

BEFORE THE APPELLATE AUTHORITY

(Constituted under the Company Secretaries Act, 1980)

APPEAL NO. 14/ICSI/2012

IN THE MATTER OF

Sudhir M. Dave

Through: Natwar Rai, Advocate

..... Appellant

Versus

1. The Institute of Company Secretaries of India

Through: R.D. Makheeja, Advocate

..... Respondents

2. Vipulkumar Dahyalal Bheda

Through: S. Suriyanarayanan, 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: 02-02-2013

Date of Order : 27-07-2013

ORDER

The present appeal has been preferred by the appellant Sudhir M. Dave against orders of the Disciplinary Committee of Institute of Company Secretaries dated 1st June, 2012 and 9th July, 2012. Vide the first order, the appellant was held guilty of professional misconduct under Clause (7) of Part I of the Second Schedule of the Company Secretaries Act, 1980 and by the second order the appellant was awarded a punishment of "Reprimand" and a fine of Rs.10,000/-.

2. The brief facts relevant for the purpose of deciding this appeal are that the complainant Vipul Kumar Bheda had filed a complaint against Chirag B. Shah (a fellow member of the Institute of Company Secretaries) and the appellant, alleging professional misconduct against both of them. Along with the complaint, he had filed an affidavit and documents relied upon by him. The Director (Discipline) of the Institute of Company Secretaries who had to scrutinize the complaint and give a prima facie opinion, sought replies from both the members of the institute against whom the complaint was made and after considering the written response and the evidence, gave a prima facie opinion about a case of professional misconduct made

out on the part of present appellant. The Director (Discipline) did not find any professional misconduct on the part of Chirag B. Shah. The opinion was considered by Disciplinary Committee and the Disciplinary Committee held an enquiry into the alleged professional misconduct of the appellant and after holding the enquiry passed the aforesaid orders.

3. The crux of complaint dated 9.7.2010 made by the complainant was that Mr. Sudhir M. Dave, a practicing Company Secretary, in connivance with R.N. Algotar, a director of V.S. Cosmopharma Pvt. Ltd. had on the basis of forged notices for calling Board Meetings, filed (a) Forms No.32 with ROC removing the complainant from directorship of the company and fraudulently, appointing Chirag B. Shah as a director of the Company (b) filed Form No.23 with ROC passing a resolution for shifting of registered office (c) filed Form No.18 showing registered office of the company having been shifted (d) filed Forms No.32 regarding appointment of other directors in a fraudulent and mala fide manner (e) filed Form No. 20B on 6th July, 2010 showing that the complainant did not hold any share of the company, although the complainant had invested more than Rs.16,00,000/- into the company on the date of filing his complaint. The complainant alleged that Form No.20B was filed on 6th July, 2010 by the appellant despite his sending e-mails to him on 26th June, 2010, 1st July, 2010 and 2nd July, 2010 informing of the fraudulent acts.

4. In response to this complaint, the respondent had taken a stand that the complainant had not specified the clause/schedule/part of the act covering the professional misconduct of the respondent and the allegations of the complainant of false certification of forms and taking undue advantage were false and baseless. There was no evidence supporting the allegations made by the complainant and he had no malafide intentions against the complainant and at the time of filing the forms, he had not conducted himself contrary to professional ethics. The appellant alleged that complainant had not come to the Institute with clean hands as he had filed a criminal complaint against his colleagues as well as against the director of the company. He submitted that he had verified the relevant documents before filing and certifying various forms filed with ROC. He was not supposed to investigate or adjudicate the matter/dispute between the directors. He was only supposed to do necessary verifications before certifying forms. He was also not to make a fishi expedition. All allegations made by the complainant were false and the complainant had maliciously dragged the appellant into controversy between him and the other directors by filing this false complaint.

