

**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/389/2017

Order reserved on: 28th February, 2019

Order issued on : 26 APR 2019

Shri Pitambar Manglani

....Complainant

Vs.

Shri Kashyap R. Mehta (FCS-1821) (CP-2052)

....Respondent

CORAM:

Shri Deepak Khaitan, Presiding Officer

Shri Manish Gupta, Member

Shri Ashok Kumar Dixit, Member

Present:

Mrs. Meenakshi Gupta, Director (Discipline)

Ms. Anita Mehra, Assistant Director, Disciplinary Directorate

ORDER

1. The Board of Discipline considered the following: -

- 1.1 A Complaint dated 3rd February, 2017 in Form I has been filed by Shri Pitambar Manglani (hereinafter referred to as 'the Complainant') against Shri Kashyap R. Mehta PCS, (CP No. 2052), (hereinafter referred to as 'the Respondent') 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').
- 1.2 The Complainant in his Complaint dated 3rd February, 2017 has inter-alia alleged that: -
 - 1.2.1 That the Respondent has made a False Statement under Section 448 of the Act, 2013 while certifying Form DIR-12 for appointment of a Director, Shri Ishwar Hemnani of M/s. Super Bakers Limited.
 - 1.2.2 The Respondent has failed to disclose the material fact in column 5(ix) of e-Form DIR-12 in respect of the appointment of Shri Ishwar Hemnani as Director in M/s. Super Bakers Limited. The designation should have been depicted as 'Additional Director' instead of 'Director'.
 - 1.2.3 There was a mismatch in the designation and as mentioned aforesaid Shri Ishwar Hemnani was shown as Director instead of Additional Director although the Board Resolution attached to the form was passed under Section 161 of the Companies Act, 2013.
 - 1.2.4 The Respondent failed to disclose a material fact known to him that Shri Ishwar Hemnani was appointed an Additional Director of the Board and not a Director appointed by the shareholders in the Extraordinary General Meeting of the Company.



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Manish Gupta

Deepak Khaitan

- 1.2.5 That the information in e-form DIR-12 was misleading and tantamount to falsification of documents which attracted Section 448 of the Companies Act, 2013 that Additional Director is appointed by the Board while Directors are appointed by the members in General Meeting under Section 152 of the Companies Act, 2013. Further, Director under section 152 has more powers than an Additional Director appointed under Sections 160 and 161 of the Companies Act, 2013.
- 1.2.6 That due to the conduct of the Respondent, the Director Shri Ishwar Hemnani had issued a notice under Section 138 of the Negotiable Instruments Act representing himself as a Director of the Company which was illegal.
- 1.3 The Respondent in his Written Statement dated 27th April, 2017 has *inter-alia* stated as under: -
- 1.3.1 That there is no false statement or concealment of fact by him regarding the appointment of Director. The Board Resolution attached to the e-form DIR-12 certified by him clearly indicated that the appointment was made by the Board.
- 1.3.2 The entire case made by the Complainant rested on the argument that there was difference in powers of Directors appointed by the Board that is Additional Director appointed under Section 161 of the Companies Act, 2013 and a Director appointed by the General Meeting under Section 152 of the Act.
- 1.3.3 Nowhere, the Companies Act or the Rules made thereunder contained any such differentiation in rights, powers and authority, duties, responsibilities and liabilities in the aforesaid Directors appointed under Sections 161 and 152 of the Act as Director appointed by the Board has the same position as of the Director appointed by the General Meeting during his tenure as Director in all respects.
- 1.3.4 The Respondent further stated that the Complainant had full knowledge of the facts and was pretending ignorance and that he had a long criminal history and was a habitual Complainant. Further the Complainant and his family members had criminal history in India and abroad where many warrants were pending against the said family.
- 1.3.5 E-Form DIR-12 certified by the Respondent gave an option to select the designation wherein one of the options was that of "Additional Director" which actually related to the nature of appointment and was not strictly a designation unlike a Managing Director and a Whole-Time Director.
- 1.3.6 That the word 'Director' has been defined under Section 2(34) of the Act as "Director means a director appointed to the Board of a Company." The definition makes no reference as to whether the appointment is made at a Board Meeting or General Meeting. Section 2 which relates to Definitions in the Companies Act, 2013 does not define 'Additional Director'. But Section 161 of the Act makes reference to the Additional as nature of appointment and not as designation. Shri Ishwar Hemnani had given his consent to act as Director and not as Additional Director through form DIR-2 under Section 152(5) of the Companies Act, 2013 read with Rules thereunder.
- 1.3.7 The Respondent referred to the allegation of the Complainant that Shri Ishwar Hemnani had misused his position by issuing threatening notice through an advocate under Section 138 of the Negotiable Instruments Act, 1938 as choosing any category under Serial No. 5(ix) of the e-Form DIR-12 would not have changed the powers of Shri Ishwar Hemnani.



