

CONFIDENTIAL

DISCIPLINARY COMMITTEE [BENCH-III (2019-20)]

[Constituted under section 21B of the Chartered Accountants Act, 1949]

Findings under Rule 18(17) read with 19(2) of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007

File No.: PR/93/14-DD/120/14-DC/493/2016

In the matter of:

Shri S. Vijayarangam,
Assistant General Manager,
Special Enforcement Cell,
Securities & Exchange Board of India,
Kurla Complex, Bandra East,
Mumbai 400 051

.....Complainant

Versus

CA. Gaurav Gupta (M.No.405243)
M/s. D.S. Shukla & Co.,
Chartered Accountants,
GF-2, Ekta Apartments,
Chandralok, Aliganj,
Lucknow-226024

.....Respondent

MEMBERS PRESENT:

CA. Prafulla Preme Sukh Chhajed, Presiding Officer
Smt. Anita Kapur, Member (Govt. Nominee)
Shri Ajay Mittal, Member (Govt. Nominee)
CA. Manu Agrawal, Member

PARTIES PRESENT:

- (i) CA. Gaurav Gupta - Respondent**
- (ii) CA. C V Sajan – Counsel for Respondent**

DATE OF HEARING: 20th August 2019 (decided on 31st October, 2019)

PLACE OF HEARING: Mumbai

Allegations of the Complainant:

1. **Shri. S. Vijayarangam, Assistant General Manager, Special Enforcement Cell, Securities & Exchange Board of India, Mumbai** (hereinafter referred to as the “**Complainant**”) has filed complaint in Form ‘I’ dated 29th November, 2013 against **M/s. D.S. Shukla & Co., (FRN. No. No. 000773C) Lucknow** (hereinafter referred to as the “**Respondent Firm**”). The Complainant in his complaint has alleged that:

1.1 Sahara India Real Estate Corporation Ltd (hereinafter referred to as “**SIRECL**”) had collected amounts aggregating approximately Rs.19,400.87crore from various subscribers through Red Herring Prospectus (RHP) dated 13.03.2008.

1.2 It is stated that the auditors for the RHP of SIRCEL were M/s. D.S. Shukla & Co. (Registration No.000773C). The Respondent being auditor of SIRECL has certified the RHPs wherein the Companies had distorted and concealed the public issues of Optionally Fully Convertible Debentures (OFCDs) by the SIRECL and misrepresented them as a private placement, which inter alia deprived crores of investors of the Investor Protection Safeguards under the Companies Act, SEBI Act, and SEBI (ICDR) Regulations, thereby not only failing in discharging their responsibilities as an auditor, but also assisting the Companies to raise huge funds in violation of the Companies Act, SEBI Act and SEBI (ICDR) Regulations without any regulatory approvals from SEBI.

Proceedings:

2. The Committee noted that during the hearing held on August 20, 2019, the Respondent, along with his Counsel, was present in person before it. . As regard the Complainant, there was neither any communication received from the Complainant-Department nor any of its representative appeared before the Committee to represent it. It was also noted that the Complainant Department vide its letter dated July 11, 2018 informed the Committee that based on material

available on its record inputs were given at the time of filing the Complaint as well as in the Rejoinder. Accordingly, it had requested the Committee to proceed with the matter as considered appropriate. Thus, the Committee decided to proceed ahead in the matter.

The Committee, thereafter, informed the Respondent that since the composition of the Committee had undergone a change, an option of de-novo hearing in the matter was available to him. The Counsel for Respondent sought de-novo hearing. The Committee accepted the request of the Respondent and accordingly, hearing in the matter was initiated afresh. The Respondent was put on oath. Thereafter, the Committee asked the Respondent whether the charges to be read out or these could be taken as read. The Counsel for the Respondent stated before the Committee that the Respondent was aware of the allegations raised against him and the same might be taken as read. On being asked, as to whether he pleaded guilty, the Respondent pleaded Not Guilty and opted to defend the case. Thereafter, the Counsel for Respondent stated that the documents / information available on record could be adopted by the Committee and thus proceeded further. The Counsel for Respondent made his oral submissions in the matter. The Committee examined the Respondent. The Counsel made his final submissions in the matter. After hearing the Counsel and on consideration of all the documents / information available on record, the Committee concluded the hearing in the matter and decision was reserved.

