



THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA
(Set up by an Act of Parliament)

DISCIPLINARY COMMITTEE [BENCH-I (2020-2021)]
[Constituted under Section 21B of the Chartered Accountants Act, 1949]

ORDER UNDER SECTION 21B(3) OF THE CHARTERED ACCOUNTANTS ACT, 1949
READ WITH RULE 19(1) OF THE CHARTERED ACCOUNTANTS (PROCEDURE OF
INVESTIGATION OF PROFESSIONAL AND OTHER MISCONDUCT AND CONDUCT
OF CASES) RULES, 2007.

In the matter of :

**Shri Laltu Pore, Assistant General Manager, (SEBI), Eastern Regional office,
Kolkata**

-Vs-

**CA. Debasis Bandyopadhyay (M.No.057861) of M/s. Debasis Bandyopadhyay & Co.,
Chartered Accountants, Kolkata**
[PR- 298/14-DD/01/16-DC/719/17]

MEMBERS PRESENT (Through Video Conferencing):

- 1. CA. Nihar N Jambusaria, Presiding Officer**
- 2. Shri Jugal Kishore Mohapatra, I.A.S. (Retd.) (Government Nominee)**
- 3. Ms. Rashmi Verma, I.A.S. (Retd.) (Government Nominee)**
- 4. CA. G. Sekar, Member**
- 5. CA. Pramod Jain, Member**

1. That vide findings dated 15.10.2019 under Rule 18 (17) of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007, the Disciplinary Committee was inter-alia of the opinion that **CA. Debasis Bandyopadhyay (M. No. 057861)** (hereinafter referred to as the **Respondent**) was **GUILTY** of professional misconduct falling within the meaning of Clauses (7) and (8) of Part I of Second Schedule to the Chartered Accountant Act, 1949.

2. That pursuant to the said findings, an action under Section 21B (3) of the Chartered Accountants (Amendment) Act, 2006 was contemplated against the Respondent and communications dated 16th July, 2020 and 15th August, 2020 were addressed to him thereby granting an opportunity of being heard in person and/or to make a written



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representation before the Committee on 30th July, 2020 and 26th August, 2020 respectively.

3. The Committee noted that on 26th August, 2020, the Respondent was present through Video Conferencing mode and made his verbal representations on the said findings.

4. The Respondent in his representation reiterated his earlier submissions and stated that non-compliance had occurred due to difference in interpretation of proviso to Section 67(3) of the Companies Act, 1956 and accordingly, he requested the Committee to take lenient view in the matter.

5. The Committee has considered the reasoning as contained in findings dated 15th October, 2019 holding the Respondent Guilty of professional misconduct vis-à-vis representations of the Respondent on the findings of the Disciplinary Committee.

6. Keeping in view the facts and circumstances of the case, material on record and representations of the Respondent made before it, the Committee is of the view that the professional misconduct on the part of the Respondent is established and however, keeping in view the submissions as brought on record by the Respondent, the said misconduct does not qualify for a severe sentence. Accordingly, the Committee orders that a fine of Rs.20,000/- (Rupees Twenty Thousand Only) be imposed upon the Respondent, CA. Debasis Bandyopadhyay (M. No. 057861), to be payable by him within 30 days from receipt of the Order.

sd/-

(CA. NIHAR N JAMBUSARIA)
PRESIDING OFFICER

(approved and confirmed through e-mail)

(SHRI JUGAL KISHORE MOHAPATRA, I.A.S. (RETD.))
GOVERNMENT NOMINEE

(approved and confirmed through e-mail)

(MS. RASHMI VERMA, I.A.S. (RETD.))
GOVERNMENT NOMINEE


sd-

(CA. G. SEKAR)
MEMBER

sd/-

(CA. PRAMOD JAIN)

MEMBER

Certified to be a true copy

Anurag Sharma
Assistant Secretary,
Disciplinary Directorate

CA. Debasis Bandyopadhyay (M. No.057861)
[PR-298/14/DD/01/16-DC/719/17]

The Institute of Chartered Accountants of India,
ICAI Bhawan, Vishwas Nagar, Shakhra, Delhi-110032

CONFIDENTIAL

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

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

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

File no. : PR/298/14-DD/01/16-DC/719/2017

In the matter of:

Shri Laltu Pore,
Asstt. General Manager,
Securities and Exchange Board of India
Eastern Regional Office
16, Camac Street,
L & T Chambers, 3rd Floor,
Kolkata-700017