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- 1.3.8 The Respondent confirmed that he had duly verified all the documents relating to the appointment of Shri Ishwar Hemnani which had been properly prepared and signed by the required officers of the Company before certifying e-Form DIR-12 and also submitted that there was no non-disclosure of material information or facts or suppression of material information and no negligence on his part as a certifying professional and that he had diligently discharged his professional duties while certifying form DIR-12 in question.
- 1.4 The Complainant in his Rejoinder dated 29th May, 2017 inter-alia stated as under: -
- 1.4.1 That the Respondent is guilty as he had certified e-form DIR-12 which misrepresented Shri Ishwar Hemnani as a Director instead of 'Additional Director'. He also explained the difference in 'Director' and 'Additional Director'.
- 1.4.2 That the Respondent had misrepresented the definition of 'Director' under Section 2(34) of the Companies Act, 2013 and that Director appointed by the Board held only temporary position for limited period and the certification done by Respondent tantamount to misconduct and negligence on the part of the Respondent.
- 1.4.3 That in e-Form DIR-12, the material fact which was not disclosed was "designation of Director" while filing column No. 5 (I) (ix) and to that extent the Respondent was negligent and had wrongly interpreted Section 161.
2. The Board of Discipline considered the following observations of Director (Discipline) made in the *prima-facie* opinion dated 10th October, 2017: -
- 2.1 The requirement of authentication of documents prescribed under Rule 8 of the Companies (Registration Offices and Fees) Rules, 2014 elaborates on the responsibility of professionals certifying the forms. The professional certifying the form must verify whether all the requirements as per the provisions of the Act and the Rules made thereunder have been complied with and all the attachments to the forms have been duly scanned and attached completely and legibly. In the instant case, the form has been filed for appointment of an 'Additional Director', Shri Ishwar Hemnani, pursuant to the provision of Section 161(1) of the Companies Act, 2013.
- 2.2 While certifying the aforesaid e-form DIR-12, pertaining to his appointment in the Board as 'Additional Director', the following checkpoints were required to be followed by the Respondent (Practising Company Secretary) which are detailed as under:
- To check the Articles of Association of the company to see whether they authorize the Board to exercise power conferred under Section 161 and in absence of such provisions whether Articles have been amended.
 - To ensure that person being appointed has a valid DIN.
 - To ensure that the director to be appointed by Board of Directors exercising the power so conferred in them by the Articles of the company is not such a person who failed to get appointed as a director in a general meeting. (If A proposal is made in General Meeting for appointment of a person as Director, if resolution got failed not passed in that meeting and that person fails to get appointed as a director in a general meeting, then that person cannot be appointed as 'Additional Director').



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- d) To ensure that Consent in writing to act as Director in Form DIR-2 has been received.
- e) That Intimation has been given by Director in e-form DIR-8 in terms of Companies (Appointment & Qualification of Directors) Rules, 2014, to the effect that he/ she is not disqualified u/s 164(2) of Companies Act, 2013.
- f) To check Board Resolution for appointment of Additional Director.
- g) To check letter of appointment.

2.3 From perusal of the records, it is clear that the Respondent had adhered to the aforesaid guidelines while certifying the form.

2.4 The attachments clearly indicate that the Director was appointed as an Additional Director in the Board pursuant to provisions of Section 161(1) of the Companies Act, 2013 and further he being independent was recommended to be an Independent Director whose appointment would be finally placed for confirmation before the General Meeting of the Company.