3. On 31st October 2019, the Committee duly considered the documents available on record and accordingly, based on the written and oral submissions of both the Complainant and the Respondent, the Committee took its decision in the matter.

4. The Committee noted that the Respondent vide his letter dated 21st August 2018 made further submissions wherein inter-alia he also pointed out that the manner in which the complaint was filed was not as per the requirement of Rule 3(3) of the (Procedure of Investigations of Professional and Other Misconduct

and Conduct of Cases) Rules, 2007 as the Complaint was made on 11th April, 2014 by Sri S. Vijayarangam who was an AGM and was ratified through an authorization dated 22nd April 2014 by Sh. Sunil Kumar, who was a Chief General manager. The Respondent argued that in extant case the complaint had not been authorized by an individual holding an office equivalent to that of a Joint Secretary nor had been signed by an individual holding an office equivalent to that of an Under Secretary of Central and/or State Government as required under the said Rules, 2007. Accordingly, the Respondent had questioned the process followed for filing the complaint with the Institute.

5. The Committee noted that the issue raised by the Respondent regarding the issue of authorization was referred to the SEBI which vide its letter dated 20th December 2018 read with its letter dated 12th September 2018 stated as follows:

- SEBI is a statutory body established by the Act of Parliament for the purpose of protecting the interest of investors in securities and to promote the development of and to regulate the securities market and for matters connected there with or incidental there to and in order to achieve the said objectives, SEBI recruits officers at various grades.
- The officers so recruited by SEBI are governed under SEBI (Employees Service) Regulation 2001. Whereas the recruitment, functions and duties of officers in Central government are governed under Central Civil Services (Conduct) Rules, 1964. As both of these rules and regulations were framed for different purposes, the designations, functions and duties of these officers cannot be analogous to each other. Further, it stated be noted that there are no norms in SEBI that established a strict/ direct one-to-one equivalence between the designations of its officers and those of Government of India.
- As regards the complaint lodged by SEBI with ICAI, it was stated that the Complaint was lodged after due approval of the Competent Authority. The extant matter was duly approved by Shri S. Ravindran, the then

Executive Director, who had authorized the complainant to lodge the complaint with ICAI on 11th April 2014.

It was noted that the approval for filing of complaints was given by the Executive Director which was one of the highest cadre Posts in the SEBI and beyond ED there were the posts of Whole Time Member and Chairman who were appointed by the Cabinet Committee on Appointments by the Government of India. Therefore, ED of SEBI was undoubtedly competent to authorize to file the complaint in terms of Rule 3 and thus could be considered as equivalent in authority to that of Joint Secretary in Central/ State Government. It was viewed that such authority across organization being governed by different set of rules could be compared only in terms of hierarchy followed in respective organizations rather than following any absolute rules of comparison. Hence, objection of the Respondent with respect to Rule 3 was ruled out by the Committee as non-maintainable.

As regard the discrepancy in the date of signing complaint vis-à-vis the date when the Complainant was authorized, the Committee noted that the Complaint was scrutinized and registered by the Disciplinary Directorate in May 2014 when the referring agency had duly authorized the Complainant to file the complaint with the Institute. In any case, it was noted that the Rule 5 lays down the procedure to register the complaint wherein Rule 5(5) prescribes the procedure to rectify the defective complaint when it stated as follows:

“5. Registration of complaint

(5) If, the complaint, on scrutiny, is found to be defective, including the defects of technical nature, the Director may allow the complainant to rectify the same in his presence or may return the complaint for rectification and resubmission within such time as he may determine.”

