

CONFIDENTIAL

DISCIPLINARY COMMITTEE [BENCH – II (2019-2020)]

[Constituted under Section 21B of the Chartered Accountants (Amendment) Act, 1949]

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

File No. : [PR-293/16-DD/317/2016 and PR/294/16/DD/311/2016 (Clubbed)/DC/917/18]

In the matter of:

Mr. Ajay Agrawal (Jhuria),
C/o Mr. A.S. Agrawal (Jhuria) Engineer Premises,
2nd Floor,
93, Mumbai Samachar Marg,
Next to Mehta house Fort,
MUMBAI - 400 023

....Complainant

Versus

CA. Porus Bomanshaw Pardiwalla (M.No. 040005)
Partner,
M/s Delloitte Haskins & Sells LLP (FRN 117366W/W100018),
Chartered Accountants,
Indiabulls Finance Centre,
Tower 3, 27th - 32nd Floor,
Senapati Bapat Marg,
Elphinstone Road (West),
MUMBAI – 400 013

.....Respondent

MEMBERS PRESENT:

CA. Atul Kumar Gupta, Presiding Officer
CA. Amarjit Chopra, Government Nominee,
Shri. Rajeev Kher, Government Nominee,
CA. Chandrashekhar Vasant Chitale, Member

DATE OF FINAL HEARING : 09.08.2019

PLACE OF FINAL HEARING : ICAI Bhawan, Mumbai

PARTIES PRESENT:

Complainant : Shri Ajay Agrawal
Respondent : CA. Porus Bomanshaw Pardiwalla
Counsel for Respondent : CA. A.P. Singh

Charges in Brief:-

1. The Committee noted that in the Prima-Facie Opinion formed by Director (Discipline) in terms of Rule 9 of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007, the Respondent is Guilty under Clauses (5) and Clause (7) of Part I of the Second Schedule of Chartered Accountant Act 1949. The above Clauses (5) of Part I of Second Schedule states as under :-

“(5) fails to disclose a material fact known to him which is not disclosed in a financial statement, but disclosure of which is necessary in making such financial statement where he is concerned with that financial statement in a professional capacity;”

And Clause (7) of Part I Second Schedule of Chartered Accountant Act 1949 which states that:-

“(7) does not exercise due diligence, or is grossly negligent in the conduct of his professional duties;”

2. In this case, the allegations of the Complainant were related to a Company M/s Cabot India Ltd. wherein the Respondent was the auditor for the financial year 2008-09. The contention of the Complainant is that the accumulated losses of M/s Cabot India Pvt. Ltd. were more than 50% of the net worth of the financial year 2008-09 and on the basis of the audit report, Board of Directors of the company resolved to discontinue the manufacturing operation of the Company. Further, the Company had also approached to The Board for Industrial and Financial Reconstruction (BIFR) under Section 23 of the Sick Industrial Companies Act, 1985 on 26.4.2010. The Complainant submitted that in spite of the facts above, the Company in its shareholders' meeting held on 14.5.2010 decided to sell out the asset of industrial unit located at Thane. The Complainant alleged that for the disposal of plant and machinery, the Company obtained the consent under Section 293(1)(a) of the Companies Act, 1956 fraudulently which was suppressed by the Respondent.

3. Additionally, the Complainant also alleged that he was having a claim against the abovesaid Company amounting to Rs.102.58 crores for which notice was also given to the Respondent, inspite of that the Respondent suppressed the Complainant claim from the financial statement.

Brief facts of the Proceedings:

4. On the day of hearing, the Committee noted that Complainant was present. The Respondent along with counsel appeared before the Committee. The Complainant as well as the Respondent were put on oath. In the presence of the Complainant and with consent of Respondent, the charges were taken as read. On being asked to the Respondent whether he pleads guilty, he replied in negative. Thereafter, the Committee sought whether he wishes to proceed with his defence. The Respondent made his submissions. After considering all papers available on record and pleadings, the Committee proceeded with the matter.