2.5 The attachments as given below which formed part of the aforesaid e-form DIR-12 was indicative enough that form was being filed for the appointment of Shri Ishwar Hemnani as an Additional Director of the Company under the provisions of Section 161(1) of the Companies Act, 2013:

- Letter of Appointment
- Declaration in e-Form DIR-12
- Certified copy of Board Resolution

2.6 However, the relevant portion of the form (Category) indicated of Shri Ishwar Hemnani being appointed as a "Director" but the attachments were clearly indicative of he being an 'Additional Director' who had been duly appointed by the Board for a specific period and subject to being regularized by the shareholders in the General Meeting. Hence, there had been no failure on the part of the Respondent to misrepresent or hide a material fact. The action of the Respondent does not show that he had certified any document which gave false or misleading information or there was any omission of material fact, requiring action under Section 448 of the Companies Act, 2013.

3. Accordingly, the Director (Discipline) after considering the material on record and all the facts & circumstances of the matter is prima facie of the opinion that the Respondent is "**Not Guilty**" of professional misconduct under Item (7) of Part I of the Second Schedule to the Company Secretaries Act, 1980 as the Respondent has displayed due diligence in certifying the e-form DIR-12 in question for the appointment of Director of the Company after verification of all relevant papers and documents such as Letter of Appointment, Declaration in Form DIR-12, Certified copy of Board Resolution.

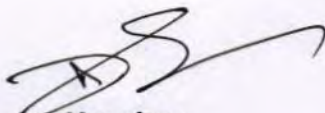
4. The Board of Discipline in its meeting held on 28th February, 2018 considered the prima facie opinion DATED 10th October, 2017 of the Director (Discipline) dated 10th October, 2017 that the Respondent is "**Not Guilty**" of professional misconduct under Item (7) of Part I of the Second Schedule to the Company Secretaries Act, 1980 as the Respondent has displayed due diligence in certifying the e-form DIR-12 in question for the appointment of Director of the Company after verification of all relevant papers and documents such as Letter of Appointment, Declaration in Form DIR-12, Certified copy of Board Resolution. The Board of Discipline after detailed deliberations advised the Director (Discipline) to further investigate the matter under Rule 9 of the Rules.




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5. The Board of Discipline considered the following observations of the Director (Discipline) made in Further Investigation Report dated 6th February, 2019: -
- 5.1 The Board Resolution dated 14th November, 2016 is attached with the e-Form DIR 12 regarding appointment of Shri Ishwar Hemnani u/s 149 and 161(1) of the Companies Act, 2013 and Rules of Shri Ishwar Hemnani as an Independent Director. Further, the business of his appointment as an Independent Director to be placed in the next General Meeting of the Company when held.
- 5.2 By virtue of the Resolution passed u/s 161(1) of the Companies Act, 2013, Shri Ishwar Hemnani was appointed as an Additional Director and the e-Form DIR 12 filed for his appointment should indicate his designation as 'Additional Director'. However, in broad terms, an Additional Director is also a Director.
6. The Board of Discipline considered the Further Investigation Report of the Director (Discipline) dated 6th February, 2019 wherein the Director (Discipline) reiterated her earlier prima facie opinion dated 10th October, 2017 that the Respondent is '**Not Guilty**' of Professional Misconduct merely on the ground of quoting designation of Shri Ishwar Hemnani as 'Director' instead of 'Additional Director' as the Additional Director is also a Director. The designation 'Additional Director' may have been selected in the e-form but in this case, the resolution attached with the e-Form DIR 12 clearly indicates the appointment of Shri Ishwar Hemnani u/s 149 and 161(1) of the Companies Act, 2013 as 'Director' and the consent letter dated 14th November, 2016 issued by Shri Ishwar Hemnani is also for 'Director' and hence 'Director' has been stated in e-form DIR 12.
7. The Board of Discipline in its meeting held on 28th February, 2019 after considering the Complaint, Written Statement, Rejoinder, related material on record, *prima-facie* opinion and Further Investigation Report of the Director (Discipline) and all the facts and circumstances of the case, agreed 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.
8. Accordingly, the complaint stands closed and disposed off.


Member


Member


Presiding Officer




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