Thus, the Committee was of the opinion that it was well within the authority of the Director (Discipline) to have the complaint rectified for any procedural defect/lapse if on scrutiny he noticed any defect in the complaint so filed. The authorization being of a date later than the date of signing the complaint would

not render the complaint invalid since the post facto authorization would cure the supposed defect and would relate back to the date on which the complaint was signed and presented. Hence such an objection was ruled out by the Committee.

6. As regard the request made by the Respondent vide his letter dated 14th January 2019 to summon the Complainant as witness of the Committee for examination, the Committee noted that the Complainant department vide its letters dated 30th March 2017 and 11th July 2018 had submitted before the Committee that based on the material available on record of SEBI, the inputs and comments were already given by SEBI at the time of lodging the formal complaints. Thus the personal presence of any official was not warranted and under the circumstances, the matter be proceeded with as per the rules of ICAI. Thus, the Committee was of the opinion that the said request made by the Respondent was unfounded as firstly, the facts related to the case had well emanated out of the documents made available on record by the Complainant department and secondly, no specific reasons have been brought out to establish the need of personal appearance of the Complainant during the hearing. Hence, such an objection was ruled out by the Committee and, accordingly, the matter was decided on merits.

Findings:

7. The Committee noted the role of the Respondent in the entire episode of issue of OFCD'S by SIRECL was that he was requested by the Company vide letter dated 08.03.2008 (**W-12**) to provide:

- a) The consent for inclusion of the Respondent's name as Statutory Auditors of the Company in the Draft RHP which the Company proposed to issue in connection with Private Placement of OFCDs and
- b) The Statement of Assets & Liabilities as well as Statement of profit and Loss Account for the preceding two financial years beginning from FY 2005-06 to Financial Year 2006-07 (Company incorporated on 28.10.2005) along with a Statement of Assets & Liabilities and a Statement of Profit and Loss Account for

the 9 months period ended 31st December, 2007, in accordance with Schedule II of the Companies Act, 1956.

In other words, he had given the consent for inclusion of his name as Statutory Auditors of the Company in the Draft RHP of proposed issue of OFCDs and had undertaken to issue the aforementioned Statements for its inclusion in the said RHP whereas as per the Complainant, the Respondent being auditor of SIRECL had certified the RHPs OFCDs issue and misrepresented them as a private placement, thereby not only failing in discharging their responsibilities as an auditor, but also assisting the Companies to raise huge funds in violation of the Companies Act, SEBI Act and SEBI (ICDR) Regulations without any regulatory approvals from SEBI.

8. The Committee noted the submissions made by the Respondent that the Company had requested them to provide the Certified statement of Profit and Loss Account and Statement of Assets and Liabilities for the period ended 31.03.2006, 31.03.2007 and interim period from 01.04.2007 to 31.12.2007 for inclusion in Draft Red Herring Prospectus pursuant to Schedule II of the Companies Act, 1956 and the Respondent report also clearly brought out the fact that it had been prepared in accordance with Clause B of Part II of Schedule II to the Companies Act, 1956. Subsequent to filing of the Draft RHP with the ROC, the Respondent were given to understand that the Company did not receive any objection from the office of ROC in the matter. He further stated that the Hon'ble Supreme Court and SEBI were influenced by the fact that large amount of money were collected by Sahara Group through OFCD issues, making it to appear as a case of abuse of the regulations governing public issue. It was contended by the Respondent that he did the said assignment prior to the issue and was not privy to those information which the SEBI and Supreme Court had relied upon. In other words, the Hon'ble Supreme Court and SEBI were in a different background of facts which influenced their decision.