5. The Disciplinary committee in its order dated 1.6.2012 noted the contents of the complaint, the response of the respondent and the material placed before it and noted the arguments advanced by both the sides before it and came to a conclusion that the appellant did not exercise due diligence at the time of certifying and filing inter-alia Form No.32 in regard to cessation of the directorship of the complainant. The respondent was expected to exercise his professional acumen and due diligence before filing the forms.

6. The appellant contended before the Appellate Authority that the Disciplinary Committee held him guilty of professional misconduct for filing Form No.32 in respect of complainant's ceasing to exist as a Director. The appellant had specifically stated in his written statement that the notices of Board Meetings were issued to the complainant under UPC, which he denied to have received. The sending of notices by UPC was a proper mode of serving of notices of Board Meetings. The Director (Discipline) in his prima facie view sent to Disciplinary Committee had stated that there were conflicting judgments on validity of sending notices by UPC. The Disciplinary Committee in its order was silent as to how it reached a conclusion that the appellant was guilty of professional misconduct; whether it considered sending of notices by UPC improper or otherwise. The order of the Disciplinary Committee was thus perverse since it was passed without giving justifications. The order deserved to be set aside.

7. We find that the order of Disciplinary Committee was silent on reasons. It had given no reasons of its own for holding the appellant guilty of professional misconduct. The order of the Disciplinary Committee is in the form of recording the submissions of both the parties and ultimately saying that it holds the appellant guilty of professional misconduct as the appellant did not exercise due diligence in certifying and filing inter-alia Form No.32 in regard to cessation of directorship of the complainant.

8. The order of the Disciplinary Committee consists of 26 paras. From para 1 to 25, the Disciplinary Committee has reproduced the contents of complaint, the contents of defence taken by the two respondents (Sudhir M. Dave & Chirag B. Shah), then the rejoinder of the complainant to the written statements of the two respondents, then the prima facie opinion of the Director (Discipline) and then the arguments of the respective advocates. There is no discussion on merits from para 1 to 25, either of the disputed facts or of the disputed questions of law. The only

contribution of the Disciplinary committee in this order is para 26, which reads as under:-

“The Disciplinary Committee at its 32nd meeting held on 1st June, 2012 considered the submissions made by the parties and other material available on record, came to the conclusion that the Respondent is ‘Guilty; of Professional Misconduct under Clause (7) of the Second Schedule of the Company Secretaries Act, 1980 as the Respondent did not exercise due diligence for certifying and filing inter-alia Form 32 in regard to cessation of the directorship of the Complainant which is expected from a professional. The Committee, in terms of sub-rule (1) of Rule 19 of the Company Secretaries (Procedure of Investigations of Professional and other misconduct and conduct of cases) Rules, 2007, hereby affords an opportunity of being heard to the Respondent on Monday, the 9th July, 2012 before passing order under section 21B of the Company Secretaries Act, 1980”.

9. It is apparent from the order dated 1.6.2013 that the Disciplinary Committee may have applied mind in its 32nd meeting on the submissions made by the parties but it failed to disclose its mind in the order. It only disclosed the conclusion to which it came, without giving reasons for coming to such conclusion. It did not even discuss the professional misconduct or the argument advanced before it by Sudhir M. Dave. It did not state what reasons weighed upon its mind to hold Sudhir M. Dave as guilty of professional misconduct.

10. It is a settled law that the disciplinary proceedings are in the nature of quasi judicial proceedings and the Disciplinary Committee acts as a quasi judicial authority. Every quasi judicial authority is supposed to consider the disputed questions of fact as well as of law raised before it and give its own reasons for arriving at a conclusion. When both the sides present their arguments before a quasi judicial authority, it is not enough that the quasi judicial authority reproduces the arguments and then without a discussion and without giving its mind as to what appealed to it and why, it passes the order.

11. This would have been a fit case for this Appellate Authority to send back to the Disciplinary Committee for deciding it on merits. However, we thought it proper to dispose of the matter after considering the issues raised on merits and after hearing the arguments of both the sides. The Disciplinary Committee of the Institute keeps changing every year. The same Disciplinary Committee is never active in the next year. The members of Disciplinary Committee change with every

election. Under these circumstances, sending this matter back to the Disciplinary Committee would have entailed an unnecessarily long delay.

