

**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/309/2015

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 'T' 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 stated that M/s. Poona Club Limited (M/s. PCL hereinafter referred to as 'the Club') had been incorporated under the Indian Companies Act, 1913 on 31st August 1931, vide certificate of incorporation issued by the ROC, Mumbai. It 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 M/s. PCL, the club.
3. The Complainant further stated that the Respondent had been appointed as a company law consultant by M/s. PCL, the Club for ensuring various




compliances of all matters relating to the company law including giving advice by exercising due care and diligence from time to time. He has been accepting remuneration from M/s. PCL, the Club The Complainant further placed on record some of glaring illustrative major alterations made by M/s. PCL in its memorandum of Association on 4th January, 2014 & 12th April, 2014 by seeking approval from the members in their general meeting(s), as given in the following table:

Sr. No	Subject matter of business transacted in brief	Date of General Meeting
1	Alteration in Memorandum of Association for alterations in main objects for addition of business of "Playing cards and catering"	04th January, 2014
2	Alteration in Clause No. 3(f) of the Memorandum of Association	12th April, 2014

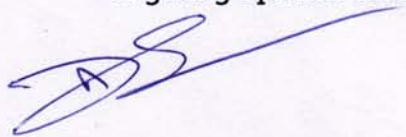
4. That in case of alteration in the Memorandum of Association which falls within the sweep of Section 17 of the Companies Act, 1956, it is necessary to comply with the following preconditions:
 - Passing of special resolution
 - Registration of alteration by submission of form 23 within three months from the date of passing special resolution
 - Obtain a certificate from the ROC confirming the alterations as conclusive evidence under Section 18(2) of the Companies Act, 1956
5. That if anyone of the above condition is not fulfilled then no such alterations, shall have any legal effect and the same shall become void and in operative as envisaged in Section 19(2) of the Companies Act, 1956.
6. That in the instant case, M/s. PCL had failed to file the prescribed Forms 23/MGT-14 and altered copy of the MOA till date, which is beyond the stipulated time period. Thus, all the alterations have become nullity in the eyes of law.
7. That all the above illegal acts of alterations in MOA stated above were done by M/s. PCL in presence of the Respondent who was present in the meeting but the Respondent had kept total silence on this in total breach of fiduciary and professional duties towards the PCL its members and Managing Committee. This shows his collusion with some of the Committee Members as a cover up deed prejudicial to the interest of all members. In fact, it was the duty of the every professional including Respondent to give proper legal advice to the management in such matters and desist them





from indulging into such illegal acts. The Complainant further stated that due to aforesaid default made in filling the amendments made in MOA by M/s. PCL, the entire alterations have become null and void having far reaching and irreversible legal consequences.

8. That as a matter of fact, the Respondent being a Company law Consultant of M/s. PCL was and is duty bound to give proper legal advice, guide and ensure all legal compliances under the Companies Act.
9. That M/s. PCL had not filed any prescribed documents regarding the aforesaid illustrative examples of alterations made in the Memorandum of Association on 04th January, 2014 & 12th April, 2014 besides series of other non-filings for more than a decade. The silence of the part of the Respondent about non filing and ultra-vires resolution passed by MIs. PCL is paramount breach of his professional duties towards M/s. PCL, its members including him and Managing Committee. The Complainant further stated that in view of serious legal contraventions, he has written a letter dated 1st April, 2015 to the Respondent requesting him to reply to various legal queries raised by him.
10. That the Respondent before advising the captioned alterations of MOA had failed to verify whether the grounds of proposed alterations in Memorandum of Association were legal or not. It is a clear cut case of misrepresentation and breach of professional duty on his part. The Complainant further stated the fact of non-filing of prescribed forms with the MCA for such long period without any lawful reasons despite professional engagement of said Respondent has put M/s. PCL in very susceptible legal position which may jeopardize the Company as well as its 4000 plus members without any fault on their side.
11. The Respondent in his written statement denied the allegations levied against him and has inter-alia stated that M/s. Poona Club Limited is a company limited by guarantee as defined in Clause 21 of Section 2 of the Companies Act, 2013. The Respondent further stated that 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 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. 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.



