



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

[PR- 20/18-DD/48/18/BOD/510/2019]

ORDER UNDER SECTION 21A(3) OF THE CHARTERED ACCOUNTANTS ACT, 1949 READ WITH RULE 15(1) OF THE CHARTERED ACCOUNTANTS (PROCEDURE OF INVESTIGATIONS OF PROFESSIONAL AND OTHER MISCONDUCT AND CONDUCT OF CASES) RULES, 2007

In the matter of:-

CA. Nishant Maitin (M. No. 079995)

Nepali Kothi, Patna.

.... Complainant

-Vs-

CA. Ashish Anand Pathak (M. No. 521013)

M/s A. A. Pathak & Co. (FRN No. 09448C)

Patna.

.... Respondent

[PR- 20/18-DD/48/18/BOD/510/2019]

MEMBERS PRESENT (in person):

CA. Rajendra Kumar P, Presiding Officer

Ms. Dolly Chakrabarty (IAAS, retd.), Government Nominee

Date of Final Hearing: 17th March, 2023

1. The Board of Discipline vide Findings dated 10th February, 2023 was of the view that **CA. Ashish Anand Pathak (M. No.521013)** is Guilty of "Professional Misconduct" falling within the meaning of Item (9) of Part-I of the First Schedule to the Chartered Accountants Act, 1949.
2. An action under Section 21A (3) of the Chartered Accountants Act, 1949 was contemplated against **CA. Ashish Anand Pathak** and communication dated 1st March, 2023 was addressed to him thereby granting him an opportunity of being heard in person and/or to make written representation before the Board on 17th March, 2023.
3. **CA. Ashish Anand Pathak** made his written representation vide letter dated 13th March, 2023 and also appeared before the Board through video conferencing on 17th March, 2023 and made his oral submissions thereat.
4. **CA. Ashish Anand Pathak**, in his written representation inter-alia stated as under:-
 - (i) Issuance of the intimation letter to the members was solely done by the Company. The Respondent cannot be held liable for default for such kind of compliance, procedural infirmity, if any. If at all, any default seemingly occurred, the onus may be fastened upon the specific erring officers, directors, members,



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management of the Company only who shall be accountable for it. The duties of the auditors are extensively outlined under Sections 143, 144, 145 and 146 of the Companies Act, 2013 and the Respondent has not contravened any provisions to this effect.

- (ii) Charging an auditor, for professional misconduct merely for the delay in conducting an EGM of a Company is preposterous and inappropriate and Hon'ble BOD must take a liberal view while pronouncing the punishment Order upon the Respondent. The Respondent had taken due care for the purpose of acceptance as the first auditor of the Company - SRL Hospital Private Limited. by getting information from the ROC and MCA by checking the portals for any Forms regarding such appointments. There is no prejudice/issue/complaint by the Company on the due appointment of the first auditor i.e. Respondent as it had duly issued a letter marked to the ROC, Patna (Bihar) dated 18.06.2018.
 - (iii) The finding is silent upon a very important document produced at the time of hearing i.e., Geeta Saar which is regarded as an official publication of the 'Centre for Corporate Governance Research and Training of the ICSI'.
 - (iv) The Hon'ble Board seems to have made an anomaly between its penultimate and last para of Point 11 of its Findings.
5. The Board has carefully gone through the facts of the case along with the oral and written representation of **CA. Ashish Anand Pathak**.
 6. As per the Findings of the Board as contained in its report, it is the duty of the incoming auditor to ascertain prior to the acceptance of the appointment as the auditor of the company that his appointment is proper, which in the instant case was clearly missing. Accordingly, the Board held the Respondent Guilty of "Professional Misconduct" falling within the meaning of Item (9) of Part-I of the First Schedule to the Chartered Accountants Act, 1949.
 7. Thus, upon consideration of the facts of the case, the consequent misconduct of **CA. Ashish Anand Pathak** and Keeping in view his oral and written representation before it, the **Board decided to Reprimand CA. Ashish Anand Pathak (M. No.521013)**.

