

**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/308/2015

Order reserved on : 19th 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 19th 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 Mr. Nitin Mohanlal Lunkad (hereinafter referred to as the 'Complainant') against Mr. Mahesh Anant Athavale, FCS-2412 (CP No 1488) (hereinafter referred to as the 'Respondent').
2. The Complainant has inter-alia alleged that the Respondent had carelessly, incorrectly and without due care and diligence issued one notice cum agenda dated 4th December, 2013 for the EOGM held on 4th January, 2014 of M/s. Poona Club Limited (M/s. PCL) recommending its members to pass an Ordinary Resolution instead of Special Resolution for alteration of the Article No. 7(a) of the Article of Association of M/s. PCL.
3. The Complainant further stated that following illegalities involved in the alterations made in said Article No. 7(a) of the Articles of Association are summarized as under:
 - (i) Despite mandatory requirement of passing of a special resolution for making any alteration in the Articles of Association, M/s. PCL had passed

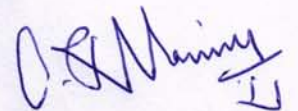
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ordinary resolution by deceiving gullible member who were not equipped with core knowledge of the Companies Act.

- (ii) The Explanatory Statement attached to the notice dated 4th December, 2013 issued by M/s. PCL had stated that "M/s. PCL has not inducted the new members for close to 20 years" which is not only a material misstatement but also a self contradictory statement which is evident from the total number of Members published by M/s. PCL in its relevant annual report, which worked out to 4000 plus members.
- (iii) It is specifically pointed out that while making any alteration in aforesaid Article No.7 (a) of the Articles of Association, it was but natural to amend Article No.3 of the Articles of Association of M/s. PCL regarding maximum permissible limit on number of members which is stated as 1000 only. Without bothering to suitably increase the said maximum limit of members in the first instance, M/s. PCL had gone ahead with illegal alteration in the said Article No. 7(a). As per the latest Annual Return filed with MCA, the total number of members had been shown as 4000 plus.
- (iv) The Explanatory Statement attached to the notice in respect of every Special Business did not contain all material facts concerning each item of business including in particular the nature of concern or interest of every director or manager and also did not mention time and place where inspection of documents involved can be taken by members, despite requirement of law.
4. The Complainant further alleged that the Respondent has not given proper legal advice on basic requirement of passing a special resolution for any alteration in the Articles of Association. The Complainant further alleged that the Respondent had failed to report non inclusion of mandatory details in notice cum agenda and explanatory statement justifying the true legal position in respect of alterations to the Articles of Association.
5. The Respondent in his written statement denied the allegations levied against him and has inter-alia stated that he is a consultant to the club for providing 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 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 further stated that he does not interfere / involve himself in the matters though relating to Company Law unless a reference is made to him by the Managing Committee. There has been no alteration to the Article No. 7(a) of the Articles of Association of the Club in the EOGM held on 4th January, 2014 and hence there is no requirement of passing the Special Resolution under the provisions of the Companies Act, 1956. All the further allegations based on this basic mistake of the Complainant are, therefore, irrelevant and baseless.