12. That the Complainant was himself the member of the Managing Committee of the Club for the period commencing from 29th September, 2013 to 27th September, 2014. He was suspended as a member of the Club from 28th March, 2015 for a period of 1 year commencing from 28th March, 2015 to 27th March, 2016. This was done due to his misbehaviour viz. stealing, misappropriating confidential documents from the office of the Club, misguiding, misleading and instigating members and others against the management of the club through posts on face-book and social media, defaming and spreading rumours and canards against Managing Committee of the Club. The Complainant was also reprimanded by the Managing Committee in its meeting held on 4th December, 2013 for spending money of the Club without any authorization.
13. That the Complainant was one of the candidates for the elections conducted in the month of September, 2014 and he wanted to become Vice-President of the Club for the year 2015 and 2016. The Complainant lost the elections held in September, 2014. The Respondent further stated that he had sent email to the Club in June, 2014 seeking certain inputs/clarifications and confirmations from the club. 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. 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.
14. That the Respondent is simply a consultant and advises on the company law matters whenever any matter is referred by the managing committee of the Club to him. The Respondent is not the overall in-charge of the company law matters. In short, the Respondent is not the compliance officer of the club. Therefore, the Respondent cannot be held responsible for whatever may be happening in the club. The Complainant has not produced any letter/ contract in between the Club and the Respondent which would prove that the Respondent was responsible for the compliances of all the provisions of the Company Law.
15. That the Complainant has been making contradictory statements at the various forums. In a complaint filed before SFIO where the Respondent was also a party, the Complainant had mentioned that the club is a Section 25 company and based on that the Complainant had made further allegations about the club not obtaining prior Government approval for the change in the Articles of Association of the club. The Respondent further stated that it would be observed that in this civil suit, the validity of the two meetings held on 4th January, 2014 and 12th April, 2014 has been challenged. The matter is *sub-judice*.



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16. That Complainant has been making contradictory statements before various authorities. He has made wrong statements in the complaint filed before SFIO as mentioned above, about the status of the company being Section 25 Company and based on that has made further allegations about Club's not obtaining prior government approval for change in the Articles of Association of the company.
17. The Respondent stated that the Complainant was present at Extra Ordinary General Meetings of the Club held on 4th January, 2014 and 12th April, 2014. The Complainant during the meetings 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. He did not demand for poll and the resolutions were declared as passed on show of hands. The initiation of the case only after the defeat of Complainant in the elections clearly states his ulterior motives. In fact, all the resolutions pertaining to the alterations of the Memorandum and Articles of Association have been passed in the EOGM of 4th January, 2014 unanimously. It is, therefore, obvious that the Complainant has not voted against the resolution and has impliedly given his consent for the amendments. That the compliance of provisions of section 17 and section 19 (2) of the Companies Act is the responsibility of the Club not of the independent consultant. The Respondent cannot be held responsible for the delay in filing of forms with the ROC as the services of the Respondent were engaged only on case to case basis on the matters as and when referred by the Managing Committee of the Club. That it is important to note that the requisite form 23 has been filed by the club vide SRN 895238796.
18. That the Respondent 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 and conduct of the meetings and nothing beyond that. The Respondent further stated that as regards the allegations pertaining to the propriety of making amendments to the Memorandum and Articles of Association, the Respondent had no role to decide the nature of amendments to the Memorandum and Articles of Association.
19. That the Managing Committee of the Club which proposed the resolutions for alterations of Memorandum and Articles of Association, of which the Complainant was an integral part, did not refer or consulted the Respondent on this matter. Therefore, legality of alterations of MOA of the Club if at all any, cannot be attributed to the Respondent.
20. That the Managing Committee of the Club, of which the Complainant was also an integral part, never consulted / sought the legal advice of the Respondent, before / during the consideration, drafting and finalizing the proposed amendments to the Memorandum and Articles of Association of

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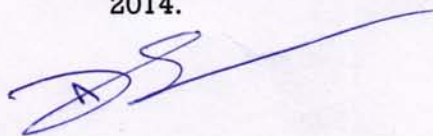


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the Club. Therefore, the question of any misrepresentation and breach of professional duty does not arise. That the Respondent was not appointed by the Club to ensure the filings with the ROC. Hence, non filing of the certain forms with the ROC cannot be attributed to the Respondent.

21. The Complainant in his rejoinder reiterated his earlier submissions and once again stated that 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. The Complainant further stated that the Respondent used to attend various meetings, providing opinions, providing all kinds of services under the Companies Act, 2013 including certification of various applications of M/s. PCL, is himself raising objections that his appointment was not properly made? The so called offer and so called rejection of the Offer by the Club are imaginary and mere eyewash. The Respondent and his partners have been providing all kinds of company law services to the Club even after their proposal was rejected.

