

CONFIDENTIAL

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/339/2017/DD/356/2017/BOD/636/2022]

CORAM: (Present in Person)

CA. Rajendra Kumar P, Presiding Officer

Ms. Dolly Chakrabarty (IAAS, ret'd.), Government Nominee

In the matter of:

Shri Hasmukhlal M Patel

174, Satyagrah Chhawani

Lane No. 8, Sector-7, Satellite Main Road

Ahmedabad- 380 015.

.....Complainant

Versus

CA. Paras Kumar Jain (M. No. 506507)

6th Floor, Lilamani Corporate Heights,

New Ashram Road

Opp. Ramapir Tekra Brts Bus Stop,

Nava Vadaj

Ahmedabad-380 013.

.....Respondent

DATE OF FINAL HEARING : 22nd May 2023

PARTIES PRESENT (in person):

Respondent : CA. Paras Kumar Jain

Council for the Respondent : CA. Deepak Shah

FINDINGS:

BRIEF BACKGROUND OF CASE:

- 1.1 The Complainant approached this forum on behalf of one of the groups of Shareholders of M/s. Ambika Food Product Pvt. Ltd. (hereinafter referred to as the "Company"). There are three groups of shareholders who hold following percentage of securities in the Company:

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Group	Group Members	% of holding
VP Patel Group	1. Manish Vipinchandra Patel (Director) 2. Krunal Vipinchandra Patel (Director)	24.20%
HM Patel Group	1. Hasmukhlal Madhavlal Patel (Complainant in extant case & Director) 2. Dilipkumar Madhavlal Patel (Director)	30.80%
Sheth Group	1. Kiritkumar Ochachhavlal Sheth 2. Ashwinkumar Ochachhavlal Sheth	45%

(As per the Order of Hon'ble NCLT, Ahmedabad dated 17/05/2017)

- 1.2 There were some disputes that arose between the above-mentioned groups over some financial irregularities in the company and applications were made by these groups to NCLT. The Respondent/ Respondent Firm was appointed by the Hon'ble NCLT, Ahmedabad vide Order dated 17th May 2017 vide para 92 (c) to conduct the audit of accounts of the company for the financial year 2009-10 and to determine what were the amounts siphoned off by each petitioner and Respondent(s).
- 1.3 As per the version of the Respondent, he issued various letters to concerned parties to seek information/ documents from the parties in question and on non-receipt of the sufficient information, had to issue interim report/ letter dated 13th October 2017, on accounts of the Company and submitted the same for consideration before Hon'ble NCLT.

CHARGE(S) ALLEGED:

- 2 Against the aforesaid background, the following was alleged against the Respondent:
- 2.1 The Respondent instead of auditing the accounts of the company for the F.Y. 2009-10, carried out a sort of investigation for the purpose of findings and submitted just made an opinion/interim report dated 13th October 2017 and stated therein other matters and his findings were not based upon his verification of books of accounts for the F.Y. 2009-10 as he never collected any information, queries and documents for forming any opinion/findings.

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- 2.2 The Respondent was required to submit his report within 2 months (up to 16/07/2017) but admittedly without obtaining any extension of time and permission to obtain papers and documents from previous auditors etc., the Respondent submitted his interim audit report of findings and that too based on non-verified photocopies of documents.
- 2.3 The Respondent allowed his opinion dated 13/10/2017 to get circulated in his name among unconcerned/ third parties without any authority/ instructions to do so.
- 2.4 The Respondent did not raise his bill on the Company but collected payment of fee as auditor from directors individually and in advance before doing the audit work.
- 2.5 The Respondent intentionally made an opinion to favour one of the group of parties despite being in the position of the auditor and violated the "Independence" principles of auditor.

The Board noted that the Director (Discipline) in his Prima Facie Opinion held the Respondent prima facie guilty of Other Misconduct falling within the meaning of Item (2) of Part IV of the First Schedule to the Chartered Accountants Act, 1949 read with section 22 in respect of the charge specified at para 2.3 and 2.4 above only and the said view had been accepted by the Board. Accordingly, the conduct of the Respondent was examined in respect of the charge specified at para 2.3 and 2.4 above only.