.....Complainant

Versus

CA. Debasis Bandyopadhyay (M.N.057861)
M/s. Debasis Bandyopadhyay & Co. ... (FRN 324338E)
8/3C, Biren Roy Road (West)
Kolkata – 700008, West Bengal

.....Respondent

Members Present:

CA. Prafulla Premasukh Chhajed, President
Smt. Anita Kapur, Member (Govt. Nominee)
Shri Ajay Mittal, IAS (Retd.), Member (Govt. Nominee)
CA. Debashis Mitra, Member
CA. Manu Agrawal, Member

Date of Final Hearing: 15th July, 2019 (decided on 23rd September 2019)

Place of Final Hearing: Kolkata

Parties Present:-

- (i) CA. Debasis Bandyopadhyay - Respondent
- (ii) CA. A. P. Singh – Counsel for Respondent

✓ (M)

Allegations of SFIO, the Complainant:

1. **Shri Laltu Pore, Assistant General Manager, SEBI (Eastern Regional Office) Kolkata** (hereinafter referred to as the "Complainant"/"SEBI") filed complaint in Form 'I' dated 28th December, 2015 (C-1 to C-26) against **CA. Debasis Bandyopadhyay (M.N.057861) of M/s Debasis Bandyopadhyay & Co., (FRN 324338E), Kolkata** (hereinafter referred to as the "Respondent" and the "Respondent Firm" respectively). The Complainant in his complaint has alleged as under:-

1.1 M/s Mangalam Agro Products Limited (hereinafter referred to as the "Company"), had made a public issue of debentures during the Fin. year 2011-12. However, the Respondent had stated in the report required under the Companies (Auditor's Report) Order 2003 that Clause xx pertaining to public issue was not applicable to the Company.

Proceedings :

2. The Committee noted that the Respondent, along with his Counsel, was present during the hearing. It was also noted that the Complainant vide its letter dated 8th July, 2019 informed that they have already submitted all the relevant documents/details vide its letter dated 28th Dec, 2015 and 3rd May, 2018. It is accordingly viewed that based on facts available the Committee may proceed with the matter on merits.

The Committee, further, noted that during the previous hearing held on 26th July, 2018, the Counsel for the Respondent had, inter alia, raised his preliminary objections on the authorization of the extant complaint which as per him was not in consonance with the provisions of Rule 3(3) of the said CA Rules 2007. Accordingly, the then Committee had given the directions to seek necessary information from the Complainant which was duly received vide Complainant's letter dated 12th Sept, 2018 and same was forwarded to the Respondent vide mail dated 20th Nov, 2018 on which the Respondent had given his submissions.

In view of the above, the Committee proceeded ahead in the matter and the Counsel for Respondent proceeded by making defense in the matter. The Committee thereafter examined the Respondent in the matter. The Counsel for the Respondent thereafter made his final submissions in the matter. After hearing from the

✓ (A)

Respondent, the Committee directed the Respondent to file his written submissions, if any, within 14 days of the hearing. Accordingly, the matter was heard and concluded.

3. On 23rd September, 2019, the Committee noted that Respondent did not provide any further submissions. Accordingly based on written and oral submissions available on record, the Committee decided to take its decision on the matter.

4. The Committee noted that the Respondent vide letter dated 30th July 2018 made submissions wherein he 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 i.e. 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. It was stated that two complainants were filed in the matter by Smt. Nikki Agarwal and the Complainant but none of them were authorized as per the requirement of Rule 3(3) of the CA Rules, 2007.

5. The Committee noted that the issues raised by the Respondent regarding the issue of authorization was referred to the SEBI which vide 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 was stated 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.

✓ (a)

- 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 Ananta Barua, the then Executive Director, who had authorized the Complainant to lodge the complaint with ICAI.

6. It was noted by the Committee that in the instant matter the approval for filing of complaint was given by the Executive Director (ED) which was the highest cadre post 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.