22. That the Complainant did not solicit any views from the Respondent, only a clarification was sought by him about the irregularities in Company law matters related to M/s. PCL. Till date he has not received any reply from the Respondent. In this connection, the Complainant had sent two letters to the Respondent. The Complainant has not received any reply from the Respondent. As a committee member as well as Life Member, he has every legal right to ask the Respondent about the irregularities in company law matters relating to M/s. PCL looked after by him. That in the instant case, M/s. PCL and the Respondents had failed to file the prescribed Form No.23/MGT-14 and altered copy of the MOA till date, which is beyond the stipulated time period. Thus, all the alterations to MOA have become nullified in the eyes of law. The Complainant further stated that due to aforesaid default made in filing the amendments made in MOA by M/s. PCL within the prescribed time limit, the entire alterations have become null and void having far reaching and irreversible legal consequences. That as per the provisions of the Companies Act, 1956/2013 it is necessary to submit any amendment in compliance by submission of form within 3 months from the date of passing of Special Resolution. M/s. PCL has submitted form 23 vide challan no. 895238796 dated 3rd February, 2014 for all the resolutions passed in the EOGM held on 4th January, 2014. The prime job of the Company Law Consultant is to examine the veracity, legality of the notice and its contents calling every Board meeting as well as every General Meeting and give proper advice to the company about its legality. The Complainant would like to invite attention as how one can pass a common resolution (item no.1 in the notice) for amendment of Memorandum of Association jointly with the amendment of Articles of Association without specifying the exact nature of underlying amendment. The 3(f) clause of MOA was amended in the EOGM held on 4th January 2014.



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23. That the provisions of Section 31 of the Companies Act are not applicable to the alteration of MOA and the provisions of Section 17 of the Companies Act are applicable to alteration to MOA. The Change in MOA is concluded only and only when the issue of prescribed certificate is made by the concerned ROC, which was not done in the stipulated time limits, making the same as void by operation of law and cannot be cured now under any circumstances. Therefore, the Respondent and the company once again brought the similar resolution (3f clause in MOA) in the EOGM held on 12th April, 2014, (Resolution no.3 in the notice) for which no MGT-14 has been filed yet.
24. That it is specifically pointed out that when all the above illegal acts of alterations in MOA stated above were done by M/s. PCL, the same have been done in the presence of the Respondent, who was present in the meeting but had kept total silence on the same. In fact, it was the duty of the Respondent to give proper legal advice to management in such matters and desist them from indulging into such illegal acts.
25. That due to complete knowledge of illegalities involved and its ultra-vires effect thereof, it appears that M/s. PCL had not filed any prescribed documents regarding the aforesaid illustrative examples of alterations made in the Memorandum of Association on 4th January, 2014 & 12th April, 2014 besides series of other non-filings for more than a decade. The silence on the part of the Respondent about non filing and ultra vires resolution passed by M/s. PCL is paramount breach of his professional duties towards M/s. PCL, its members. The Complainant further stated that the Respondent before advising the captioned alterations of MOA had failed to verify whether the grounds of proposed alterations in Memorandum of Association were legal or not. That the fact of non-filing of prescribed forms with the MCA for such long period without any lawful reasons despite professional engagement of the Respondent has put M/s. PCL in very susceptible legal position which may jeopardize the company as well as its 4000 plus members without any fault on their side. The Complainant further stated that in view of above, it is clear that the Respondent had failed to exercise due diligence and has been grossly negligent in the conduct of his professional duties.
26. The Director(Discipline) on examination of the complaint, written statement, rejoinder & all the documents on record, vide her prima-facie opinion 3rd October, 2017 observed that the Respondent is not 'Guilty' of Professional misconduct or other misconduct under the Company Secretaries Act, 1980 . The Director (Discipline) in her opinion observed that the Complainant has alleged that the Respondent has wrongly advised to M/s. PCL regarding the alterations made in Memorandum of Association on 4th January, 2014 and 12th April, 2014. Whereas the Respondent has denied all the allegations and stated that he had no role in the alleged matter. Further, the Respondent stated that if M/s. PCL, the Club was dissatisfied with his services; they may have filed a complaint against him. It is further observed that the Complainant has not substantiated his

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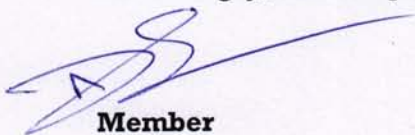


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allegation with any proof or submitted any relevant document supporting his allegation. It is for the Club for filing the appropriate e-form and non filing of the same cannot be attributed to the consultant of the company.

27. 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