Sd/-
CA. Rajendra Kumar P.
(Presiding Officer)

DATE: 19th April 2023

CA. Nishant Maitin (M. No. 079995) -Vs- **CA. Ashish Anand Pathak (M. No. 521013)**

सही प्रतिलिपि होने के लिए प्रमाणित
Certified to be true copy

बिधा नाथ तिवारी / Bishwa Nath Tiwari
कार्यकारी अधिकारी / Executive Officer
अनुशासनालयक निदेशालय / Disciplinary Directorate
इंस्टिट्यूट ऑफ चार्टर्ड एकाउंटेंट्स ऑफ इंडिया
The Institute of Chartered Accountants of India
आईसीएआई भवन, विवास नगर, शाहदरा, दिल्ली-110032

Sd/-
Ms. Dolly Chakrabarty (IAAS, rettd.)
(Government Nominee)

bCONFIDENTIAL

BOARD OF DISCIPLINE

Constituted under Section 21A of the Chartered Accountants Act 1949

Findings under Rule 14(9) of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007

File No.: [PR- 20/18-DD/48/18/BOD/510/2019]

CORAM(present in person):

CA. Prasanna Kumar D. (Presiding Officer)

Ms. Dolly Chakrabarty (IAAS, Retd., Government Nominee)

CA. (Dr.) Raj Chawla (Member)

In the matter of:

CA. Nishant Maitin(M. No. 079995)

Nepali Kothi

Opposite Gasoline Petrol Pump

Boring Road

Patna-800001(Bihar)

..... Complainant

Versus

CA. Ashish Anand Pathak (M. No. 521013)

M/s A A Pathak & Co. (FRN No. 09448C)

L-21, Road No. 12

Near Madhukunj Building

Sri Krishna Nagar

Patna-800001(Bihar)

..... Respondent

DATE OF FINAL HEARING : **5th July, 2022**
PLACE OF FINAL HEARING : **New Delhi / through video conferencing**

PARTIES PRESENT:

Counsel for the Complainant : **Advocate Rohit Kumar Singh**

Counsel for the Respondent : **Advocate Sumit Kansal**

FINDINGS:

BACKGROUND OF CASE:



1. The SRI Hospital Pvt. Ltd. (herein referred to as the Company) was incorporated on 11th February 2014. The Company appointed the Complainant's Firm as the auditors of the Company in their Board meeting held on 8th March, 2014 for the FY 2014 - 2015. However, it was later found out by the Complainant that the Respondent had accepted the assignment and completed the audit for the FY 2014-2015 of the Company.

CHARGE ALLEGED:

- 2.1 It is alleged that despite the Complainant being appointed the Statutory auditors of the 'Company' vide appointment letter dated 8th March 2014 for holding the office until the conclusion of the fifth AGM of the Company, the Respondent accepted the audit assignment and completed the audit of the company for the Financial Year 2014-15 without communicating with the Complainant (being the previous auditor) for which a letter dated 2nd November 2017 was addressed to the Respondent.
- 2.2 The Complainant further alleged that the Respondent accepted the appointment as an auditor of the company for the Financial Year 2014-15 without first ascertaining from the Company whether the requirements of section 139, 140, 141 and 142 of the Companies Act, 2013 in respect of such appointment were complied with or not.
The Board noted that the Director (Discipline) held the Respondent Prima Facie Guilty in respect of the charge specified at 2.2 above and not guilty in respect of the charge specified at 2.1 above. The said view of the Director(Discipline) had been accepted by the Board. Accordingly, the conduct of the Respondent had been examined in respect of the charge specified at 2.2 above.

BRIEF OF PROCEEDINGS HELD:

3. At the time of hearing held in the case on 5th July, 2022, the Counsel for the Complainant as well as the Respondent were present before the Board through video conferencing. Since there was a change in the composition of the Board since the last hearing, the Board gave an option to the parties to the case as to whether they would like to have a De -Novo enquiry or continue from the last proceedings to which the Counsel for the Respondent stated that they would like to have a fresh hearing in the case. Thereafter, the Counsel for the Complainant and the Respondent made their respective detailed oral submissions before the Board. Upon consideration of the submissions and documents on record, the Board concluded the hearing in the case and directed the office to examine the requirements of Sec 139(6) of the Companies Act 2013 in case the first auditor of the company is not appointed by the Board of directors within 30 days of incorporation of the company. Thereafter, on consideration of the submissions and documents on record, the Board at its meeting held on 2nd November 2022 decided on the conduct of the Respondent.