7. As regard two complaints filed by the same Complainant-Department i.e. SEBI by Nikki Agarwal on 13th October, 2014 and by the Complainant of instant matter on 28th December, 2015, it was noted that on receipt of original complaint on 13th October, 2014, Director (Discipline) had vide its letters dated 14th May, 2015 and 30th September, 2015, requested SEBI to provide requested documents/rectify defects to comply with requirements of Rule 3(3) of Rules 2007 (C-25) in view of which due approvals were taken by SEBI as informed that ED had approved/authorised the matter on 17th May, 2015 and consequently rectified complaint was filed by Shri Laltu Pore as confirmed by SEBI in its letters dated 28th December, 2015 (C-26) and 12th September, 2018. In other words, the instant complaint was filed after seeking due approvals for filing complaint which was in compliance of Rule 3 of CA Rules, 2007 and that the Director (Discipline) had taken due cognizance of the matter only when due authorization and approval were in place and everything was on record duly complied. It was also noted that 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. Hence, objection of the Respondent with respect to Rule 3 was ruled out by the Committee as non-maintainable. The Committee accordingly decided the case on merits.

Findings of the Committee:

8. The Committee noted that in the extant case, it had been alleged against the Respondent that the Company had made public issue of debentures during the F.Y. 2011-12 whereas the Respondent being the statutory auditor in his statutory report for the said year reported that Clause (xx) of CARO Report, 2003 relating to Public issue was not applicable to the Company (C-9).

9. The Committee noted that the Respondent in his Written Statement dated nil received on 7th May 2018 had submitted before the Committee that the reporting by a statutory auditor in response to Para (xx) of CARO would relate to disclosure on the end use of the money raised by an invitation to the public to subscribe to the securities offered through a prospectus and the securities offered by the company, in the instant matter, were non-convertible redeemable debentures which were secured through a charge on the properties registered with the ROC. No prospectus was drawn up or filed with any authority or regulator in the instant case. He further stated that during the discussions with the management held before submission of the audit report, he was made to understand that the intent of the statute was to apply Section 67(3) of the Companies Act 1956 and its proviso to “The “offer” (i.e. each offer separately). The Management has accordingly interpreted the section concerned based on the use of the Article “The” before the words “Offer or invitation” to mean that the Company could make multiple offers, and that if each such offer was made to less than 49 persons, the question of the same being regarded as a public issue would not arise.

✓ (B)

However, while passing SEBI order, the Whole Time Member had interpreted the intent of the Companies Act "to include all allotments done by the company under the same Resolution" which was only a question of difference in view and interpretation. He further submitted the copies of his working papers including some copies of the list of the persons to whom offers in various tranches for subscribing to the non-convertible debentures were made and he being aware of the provisions of the Companies Act and his obligations to report under CARO 2003 and it was clear that the issue of debentures was approved by way of private placement only and hence the question of reporting under Para 4(xx) of CARO did not arise.

10. The Committee further noted that the Complainant department had provided a copy of the Final order passed by it in the matter of Company under question which inter-alia (R-20 to R-34) stated that the Company had made an offer and allotted Secured Non-Convertible Debentures ("NCDs") to around 4820 investors during the Financial Year 2011-12 and mobilized Rs. 11 crores in a series of 107 offers for which allotment was done made in tranches by the Company during the period January 2011 to June 2012. The said allotment was based on the approval of two resolutions dated March 01, 2011 (approval for issue of 50,00,000 NCDs @ Rs. 10/) and November 15, 2011 (approval for issue of 6,00,000 NCDs @ Rs. 100/-).The said allotment resulted in the allotment of NCD's to approximately 4820 investors. The Order further state that the series of offers and allotments made by the Company to less than 49 persons was nothing but a device adopted to circumvent the provisions of section 67(3) of the Companies, Act, 1956 as the aggregate number of investors to whom the offers and allotments were made were more than 49. Therefore, admittedly, the Company had made the offer and issued debentures to more than 50 persons which accordingly became a public issue of such securities in term of first proviso to Section 67(3) of the Companies Act, 1956 .

11. The Committee noted that in order to determine whether an offer was made to the public or done through private placement the criteria laid down under Section 67 of the Companies Act, 1956 was needed to be applied. Accordingly, it would be important to refer to the provisions of Section 67(1) and 67(3) of the Companies Act, 1956 which states as follows:-

✓ a

“67(1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.”

“67(3) No offer or invitation shall be treated as made to the public by virtue of sub-section (1) or sub-section(2) as the case may be, if the offer or invitation can properly be regarded in all the circumstances:-

- a) as not being calculated to result, directly or indirectly, in the share or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or
- b) Otherwise, as being a domestic concern of the persons making and receiving the offer or invitation”

Provided that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more.

Provided further that nothing contained in the first proviso shall apply to non-banking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956).”