9. The Committee in this regard was of the view that it never fell within the ambit of scope of duties of the Respondent to verify whether SIRECL was right in seeking certificate in accordance with Schedule II from him as his responsibility was limited to the issuance of certificates for which he was professionally engaged. It was noted that the professional engagement letter dated 7th Jan, 2008 explicitly stated that said issue of OFCDs would be done on private placement basis, without giving any advertisement/inviting to General Public, and for which, it was also confirmed that it would not get listed in any Stock Exchange. It was, accordingly, viewed that if the Company had passed a resolution resolving that it would not be a public issue then no mistake could be attributed to the Respondent, who relied on the stated pre-conditions and issued the audit certificates strictly according to the terms of the professional engagement. It was noted that the Respondent had only undertaken to certify the figures of profit/loss and assets/liabilities for the period which was duly done by relying up on the books of accounts, audit evidences, management representations and nothing has been brought on record by the Complainant to prove that the certificate so issued for the purpose of RHP was deficient in any manner or there was any material error or misstatement in the financial statements certified by the Respondent.

10. The Committee noted that as on the date of the professional engagement of the Respondent as well as on the date when he issued the required certificates, the said issue of OFCDs were decided by the Company to be private placement. As on that date, there was no reason for the Respondent to raise suspicion on intention of the Company. The money on such large scale was raised thereafter. In fact, the said issue was held as public issue by the Hon'ble Supreme Court in its Order dated 31st August 2012 based on then prevailing information regarding the scale in which OFCDs issue was subscribed. It was based on this Order of the Hon'ble Supreme Court that the Complainant has argued that the Respondent should have issued audit certificate in compliance of DIP Guidelines of SEBI and not according to Schedule II of the Companies Act 1956. The

Committee in this context noted that from the professional engagement letter issued to the Respondent by the Company, it was quite evident that the Respondent was requested vide letter dated 7th January 2008 to issue audit certificates in accordance with the requirements of Clause B of Part II of Schedule II to the Companies Act 1956 to be included in their Red Herring Prospectus (RHP). There was no reference to DIP Guidelines in the engagement letter. Therefore, the responsibility of the Respondent was only limited to issue the certificate in accordance to Schedule II to the Companies Act 1956 and nothing else. It further noted that the status of the OFCDs issue could have never been pre-conceived as public issue at the time when the Respondent had issued certificate to be included in RHP in 2008.

11. The Committee observed that even if it was a case where the Company had to comply with the DIP Guidelines, then also the reports issued by the Respondent as an auditor would have remained the same as the reporting requirement under clause 6.10.2.1 of DIP Guidelines when compared to the requirement under clause B of Part II of Schedule II of the Companies Act 1956 were found to be exactly same. Thus, the quantum of information or certification required from the Respondent being the auditor would not have been different had the Company complied with DIP Guidelines.

12. Thus, in light of the above, the Committee was of the considered view that in extant case, the Respondent has been alleged for misrepresentation of RHP relating to alleged OFCDs issue whereas the RHP contains a great deal of information covering many aspects of the company management, proposed issue and the project plans. It was viewed that the statutory auditor of RHP neither certifies the RHP nor certifies various aspects of information contained therein but only certifies the financial information contained in it. Thus the Committee was of the opinion that in extant case the Respondent did not attest or approve the RHP or its contents that was filed by SIRECL with Registrar of Companies but had simply certified the statements prepared from the annual audited

accounts for the period ended 31.03.2006, 31.03.2007 and interim period from 01.04.2007 to 31.12.2007 for inclusion in Draft Red Herring Prospectus. Accordingly, the Respondent is held not guilty of the charges alleged in the extant matter.

CONCLUSION:

13. Thus in conclusion, in the considered opinion of the Committee, the Respondent is held **Not Guilty** of professional misconduct falling within the meaning of Clause (7) of Part I of the Second Schedule to the Chartered Accountants Act, 1949.

14. The Committee accordingly passes Order for closure of this case against the Respondent.

Sd/-
(CA. Prafulla Premsukh Chhajed)
Presiding Officer

Sd/-
(Smt. Anita Kapur)
Member (Govt. Nominee)

Sd/-
(Shri Ajay Mittal)
Member (Govt. Nominee)

Sd/-
(CA. Manu Agrawal)
Member

Date: 15th January, 2020
Place: New Delhi