BRIEF SUBMISSIONS OF THE PARTIES TO THE CASE:



(a) RESPONDENT:

The Respondent in his written submissions inter alia submitted as under:

- 4.1 The Company was incorporated on Feb 11, 2014. As per the Companies Act, 1956, the Company was required to appoint first auditor by March 13, 2014. However, the Company did not appoint the first auditors within 30 days of its incorporation. Further, as per Clause (b) of sub-section 224(5) of Companies Act, 1956, on Appointment of Auditors - :

"If the Board fails to exercise its powers under this sub-section, the company in general meeting may appoint the first auditor or auditors".

However, the Company did not hold any meeting by March 31, 2014 which was the last date for enforceability of section 224 of Companies Act, 1956.

(31st March, 2014 being the cut-of date, of Section 224 of Companies Act, 1956 and vide NOTIFICATION NO. SO 902(E) [FILE NO. 1/15/2013-CL. V], dated, 26-3-2014, the effective date for enforceability of provisions of Section 139 of Companies Act 2013, which deals with the Appointment of Auditors, is 01.04.2014).

- 4.2 Evidently, Section 139 of the new Companies Act, 2013 came into play according to which, in case of non-appointment of first auditors by the Board of Directors, they were required to intimate the members of the Company about this fact and the members shall hold EGM for appointment of first auditors within 90 days. The meeting was held on July 21, 2014, i.e., after 31st March, 2014 (cut off date), for appointment of first auditor. As such, the Companies Act, 2013 is applicable in the instant case at hand.

- 4.3 The Respondent agreed with the said observation. However, submitted that in Para 8.5 of the PFO the words used were "from the date of Company incorporation" and the law is silent regarding from when this time limit of 90 days be reckoned – from informing the members or date of incorporation.

- 4.4 The Respondent agreed with the opinion on Clause (8) of Part I of First Schedule. The Respondent further stated that there was no requirement of filing Form no ADT-1, since the Respondent had been appointed as per the provisions of Section 139(6) of the Companies Act, 2013 (*said appointment, as explained in para 5 above*). Further, the EGM dated 21.07.2014 and letter dated 21.07.2014 by the Company to the Auditor affirms this fact wherein it is mentioned –

"we wish to inform that as the first auditor has not been appointed within 30 days from the date of incorporation, EGM has been held and decided to appoint your firm as first auditor of the company".

That sub-rule 2, to Rule 4 of The Companies (Audit and Auditors) Rules, 2014 states as under:

"Rule 4(2)- The notice to Registrar about appointment of auditor under fourth proviso to sub section (1) of section 139 shall be in form ADT-1 "

- 4.5 As evident, Rule 4(2) shall be applicable only if the Auditor was appointed u/s 139(1) of Companies Act, 2013 but here the Auditor being appointed u/s 139(6) of Companies Act,

2013 and in absence of any requirement of law, rules to file ADT-1 to this effect, the said Form was not a necessity to be filed by the Respondent.

- 4.6 In reference to allegation of Clause 9 of part I of First Schedule, of the Chartered Accountants Act, 1949, the Ld. DD has erred in arriving on the conclusions and consequently, charged the Respondent unjustly and illegally. There are no facts, evidences of any sort to exhibit that the Respondent is prima facie "guilty" of Professional Misconduct falling within the meaning of clause (9) of Part I of First Schedule to the Chartered Accountants Act 1949.

As evident, the Complainant has very slyly, twisted the text of Clause 9 of part I of First Schedule, to serve his own ulterior motives, which has thereby led to harassment and defamation of the Respondent.