Findings of the Committee

5. On the matter stated above, the Committee reviewed that in reply, for both the allegations, the Respondent provided the written statement wherein he submitted being the erosion of peak net worth for the said company was 41.5% only, the matter is not falling under the said provisions of the Sick Industrial Companies Act (SICA) 1985. The Respondent submitted that it is upheld in the Apex Court that there is no provision under SICA whereby the BIFR asked a potentially sick industrial company not to dispose of its asset. Such a power conferred under Section 22A and is restricted to Sick Industrial Company only.
6. In this case of M/s Cabot India Ltd. even the BIFR communicated to the above Company that it did not fall within the meaning of Section 53 of SICA. Further, the Respondent relied upon the ruling of Supreme Court in **UP State Sugar Corporation Ltd. Vs. UP State Sugar Karamchari Association [AIR 1995-SC 1484]**. The Supreme Court observed as under:
*“Once it is held that there was no reference under Section 15(1) of the Act then the only question which requires to be considered is **whether after a report has been made to the Board by a potentially sick industrial company under Section 23 of the Act the company is prohibited from disposing of its assets. We have been unable to***

find any provision in the Act which imposes such a restriction. Under the Act the only restriction on the right on an industrial company to dispose of its assets is that contained in Section 22A whereby the Board has been empowered to pass an order directing a sick industrial company not to dispose of, except with the consent of the Board, any of its assets. Apart from the fact that this power is restricted in its application to a sick industrial company dealt with under Chapter III of the Act and does not apply to a potentially sick industrial company dealt with under Chapter IV, even in respect of a sick industrial company this power to impose such a restriction is available only during the period of preparation or consideration of the scheme under Section 18 and during the period beginning with the recording of opinion by the Board for winding up of the company under Sub-section (1) of Section 20 and upto commencement of the proceedings relating to the winding up before the concerned High Court.” (emphasis provided)

7. The Committee noted that The Respondent also submitted the matrix of financial statements of the company for last 5 years wherein the Respondent under clause (10) of the CARO, 2003 have disclosed the net worth erosion for various years. In view of the submissions and referring the relevant Sections of SICA, the Committee is of the opinion that Section 23 of the SICA is not applicable on the said Company, accordingly, the charge on this ground is not being proved against the Respondent.
8. For the second charge, the Committee noted that the suit by the Complainant for the amount to be claimed from the company i.e. Rs.102.58 crores was pending since 2000 wherein the Respondent was not the auditor and become the auditor from the year 2007 onwards. The Respondent and his counsel submitted that the audit of this Company for four previous years was conducted wherein none of the previous auditor has included the claim of the Complainant as a contingent liability.
9. In view of the above and as laid down by AS-29 i.e. the principle of probability, the Respondent asked for the legal opinion to seek for chance of occurrence of liability which need to be reflected as “contingent”. Based on the opinion received confirming the status continued from 2000, the Respondent in the best of his professional judgement decided not to create a new contingent liability which was not being reflected in all the provisions.

10. In view of the above submissions made by the Respondent and no supportive evidence from the Complainant which change the position from 2000 to 2009, the Committee is of the view that the Respondent under his professional judgement has rightly acted upon, hence cannot be held guilty under any of the clause of professional misconduct to the Chartered Accountants Act, 1949.

Conclusion

11. In view of the above findings, the Committee is of the view the Committee finds no merit in the complaint filed by the Complainant. Accordingly, in the considered opinion of the Committee, the Respondent is **NOT GUILTY** under Clause (6) and Clause (7) of Part I of the Second Schedule of Chartered Accountant Act 1949.

12. **Accordingly, in terms of Rule 19 (2) of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007, the Committee passes Order for closure of this case against the Respondent.**

Sd/-
(CA. ATUL KUMAR GUPTA)
PRESIDING OFFICER

Sd/-
(CA. AMARJIT CHOPRA)
GOVERNMENT NOMINEE

Sd/-
(SHRI. RAJEEV KHER)
GOVERNMENT NOMINEE

Sd/-
(CA. CHANDRASHEKHAR VASANT CHITALE)
MEMBER

DATE: 10/02/2020
PLACE: NEW DELHI