BRIEF OF PROCEEDINGS HELD:

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S.no.	Date of Hearing(s)	Status of Hearing(s)
1.	29 th March 2023	Part heard and adjourned to give a final opportunity to the Complainant to present his case before the Board.
2.	22 nd May 2023	Heard and concluded.

BRIEF SUBMISSIONS OF THE RESPONDENT:

4. The Respondent in his written submissions, inter-alia, stated as under:
 - 4.1 The Director (Discipline) has travelled beyond the charge levelled against the Respondent. It is settled law that while adjudicating the matter, what is to be seen as to whether the charge levelled against the accused is proved. Since the charge levelled against Respondent and charge for which

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Respondent is held guilty is quite distinct and separate charge, Respondent could not have been held guilty for a charge not levelled against Respondent. For this proposition, the Respondent rely upon the decision of Hon'ble Supreme Court of India in the case of *Mohindersingh Gill and Another Vs. Chief Election Commissioner (1978 AIR 851)* wherein the Constitution Bench of the Hon'ble Supreme Court observed as under:

"The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by the fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (1)

"Public orders, publicly made, in exercise of statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to, do. Public orders made by public authorities are meant to have public effects and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older."

"A fair hearing with fun notice to both or others may surely protract; and notice does mean communication of materials since no one can meet an unknown ground. Otherwise hearing becomes hollow, the right becomes a ritual. Should the cardinal principle of 'hearing' as a condition for decision-making be martyred for the cause of administrative immediacy? We think not".

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Since the charge by the Complainant and the charge for which Respondent is held guilty in the prima facie opinion are altogether distinct and different charge, the same is not sustainable in law.

- 4.2 There are three groups of shareholders, and the Respondent was appointed by NCLT to investigate as to the financial irregularities in the Company and to find out as to whether any amount is siphoned off by each petitioner and Respondent. Since in the report, Respondent has made some adverse remarks against the Complainant, the Complainant was not satisfied with the report and hence the present complaint came to be filed on some flimsy grounds.
- 4.3 As per the allegation, Respondent has allowed the opinion to be circulated with Sheth Group of shareholders without any authority. Please note that there are three group of shareholders and terms of appointment required the Respondent to state as to whether any amount is siphoned off by any of the shareholder group. Thus, the allegation against anyone of them is directly affecting their rights and responsibilities. Even during examination, explanations were sought from all the three groups. The said Sheth Group is the largest shareholder controlling 45% shareholding. Thus, it can be seen that the report is not shared with anyone who is not interested in the same. The report was to be shared with the company however, since the company was non-functional from long time, as per record filed with Registrar of Companies last AGM held on 29/09/2009 and the company being a non-juristic person and the shareholders represent the company the report was shared with the largest shareholder only and not an outsider. In the event, sharing the report with the largest shareholder is not in violation of terms of appointment, rather, it is a rightful act. The other shareholder which controls 24.20% shareholding does not have any grievance. In fact, the said group was the appellant before the NCLT and hence grievance, if any, should have been with them but they do not have any of the grievance. Therefore, Respondent cannot be held guilty for sharing the report with the majority shareholder.

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4.4 The next allegation is that the Respondent did not raise the bill on the company but collected fees from the directors individually and that too in advance before issuing the audit report. It becomes clear that the dispute between three groups of shareholders were at its peak and the Complainant group was most uncooperative for conduct of investigation assigned by NCLT. Even the books of accounts were not made available, and the functioning of the company had come to a grinding halt. The Complainant is the signatory to the bank accounts for the company, but still, Complainant himself paid the fees coming to his share without raising any objection. The bill was raised in the name of the company only, but the payment came to be made by the shareholder groups in the proportion to their shareholding ratio. In the joint meeting of all the group with Respondent and Complainant, it was agreed by them that they will pay the fees in the proportion to their shareholding ratio as the company's bank account can operate with signatures of both the directors from both the groups, V P Patel group and H M Patel group i.e. Manish Patel and Hashmukh Patel respectively. So, it is not at Respondent's insistence that the fees were paid by the shareholders group but rather it was their suggestion, and acceptable to all, that the fees were paid accordingly. Even the said fact is proved by the letter of the Complainant paying the fees. Similar letter issued by Sheth group dated 26th June 2017 is also attached herewith. Thus, the fees were received from the shareholders due to peculiar facts of the case. Regarding receiving in advance, it was never insisted upon, but voluntarily paid by each group of their own volition. The Act is silent about the time when an auditor is to receive his fees. Even no Guidance Note is published in this regard. It is all subject to the understanding of the party to the work. In all other profession, legal or medical, the fees are payable and paid in advance. Therefore, even if the fees are received in advance, it is not unbecoming of a Chartered Accountant.