- 4.7 The Complainant has arbitrarily and recklessly charged the Respondent under various sections - Section 140 (Removal, resignation of auditor and giving of special notice), Section 141 (Eligibility, qualifications, and disqualifications of auditors), Section 142 (Remuneration of auditors) which are nowhere related to the issue at hand, i.e. pertaining to the Appointment of First Auditor of Company, mentioned by the Ld. DD in para 8.5 of the PFO. It is requested that the Hon'ble Board, must take into consideration such frivolous allegations leveled by the Complainant in the interests of equity, justice & fairness.
- 4.8 The Respondent cannot be charged under Clause 9 of part I of First Schedule of the CA Act, 1949, in any manner whatsoever, as the said Clause deals with erstwhile Section 225 as enshrined under Companies Act, 1956 while the Companies Act, 2013 is applicable in the present case on the company - SRL Hospital Private Limited. There has been no parallel amendment or modification made in the CA Act, 1949, in consonance with the changes made in the provisions of the Companies Act. It will be absurd to forcefully bring the Company under the ambit of erstwhile Companies Act, 1956 so as to charge the Respondent under Clause 9 of part I of First Schedule of CA Act, 1949. Nor has the CA Act been amended to keep itself abreast with the latest developments and changes under the Companies Act.
- 4.9 The Ld. DD, under Para 8.5 & 8.6 of the PFO, has charged the Respondent for his irregular appointment as the first auditor of the Company, mentioning that the provisions on Appointment of Auditors under Section 139 of the Companies Act, 2013, precisely being Section 139(6) and proviso to Section 139(1) have been infringed. It is submitted, that on a deeper look of these provisions with the erstwhile Companies Act, 1956, it is found that somewhat proximate provisions find place in Section 224 of the Companies Act, 1956 which deals with - "Appointment and Remuneration of Auditors".
- 4.10 Further, it is crystal clear from the above Section 225 of Companies Act, 1956 that it does not anywhere even mention the words "Appointing of first auditors", leave alone the fact that any procedure has been outlined under the said provision. As such, in reference to the allegations raised by the Ld. DD, Section 225 of the erstwhile Act has no nexus/relevance/connection.



Consequently, when Section 225 of Companies Act, 1956 is not attracted, Clause 9 of part I of First Schedule of the CA Act, 1949 automatically, becomes redundant / inapplicable. On this ground alone, the charge levelled on the Respondent, under Clause 9 of part I of First Schedule of the CA Act should be dropped instantly.

- 4.11 Without prejudice to the submissions made in para above, it is submitted that in Para 8.6 of the PFO, the Ld. DD has charged the Respondent for non-compliance of proviso to Section 139(1) of Companies Act, 2013. In the instant case, it is reiterated, that the Respondent has been appointed under the provisions of Section 139(6) of Companies Act, 2013 and not Section 139(1) of the Act. Consequently, when Section 139(1) is not applicable, the question of its proviso being attracted is out of place and as such, this charge as wrongfully mentioned in the PFO is liable to be dismissed.
- 4.12 Without prejudice to the above submissions, it is submitted that, under Section 139(6), the responsibility to appoint the first auditor of a company, is on the Board of Directors, and in case of their failure, the members shall conduct an EGM within 90 days for appointment of first auditor. The fact, that the Auditor was appointed in an EGM conducted afterwards, and that such kind of a secretarial and compliance process/procedure cannot be overstretched to an Auditor. For such kind of compliances - the officers, directors, members, management of the Company be answerable and liable. It is stated that, the duties of the auditors are extensively outlined under Sections 143, 144, 145 and 146 of the Companies Act, 2013.
- 4.13 A statutory auditor has defined powers, duties, professional boundaries to conduct audit and as a matter of professional ethics and integrity he cannot be involved and dragged in every other transaction, deal, compliance to be undertaken by the Company. Charging an auditor, for professional misconduct merely for the delay in conducting an EGM of a Company is preposterous and inappropriate.
- 4.14 Professional misconduct on the part of a practicing professional cannot be gauged merely on a finding of a bare non-performance of a duty or some default in performing it. The charge is not one of inefficiency but of misconduct. Imputation of certain mental condition is always involved in professional misconduct against a member. The test must always be whether in addition to the failure to do the duty, there has also been a failure to act honestly and reasonably. Professional misconduct is a wide term and implies fairly serious cases of misconduct of gross negligence. As such minor errors and lapses, if any, cannot constitute professional misconduct.

(b) Complainant:

- 5.1 The Complainant objected to the dropping of the charges of misconduct under clause (5),(6),(8) and (9) of Part 1 of second schedule and clause [2] of Part IV of first schedule of Chartered Accountants Act, 1949 in the prima facie Opinion .



