

**BEFORE THE APPELLATE AUTHORITY**

(Constituted under the Company Secretaries Act, 1980)

**APPEAL NO. 01/ICSI/2012**

IN THE MATTER OF

Rakesh Kumar Srivastava ..... Appellant  
Through: Sh. Ashish Middha, Advocate

Versus

The Institute of Company Secretaries of India ..... Respondent  
Through: Sh. R.D. Makheeja, Advocate

**CORAM:**

**HON'BLE THE CHAIRPERSON**

**HON'BLE MR. RAKESH CHANDRA, MEMBER**

**HON'BLE MR. G. GEHANI, MEMBER**

**HON'BLE MR. PAVAN KUMAR VIJAY, MEMBER**

Date of Hearing: 12-10-2013

Date of Order : 26-12-2013

Order

The appellant, aggrieved by the order dated 17.6.2013 of the Board of Discipline of Institute of Company Secretaries, holding him guilty of professional misconduct and penalizing with a fine of Rs.25,000/- and removal of his name from the Register of Members for a period of 30 days, has filed this appeal.

2. The brief facts relevant for the purpose of deciding this appeal are that an e-mail message was forwarded to various members of the Institute of Company Secretaries during elections of the Institute in the year 2010. The e-mail sent from e-mail ID of one John Smith reads as under:-

1. A Writ Petition has been filed before Hon'ble Delhi High Court by a member of the Institute challenging the validity of elections of those central council members who are contesting third time without giving a cooling period. It has always been the intent of the Company Secretaries Act to give a cooling period of one term after completing two consecutive terms.

2. The affected Council members by the writ are Mr. Nesar Ahmad and Mr. P.K. Mittal.

3. The Hon'ble Delhi High Court has said that the election process is subject to decision of this court and the next date is fixed for 11<sup>th</sup> January, 2011.
4. The matter being sub-judice, why the Institute has allowed the affected Council members to contest the elections for the third consecutive term?
5. Why so much of Institute's money is being spent on defending the affected council members?
6. What happens if the court rejects the candidature of affected council members? Will the institute appeal against the decision? Or,
7. Will the Institute conduct elections again? If yes, at whose cost?

Your vote is your voice. Don't waste your vote; cast it judiciously."

3. The Institute suo moto took cognizance of this e-mail and engaged a law firm, namely, 'e-Minds Legal consultants Pvt. Ltd.' to carry out cyber investigation to identify the person responsible for sending/forwarding the e-mail. A criminal complaint was also filed at a Gurgaon Police Station by Mr. Sumit Pahwa, Advocate of e-Minds Legal on behalf of the Institute of company Secretaries on 11.6.2011 under section 66A of the Information Technology Act. With the help of Gurgaon Police, the address of the sender of above e-mail was traced and it was found that the e-mail was sent from the office of Shri Lakshmi Cotsyn Limited, 19/X-1, Krishnapuram, G.T. Road, Kanpur. The criminal complaint was thereafter junked and no action followed.

4. There were three members of the Institute working at the address so found, namely, Ms. Vidhi Jain, Ms. Archana Gupta and Mr. R.K. Srivastava. Since, Mr. Rakesh.Kumar Srivastava, the appellant was also one of the candidates for Central Council Elections to be held in December, 2010, 'e-Minds Legal', the company engaged by the Institute, drew conclusion that it was Mr. R.K. Srivastava who was responsible for circulating the e-mail since the e-mail was written at the time of election with a possible motive to influence the decision of the members with regard to their vote.

5. After receiving the report of e-Minds Legal, a formal complaint was filed before Director (Discipline) and the Director (Discipline) of the Institute formed a prima facie opinion that Mr. R.K. Srivastava was guilty of professional misconduct under Item (2) of Part-IV of the First Schedule of the Company Secretaries Act, 1980, which reads as under:

"(2) In the opinion of the Council, he brings disrepute to the profession of the Institute as a result of his action whether or not related to his professional work"

6. The Board of Discipline on receiving prima facie opinion proceeded against the appellant and passed the impugned order holding the appellant guilty of professional

misconduct and imposed a penalty of a fine of Rs.25,000/- and removal of his name from the Register of Members for a period of 30 days.

7. A perusal of the order of the Board of Discipline shows that the Board of Discipline acted in a totally mechanical manner without application of mind. Prerequisite for acting against a member of the Institute under Part-IV of First Schedule of Company Secretaries Act is that the member should have brought disrepute to the profession or the Institute as result of his action. There is no evidence on record either of a member of the Council or of the Institute stating that the appellant brought disrepute to the profession or to the Institute. Neither Director (Discipline) nor Board of Discipline thought it proper to examine either any of the contestants of the Council election or voters to know their views about the e-mail and both the Director (Discipline) and Board of Discipline passed the order without evidence. The only material relied upon by the Director (Discipline) & the Board of Discipline was a self serving report obtained by the Institute from a law firm by paying a fee to it. Such a report has no evidentiary value in the eyes of law even in a disciplinary enquiry.