4.5 V P Patel group and Sheth Group who control amongst themselves more than 69% of shareholding have no grievance regarding conduct of Respondent duties. The Complainant has levelled allegations against Respondent due to their ongoing dispute *with other groups of shareholders in a company before NCLT and NCLAT.*

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OBSERVATIONS OF THE BOARD:

5. On perusal of the documents and submissions on record, the Board observed that the Respondent raised certain technical objections with regard to the admissibility of the case and decided to deal with them before arriving at its Findings.
- 5.1 As regard the objection of the Respondent that the Director (Discipline) has travelled beyond the charge levelled against him, the Board was of the view that it is trite that a Complainant is required as per law to state the allegations which are to form a factual foundation for an Adjudicating Authority to exercise jurisdiction and even if an incorrect provision of law/no clauses is mentioned by the Complainant in FORM 1, that alone cannot be a ground to dismiss a complaint if otherwise the Authority has the jurisdiction to entertain the complaint. Further, though the provision of Rule 3 is couched in a "mandatory form" by use of words such as "shall" and appear to be mandating a procedure that must be necessarily followed. However, mere use of language which suggest or purports to suggest a "mandate" may not alone be sufficient to regard a procedural rule to be mandatory to the extent that its non-compliance could vitiate the entire proceeding. While coming to the said view the Board took into view the following observations of the Hon'ble Supreme Court in the matter of Uday Shankar Triyar v. Ram Kalewar Prasad Singh and Anr. (Reported in AIR 2006 SC 269) as under:

"Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use."

Further, the onus to formulate a prima facie opinion as to the misconduct rests with the Director (Discipline) and therefore, premised on the pleadings filed which contains the allegations and documents placed on record, it is the Director (Discipline) which has to

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first formulate a prima facie opinion on the alleged misconduct. Accordingly, the Board was of the view that the object of the Respondent is not sustainable.

- 5.2 As regard the charge that the Respondent circulated his Opinion dated 13th October, 2017 to the unconcerned or the third party, the Board noted that the same is based on the interpretation of para 92(c) and 92(d) of the Order dated 17th May, 2017 passed by the Hon'ble NCLT in no. TP No. 197/397-398/NCLT/AH M/2016 (NEW) – CP No.16/397-398/CLB/MB/ 2012 (OLD) & TP No. 10/397-398/NCLT/AH M/ 2016 (NEW) – CP No.86/397-398/CLB/MB/2012 (OLD) in which it directed the Respondent to file report before it within two months with a copy to the company and its directors. The Board took into view the said part of Order as stated hereunder:

“92(c) In view of finding on point No. 5, this Tribunal direct that there be audit of account of company from financial year 2009 – 2010 and determine what are the amounts siphoned by each petitioner and Respondents 2 to 5 and place the report before the General Body of the company duly convening Extra Ordinary General Meeting. The company is directed to take steps for recovery of such amounts from the concerned persons.

92(d) M/S, A.R Sulakhe & Co., 515, Lotta Bhavan, Opp. Old High court, Near Income Tax Circle, Ashram Road, Ahmedabad 380 009 Is appointed as auditors for the purpose auditing accounts of the company as directed above. The Auditors shall file report before this Tribunal within two months from the date of this serving .copy to the company and its directors. Fee of the auditors .is tentatively fixed at Rs 50,000/- (Rupees fifty thousand Only) the auditors are liberty to ask for further depending on workload.”

