-called Directors' Report and relevant Form No. 23AC and for FY 2013-14, it is submitted that the same had been wrongly certified by Shri Gaurav Madan Bapat who is






one of the junior partners in M/s. Kanjmag in which said Respondent is a main partner.

- 4.9 That the Respondent has wrongly advised on the so called Directors Reports in a premeditated and prejudiced manner with a hand in glove with M/s. PCL and its Directors. This is criminal conspiracy on his part against the innocent members. The Complainant further stated that the Respondent had acted in the most careless manner in giving professional advice regarding inclusion of mandatory details in Directors' Report for several years not befitting to a professional and brought disrepute to the Institute and profession as envisaged in clause (2) of Part IV of the First Schedule of the Company Secretaries Act, 1980.
5. The Director(Discipline) on examination of the complaint, written statement, rejoinder & all the documents on record, vide her prima-facie opinion 23rd September, 2017 observed that the Respondent is 'not 'Guilty' of Professional misconduct or other misconduct under the Company Secretaries Act, 1980 as the Complainant has filed the instant complaint regarding the non-disclosure of material fact in the Directors Report of M/s. PCL, however, no role of the Respondent has been established in the drafting the Directors report of the club. Further, as per the Respondent, the Complainant was a member of the Managing Committee which approved the draft of the Directors' Report for circulation to the members in the year 2013 -2014, the said averment of the Respondent has not been denied by the Complainant. Further, the Complainant has also not produced any evidence to substantiate his allegations levied against the Respondent. Moreover, the Respondent is a consultant and not a compliance officer of the club. Even otherwise a consultant is to provide opinions, views and guidance regarding the conduct of member's meetings and inspection of record, as and when asked from him to provide his opinions, views and guidance. Hence, the Respondent, therefore, cannot be held responsible for whatever may be happening in M/s. PCL. Further, if M/s. PCL was dissatisfied with any of the services provided by him to M/s. PCL; it would have filed a complaint against him which is not the case here.
6. The Board of Discipline after considering the material on record, prima-facie opinion of the Director (Discipline) and all the facts and circumstances of the case, agreed with the prima-facie opinion of the Director (Discipline) and held that the Respondent is "Not Guilty" of Professional or other misconduct under the Company Secretaries Act, 1980 for the acts and/or omissions alleged by the Complainant in his complaint.

Accordingly, the complaint stands disposed-off.

  
Member



  
Presiding Officer