

**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**

DC/323/2016

Order reserved on: 04.09.2017

Order issued on : 26<sup>th</sup> September, 2017

**Shri C. Mohan, FCS-5417**

.....Complainant

Vs

**Shri P. Shivakumar, FCS-3050  
(ACS - 33558 & CP No.4247)**

.....Respondent

**Present:**

Mrs. Meenakshi Gupta, Director (Discipline)

**FINAL ORDER**

1. A complaint dated 9<sup>th</sup> August, 2015 in Form 'I' of Shri C Mohan, FCS-5417 (hereinafter referred to as the 'Complainant') against Shri P Shivakumar, FCS-3050, (CP No. 2210) (hereinafter referred to as the 'Respondent') filed under Section 21 of the Company Secretaries Act, 1980 (the Act) 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).
2. the Complainant *inter alia* stated that:-
  - (i) that the Respondent has failed to disclose in the Secretarial Audit Report about non-compliance of some of the provisions of the Companies Act, 2013 and the Secretarial Standards issued by the ICSI, despite having information about such non-compliance.
  - (ii) that during the F.Y. 2014-15, the Complainant did not agree to some of the decisions taken by the Audit Committee / Board of Directors of M/s. KiteX Garments Ltd., and the Complainant had communicated his views on those resolutions to the Chairman and the Company Secretary and requested them to incorporate his views in the Minutes of the respective meetings and to enter his name as a non-concurring director against those resolutions. But he could not verify whether his name was entered as a non-concurring director in respect of those decisions since, despite his repeated requests, he was denied access to the minutes and also not given copies of the minutes.
  - (iii) that the Complainant had informed these facts to the Respondent, the Secretarial Auditor and requested him to ensure during his Secretarial Audit that his name was entered as a non-concurring director against those resolutions *vide* his e-mail dated 16.03.2015. But still the Respondent as the



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*[Handwritten signature: C. S. Meenakshi]*

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Secretarial Auditor of the company has reported in his Secretarial Audit Report dated 4<sup>th</sup> April, 2015 that "**all decisions of the Board were unanimous and the same was captured and recorded as part of the minutes, thereby indicating that his name was not entered as a non-concurring directors. It can be easily inferred that it was the reason why he was denied access to the minutes and he was not given copies of the minutes.**"

3. The Respondent submitted in his written statement dated 19<sup>th</sup> September, 2015; denied the allegations levied against him and *inter-alia* stated that:-
- (i) on receipt of an e-mail from the Complainant, the Complainant had forwarded the same to his senior partner Mr. Vincent P D, who was dealing with the secretarial audit of M/s. KITEX Garments Limited and the same, was duly informed to the Complainant through e-mail. That they had taken up the matter with the Chairman of the Company and he had confirmed that the minutes as recorded in the minutes' book reflected the correct position and further that the Complainant had never objected to the minutes, when it came up for approval.
  - (ii) as an external secretarial auditor, the role of the Respondent is limited to examining the records and registers produced before him during the course of the audit and report compliance or otherwise with the provisions of the Companies Act, 1956/2013.
  - (iii) there was absolutely nothing in the records maintained by the company to suggest that the resolutions had not been unanimously passed. That further to the email of the Complainant, they insisted for a separate written confirmation of the Chairman. The Chairman of the company had *vide* letter of representation dated 03.04.2015 confirmed that all resolutions were passed unanimously
  - (iv) being Secretarial auditors, it has been categorically stated that they have verified the minutes of all Board meetings held during the financial year in question and issued the report based on the same.
  - (v) that there were 6 Board meetings held during the financial year, out of which the complainant has attended all Board meetings except one meeting held on 12.01.2015. None of these minutes show that there was any dissent from the Complainant.
4. The Complainant submitted his rejoinder dated 10<sup>th</sup> October, 2015 to the written statement wherein he has pointed out certain resolutions in which he had objected in the Board meetings.
5. The Board further considered the *prima-facie* opinion dated 9<sup>th</sup> August, 2017 of Director (Discipline) in the matter noted the following observations:-
- (i) It may be stated that as an external secretarial auditor, the role is limited to examining the records and registers produced before the auditor during the course of the audit and report compliance or otherwise with the provisions of the Companies Act, 1956/2013. In the instant case, the Respondent has issued Secretarial Audit Report based on the minutes as recorded in the



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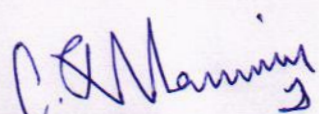
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minutes' book of the company, more so after the receipt of Complainant's email, the Respondent has sought clarification from the Chairman of the Company on the issues raised by the Complainant related to his objections/ disagreements related to the minutes and the Chairman of the company had vide letter of representation dated 3.4.2015 confirmed that all resolutions were passed unanimously, which states as below:

*"No Director have dissented on any matter in the Board meetings held during the year. The minutes of all meetings contain a fair and correct summary if the proceedings thereat as per Section 118, duly signed by the Chairman".*

- (ii) Further, under sub-section (6) of Section 118 of the Companies Act 2013, the Chairman of the company *'shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes on the grounds specified in sub-section (5)'*. Therefore, the secretarial auditor cannot make any remark on the basis of an e-mail of the complainant as otherwise; the secretarial auditor would be acting against the mandate of Section 118 of the Companies Act, 2013.
- (iii) It is the duty of an auditor to perform his work with skill, care and caution which a reasonably competent, careful, and cautious auditor would use. What is reasonable skill, care and caution must depend on the facts and circumstances of particular case. An auditor is not bound to be a detective, or as was said, to approach his work with suspicion or with a foregone conclusion that there is something wrong.
- (iv) In view of the above and keeping in view all the circumstances of the matter, the Director (Discipline) is *prima-facie* of the opinion that the Respondent is **"Not Guilty"** of professional or other misconduct under the Company Secretaries Act, 1980."
6. **The Board of Discipline after considering the her prima-facie opinion of Director (Discipline), complaint, written statement, rejoinder and other material on record, observed that the the Complainant in his email sent to the company though has denied to have received the minutes but has not dissented to any of the decisions passed the meetings. Moreso, the Respondent has relied on the records of the company and on the receipt of any email from the Complainant has reaffirmed the position in the minutes from the Chairman of the Company. Therefore, the Board keeping in views all the facts and circumstances of the case, agreed to the prima-facie opinion of the Director (Discipline), 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.**

  
CS Dinesh Chandra Arora  
Member

  
CS C Ramasubramaniam  
Member

  
CS Ashish Doshi  
Presiding Officer

