

**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/369/2016

Order reserved on : 27th February, 2018

Order issued on : 22nd March, 2018

Shri Atul Batra

....Complainant

Vs

Shri ShibhuShrestha, ACS-8060

....Respondent

Present:

Mrs. Meenakshi Gupta, Director (Discipline)

FINAL ORDER

1. A complaint dated 9th November 2016 in Form 'I' was filed under Section 21 of the Company Secretaries Act, 1980(hereinafter referred to as '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 (hereinafter referred to as 'the Rules') by Shri Atul Batra(hereinafter referred to as 'the Complainant') against Shri Shibhu Shrestha (ACS-A8060) (hereinafter referred to as 'the Respondent').
2. The Respondent was in employment with M/S BHP Engineers PVT Ltd (hereinafter referred to as 'the Company') as Company Secretary on whole time basis. The Complainant has inter- alia alleged as under:-
 - (i) that there was misstatement and deliberate concealment of facts in the Financial Statements for 2015-16 and 2014-15 Balance Sheet for 2015-16.
 - (ii) that there was a violation of section 186 of the Companies Act, 2013 from 1st April till the present date and the Respondent along with the Directors and Auditors had tried to cover-up this violation by trying to pass a backdated resolution. Section 186 of the Companies Act, 2013 refers to the "Prior Approval" and there is no provision for back dated or post approval.



- (iii) that there was an attempt to hold Annual General Meeting of the Company in the year 2016 without giving proper and adequate notice. The Statutory Auditors were not present at the AGM. The absence of two directors of the Company at the AGM was not explained during the AGM. The members were not allowed to ask questions and seek clarifications on the Financial Statements before their being considered and voted upon. There was complete violation of Secretarial Standard 2 for which the Respondent Company Secretary was held responsible as he failed to conduct the meeting properly and advise the Chairman and directors thereto.
- (iv) that the Respondent Company Secretary had failed in his duty in not advising the Chairman and Directors properly, not disclosing the true and fair position of affairs of the Company. Hence, there was violation of section 205 of the Companies Act, 2013.
3. The Respondent in his written statement dated 22nd December, 2016 has denied all the allegations and averments made against him in the complaint filed and *inter-alia* stated that there was no misstatement and deliberate concealment of facts in financial statements for the financial year 2015-2016. That he has performed his duties diligently in adherence to the applicable laws and secretarial standards and there was no violation of section 205 of the Companies Act, 2013.
4. The Respondent in his rejoinder dated 23rd January 2017 to written statement has reiterated his submissions and *inter-alia* stated that the loan of around Rs. 4 crore advanced to M/s BHP Infrastructure was wrongly reflected in the Financial Statements as "realizable" as M/s BHP Infrastructure Pvt. Ltd was a sick Company on the verge of bankruptcy. The Respondent was responsible to get the special resolution of shareholders passed for loan advanced to M/s BHP Infrastructure in the year 2013, within one year from the date Section 186 of the Companies Act, 2013 came into force i.e. before 31st March 2015 but the Respondent had attempted to get a special resolution passed one and half year after the required date on 30th September 2016. This fact which was well known to the Respondent Company Secretary and the same was suppressed by him in the Financial Statements of 2014-15 and 2015-2016.
5. The Board of Discipline considered the prima-facie opinion dated 30th October 2017 of the Director (Discipline) alongwith all material on record wherein Director (Discipline) is prima-facie of the opinion that the Respondent is "Not Guilty" of professional or other misconduct under any of the Items of the First and/or Second Schedule to the Act, as The



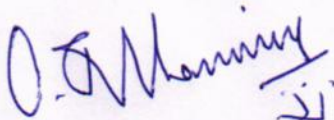
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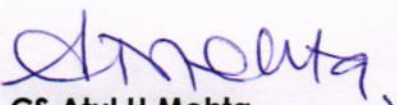
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alleged violation relate to the contravention of the provisions of the Companies Act, 2013. The jurisdiction for the adjudication of the alleged contravention is not in the domain of the Company Secretaries Act 1980 and contravention, if any, is punishable under the provisions of Companies Act, 2013 only. There could be a case of bringing disrepute to the Institute and profession if and when any of these Regulatory Authorities make an adverse finding against the Respondent for not ensuring the compliances of the provisions of the Companies Act, 2013.

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 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 as the Respondent is employment and allegations relates to the contravention of provisions of the Companies Act, 2013 jurisdiction for the adjudication of the alleged contravention is not in the domain of the Company Secretaries Act 1980 and accordingly decided to close the complaint.
7. *The Complainant if so desire, is at liberty to file the complaint against the Respondent in case any adverse finding against him for not ensuring the compliances of the provisions of the Companies Act, 2013 is passed by the Competent Authority.*


CS Dinesh Chandra Arora
Member


CS C Ramasubramaniam
Member


CS Atul H Mehta
Presiding Officer