12. Thus in terms of Section 67, the offer can be of shares or debentures. Hence, provisions of Section 67 were applicable in extant case. It was noted that the first provision to section 67(3) explicitly states that any offer or invitation to subscribe for shares or debentures made to 50 persons or more was construed to be an offer made to the public. From the Order of SEBI, it was noted that the Company had allotted NCDs to approximately 4820 investors/persons mobilising Rs. 11 crore. Considering the number of final investors, the Committee was of the view that the Company had undeniably made offer to more than 50 persons and accordingly it was a 'public issue' of such securities in terms of first proviso to section 67(3).

13. It was noted from the Balance sheet of the Company as at 31st March, 2012 (C-10), an amount of Rs. 11,00,00,000/- was shown as Long term borrowings. Under Note-3 (C-12), the break-up of Long term borrowings was given as under:-

<u>Long term borrowing</u>	31.03.2012
a) Secured Non-convertible Debentures	
50,00,000 debentures @ Rs. 10 each/-	5,00,00,000
6,00,000 debentures @ Rs. 100/- each	6,00,00,000

①

14. From the above, it was evident that as on the balance sheet date Rs. 11 crores had been mobilised and collected from 4820 investors through NCDs which was public issue in terms of proviso to Section 67(3). However, in relation to paragraph 4(xx) of Companies (Auditor's Report) Order, 2003, the Respondent had reported that the said clause was not applicable to the company (C-9) when the statutory auditor was required to report as to whether the Company had disclosed end use of money raised by public issue and whether he had verified the same.

15. The Committee noted that in light of above, the Respondent being a Statutory Auditor of the Company while certifying the financial statements of the Company, had failed to act prudently as being a qualified Chartered Accountant he failed to use his professional competence before reporting under para (xx) of CARO 2003. It was viewed that the Respondent was not only required to report under CARO but also required to verify the details of material items as envisaged in SA-250 reproduced below:

"13. The auditor shall obtain sufficient appropriate audit evidence regarding compliance with the provisions of those laws and regulations generally recognised to have a direct effect on the determination of material amounts and disclosures in the financial statements."

16. As regard the Respondent's submission about resolution or mortgage deed stating that such offer was to be made by way of private placement, it was viewed that Respondent was reporting under CARO and was also verifying the facts related to NCDs for the balance sheet. Further, the said securities, till then, were issued and he was well into the position to understand the number of allottees to whom NCDs were issued. Thus, the plea of the Respondent that non-compliance had occurred due to difference in interpretation of proviso to Sec 67(3) cannot be accepted because around 107 offers were made to collect the said money. The series of offers of NCDs and allotments being made in tranches itself was an indication that a device to circumvent the proviso to Section 67(3) of the Companies Act, 1956 was used since each offer so made involved time and money. Such frequent offers were sufficient to raise the Respondent's professional skepticism.

The Respondent, being a professional was expected to examine independently the facts in view of the provisions of the Companies Act rather than merely relying

upon the Extract of Board of Directors meeting dated 01/03/2011 (W-7) and Deed of Mortgage (W-8 to W-22) especially in view of the amount of public money involved. Accordingly, the Committee was of the considered opinion that the Respondent had not only failed to exercise due diligence but was also grossly negligent in his professional conduct whereby he failed to comment on the management's disclosure on the end use of public issue proceeds and verification thereof under Clause 4(xx) of CARO, 2003. Thus, he is guilty of professional misconduct falling within the meaning of Clauses (7) and (8) of Part I of the Second Schedule to the Chartered Accountants Act, 1949.

Conclusion :

16. Thus, in conclusion, in the opinion of the Committee, the Respondent is **GUILTY** of professional misconduct falling within the meaning of Clauses (7) and (8) of Part I of the Second Schedule to the Chartered Accountants Act, 1949.

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

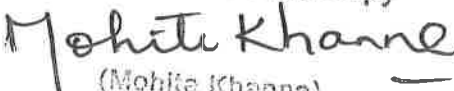
Sd/-
(Smt. Anita Kapur)
Member (Govt. Nominee)

Sd/-
[Shri Ajay Mittal, IAS (Retd.)]
Member (Govt. Nominee)

Sd/-
(CA. Debashis Mitra)
Member

Sd/-
(CA. Manu Agrawal)
Member

Date : 15th October, 2019
Place : New Delhi

Certified to be True Copy

(Mohite Khanna)
Assistant Secretary
Disciplinary Directorate
The Institute of Chartered Accountants of India