12. The core issue involved in this matter is whether reliance placed by the appellant on UPC about sending of the notice of a Board Meeting to directors was good enough to file form No.32 before ROC about loss of directorship based on such notices. In this case, three Board Meetings were allegedly held on 9.1.2010, 20.2.2010 and 15.4.2010 respectively. The notices of these three Board Meetings were allegedly sent to the complainant, one of the Directors and to another Director, Rajiv Rakam Singh only by UPC. A perusal of notices available on record would show that the date of notice for the meeting dated 9.1.2010 was 2.1.2010. Similarly of 20.2.2010 was 12.2.2010 and of 15.4.2010 was 8.4.2010. Another alleged Board meeting was held on 26.5.2010 and the notice of this meeting was also allegedly sent on 19.5.2010 via UPC. It is clear from the copy of notices that these notices were allegedly sent a week before the date of Board Meeting and were allegedly sent under UPC. The claim of the appellant is that he had seen UPC and was satisfied about the services of the notices and was also satisfied that the three Board Meetings had taken place on 9.1.2010, 20.2.2010 and 15.4.2010 and the complainant did not attend these Board Meetings. By virtue of section 283(1)(g) and 283(1)(i) of the Companies Act the complainant ceased to be a Member of the Board for the reason of not attending three consecutive Board Meetings. Form No.32 was therefore rightly filed by appellant showing that he ceased to be a member of the board. Similar arguments have been given by the appellant in respect of other forms filed by him namely, Form No.23, Form No.18, Form No.32 in respect of appointment of Chirag B. Shah and Form No.20B on 6th July, 2010 showing that the complainant does not hold any shares in the Company.

13. We are living in an era of communication revolution where communication can be transmitted to a person instantly and a confirmation of transmitted communication having been received is also received immediately. The record shows that the complainant's e-mail address was with the Company Secretary and the Company Secretary's e-mail address was with the complainant. It is obvious that if the complainant was having an e-mail address, his e-mail address must have been known to the company and other directors of the Company. It would also not be out of place to mention that mobile phones have become so affordable that even rickshaw pullers these days maintain a mobile phone. It cannot be presumed that the directors of the Company who had invested lakhs of rupees into the company were not having mobile phones. In this case, V.S. Cosmopharma Pvt. Ltd. was having

only three Directors and it cannot be imagined that directors did not have each other's phone numbers or e-mail addresses. A communication through phone, e-mail, SMS is an instant communication and the fact of the communication having been received, is also known by the communicator immediately, electronically. It is noteworthy that due to this revolution in communication, the ROC office had introduced e-filing of all statutory forms and all forms in this case were also filed not physically, but through e-filing. A professional Company Secretary living in the modern era, who resorts to e-filing of statutory forms and who had e-mail address of the complainant director, who corresponded with him at least before filing of form No.20B, cannot be heard to say that he was satisfied that the directors were properly served with the notice of Board Meeting because a UPC certificate was produced before him. It is well known that a UPC certificate can be easily procured. It can be predated and having a UPC certificate is no guarantee of even actually posting of the letters. Though, there is a presumption under law that once an article/document is put in post, it reaches the person whose address is written on the envelope, but when a person denies that he has received the article through post and gives evidence or files an affidavit and uses his e-mail to communicate with the Company Secretary, then Company Secretary cannot be heard to say that the service of notices could be presumed on the basis of UPC. Since UPC certificates were being grossly misused, the postal department also stopped issuing UPC certificates since 2011. It is also to be noted that the Postal Department had started Speed Post service long back and one can keep track of the position of the article sent by speed post service through the internet and can come to know whether the article sent by speed post was delivered or not. When an article is sent through speed post, the dispatch of the article is ensured by issuance of a receipt and its reaching to the destination is ensured by obtaining a receipt from the receiver. With the facility of Speed Post, SMS, etc. being available for communicating date and place of meeting and the agenda of meeting and when the directors were having some kind of dispute with each other within the knowledge of appellant, it was expected of the appellant (Company Secretary) to ensure that proper service of notices of the meetings was there before he filed statutory forms of cessation of a director on the Board of the Company so that allegations of fraud could be not made later on. In this case all notices were sent only through UPC and the appellant was told by complainant that a fraud was being played with him and he (appellant) himself was in connivance, despite this correspondence through e-mail, he filed another Form 20B on 6th July, 2010 after receiving letters from the complainant through e-mail. These e-mail