8. The Institute had not formed a formal opinion that the action of forwarding the e-mail allegedly by the appellant had brought disrepute to the profession and the Institute. No member had a grievance against the e-mail, still disciplinary proceedings were initiated against the appellant, perhaps for exterior reasons. Nowhere in the complaint, is it mentioned that the Institute was of the opinion as stated above. The Director (Discipline) in her prima facie opinion has merely reproduced the facts and provisions of Rule 42(4) (ii), (iii), (viii) & (xii) of the Company Secretaries (Election to the Council) Rules, 2006 and Item (2) of Part-IV of First Schedule of the Company Secretaries Act, 1980 and after quoting the facts and rules has stated that the respondent was prime facie guilty of contravening of Election Rules and Item (2) of Part-IV of the First Schedule of The Company Secretaries Act, 1980 and held respondent prima facie guilty. The Director (Discipline) has given no reasons as to how he even prima facie came to a conclusion about the guilt of the appellant. In the impugned order of the Board of Discipline too, the fact of forwarding of an e-mail to different members has been stated, the fact of obtaining the report of e-Minds Legal has been stated and the fact of giving response to the complaint by the respondent has been stated, the various provisions of Election Rules and Part-IV of the First Schedule of The Company Secretaries Act, 1980 have been reproduced and it is stated that the Board considered all the facts and response of the appellant as well as the report of e-Minds Legal Consultants Pvt. Ltd. and made enquiries from the respondent and came to conclusion that appellant was guilty of professional misconduct. The Board emphasized that the appellant could not escape responsibility as the E-mail was sent out to several members of ICSI in order to exercise undue influence in the minds of potential voters at the time of the elections. The e-mail was sent with an attempt to hinder the smooth conduct of election

process and for the purpose of causing inconvenience or annoyance to the Institute, the Council Members as well as for misleading the recipients of the e-mail. The Board considered that usage of a fictitious name and e-mail ID of John Smith leads to the conclusion that the appellant had sent the e-mail and this act of the appellant, who happened to be a contesting candidate for ICSI Central Council Election, 2010, was in violation of the Company Secretaries (Election to the Council) Rules, 2006. However, except the report of e-Minds Legal, there was no other material on record and no evidence was there, how the election process got hindered and how members got influenced by an e-mail that asked the members to vote judiciously.

9. It is apparent from the order of the Board of Discipline that the Board did not conclude that the action of the respondent brought disrepute to the profession or to the Institute. The only observation made by the Board in para-18 is that the e-mail was sent with an attempt to hinder the smooth conduct of election process and for the purpose of causing inconvenience or annoyance to the institute and the Council members and for misleading the recipients of e-mail.

10. We shall discuss the content and their effect a little later but inconvenience or annoyance of Institute or the Council Members or the Board of Discipline itself is not a ground for taking disciplinary action against any member of the institute. The Truth 'most of the time' is bitter and many people get annoyed when confronted with the truth. The inconvenience or annoyance of persons who cannot face the truth is not equivalent to bringing disrepute to the profession or the Institute. Inconvenience and annoyance of the Institute cannot be a ground to penalize the member who is source of annoyance.

11. The e-mail circulated among the Members is reproduced in para-2 above. A perusal of the e-mail shows that this e-mail brought to the notice of the members a true fact about the pendency of a writ petition before the Delhi High Court. The writ petition was filed by another Member of the Institute. By this writ petition, the validity of candidature of some of the contesting members was challenged. It appears that the High Court had not stayed the conduct of elections and observed that the results of the election shall be subject to decision of the High Court. In the e-mail, a question was raised that since the matter was sub judice, why hold elections and why was the Institute allowing the affected Council Members to contest the elections for the third consecutive term and why so much money was being spent on defending affected Council Members and what would happen if the court rejects the candidature of the affected council members. The names of two affected Council Members, Mr. Nesar Ahmad and Mr. P.K. Mittal were mentioned in the e-mail. At the end the voters were advised to cast their vote judiciously.

12. Although, the appellant has disowned this e-mail and there is no clear cut evidence that this mail was sent/forwarded by the appellant, however, presuming that this mail was



forwarded by the appellant, we find that the mail was merely information to the Members and could not have been a cause of inconvenience or annoyance to the Institute. The language used in the e-mail, by no stretch of imagination can be said to be abusive or unparliamentary or below the dignity of a member. In our opinion, there is nothing in the substance or the language of this e-mail which called for taking cognizance of the e-mail for the purpose of disciplinary proceedings. The e-mail may have annoyed or caused inconvenience to the Council Members for the reasons best known to them but the e-mail did not undermine the reputation of the Institute or the Members. Rather the e-mail showed that the Members of the Institute were alive to their rights of questioning the Council Members and were also informing other members to cast their vote judiciously. Raising questions about holding elections or protesting against certain members of the Council who were contesting elections for the third time, allegedly contrary to the rules, cannot be said to be abusive nor can it be said that the e-mail in any manner interfered with the elections or process of election being conducted by the Institute.

13. We consider that the entire approach of the Director (Discipline) and the Board of Discipline has been the approach of a subservient authority. The Director (Discipline) and the Board of Discipline are supposed to act independent of the Council Members. We find that the prima facie order was passed by the Director (Discipline) without evidence. Similarly the Board of Discipline also passed the order without application of judicious mind. The order dated 17.6.2013 is liable to be set aside. The order is hereby set aside and the appeal is allowed with costs of Rs. 25,000/- in favour of the appellant. Institute to pay costs within 30 days.

14. This Appellate Authority has had occasion to deal with a number of appeals arising from the orders of the Board of Discipline of the Institute of Company Secretaries and found the enquiries being conducted casually, although the orders of the Board affect the careers of the members of the Institute. The Orders of the Board do not even reflect the thought process and give no reasoning for the conclusions arrived at. Often there is no analysis of the evidence and material.

The Institute should give adequate training to those who are involved in conducting disciplinary proceedings and taking decisions.

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{Justice S.N. DHINGRA(Retd.)}  
CHAIRPERSON

*sdl*  
(RAKESH CHANDRA)  
MEMBER

*sdf*  
(G. GEHANI)  
MEMBER

*sdf*  
(PAVAN KUMAR VIJAY)  
MEMBER

TRUE COPY

DEPUTY REGISTRAR  
APPELLATE AUTHORITY

26/12/13