OBSERVATIONS OF THE BOARD:

6. At the outset, the Board noted that the Complainant objected to the dropping of the Charges of Misconduct in the Prima Facie Opinion. In this regard, the Board noted that the Complainant in column 5 of Form 'I' referred to two allegations against the Respondent as referred in point no. 2.1 & 2.2 above. The Director (Discipline) held the Respondent Prima Facie Guilty in respect of the charge specified at 2.2 above and not guilty in respect of the charge specified at 2.1 above. The said view of the Director (Discipline) had been accepted by the Board at Rule (9) stage. Since the Chartered Accountants Act 1949 and the Rules framed thereunder do not contain any provision for the review of the Orders passed by the BOD/DC, the objection of the Complainant was dismissed.
7. As regard the charge alleged in para 2.2 is concerned, the Board noted that the following sequence of events in the context of appointment of the Respondent as the auditor of the company for the F.Y. 2014-15 merits consideration:

S.No.	Date	Event
1.	11/02/2014	Date of incorporation of the Company
2.	26/06/2014	Intimation letter issued to members of the Company for holding EGM.
3.	21/07/2014	Date of EGM and intimation of appointment.
4.	25/07/2014	Date of Appointment of Respondent as the Auditor

8. The Respondent in his defence stated that the appointment of the first auditor of the Company took place within 90 days from the date the members were informed i.e. 26th June, 2014.
9. The Board noted that the main issue which needs to be considered is to examine the requirements of Section 139(6) of the Companies Act 2013 in case the first auditor of the company is not appointed by the Board of directors within 30 days of incorporation of the company. In this regard, Section 139(6) of the Companies Act, 2013 states as under:
"Notwithstanding anything contained in sub-section (1), the first auditor of a company, other than a Government company, shall be appointed by the Board of Directors within thirty days from the date of registration of the company and in the case of failure of the Board to appoint such auditor, it shall inform the members of the company, who shall within ninety days at an extraordinary general meeting appoint such auditor and such auditor shall hold office till the conclusion of the first annual general meeting."

It was observed by the Board that as per Section 139(6) of the Companies Act 2013, the first auditor of the Company, other than a Government Company shall be appointed by the Board within 30 days of Incorporation. In case of Board's failure, an EGM shall be

called within 90 days to appoint the first auditor. However, the law is silent as to when the time limit of 90 days commences.

In this regard, the Board noted that in Poppatlal Shah v. State of Madras reported in AIR 1953 SC 274, the Supreme Court held as under:

"it is settled rule of construction that to ascertain the legislative intent all the constituent parts of a statute are to be taken together and each word, phrase and sentence is to be considered in the light of the general purpose and object of the Act itself."

Hence, the Board was of the view that it is viable to take the stricter view and interpret that the 90 days limit starts from Incorporation rather than expiry of 30 days.

10. It is pertinent to mention herewith that the period of 90 days from the date of Incorporation ended on 11th May 2014. However, the EGM was held on 21st July 2014 for which the intimation letter was issued to the Members of the Company only on 26th June 2014 which is 47 days after the expiry of the statutory limit of 90 days. Thus, the appointment of the Respondent was in violation of Section 139(6) of the Companies Act 2013.

11. As regard the violation of proviso to Section 139(1) of the Companies Act, 2013, the Respondent in his defence stated that he had been appointed under the provisions of Section 139(6) of Companies Act, 2013 and not Section 139(1) of the Act. Consequently, when Section 139(1) is not applicable, the question of its proviso being attracted is out of place.

The Board noted that proviso to Section 139(1) of the Companies Act, 2013 states as under:

"Provided further that before such appointment is made, the written consent of the auditor to such appointment, and a certificate from him or it that the appointment, if made, shall be in accordance with the conditions as may be prescribed, shall be obtained from the auditor."

The Board noted that the EGM of the company was held on 21st July, 2014 subsequent to which the intimation for appointment as an auditor was sent to the Respondent on the same day. The written consent and the certificate were issued by the Respondent on 25th July 2014, which is after the appointment of the Respondent as the auditor of the Company.