letters are there on record and had not been denied. This only shows that the appellant was not conducting himself diligently in performance of his professional duty and he filed all the statutory forms in regard to affairs of the company including Form No.32 about appointment of Chirag B. Shah, Form No.23 for passing special resolution for registered office, form No.18 for shifting registered office, Form No.32 for appointment of other Directors and Form No.20B, deliberately knowing well that the process of service of notice was doubtful and no notice was served upon the complainant for ulterior purpose.

14. As regards the argument of complainant not mentioning the provisions of the Schedule under which misconduct was covered, this must be rejected. A perusal of Section 22 of the Act would show that the section gives an inclusive definition of professional misconduct and the misconducts enumerated in First and Second Schedule are not exhaustive in nature. The legislature could not have foreseen the different kinds of misconducts of Company Secretaries and it is not humanly possible to foresee all of them. It is for this purpose that an inclusive definition of misconduct was given by the legislature. In *Institute of Chartered Accounts vs. B. Mukerjea* (1958) SCR 371 Supreme Court had occasion to consider the import of section 22 of the Chartered Accountants Act and observed as under:-

“The misconduct alleged on the part of a Chartered Accountant may not attract any of the provisions in the schedule and may not therefore, be regarded as falling within the first part of Section 22; but as the definition given by Section 22 itself purports to be an inclusive definition and as the section itself in its latter portion specifically preserves the larger powers and jurisdiction conferred upon the Council to hold inquiries under section 21, sub-section (1), it would not be right to hold that such disciplinary jurisdiction can be invoked only in respect of conduct falling specifically and expressly within the inclusive definition given by Section 22. Section 8, sub-sections (v) and (vi) also support the argument that disciplinary jurisdiction can be exercised against chartered accountants even in respect of conduct which may not fall expressly within the inclusive definition contained in Section 22.

Hence, if a member of the Institute is found, prima facie, guilty of conduct which, in the opinion of the Council, renders him unfit to be a member of the institute, even though such conduct may not attract any of the provisions of the schedule, it would still be open to the Council to hold an inquiry against

the member in respect of such conduct and a finding against him in such an inquiry would justify appropriate action being taken by the High Court..."

15. In Council of Institute of Chartered Accounts of India vs. Mukesh Arsha AIR 2004 Guj. 164, Gujarat High Court had observed that even if a member of the Institute is found guilty of a conduct which in the opinion of the Council renders him unfit to be a member of the Institute, it would be a professional misconduct though such conduct may not attract any of the provisions of the schedule. It would be open to the Council to hold an inquiry against the member in respect of such a conduct and give a finding against him after such an inquiry and to take appropriate action.

16. We therefore find that there is no force in the appeal and the appeal is therefore dismissed. We also find that no reasons were there to terminate the membership of appellant for life as pleaded before us by the respondent. However, we hope that the appellant shall, in future uphold the dignity of his profession and conduct himself diligently. We also expect that Disciplinary Committee in its future orders shall disclose the reasons and justifications for arriving at a conclusion.

New Delhi
Dated: 27th July, 2013.

Sd/-

Justice S.N. DHINGRA(Retd.)
CHAIRPERSON

Sd/-

RAKESH CHANDRA
MEMBER

Sd/-

G. GEHANI
MEMBER

Sd/-

PAVAN KUMAR VIJAY
MEMBER

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29/7/13