The Board further noted that the Respondent received a written request vide letter dated 14th October 2017 from the Sheth Group holding 45% of shareholding in the Company to provide a copy of the audit report of the company to whom the report was provided on the same date subsequent to serving it upon the NCLT on 13th October 2017.

- 5.3 Thus, the Board was of the view that in the peculiar facts of the case when the company was non-functional, the act of the Respondent of sharing his report dated 13th October, 2017 with the Sheth Group who was the majority shareholder of the company and also

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Respondent in the case before NCLT subsequent to serving it upon the NCLT, cannot tantamount to sharing the report with the outsiders especially when the NCLT in its aforesaid Order had also desired to place the report before the General Body of the company. Accordingly, the Board held the Respondent NOT GUILTY in respect of the said charge.

- 5.4 As regard the charge that the Respondent did not raise the bill on the company but collected his fees from the directors individually in advance, the Board noted that a letter dated 23rd June 2017 was addressed by Shri H M Patel (i.e. the Complainant) and Shri D M Patel to the Respondent, inter-alia, stating as hereunder:

"we have to contribute 1/3rd of the total fee of Rs.50,000/- decided by NCLT, therefore, please find enclosed herewith a Cheque bearing number.13887 dated 23rd June, 2017 drawn on Bavla Nagar Sahkari Bank Limited, Naranpura, Ahmedabad for Rs.17,710/- (Rupees Seventeen Thousand Seven Hundred Ten) being our portion of fee payment to you."

Similarly, a letter dated 26th June 2017 was addressed by Shri Ashvinkumar O. Sheth to the Respondent, inter-alia, stating as hereunder:

"As per the Order of Court the company is suppose to make payment of Auditors Fees to the Auditor. But as the company has denied for the same and as per the discussion undersigned had with you, you have suggested to make payment of Audit Fees on the basis of Share Holding Pattern (45%) Accordingly we are submitting herewith Cheque of Rs. 25875/- bearing No. 597895 dated 26/06/2017 in favour of Bank of Baroda, University Campus, Ahmedabad on behalf of Sheth Group".

- 5.5 Thus, the Board was of the view that in the peculiar facts of the case when the company was non-functional, the act of the Respondent of collecting his fees from the shareholders of the company in advance of rendering his services cannot be treated as tantamounting to misconduct as:

- (a) the company was a privately held company, and the members of the company (including the Complainant) agreed to the payment of the Respondent's fees and eventually paid the same.

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- (b) the Respondent being in the capacity of professional had full right to recover his fees as per his terms especially when there was no embargo to that extent in the NCLT Order.

Accordingly, the Board held the Respondent NOT GUILTY in respect of the said charge.

5.6 While arriving at its Findings, the Board also noted that despite the due service of the notice for hearing, the Complainant chose not to be present before the Board and substantiate his case.

CONCLUSION:

6. Thus, in conclusion, in the considered opinion of the Board, the Respondent is **NOT GUILTY** of Other Misconduct falling within the meaning of Item (2) of Part IV of the First Schedule to the Chartered Accountants Act, 1949 read with Section 22 of the said Act. Accordingly, the Board passed Order for closure of the case in terms of the provisions of Rule 15 (2) of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007.

Sd/-

CA. Rajendra Kumar P

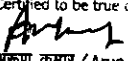
(Presiding Officer)

Sd/-

Ms. Dolly Chakrabarty (IAAS, rettd.)

(Government Nominee)

DATE: 07-02-2024

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Certified to be true copy

अरुण कुमार / Arun Kumar
वरिष्ठ कार्यकारी अधिकारी / Sr. Executive Officer
अनुशासनात्मक निदेशालय / Disciplinary Directorate
इंस्टिट्यूट ऑफ चार्टर्ड एकाउंटेंट्स ऑफ इंडिया
The Institute of Chartered Accountants of India
आईसीएआई भवन, विश्वास नगर, शाहदरा, दिल्ली-110032
ICAI Bhawan, Vishwas Nagar, Shahdra, Delhi-110032