Further, the consent letter dated 25th July, 2014 provided by the Respondent stated as under:

I, CA ASHISH ANAND PATHAK, PROPRIETOR of M/s. A.A. PATHAK AND COMPANY, hereby certify that:

- A. *Satisfies the criteria provided u/s 141 and eligible for appointment and not disqualified for appointment under the Companies Act, 2013 and the Chartered Accountants Act, 1949 and the rules or regulations made there under; the appointment made is in accordance with the limits on the number of auditors.*



- B. *The proposed appointment is as per the term provided under the Companies Act, 2013.*
- C. *The proposed appointment is within the limits laid down by or under the authority of the Companies Act, 2013.*
- D. *There are no proceedings against me or my audit firm with respect to professional matters of conduct.*

Further, if appointed is made in the ensuing Annual General Meeting of the Company, I give my free consent to act as statutory auditor of the Company for the period appointed and the manner appointed."

In *Saradambal v. Seethalakshmi* [MANU/TN/0197/1962, A.I.R. 1962 Mad 108] the Madras High Court held as under:

"in the absence of a special indication to show that the proviso to a section is limited to one part of it normally, the proviso governs the entire section and further that it is not necessary for the purpose of making a proviso applicable to the entire section to repeat it under each subsection."

The Honourable Supreme Court in *The Sales Tax Commissioner, etc., v. B.G. Patel, etc.* [MANU/SC/0930/1995: JT 1995(6) SC 271], held as under:

"It is settled law that the proviso of the main part of the Rule are to be harmoniously read to and interpreted to give effect to the object of the provision."

It is a well settled principle that non obstante clause carves out an exception to the operation of provisions. The Apex Court held in *Union of India & Anr. v/s CM. Kokil and Ors.* 1984 AIR 1022, 1984 SCR (3) 292, as under:

"a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some other contrary provisions that may be found either in the same enactment or some other enactment and to avoid the operation and effect of all contrary provisions."

The Board observed that appointment of first auditor is governed through section 139(6) which starts with a non-obstante clause [notwithstanding anything contained in sub-section (1)] and it is sub-section (1) which requires obtaining consent and certificate from auditor and filing of Form ADT-1 with ROC. Interpretation of *"notwithstanding anything contained..."* As per Honorable Supreme Court observations, the non-obstante clause is used to avoid the operation and effect of all contrary provisions. In case any departure between non-obstante clause and other provisions, non-obstante clause will prevail.

Thus, the Board held that since Section 139(6) of the Companies Act 2013 does not speak anything contrary to Section 139(1) as far as obtaining of consent, certificate and filing of form is concerned therefore it can be interpreted that ADT-1 should be filed with ROC for first auditor too which had not been done in the instant case.

12. The Board observed that it is the duty of the incoming auditor to ascertain prior to the acceptance of the appointment as the auditor of the company that his appointment is proper, which in the instant case was clearly missing. Accordingly, the Board held the Respondent guilty in respect of the charge alleged.



13. While holding the Respondent guilty in respect of the charge alleged, the Board also held that the contention of the Respondent that he cannot be charged under Clause 9 of Part I of First Schedule of the CA Act, 1949, in any manner whatsoever, as the said Clause deals with erstwhile Section 225 as enshrined under Companies Act, 1956 while the Companies Act, 2013 is applicable in the present case on the company is not acceptable as the Council has notified that the provisions to be complied with under Clause (9) are those contained in Sections 139 and 140 of the Act.

CONCLUSION:

14. Thus, in conclusion, in the considered opinion of the Board, the Respondent is **GUILTY** of Professional Misconduct falling within the meaning of Item (9) of Part I of the First Schedule to the Chartered Accountants Act, 1949.

Sd/- CA. Prasanna Kumar D. (Presiding Officer) Sd/- Ms. Dolly Chakrabarty (IAAS, rettd.) (Government Nominee) Sd/- CA. (Dr.) Raj Chawla (Member)

DATE: 10th February 2023

सही प्रतिलिपि होने के लिए प्रमाणित
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मोहित कुमार / MOHIT KUMAR
कार्यकारी अधिकारी / Executive Officer
अनुशासनशास्त्र निदेशालय / Disciplinary Directorate
भारतीय चार्टर्ड अकाउंटन्ट्स संस्थान
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