6. The Respondent further stated that he had no role to decide the nature of amendments to the Articles of Association. The Respondent further stated that a civil suit has also been filed against the amendments made in the EOGM held on 4th January, 2014 and 12th April, 2014. The said matter is sub-judice.
7. The Respondent further stated that the Complainant was present at the EOGM of the Club held on 4th January, 2014. The Complainant during the meeting did not vote against nor did he express his views against the passing of the resolutions or said anything about inadequacy or illegality of the Notice, Agenda or Explanatory Statement as alleged by the Complainant.
8. The Complainant in his Rejoinder while reiterating his earlier submissions inter-alia stated that the Respondent was present in the EOGM held on 4th January, 2014, had kept deliberate silence and allowed the Managing Committee of M/s. PCL to move ahead with alteration(s) in the said Article No 7(a) to pass the subject matter by way of an ordinary resolution, which is a serious and irreversible contravention of law. Consequently, copy of the said resolution had also not been filed with the ROC. The Complainant further stated that following illegalities involved in the alterations made in said Article No. 7(a) of the Articles of Association are summarized as under:
- a. *Despite express mandatory requirement of passing of a Special Resolution for making any alteration in the Articles of Association, M/s. PCL had passed Ordinary Resolution.*
 - b. *The Explanatory Statement attached to Notice dated 4th December, 2013 issued by M/s. PCL had stated that "PCL has not inducted the new members for close to 20 years" which is not only a material mis-statement but also a self contradictory statement which is evident from the total number of members published by M/s. PCL in its relevant Annual Report, which worked out to 4000 plus members.*
 - c. *It is specifically pointed out that while making any alteration in aforesaid Article No.7 (a) of the Articles of Association, it was but natural to amend Article No.3 of the Articles of Association of M/s. PCL regarding maximum permissible limit on number of members which is stated as 1000 only. Without bothering to suitably increase the said maximum limit of members in the first instance, M/s. PCL had gone ahead with illegal alteration in the said Article No 7(a). As per the latest Annual Return filed with MCA, the total number of members had been shown as 4000 plus. It is a case of oppression on majority within the meaning of the Companies Act, 1956.*
 - d. *The Explanatory Statement attached to the Notice in respect of every Special Business did not contain all material facts concerning each item of business including in particular the nature of concern or interest of every director or manager and also did not mention time and place where inspection of documents involved can be taken by members, despite requirement of law. It is well settled position of the law that failure to give explanatory statement as per section 173 of the Companies Act, 1956 and 102 of the Companies Act, 2013 render the entire proceedings of the meeting null and void in respect of the item of business in question.*



9. The Complainant further stated that as per the provisions of Articles of Association, any person who wants to become member is required to make upfront payment of membership fees to M/s. PCL. However, M/s. PCL had unilaterally changed the said provision and allowed new persons to acquire membership by paying the membership fees by way of instalments instead of upfront payment. Such new members were also allowed to cast their votes in the last elections held in September, 2014. It is worth noting that the act of allowing new members to exercise right to vote in the last elections and enjoy all other rights of membership at par with old members (who have paid their membership fees upfront and not in instalments) amounts to discrimination made between the old and new members without any intelligible differentia and hence is void-ab-initio. The entire series of acts proceeding to change in Articles/Bye laws of M/s. PCL in accepting membership fees in instalments from new members was and is absolutely unreasonable and amounts to denial of rule of law as a same had varied the spirit of law about their rights of membership. This would not have been possible if the Respondent would have given wiser counsel to M/s. PCL in his professional capacity with which he was connected.
10. The Director(Discipline) on examination of the complaint, written statement, rejoinder & all the documents on record, vide her prima-facie opinion 25th September, 2017 observed that the Respondent is 'not 'Guilty' of Professional misconduct or other misconduct under the Company Secretaries Act, 1980 as the Respondent was apparently a consultant to Poona Club Ltd (PCL) to provide his advice / consultancy on company law matters/legal compliances as and when referred by the Club and not a Compliance Officer of the Club. The Respondent, therefore, cannot be held liable for the alleged non compliances, if any, of filing of statutory forms or any flaw in the alteration of Articles of Association of M/s PCL from time to time. It may be mentioned that the Complainant has alleged that the Respondent has wrongly issued the notice cum agenda dated 4th December, 2013 for the EOGM held on 4th January, 2014 for M/s. PCL as it recommended its members to pass an Ordinary Resolution instead of Special Resolution for alteration of the Article No. 7(a) of the Article of Association of M/s. PCL. However, the notice of the alleged EOGM has not been issued or signed by the Respondent. Further, the Complainant himself was a Managing Committee member of the Club. The Respondent has stated that the Complainant was present at the EOGM of the Club held on 4th January, 2014 wherein the Complainant during the meeting did not vote against nor did he express his views against the passing of the resolutions or said anything about inadequacy or illegality of the Notice, Agenda or Explanatory Statement the said fact is not denied by the Complainant. Moreover, the Complainant has not produced any proof which may substantiate his allegation(s) of misconduct against the Respondent i.e. he had wrongly advised the Club. Also it is also observed that the notice of the alleged EOGM has not been issued or signed by the Respondent.



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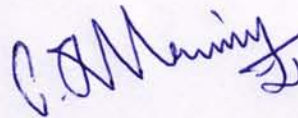


11. The Board of Discipline after considering the material on record, prima-facie opinion of the Director (Discipline) and all the facts and circumstances of the case, agreed with the prima-facie opinion of the Director (Discipline) and held that the Respondent is "Not Guilty" of Professional or other 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